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FP Comment

Terence Corcoran: Nortel's billions

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Exactly what role does Ottawa think it can play in Nortel cash allocation?

It's hard to know what purpose Industry Minister Christian Paradis might have by inserting foreign investment issues into the Nortel asset sales at this late date. The last thing Nortel's creditors and former employees need now is for Ottawa to start throwing its weight around over whether the company's asset sales meet mysterious Canadian "net benefit" investment tests.



Unless, of course, Ottawa is looking for a way to high-stick its way into the biggest Nortel issue of all.

There are soon to be at least \$8-billion — maybe more — sitting in the naked remains of Nortel, but nobody has a clue to how that money could be or should be allocated — or even whether it will ever be allocated, given the Dickensian paralysis that has engulfed the Nortel bankruptcy proceeding over the past two years.

The \$8-billion figure includes the blockbuster \$4.5-billion windfall from last week's auction of Nortel's patents to Apple and a consortium of telecom companies. Add the patent cash to the more than \$3-billion already on hand — apparently held in escrow at Goldman Sachs in New York — and suddenly there's a greater incentive for all of Nortel's claimants to reach agreement on who gets the money. If there's more to get, the urge to compromise might be stronger.

Or maybe not. So far, lawyers familiar with the negotiations over how to divide up the mounting pile of cash say the tangle of legal jurisdictions and claimants has become a nightmare of infighting. The claims against the cash are believed to total at least \$13-billion, depending on who's doing the counting. As haircuts go, \$8-billion would work out to 60¢ on the dollar. If it's \$10-billion, that's 75¢, which is a lot more than was expected out of Nortel even a week ago. Bondholders could get 100¢. Is the greater payoff an new incentive to reach an accommodation — or a stronger reason to hold out?

The task of getting the international crowd of creditors — employee groups, noteholders, pension funds, bankers and lawyers — to reach an accommodation now rests with Ontario Chief Justice Warren K. Winkler. He's the latest to attempt to mediate the mob. One lawyer said that one of the earlier mediation attempts in November in New York turned into a "120-lawyer clusterf — k."

Ontario Justice Geoffrey B. Morawetz, outlining the scope of the mediation, was more polite in a filing last week: "To date, the parties have been unable to resolve these allocation issues on a consensual basis. This has resulted in a most unfortunate situation."

The legal "free-for-all," as one lawyer put it, is the product of Nortel's unique corporate structure and international operations. Bankruptcy proceedings in three regions — Canada, the United States and an international process based in the U.K. but also encompassing claimants in Europe, Africa and the Middle East — have created a situation that is without precedent and legal structure.

Essentially, according to lawyers involved, no laws apply. It is all a matter of negotiation among the parties, and the parties cannot agree. Nobody wants to give up value when there is no legal reason to do so.

And nobody gets a cent before they all agree. Ernst & Young, the bankruptcy monitor, said last month in a report that "Simply put, [there] are matters that must be resolved before any creditor of an applicant (and likely any other Nortel debtor) can expect to receive a meaningful distribution on account" of amounts outstanding.

Judge Morawetz made other comments, especially regarding the many pension and employee claimants in Canada and abroad:

- For many of these individuals, the delay in receiving a meaningful distribution can be significant. It is not just a question of calculating the time value of money. For this group of creditors, time is not on their side.

- This issue is international in scope. It is also a public-interest issue. A protracted delay in resolving the impasse surrounding allocation is highly prejudicial to this group.
- In making these comments, I do not mean to suggest that the claims of other creditor groups are not of equal significance. The reality is, however, that the timing of a receipt of a distribution may be less critical for a financial player as opposed to an individual.
- The difficulty in resolving the allocation issue that is before both the U.S. court and this court is, of course, complicated by the fact that it is a multi-jurisdictional issue. There is no simple solution to the legal predicament that faces all parties.
- Decisions in respect of both motions are currently under reserve. The nature and length of the arguments presented at the motion will necessitate careful drafting and separate rulings by the U.S. court and this court. Both courts are concerned that this delay will also delay allocation proceedings and therefore distributions to creditors. Moreover, the risk of inconsistent decisions and the uncertainty of the appellate process (with further risk of inconsistent decisions) may further delay the progress of the cases.

Judge Morawetz added that a protracted delay in the progress of the cases will only exacerbate an already-unfortunate situation for the many individual creditors. "With extended delay comes uncertainty. For many, uncertainty brings considerable stress and a bad situation becomes even worse. Clearly, the consequences of extended litigation are not desirable."

All this and more now falls into the lap of Chief Justice Winkler. Whether Ottawa's foreign-investment intervention has a role to play in applying pressure or manipulation is hard to discern at the moment. Does Ottawa think it can turn much of the \$8-billion to \$10-billion into a "net benefit" to Canada?

Nortel now has a pile of cash, but it may not be able to get rid of it for some time.

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