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Nortel's litigation legacy:

The truly cross-border trial and other lessons for the future

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Nortel Networks was once best known as Canada's global telecommunications giant. Its business legacy, however, disappeared in the wake of its insolvency that followed on the heels of the 2008 financial crisis. But in the end Nortel did leave a legacy – to the world of cross-border litigation, particularly in the context of the insolvency of large, multinational businesses.

As members of the counsel team for Ernst & Young Inc., the court-appointed monitor of Nortel Networks Canada that was charged with primary carriage of much of the litigation for Nortel Canada, we saw how the various tensions arising in complex, cross-border litigation worked to shape the first-ever truly joint cross-border trial held by a Canadian and a US court.[1] We observed how innovative procedures can substantially improve trial efficiency, how aspects of US litigation practice might be used to improve our own litigation process, and what advocates will need to be ready for in truly cross-border litigation in the future.

The reality is that, in a world in which businesses are increasingly working seamlessly across borders, there will be more cases that require the type of co-operation between courts of different countries which took place during the Nortel case. The other reality is that neither the judicial system nor litigants can afford to try complex cases using the traditional trial model. In this article, we take a look at some of the lessons that can be gleaned from Nortel's insolvency proceedings which can help us meet both these challenges.

Nortel Networks: A brief history

Nortel started life as Bell Canada's Northern Telecom subsidiary, a renowned technology division that was formally spun off as a separate public company during the dot-com boom. Nortel emerged at a time when it was at the forefront of the development of the technology infrastructure that was driving the telecommunications and internet boom. As its lustre grew and its global reach spread, Nortel came to account for almost one-third of the value of the leading Canadian stock index, and its shares were a staple in Canadians' retirement portfolios. However, despite its meteoric rise, and as many Canadians vividly recall, Nortel suffered a number of setbacks in the early 2000s as a result of accounting scandals following the dot-com bust. Ultimately, after putting itself on the road to recovery, it fell victim to the global financial crisis that started in late 2007.

The restructuring proceedings and eventual liquidation of Nortel made up the largest insolvency in Canadian history. However, for the legal profession, especially the litigation bar, the size of the insolvency may not be the most memorable aspect of the proceedings in the long run. Rather, it is the fact that the Nortel proceedings resulted in an opportunity to participate in the first cross-border joint trial conducted by a Canadian and a US court.

When Nortel filed for insolvency protection in Canada in January 2009, it also commenced corresponding insolvency proceedings for its subsidiaries in the United States and the EMEA region.[2] In keeping with standard practice in such cases, these separate "bankruptcy estates" were being managed by local company representatives and different insolvency professionals, each attempting to maximize recovery for their own stakeholders.

While there had been many cross-border insolvencies in the past, including ones in which the interests of the bankruptcy estates in different countries conflicted with each other, none had the one defining characteristic that made the Nortel insolvency so complicated: Nortel's business was not structured geographically by country, but by business segments that seamlessly operated across international borders. While Nortel had subsidiaries in the foreign countries, the reality from an operating standpoint was that each business segment had essential, non-divisible assets and operations spanning multiple countries. No single Nortel corporate entity had a saleable business, and maximizing value required the sale of business units that were made up of assets pooled from across multiple corporate entities in different countries (principally Canada, the United States and the United Kingdom). Moreover, resolving how the sales proceeds would be allocated among the different bankruptcy estates proved to be particularly difficult because a significant portion of the realized value of Nortel's business was attributable to patents and other intellectual property. The R&D functions at Nortel, like its business lines, were also spread across the globe and R&D was developed co-operatively by employees in multiple jurisdictions, although the patents themselves were largely owned by the Canadian parent. Compounding the complexity was the fact that there was no clearly applicable agreement on how the value attributable to the intellectual property was to be allocated in a liquidation among the various companies whose employees contributed to its creation.

The allocation of the sales proceeds was a critical issue for each of the separate bankruptcy estates since Nortel's creditors, unlike the assets, were creditors of specific corporate entities. Thus, recovery for the different creditors in each country (including bondholders, employees and pension plans) was dependent on how the proceeds

from the various sales, ultimately approximately $9 billion, were allocated to the various international subsidiaries. This issue had to be resolved on a basis that did not result in inconsistent results in the different jurisdictions.

Since there were no mechanisms in place to determine how the proceeds would be allocated among the entities contributing the assets to the various sales, it was agreed that the sales proceeds would be pooled and held in escrow and the allocation exercise would be deferred until the conclusion of the sales process. When each separate business division was sold, the purchaser acquired assets in different jurisdictions around the world – yet it paid only one, undivided purchase price. The question of how the proceeds from the sales were to be divided among the Canadian, American and EMEA estates then had to be resolved, and, if not resolved consensually, somehow litigated. This exercise would involve a dissection of how Nortel and its subsidiaries operated over an extended period of years and extensive evidence, including expert evidence, on how to value the respective contributions to the assets and revenues. The task was daunting.

A unique solution for a unique situation

There was no clear answer as to which court should decide these issues. The test in UNCITRALbased insolvency regimes (such as those in Canada, the United States and the United Kingdom) for determining which court should take the lead in an international insolvency is based on determining a company's centre of main interest (COMI).[3] However, the "COMI" test determines only where the various proceedings are to be conducted and does not deal with the substantial issue of how to allocate sale proceeds among competing companies.

The parties' agreement paving the way for the cross-border sales and deferral of the allocation issue provided that the allocation issue would be determined by the Canadian and US courts. Voluntarily assigning sole jurisdiction over the case to a court in one of these countries was unpalatable or politically impossible. Various attempts were made to force the matter into arbitration so there would be only one decision-maker; however, with no enforceable arbitration agreement in place, and with matters of public interest at play and a large community of stakeholders whose rights were in issue, these efforts were unsuccessful. In the end, resolution of the dispute fell to the Canadian and US bankruptcy courts in Toronto and Delaware. It was determined that the two bankruptcy courts would conduct a joint trial, aided by the use of telecommunications technology to connect the courtrooms. Surely, Nortel would have been proud.

It is important to understand what the joint trial was and was not. There were two distinct proceedings – a Canadian trial presided over by a Canadian judge of the Ontario Superior Court of Justice, and a US trial presided over by a US judge of the United States Bankruptcy Court for the District of Delaware. What was agreed – and essential – was that there should be a single, common evidentiary record which would form the basis for their respective decisions. The cost and delay of multiple trials, and the risk to the integrity of the decisions if based on inconsistent factual records, demanded a joint trial. Given that there would be two judges, and neither could defer his or her decision to the other, each court was to make its own independent decision, based on the law applicable in its jurisdiction. While there was a hope, and perhaps an expectation, that the two courts would come to the same decision, there was no assurance that they would and there was no alternative

plan if they did not.

Nor did a joint trial mean that the courts would preside over one courtroom. Jurisdictional concerns required that each judge preside over his or her own courtroom in his or her jurisdiction.

The two essential elements to making the Nortel joint trial possible were the virtual integration of the two courtrooms and the procedural integration. To accommodate the joint trial, the courtrooms in Toronto and Delaware were outfitted with the technology necessary to ensure that the judges, counsel and witnesses could all see and hear one another in real time, and that documents being put to witnesses or shown to a judge could be seen by everyone in both courtrooms simultaneously. The result was that witnesses who were located in Toronto, Delaware and elsewhere could be examined and cross-examined by counsel in either courtroom, while at the same time the other court, all counsel and the public could follow along. The technology worked remarkably well, although it was expensive. A dedicated link between the two courtrooms was required, and a dedicated and staffed equipment room was required in each courthouse.

The process to integrate the two different procedural regimes and traditions into a common set of rules proved to be as challenging as one would expect. Although many counsel have experience with procedural rules for arbitrations or other proceedings that differ considerably from domestic rules of civil procedure, adapting two different domestic court procedures into one process that could be used by the courts in both countries was a novel and difficult exercise. This challenge was amplified by the fact that US "due process" rights have a constitutional or quasi-constitutional status, meaning that the process was mostly influenced by the requirements of US procedure. Although this could be easily accommodated by the Ontario court, given that Ontario's procedural rules are more flexible, it did result in a more complex pre-trial process than is typical in Canada.

Setting the evidentiary rules for the trial itself had to be determined more pragmatically, given that it would have been unworkable to have the judges jointly attempt to determine what evidentiary laws would apply or how specific evidentiary rulings would be made in real-time during the trial. Since the procedural law of the *lex fori* typically applies in any dispute, it was agreed that the judge sitting in the court where the witness was located would apply the local evidentiary law to all evidentiary rulings regardless of the location of the examining counsel.

In the end, more than three million documents were produced in discoveries, 110 depositions took place, 36 witnesses were called at trial, and the trial was able to be completed in only 24 trial days (not including the trial of various interestate claims that had to be resolved prior to the final accounting being settled).

The pace at which telecommunications technology is developing means that it will not be long before witnesses will be able to attend at trial more frequently via video link.

There are many lessons for multijurisdictional proceedings that could be gleaned from the Nortel joint-trial process. The following are some of the most noteworthy.

Conflicts of law principles need to evolve to address joint hearings

Transnational disputes are not new. The dispute resolution procedures in both private arbitration agreements and international treaty regimes are prevalent and highly evolved. But insolvency proceedings implicate the interests of stakeholders whose participation in arbitration cannot be mandated, as well as public interests that governments cannot, or will not, permit to be resolved outside of their national courts.

Our first observation is that the Nortel proceedings made it clear that globalization will require more of counsel and courts than merely resorting to the rules of private international law that have long been a part of the law of trading countries. Whereas traditional private international law is aimed at selecting the "one" law that applies and the "one" location where a claim should be tried, truly cross-border litigation will increasingly require, in the absence of applicable international treaties, a synthesizing of legal processes, rules and traditions to reach what can be considered to be fair outcomes for all parties. As technologies such as blockchain increasingly render jurisdictional borders irrelevant, the need for joint trials is likely to continue to grow. The experience in the Nortel trial demonstrates that we as advocates must be ready to design and implement such processes.

The integral role of technology

The second observation is that technology is the *sine qua non* of multijurisdictional litigation. The litigation required the reconstruction of a complex series of events spanning many years and multiple legal entities. Collecting, reviewing, indexing and producing millions of documents, and presenting them at trial in multiple venues simultaneously, was essential to a fair disposition of the issues; it is a safe assumption that the same will be true of any future case that requires a transnational resolution. This process would simply not have been possible unless done entirely electronically. While electronic collection and production is now routine and the tools to do it are robust and improving rapidly, the electronic trial is still not routine. But it was essential to the successful resolution of such a complex case, especially one conducted in multiple venues. And the technology worked. Remarkably, throughout the trial, the daises of both judges were entirely free of the usual binders and piles of documents, and counsel were unburdened by the usual caravan of boxes filled with copies of productions and exhibits.

The pace at which telecommunications technology is developing means that it will not be long before witnesses will be able to attend at trial more frequently via video link. The remote appearance of witnesses is not unusual, but it is typically still done on an exceptional basis. In the Nortel trial it was done as a matter of routine, both with examining counsel in the remote venue or examining remotely. The technology to accomplish this reliably and securely is extensive and expensive, prohibitively so for all but the most exceptional cases. But if that technology is installed as part of the courthouse infrastructure, it will become accessible and cost effective. To be sure, there will always be cases in which the in-person cross-examination will remain essential. However, for cross-border commercial cases, video technology will often be sufficient and more cost effective. Conducting separate trials would have been materially more expensive than the investment made in the use of technology in the Nortel trial.

This has implications not only for international litigation, but also for any litigation in which witnesses are in multiple jurisdictions.

This may also affect matters such as *forum non conveniens* motions, since those motions may increasingly require consideration of the availability of technology to allow for the examination of witnesses via video link at trial. Similarly, motions for letters rogatory for the taking of evidence for trial may be modified to simply call for a local order requiring a person to attend a video-linked examination for a proceeding in a foreign court (which may be superior to being limited to only obtaining a transcript of the witness's evidence).

The conduct of the trial

Our third observation is that advocates must continue to critically consider what is actually necessary in a trial process to ensure that justice is done. Many courts, organizations and governments have come to realize that the traditional notion of a trial involving an unlimited number of live witnesses and cross-examinations is not a sustainable model. Organizations such as The Advocates' Society have released best practice guidelines for civil trials that recognize the need to reexamine the concept of the trial in the face of increasing costs and limited judicial resources; and the Supreme Court of Canada has recognized that full traditional trials are not always necessary to ensure that justice is done.[4] Clients do not need – and certainly don't want – the most expensive trial process. They want their disputes resolved fairly in the sense that the process meets a reasonable standard of fairness under rules which apply equally to all parties.

The costs that a traditional trial would impose on parties and the justice system would be unbearable for both in a case as complex as Nortel. Accordingly, the notion of what the trial process needed to look like was re-examined in Nortel. The evidence of most non-essential witnesses was taken out of court in time-limited depositions and filed in the trial record; the trial judges generally read only the passages relied upon in argument. Witnesses who did appear gave their direct evidence-in-chief principally in written format. Trial time was fixed and allocated among the parties, who made their own decisions as to how to use their time (referred to as the "chess-clock" method).

Most advocates well understand the tension between the knowledge that most cases only ever turn on a limited number of issues and documents, and the concern of being criticized for not pursuing every argument at trial. And trial judges are traditionally loath to limit counsel once the trial is under way. The early imposition of reasonable time constraints at trial addresses this issue by forcing all parties, prior to the start of the trial, to more critically examine the case and identify the issues and evidence that are most likely to be material to the resolution of the dispute. The Nortel trial took a fraction of the time it would have taken if traditional processes were adhered to; indeed, the trial was shorter than less complicated matters using the traditional process. No doubt the pre-trial discovery process was proportionately more extensive, but the trial process itself benefited correspondingly from that investment and left judicial resources available for other litigants. And despite a relatively truncated trial process, none of the parties expressed a concern that they did not have their day in court.

US procedures that should be adopted into Canadian practice

Our fourth observation is that procedures in Canada (and specifically in Ontario) could be improved by adopting some practices used in US litigation.

Depositions and discoveries

In resolving the contents of the pre-trial procedure, it was agreed that US-style depositions would take place, despite the fact that such depositions are not explicitly contemplated under Ontario's rules of court.[5] Some 110 depositions of fact witnesses took place before trial, in addition to traditional discoveries of representatives of the parties. The long-standing Canadian view of American-style depositions is that they are unnecessary and overly burdensome. Yet, as Canadian lawyers, it was enlightening for us to have an opportunity to be able to take the depositions of multiple witnesses and potential witnesses in advance of trial and assess the effectiveness of this process.

From our experience, the depositions were both necessary and instrumental to making the litigation and trial more efficient. They were necessary because calling all the essential witnesses at trial would have necessitated an unacceptably lengthy trial. The depositions were also instrumental in reducing the number of claims that proceeded to trial and narrowing the issues that did go to trial.

In most Canadian proceedings, lawyers are hampered by the fact that they cannot compel a witness to attend a pre-trial interview. Thus, the first time they may see a witness is once the witness enters the witness box, regardless of how critical that witness's testimony is to the resolution of the proceedings. In a system that continues to place increasing reliance on pre-trial disclosure, perhaps the time has come to reconsider the Ontario practice of there being no depositions of key witnesses, especially ones not in the employ of the parties. The availability of depositions allows counsel to hear evidence at an early stage, which has the benefit of letting counsel test certain lines of inquiry outside of court and allowing unfruitful ones to be left out of the trial, thus making the trial more efficient. Moreover, since the parties have a better idea of how their evidence will actually play out in the crucible of examination, they will also be in a better position to settle issues, or the entire matter, at an earlier stage. The benefits of depositions simply cannot be replicated by witness statements obtained on discovery. Our experience in the Nortel trial reinforced the utility of a US-style deposition process.

A made-in-Canada solution to avoid runaway depositions could easily be crafted by placing limits on the number and length of depositions, which can be altered with counsel's consent. Discovery plans reached on consent or approved by the court can be the vehicle for ensuring that any depositions are appropriately limited. In our view, this is an easily implemented change that could, in many cases, result in more efficient proceedings.

Expert witnesses

Canadian jurisdictions should also consider permitting pre-trial discovery of expert witnesses. Similar to the benefits of depositions discussed above, the pre-trial examination of expert witnesses provides many benefits that will streamline litigation and trials, and promote earlier settlement. Complex litigation is increasingly becoming a battle of experts. Not providing an opportunity for the pre-trial deposition of witnesses, at least in complex cases, does not contribute to either efficiency or truth-finding. The examinations of experts allow counsel to determine which lines of questions are not worthy of pursuing at trial (reducing trial time by eliminating unproductive examinations), thus fostering more focus on the issues that the court will need to decide. Furthermore, such an approach allows for more opportunity to find common ground between the experts, which will also encourage earlier settlement and the streamlining of the trial. Again, our experience at the Nortel trial was that pre-trial depositions of the experts contributed significantly to both focusing the proceedings and making the trial more efficient.

Pre-trial objections

One area in which we usually consider Canadian practice to be superior to US practice is in the manner in which objections are addressed in pre-trial examinations. Under typical US practice, a deponent is required to answer a question even if it is objected to unless the objection relates to certain limited exceptions, such as privilege. The parties are then required to identify which objections they wish to maintain, and that evidence then cannot be used at trial unless consent is obtained or the court rules on the objection. The result is that US lawyers tend to object to every question if there is the slightest possibility of a viable objection so as to preserve their right to object to its admissibility at trial. This is the opposite of the Canadian practice, where witnesses need not answer questions objected to and the questioning party must move to compel answers or a re-attendance if it considers the objection unfounded. The US practice was used in the Nortel trial and, for most of the Canadian lawyers involved in it, there seemed to be a dizzying array of bases for objection under US procedure, most with a tenuous basis and almost none seriously advanced at trial.

In the Nortel proceedings, the perceived disadvantage of the US practice in the deposition process was clearly evident: Without exception, the endless objections were disruptive to the examiner and the witness and, in the end, were simply not proportional to the actual number of objections that were later maintained. The US practice also forces the deponent to divulge information that the adverse party may not be entitled to have, which may prejudice the deponent in various ways. That prejudice is particularly unfair to non-party witnesses. Lastly, it makes examination transcripts more difficult to rely upon as the court then has to consider what parts of the transcript the court may treat as admissible evidence. For these reasons, the traditional Canadian practice toward objections during out-of-court examinations has advantages.

However, the reality is that many objections, while valid, protect the disclosure of information that is not actually problematic or prejudicial. Simply answering the questions while noting the objection may result in the end of your opponent's line of inquiry as opposed to the issue becoming the subject of a refusals motion and possible re-attendance, all with the associated costs and delay. Moreover, the process of objections, motions and re-attendances may not be practical or fair for non-party witnesses.

The more liberalized use of pre-trial depositions, as we propose, may require the adoption of the rule that the questions objected to must be answered with only limited exceptions for non-party witnesses. However, there would need to be a very limited set of permissible objections or sanctions for excessive objectives. Finding a balance would seem to be both achievable and beneficial in Canada, where the grounds on which questions may be objected to are narrower.

In fact, there is already a "Canadian-style" solution that would not require legislative or rule changes in many jurisdictions, but rather simply a change in how counsel practise. Many of the provinces' rules of court provide for the ability for counsel to allow a witness to answer a question under a reservation of right that such answer cannot be used without the consent of the party or a court order (see, for example, Rule 34.12 of the Ontario *Rules of Civil Procedure*). Through greater use of such tools, parties can obtain the benefit of the US practice of having the questions placed onto the record in appropriate situations while not jeopardizing their case by being forced to divulge information that otherwise would not be disclosable, and thereby lessen the need for refusals motions and re-attendances. Such a process would be particularly beneficial in a system which will liberalize the use of pretrial depositions.

Conclusion

The Nortel cross-border trial presented us with an opportunity to adapt our court procedures to better streamline complex trials and ensure that we are able to meet the challenges of international litigation in an increasingly borderless world. We have at our disposal the tools necessary to resolve complex trials efficiently – trial times can be significantly reduced without any loss of fairness. Moving in this direction will assist in increasing access to justice. We also have the tools we need to allow us to structure the cross-border dispute resolution mechanisms which will be increasingly required in the years to come. The adoption of the incremental changes suggested above, which are borrowed from sister common-law jurisdictions and have been shown to work here, would be a welcome incremental change and will in the long run assist in reducing costs and court backlogs on the civil list.

Notes

1. *Re Nortel Networks Corp., et al*, 2015 ONSC 2987 (CDN allocation decision) (reconsidered 2015 ONSC 4170, and leave to appeal denied 2016 ONCA 332); 2015 532 B.R. 494, 2015 WL 2374351 (US allocation decision); and *Re Nortel Networks Corp.* 2014 ONSC 6973 (claims decision). Because the allocation and claims litigation was conducted after Nortel's assets and businesses had been sold, the powers of the monitor were expanded such that the monitor was tasked with conducting the allocation and claims litigation on behalf of Nortel Networks Canada.
2. EMEA is a widely used acronym for "Europe, Middle East and Africa." For practical purposes, the litigation proceeded on the basis of allocating the sales proceeds among Canada, the United States and the United Kingdom as the proxy for the EMEA subsidiaries.
3. UNCITRAL is the United Nations Commission on International Trade Law. Under these regimes, courts consider where a company's COMI is situated. That country's courts are to conduct the "main proceedings," dealing with issues that affect the overall restructuring or liquidation proceedings; and the other courts are to manage "nonmain proceedings," which are intended to recognize orders granted in the "main proceedings" and address local issues.
4. See "Best Practices for Civil Trials" (Toronto: The Advocates' Society, June 2015); *Hryniak v Mauldin*, 2014 SCC 7.
5. Examinations under Rule 39.03 of the *Rules of Civil Procedure* are sufficiently different that they are not comparable to US-style depositions.