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Ontario court rejects U.S. bondholders' appeal of Nortel asset allocation

By JANET McFARLAND

Company's U.S. bondholders challenged method for distribution remaining \$7.3-billion (U.S.) in assets

The Ontario Court of Appeal has rejected an appeal application by Nortel Networks Corp.'s U.S. bondholders in their protest against the proposed distribution of the technology giant's remaining \$7.3-billion (U.S.) in assets.

In a ruling released Tuesday, a panel of three judges of the Ontario appeal court denied the U.S. creditors the right to appeal a 2015 decision on the method for dividing Nortel's remaining funds.

The judges also used their ruling to chide lawyers for the long delays in resolving the Nortel bankruptcy matter after seven years of fighting, noting all parties in the case have been repeatedly encouraged to "resolve their differences" through mediation and a settlement, but have not done so.

"Consistent allocation decisions have been issued by the Canadian and U.S. courts," the ruling stated. "A further appeal proceeding in Canada would achieve nothing but more delay, greater expense and the erosion of creditor recoveries."

Lawyers for the U.S. bondholder group could not be reached to comment on the decision and whether they will attempt to appeal further to the Supreme Court of Canada, which is rare in decisions involving applications for leave to appeal.

Michael Barrack, a Toronto lawyer representing British pensioners in the dispute, said the Ontario court ruling is an "excellent decision" that upholds his group's argument that Nortel's assets should be divided equally on a pro rata basis among the company's divisions in the United States, Canada and Europe.

"It was our clients who led the charge on the pro rata fight, and it was accepted by both courts and has been accepted here in a way that's pretty resounding," he said.

In their analysis, the appeal court judges said the test for an appeal was not met by the U.S. bondholders, noting leave to appeal "is granted sparingly" involving rulings made under Canada's bankruptcy protection legislation.

While the judges denied the appeal application in Ontario, an appeal of the same matter is still proceeding in U.S. court, which means there is still no final decision on the distribution of Nortel's assets.

Nortel's bankruptcy process is being jointly overseen by courts in Ontario and Wilmington, Del., and both courts issued parallel rulings in May, 2015, laying out how Nortel's remaining assets should be divided among Nortel's

divisions.

The original rulings were in agreement last year that the money should be distributed equally, but U.S. bondholders launched an appeal process in both courts. The U.S. court, which heard arguments in the appeal in April, has not released a decision yet in the matter.

If the U.S. decision is overturned while the Canadian decision remains intact, it could lead to further legal battles on how to manage the asset distribution, said Toronto insolvency lawyer David Ullmann, who is not acting for any of the parties in the case.

Mr. Ullmann said there is no precedent for that outcome, adding that lawyers would likely return to the courts to argue which ruling should take precedence, possibly proposing the decision should hinge on where the remaining money is being held.

"This has always loomed large as an inherent potential problem with this process," he said.

The Ontario appeal court judges acknowledged that awkward possibility in their decision, but said the fact there is a separate appeal process in the United States does not "somehow diminish the need to bring these proceedings in Canada to a conclusion."

"In our view, any additional step is a barrier to progress," the judges said.

The appeal judges said former employees have waited seven years to find out how much they would receive from the distribution of Nortel's assets, noting more than 6,800 Nortel employees and pensioners have died since the company filed for bankruptcy protection in 2009. A recent analysis of professional fees charged to Nortel's estate said the total had surpassed \$1.8-billion (U.S.), \$2.5-billion (Canadian).

Mr. Ullmann said the appeal court's comments about the delays and costs in the case are clearly aimed at the lawyers involved in the case and others who will be involved in similar cases in the future, making it clear the province's most senior court is unhappy with how the case has unfolded.

"It is something that both practitioners like myself and the judges in front of whom I have to appear will take note of, and that's the purpose of including it," he said.

The appeal judges also appeared to sympathize with the position of the Canadian and U.S. trial judges who heard the case last year, saying "there was no clear answer" to the question of who was entitled to receive Nortel's assets, noting the Canadian and U.S. divisions took positions that had no middle ground.

The U.S. bondholders argued they should get more than \$5-billion of Nortel's remaining funds and the Canadian unit should get just \$770-million, while the Canadian debtors argued they deserved more than \$6-billion of the remaining funds and the U.S. estate should receive \$1-billion.

"The highly integrated nature of the Nortel business operations and the nature of the assets sold defied either outcome," the appeal court said.

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