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Winkler versus the Nortel quagmire



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Former Nortel employees were joined by other workers for a demonstration on Parliament Hill on Oct. 21, 2009, to protest government inaction on their... [more](#)



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BY BERT HILL, OTTAWA CITIZEN MARCH 31, 2012

When Warren Winkler, a young law student from Pincher Creek, Alta, arrived in Toronto on a torrid Labour Day in 1959, he was sweating under a wool suit, knew no one and had nowhere to stay.

"I got a place to sleep at the Central Y," he told an Osgoode Hall Law School group last October. "I had 36 other roommates. I put my steamer trunk under my bed, but I was so afraid that I couldn't sleep or go to the washroom."

Then he met his new law school classmates. Most were the scions of the province's elite, complete with blazers and rings from the best private schools. "Their cufflinks cost more than my parents' house. We had nothing to talk about in the cafeteria because we had no shared experience."

Today Winkler is the chief justice of Ontario and an outspoken critic of the cost and delays the justice system puts on ordinary citizens who

have seen more YMCAs than private schools. He wants judges in criminal, civil, family and labour disputes to dispense justice that is "cheap, quick and final."

His energy, sharp mind and nononsense approach has earned him many tough challenges: the Walkerton tainted water scandal, breast implants, native residential schools and the Air Canada and Canwest-Shaw restructurings.

Perhaps the biggest challenge of his illustrious career - and a glaring example of everything that is wrong with the justice system - is finding a solution to the Nortel Networks bankruptcy quagmire.

The war over \$9 billion in assets is in a fourth year and involves tens of thousands of pensioners, former employees, small suppliers, bondholders and a richly-paid army of lawyers and accountants around the world.

Winkler has already lost nine months on the mediation assignment because of legal wrangles involving huge European claims that, at least for now, have been blocked. Hopefully, he can find solutions before he reaches the mandatory retirement age of 75 next year.

Finding a balance between contending interests will be difficult. While some estimates put the total creditor claims at more than twice the Nortel assets, speculators in U.S. Nortel bonds are betting they will get all their money back and more.

The 10,000 Canadian Nortel pensioners had pensions cut by up to 40 per cent and were stripped of life insurance, dental and drug benefits a year ago. Several hundred long-term disability recipients are living on public disability benefits that are a shadow of their former income.

However, U.S. pensioners and LTD recipients will get \$26 million in benefits from the company this year because of quirks in the law.

With Canadian claims of \$2.56 billion for lost severance, pension and other benefits, the Canadian contingent of more than 20,000 can't afford to wait much longer, particularly

pensioners with an average age of 74 and their survivors now about 80.

The pain doesn't stop there. Many small suppliers who lost heavily in the Nortel debacle are selling their claims for cents on the dollar to speculators who see paydays ahead.

Winkler has some weapons to work with. Participation in the mediation is mandatory and he may be able to act as arbitrator on some unresolved issues.

Settlements will be subject to votes by creditors, a situation that could mean the Nortel cash is stretched evenly around the globe and Canadian creditors aren't disproportionately hurt.

Still, delay is still the name of the game. The first attempt to mediate a settlement failed after months of efforts in 2010-11 with 125 lawyers in the room.

A separate court fight over huge European claims of more than \$13.5 billion against North American assets - Nortel said they could more than double the claims of Canadian creditors - has kept the clock running and the legal fees rising.

Scores of smaller claims remain to be settled, including one over a long-closed Nortel plant in Brockville.

Many claims are now in the hands of second- and third-generation corporate owners because of shakeups in the industry.

In a speech to University of Ottawa law students last year, Winkler said: "The environment in which many lawyers currently practise has, over time, become increasingly competitive and commercial. There is a pressure to bring in, and to keep, clients. The drive to the bottom line is difficult to resist. But I reiterate: Law is, first and foremost, a profession; it is a business only secondarily. If you fail to recognize this distinction, you will almost certainly lose your way."

The Nortel case exemplifies everything that is wrong with the bankruptcy process.

Rather than restructure Nortel for survival, it forced the sale of operating businesses at a fraction of their value, provided jobs for only 16,000 of the 30,000 employees Nortel had in 2008 and exposed the assets to ruinous legal costs.

The bills sailed past the \$300-million mark last year as senior lawyers charge more than \$1,000 an hour and a bevy of junior counsel, accountants and consultants run up monthly itemized bills, called dockets, that record every email, phone call or dinner meeting in increments of as little as six minutes.

The total professional fees are so far 50 per cent more than the \$208-million sale price of the Carling Avenue campus to the federal government.

Nortel disclosed recently that it expected to pay another \$87 million in 2012 on professional fees, up more than 20 per cent from last year.

At another legal conference, Winkler recalled that lawyers did not keep dockets when he was practising law.

The amount of time spent on a case "was determined entirely on what the case called for, and how thoroughly you wanted to be prepared," he said. "It had nothing to do with how much you could charge."

Sadly, one of Winkler's first actions in the Nortel mediation case was to hire two more law firms to provide him with advice. One is a Toronto litigation boutique firm and the other is a big New York City firm.

The Nortel assets are under pressure from other sources. While the remaining Canadian workforce fell by a half to 190 last year, two top executives received \$7.1 million when they left. The two top remaining executives shared \$2.5 million in pay and retention deals, and the three directors were paid \$790,000.

Nortel cash assets in the U.S. and Canada have shrunk to about \$1.8 billion, excluding the \$7.73-million proceeds from sales of patents and operating businesses.

Kevin Gross, a U.S. bankruptcy court judge, cut off bids by British, Irish and French operations of Nortel for a bigger share of the assets in a long-awaited new decision following a major court hearing last fall.

It was a third decision so far this year by U.S. courts against the European claims, but whether third time is lucky is doubtful. There is still a possibility of a trial over European claims that Nortel North America engaged in an elaborate scheme to siphon away assets and leave Nortel Europe with troubled subsidiaries and big restructuring and research bills on the eve of collapse.

Gross did not rule on the specific claims. While he said they appeared weak and unlikely to survive a full court test, he rejected the claims on a separate issue: that Nortel North America could not be held to account - the official term is fiduciary responsibility - for the problems of Nortel Europe.

He said there was no basis in European securities law for the parent company to be considered "a shadow director" of the Nortel European operations.

While this decision may make sense to securities lawyers, it suggests that the giant corporations that dominate the global economy are just loose federations marching under a marketing flag of convenience. It is a decision likely to breed trouble.

Still, nervous Nortel creditors will heave a sigh of relief.

Nortel recently calculated that it owes \$665 million to the 40,000 current and future Nortel pensioners in Britain, but the Europeans operations are seeking \$3.7 billion to cover expected charges when a big British pension insurance plan kicks in.

Then there is the issue of how clean are the hands of Nortel North America operations in the assault on assets. Nortel Canada initially agreed to recognize a claim by U.S. tax authorities of \$2.1 billion against Canadian assets for tax claims flowing from the infamous accounting scandal.

The Internal Revenue Service ultimately got \$37.5 million in lieu of the claim. That payment two years ago will likely stand regardless of the outcome of the Toronto fraud trial against former CEO Frank Dunn and top former financial executives.

Nortel has been freed from future obligations to clean up polluted former manufacturing sites across Ontario.

The Ontario environmental ministry sought an action plan for cleaning up the worst property in London, a project Nortel said would cost \$18 million in addition to the \$30 million it had already spent voluntarily.

It halted manufacturing and sold the properties more than 15 years ago.

About 750 former Nortel Canada employees and their survivors are getting \$10.3 million in additional compensation from an underfunded employee benefit plan. Former long-term disability recipients and survivors of deceased pensioners had monthly income support and life insurance benefits cut off a year ago. They got first instalments of about \$24 million from the underfunded benefit plans last year.

With the latest payment - about \$15,000 each on average - they will still get only about 35 per cent of the \$105 million in benefits they were owed by Nortel.

One group that doesn't have to worry is the federal tax authorities. They receive \$900,000 in income tax revenues from the windup of the benefit plans.

When companies went broke in the past, the last things left behind were desks, office equipment and obsolete production equipment to be sold cheaply. Now the Internet has created a new asset. The Nortel trustees are sitting on 17 million Internet protocol addresses and 700 servers.

It is selling some of the addresses to Salesforce.com, a big business services company, and Cablevision, which runs U.S. television and cable companies. By court order, terms of the sale will not be disclosed.

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