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Legal fees: Courts' different approaches on class actions vs insolvencies



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Earlier this month, Ontario's Superior Court of Justice handed down three decisions involving class action law suits brought against BMO Nesbitt Burns, Manulife Financial and DePuy Orthopaedics, all of which are proceeding. Getty/Thinkstock

Market participants are supposed to alter their behaviour, through a continual process of adjusting and readjusting, by learning from events.

Now thanks to some recent decisions on the payment of costs, lawyers have been given a clear signal. The message: Don't think about entering the world of class action law suits where the payment of costs has been placed in some sort of jeopardy but rather opt for a career in restructuring/insolvency where the message seems to be "back up the truck," given that the fees for Nortel recently passed \$1-billion – or more than 10% of the so-called global estate.

That message has some industry consequences, in general, class action law firms are started by entrepreneurial lawyers who are interested in establishing a presence in that field and work on a contingency basis. (Of course the need for such legislation at least in the securities field, arose, in part, because boards and securities regulators didn't do a good enough job.) On the other hand, the restructuring/insolvency work tends to be done by the big boys, those who are members of the club. In other words, the independents get beaten up but the members of the club get looked after.

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Earlier this month, Ontario's Superior Court of Justice handed down three decisions involving class action law suits brought against BMO Nesbitt Burns, Manulife Financial and DePuy Orthopaedics, all of which are proceeding. The decisions were all rendered by Justice Edward Belobaba, who used much of the same language in the three decisions. Arguing that more transparency is needed, that the awarding of costs should not price the class proceeding "out of existence," and that access to justice is an objective worth furthering, Justice Belobaba indicated that the cost outlines provided by counsel, the hourly rates used and historical cost awards will all be considered before a decision is made.

In the BMO decision, the mark-down is significant: the plaintiffs asked for \$684,829 (an amount that includes disbursements); but would be "content with" \$575,000; the defendants said they should receive \$315,000. Justice Belobaba awarded \$290,000, all

inclusive.

At Manulife the comparable numbers were: \$1,182,357 (the bulk of which was for expert reports); Manulife indicated \$418,111 was reasonable before Justice Belobaba fixed costs at \$467,234.

No such restrictions seem to be at work at Nortel where the club, in three jurisdictions, has been racking up more than \$1-billion in fees, of which \$323-million has been awarded to the Canadian players. Ernst & Young is the court-approved monitor.

At least 16 other firms are beneficiaries of the payments. "The \$1-billion in professional fees is the largest in Canadian history and second largest in global history behind Lehman Brothers at \$2.2-billion," noted Diane Urquhart, an independent financial analyst. "At \$1-billion, it is 10% of the Nortel global bankruptcy estate, it is the highest percentage in Canada and likely globally for a company of this size."

Hitting \$1-billion in professional fees occurred in the same week the parties were given another month to prepare for a trial in the spring of 2014 on how to divide up the global estate. At that session, Dow Jones quoted Justice Geoffrey Morawetz of the Ontario Superior Court as saying "the court here is in the dark and I don't want to be in the dark any longer," which raises the question of who has been approving the fees.



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