THE LAWYERS WEEKLY

Vol. 35, No. 7 JUNE 19, 2015 lawyersweekly.ca

'Unprecedented' Nortel ruling spans Canadian and U.S. courts

Lawyers split after lengthy proceedings take $1 billion toll

JEFF BUCKSTEIN

One of the largest corporate failures in Canadian history has led to an unusual and controversial multi-jurisdictional decision, as judges in Canada and the United States simultaneously ruled that the remaining U.S. $7.3 billion in assets of bankrupt Nortel Networks Corp. must be distributed on a pro-rata basis to the company's worldwide subsidiaries, for ultimate delivery to creditors.

Nortel represented an unprecedented case involving insolvencies of many corporations and bankrupt estates in different jurisdictions, said Ontario Superior Court Justice Frank Newbould. "Insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through co-operation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched-earth litigation. The costs have well exceeded $1 billion," wrote Justice Newbould in Nortel Networks Corp. (Re) [2015] O.J. No. 2440.

Lenczner Slaght partner Monique Jilesen, who specialities include bankruptcy and insolvency law, called the Nortel decision both carefully considered and innovative. She is seen above outside the firm offices in Toronto.
TIM FRASER FOR THE LAWYERS WEEKLY

Justice Newbould, along with Judge Kevin Gross of the United States Bankruptcy Court in Delaware, also blasted the slow pace of the case since Nortel filed for bankruptcy protection in January 2009.

"These insolvency proceedings have now lasted over six years at unimaginable expense and they should if at all possible come to a final resolution. It is in all of the parties' interests for that to occur. Consistent decisions that we both agree with will facilitate such a resolution," Justice Newbould wrote.

Krishna, Page 23

Remarks in speech prompt impact debate

CRISTIN SCHMITZ
OTTAWA

Lawyers are debating the impact on several ongoing court cases of Supreme Court Chief Justice Beverley McLachlin's off-the-bench pronouncement that Canada's "policy of assimilation" carried out by Indian residential schools amounted to "cultural genocide" against First Nations.

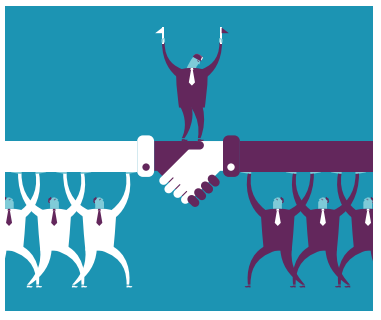
Some also query whether the headline-grabbing speech made by Canada's top judge to the Aga Khan Foundation in Toronto May 28 breached the established ethics rule that judges should not comment on contentious matters that could come before them in a way that could undermine public confidence in their impartiality.

Both questions are being raised against the backdrop of three class actions, still at the pre-trial stage, in which the federal government vigorously opposed certification and disputed that Canada had a policy of assimilation or cultural genocide.

The cases could eventually arrive at the Supreme Court's door.

Thousands of plaintiffs are seeking in excess of $1 billion in damages for Canada's alleged

Crux, Page 3



PUBLICATIONS MAIL AGREEMENT NO. 40065517

News

Krishna: Good result but at a 'very expensive' cost

Continued from page 1

In his decision, Judge Gross noted the parties "have submitted widely varying approaches for deciding the issue leaving virtually no middle ground. Their strong criticism of each other's allocation methodology also reveals why the parties were unable to resolve the dispute without the expenditure of time and expense. The Court can only speculate why the parties, all represented by the ablest of lawyers and sparing no expense, were unable to reach a settlement on allocation."

The decision provoked debate within the legal community. Monique Jilesen, a partner with Lenczner Slaght Royce Smith Griffin in Toronto, called it a carefully considered but innovative solution to the problem that both courts faced.

"It's not every day that two courts across jurisdictions have to come to a decision," said Jilesen, who was not involved in the case but whose specialties include bankruptcy and insolvency law. "Also, both courts concluded that none of the arguments or interpretations made by counsel fit the particular circumstances of the case. So the courts had to come up with their own results.

"I think the positions of the parties were so diverse and very black and white. At the end of the day, it's hard to imagine a situation where they could have come to a resolution on their own without going to court. The stakes were so high that a trial of this issue was likely inevitable."

But Ramy Elitzur, a professor in financial analysis at the University of Toronto's Rotman School of Management, said the courts took "the easy way out." Rather than awarding specific amounts to individual parties they delivered what he termed "a typically Canadian solution" to pay everybody on a pro-rata basis. Elitzur also criticized the length of time it took to come up with what he said ultimately proved to be such a simple settlement formula.

Vern Krishna, tax counsel with TaxChambers LLP, who was also not involved in the Nortel case, viewed the ruling in a different light.

"I think the decision ultimately arrived at was probably as good and appropriate as one could have expected in such complex litigation involving so many parties, and so many countries, and so many legal systems," he said.

Elitzur said that since the case began, more than $1 billion in assets have been eroded due to legal and other fees — akin to a "dead weight loss," he said.

"Unfortunately, that is something that happens in a lot of litigation, not only this one," said Krishna. "Lawyers inevitably erode some of the distributions and the winnings for the participants."

It is all very well to suggest after the fact that there shouldn't be infighting, but it's difficult to control that while the proceedings are going on, expenses accumulate and the full magnitude of the parties' differences is not yet evident, he added.

Elitzur was also concerned about the possible legal precedents from the decision.

"Secured creditors are really not that secured, which could actually raise issues later on in the capital markets. [When] people understand the debt is not as secure as they once thought, it might raise the cost of capital. There is basically a meltdown of the secured and unsecured pecking order, which I think is the real issue in the future," he said.

> I think the decision ultimately arrived at was probably as good and appropriate as one could have expected in such complex litigation involving so many parties, and so many countries, and so many legal systems.
>
> **Vern Krishna**
> TaxChambers LLP

> They have nominal income to begin with ... An individual disabled person can't live on $15,000 per year, and so whatever meagre settlements they're getting here get used up.
>
> **Diane Urquhart**
> Financial analyst

Krishna conceded that perhaps with the benefit of hindsight some of the strife could have been avoided. But he noted that the lawyers had a complex role to perform, and in the end they did get participants, including pensioners, much more than they would have received under any original offer.

"So it did achieve a good result, but at a very expensive cost," said Krishna.

Diane Urquhart, a Toronto-based independent financial analyst, said she believes the long-term disabled in Canada will be hurt most by the decision.

"They have nominal income to begin with. In long-term disability you get only 60 per cent of what your working income would have been. Canada Pension Plan is paying approximately $11,000 to $15,000 per year. An individual disabled person can't live on $15,000 per year, and so whatever meagre settlements they're getting here get used up," she said.

Urquhart also claimed that the professional fees paid were unreasonably high, and she believes that EY Canada, as the court's monitor in the Canadian estate proceedings, could have indicated such before fees were released.

"I believe that Ernst & Young had a very direct mandate to monitor the applicants' receipts and disbursements. They were in a position to not consent for the ongoing release of funds for the bankruptcy professionals, unless the fees were reduced," she said.

Krishna took a different viewpoint.

"[EY Canada's] job was to analyze the situation and provide information for the lawyers, who were in search for solutions using that information. I don't think they had any particular special role. They were caught up in the complexity and the various options themselves. And the litigation just marched on as it does quite often in these situations," said Krishna.

EY did not want to comment on the case when contacted by *The Lawyers Weekly*.

Jilesen said although the role of accounting professionals in general doesn't appear prominently in the legal decision, they did a significant amount of work behind the scenes to assist the various parties in assessing their respective financial positions, which she expects was ultimately fundamental to the positions they put forward. Jilesen also noted that all counsel and creditors will look at this Nortel case as a precedent for the future.

"I think it will teach lawyers and parties that whatever one's view of the precise legal interpretation of a contract may be, particularly in an insolvency, the court may be able to look beyond that, and get to the most just result," she said.

Future plans, including any possible appeals, are unknown. Goodmans LLP, counsel for the monitor and Canadian debtors, and McCarthy Tetrault, counsel for the Canadian Creditors Committee were contacted by *The Lawyers Weekly*, but did not wish to respond.

"Because there are decisions of two courts, if there is an appeal, that will be very interesting to follow from a legal perspective," said Jilesen.

Elitzur tried to put in historical perspective the distribution in billions of dollars of assets that were once put to productive use.

"It's actually quite sad, because it was the flagship of Canadian industry for many years," he said of Nortel.

We want to hear from you!
Send us your verdict:
comments@lawyersweekly.ca