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Joint trial for Nortel liquidation 'best option that remains'

Written by Jennifer Brown
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Despite concerns it could lead to "chaos" a joint trial announced to divvy up the $9 billion from the liquidation of Nortel Networks could be a creative solution that might just work.

Judges in both Delaware and Toronto will hear the Nortel liquidation trial. (Photo: Mike Cassese/Reuters)

Last Friday, a U.S. judge and a Canadian judge agreed to a joint, simultaneous trial, overruling objections to the unusual arrangement. Kevin Gross, a U.S. Bankruptcy Court judge in Wilmington, Del., told the parties on a conference call held jointly with Ontario Superior Court Justice Geoffrey Morawetz in Toronto that the litigants should prepare for a trial late this year.

Gross and Morawetz have been overseeing the liquidation of the former telecom giant.

It may be the "best option of the options that remain," says Linc Rogers, a partner with Blake Cassels & Graydon LLP.

"Although not desirable in the sense that a consensual mediation would have had a resolution to it that all the parties would have bought into and would have been preferable, since that didn't work they were left with little choice as to how to resolve this," he says.

Given the judges in charge of the process, Rogers believes they will strive to get a consensus because there's no overseeing body to ultimately determine any divergence in opinion.

"That's the real issue in this proposed cross-border trial that sets it apart from some of the other procedural issues that have been dealt with in a cross-border manner in the past," says Rogers.

Brandon Barnes, a lawyer with Davis LLP, doesn't see why it can't succeed and applauds the judges involved for coming up with a creative approach.

"I think it's quite a wise decision in the sense there is a reluctance sometimes to acknowledge the limits of the jurisdiction of the court," says Barnes. "By that I don't mean the legal jurisdiction but the geographic jurisdiction. There's a tendency to think 'the assets are overseas and it's out of our reach.' Looking at this from a global perspective and recognizing the business of Nortel was essentially global in nature, why not allow the courts to rise to that level?"

Barnes says it's important to understand the Nortel insolvency has a number of relatively unique features. While that may lead some to also think it will result in large legal bills and a lot of procedural hurdles the reality is — particularly in insolvency cases — there's "only so much runway."

He says the Commercial List court, in particular, often makes use of aspects of the rules that allow for liberality of procedure to try and achieve efficiency.

The alternative would be an out-of-court procedure involving arbitrators from both sides of the border. Administrators for former Nortel units in Europe had requested the judges send the matter to binding arbitration. They can appeal the ruling.

After Nortel filed in 2009 for protection from creditors in courts around the world, its units in the United States, Canada, and Europe agreed to sell Nortel's operations as global businesses as a way to increase their value.

However, those units in different countries never tackled the complex question of how to split the money that was raised. Until each Nortel unit knows how much money it has, it is nearly impossible to negotiate and settle the more than $30 billion of claims of their creditors.

The U.S. and Canadian units wanted a public trial after three attempts to mediate the dispute failed. Their lawyer told a hearing in Wilmington on Thursday that he wanted court scrutiny of the European units' claims to the $9 billion.

Derek Adler of Hughes Hubbard & Reed, the lawyer for the European units, says a joint trial would lead to chaos if the judges in the Canada and the United States reached conflicting rulings with no appeals court to bind them both.

"I think that concern is a valid one, but given the history of the courts and how they have been able to work together I think they can come to a single conclusion," says Rogers. "I think they will be looking for what's reasonable in the circumstances. The judges are going to be looking for something that splits the difference."

There is also a concern about logistics. The Canadian and Delaware courtrooms last Thursday experienced technical glitches that rendered portions of the Toronto proceedings inaudible in Wilmington. Adler questions whether such difficulties might make it impossible to cross-examine witnesses, denying his clients due process.

Rogers says those concerns are "wildly overstated."

"What it comes back to is the experience of the judges overseeing this proceeding. I think the technology and infrastructure is there to make this efficient. If the feed goes down and people have to take a break that won't be a problem. But I fully expect procedural fairness will be respected in this forum."

Jennifer Brown

Jennifer Brown is the editor of *Canadian Lawyer InHouse*. She has been a business magazine writer and editor for 10 years covering the IT, occupational health and safety, and security sectors for the business-to-business press prior to arriving at *InHouse*. She was also a newspaper reporter for five years in the Greater Toronto Area covering health care and education before going to work at a daily news online portal reporting on the technology sector.

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