Two Cheers for Universalism: Nortel's Nifty Novelty

John A. E. Pottow
University of Michigan Law School, pottow@umich.edu

Available at: https://repository.law.umich.edu/book_chapters/424

Follow this and additional works at: https://repository.law.umich.edu/book_chapters

Part of the Bankruptcy Law Commons, and the Transnational Law Commons

Publication Information & Recommended Citation
NOTICE AND DISCLAIMER: All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher (Carswell).

Carswell and all persons involved in the preparation and sale of this publication disclaim any warranty as to accuracy or currency of the publication. This publication is provided on the understanding and basis that none of Carswell, the author(s) or other persons involved in the creation of this publication shall be responsible for the accuracy or currency of the contents, or for the results of any action taken on the basis of the information contained in this publication, or for any errors or omissions contained herein.

No one involved in this publication is attempting herein to render legal, accounting, or other professional advice.

A cataloguing record for this publication is available from Library and Archives Canada.

ISSN 1713-6288
ISBN 978-0-7798-7066-0


Printed in Canada by Thomson Reuters

TELL US HOW WE'RE DOING
Scan the QR code to the right with your smartphone to send your comments regarding our products and services.
Free QR Code Readers are available from your mobile device app store.
You can also email us at carswell.feedback@thomsonreuters.com

Annual Review of Insolvency Law
Editorial Advisory Board

Editors-in-Chief:
Dr Janis Sarra, Allard School of Law, University of British Columbia
The Honourable Barbara Romaine, Alberta Court of Queen’s Bench

Editorial Advisory Board
Jean-Daniel Breton, Ernst & Young Inc, Montréal
Philippe Bélanger, McCarthy Tétrault LLP, Montréal
Kevin Brennan, Ernst & Young Inc, Vancouver
Mary Buttery, DLA Piper LLP, Vancouver
Dr Ronald B Davis, Allard School of Law, University of British Columbia
The Honourable James Farley, QC, Toronto
The Honourable Shelley Fitzpatrick, British Columbia Supreme Court
The Honourable Clément Gascon, Supreme Court of Canada
John Grieve, Fasken, Martineau, DuMoulin LLP, Vancouver
The Honourable Georgina R Jackson, Court of Appeal for Saskatchewan
Robert R MacKeigan, QC, Stewart McKelvey, Halifax
Patrick McCarthy, Borden Ladner Gervais LLP, Calgary
Douglas R McIntosh, Alvarez & Marsal Canada ULC
The Honourable Geoffrey Morawetz, Ontario Superior Court of Justice
The Honourable Marina Paperny, Alberta Court of Appeal
Edward Sellers, Osler, Hoskin & Harcourt LLP, Toronto
Dr Thomas Telfer, Faculty of Law, Western University

Student Editors
Michael Cremers
Caitlyn Gregg
Two Cheers for Universalism: Nortel’s Nifty Novelty

John A E Pottow*

I. INTRODUCTION

Individuals in the cross-border bankruptcy community hiding under rocks may not have heard about the monumental decisions in the co-trials in the Canadian-United States Nortel bankruptcy proceedings, In re Nortel Networks, Inc and Re Nortel Networks Corp. The decisions are thoughtful, innovative, practical, and important. They warrant a detailed case comment or two in their own right. This brief article, however, will not provide such worthy treatment. Those hungering for in-depth reports of the cases and their holdings may stop reading now and devote their labours elsewhere. What this article will be is an appreciation of Nortel, explaining both why it is such an important opinion, or pair of opinions, for the cross-border bankruptcy world and why it should be seen as a triumph, albeit an incremental one, for the universalist school of transnational insolvency.

* John A E Pottow. John Philip Dawson Collegiate Professor of Law. University of Michigan Law School. James Robinson, Michigan JD Class of 2016, provided research assistance, and the referees provided comments. All are appreciated.

1 In re Nortel Networks, Inc. 532 BR 494 (Bankr D Del 2015); Re Nortel Networks Corp. 2015 ONSC 2987 (Ont SCJ [Commercial List]).

2 Others have taken up the charge. See, eg. Robert Harlang & Mitch Vininsky. “Nortel Networks: A New Twist on Substantive Consolidation?” (2015). 34 Am Bankr Inst J 18, 66 (“The Nortel allocation case was unique in many respects and resulted in decisions that demonstrated the respective judges’ understanding of the business world and their creativity.”).

3 The reader is presumed to know the well-rehearsed international bankruptcy debates between the competing theories of “territorial-
II. THE NORTEL CASES

1. The Nortel Enterprise

"Nortel", made up of Nortel Networks, Inc and Nortel Networks Corp, was an enormous telecommunications company of storiéd pedigree that foundered in the Great Recession. Although global in reach, one can fairly call it a "Canadian" company. Like many multinational business enterprises ("MNE"), it had, by definition, its tentacles well extended worldwide, but if anyone tried to assess the centre of main interests ("COMI") of the corporate group, it would likely have been Canada. As is often the case with such Canadian businesses, however, a considerable portion of its affairs were transacted in the United States ("US"), which produced the lion’s share of its revenue. Most relevant for present purposes is that a significant component of Nortel’s business was dependent upon intellectual property. The history and business model of Nortel, including its multiple product and service lines, is well recounted in both the Canadian and US bankruptcy court opinions; the curious reader is referred to either source for more detail.¹

² See supra note 1. For flavour: as of January 2009, Nortel’s lines of business were “carrier networks”, wireless networking solutions for providers of mobile voice, data and multimedia communications services over technologies; “enterprise solutions”, enterprise communications solutions addressing the headquarters, branch and homes office needs of large and small businesses; and “metro ethernet networks”, optical networking and carrier grade ethernet data networking solutions. In re Nortel Networks, Inc, 532 BR at 503.

2. The Nortel Proceedings

When Nortel first started to skid, reorganization was attempted, but the onslaught of the Great Recession hammered any lingering nails into its coffin. The company soon filed for bankruptcy protection. But it did not do so in the paradigmatic way anticipated by the dominant international instruments regulating cross-border insolvency proceedings, such as most notably, the UNICITRAL Model Law on Cross-Border Insolvency⁵ implemented in Canadian law through the Companies’ Creditors Arrangement Act (CCAA)⁶ and US law through Chapter 15 of the US Bankruptcy Code.⁷ That is, there was not a “main” proceeding filed in Nortel’s COMI (Canada) and “ancillary” proceedings in the myriad other countries around the world where Nortel also had establishments. Rather, Nortel filed “parallel” proceedings in both Canada and the United States.⁸ The filings were coordinated and simultaneous. To be specific, Nortel was not one megacorporation that filed multiple parallel bankruptcy proceedings in different jurisdictions around the world: Nortel filed its various proceedings chiefly by affiliation. That is, the main parent and Canadian operating subsidiary filed in Canada, the US operating subsidiary filed in the United States, and so on. Some entities stayed out of formal court

⁵ UNICITRAL. UNICITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (New York: UN, 2014) [Model Law].
⁶ Companies’ Creditors Arrangement Act. RSC 1985, c C-36, as amended to 26 February 2015 [CCAA].
proceedings altogether.¹⁰ Nortel, through multiple debtors in multiple proceedings, “went into bankruptcy.”

As mentioned, the starts at reorganization ultimately sputtered. Not helping was inter-corporate squabbling over transfer payments, which are the tax-animated headaches that arise when one corporate affiliate pays another for intra-enterprise transactions, all designed to assuage tax watchdogs that tax evasion through income flight is not afoot.¹⁰ The Canadian debtors also demanded financing from the US subsidiaries, contending that the financing was necessary to fund any sort of reorganization attempt.¹¹ But eventually, the writing revealed itself on the walls, and talk turned to liquidation.

In an enterprise the size of Nortel, liquidation can mean anything from depressing auctions of office chairs to highly integrated cross-border sales of intact business lines subsumed within larger corporate groups. The Nortel stakeholders hungered for the latter. In an omnibus resolution of some of the inter-corporate financing bickering, the various Nortel debtors entered into a protocol to cooperate in the sale of the firms’ assets.¹² This protocol, significantly, recognized that trying to resolve the inter-corporate squabbles would delay and even jeopardize the value-maximizing sale of the corporate assets, and so the consensus was reached to sell all of the viable business lines collectively and put the proceeds into an evocatively labeled “lockbox”.¹³ Disbursing the lockbox’s proceeds was left for a later day, after all the stakeholders had pulled together and beat the bushes for bidders. This protocol was successfully entered and survived appeal.¹⁴

The lockbox approach proved successful. After the major business lines were sold off, the debtors were even able to monetize their “rump” portfolio of around 7,000

¹⁰ One example is Nortel Networks SA, a French company.
¹¹ From the late 1970s to 31 December 2000, Nortel operated under a series of Cost Sharing Agreements (“CSA”), which were bilateral agreements between the Canadian parent, Nortel Networks Limited (“NNL”), and each of the other R&D-performing Nortel entities. The purpose of these CSA was effectively to implement transfer pricing by allocating costs to respective corporate affiliates across the globe (and hence dictate the net taxable income for each such affiliate). It was never a smooth process at Nortel. For example, the last R&D CSA between NNL and the main US subsidiary, Nortel Networks, Inc (“NNI”), was drafted in 1996 and made effective from 1 January 1992, to reflect the terms of a 1996 advanced pricing agreement (“APA”) between NNL, NNI, the Canadian Revenue Agency (“CRA”), the taxing authority and the Internal Revenue Service (“IRS”), the US tax authority. At the end of 1999, however, each of the three CSA APA in effect between NNL and each of the other then-cost sharing participants (“CSP”) (namely, those governing R&D, tangible property, and headquarters cost sharing) had expired or was nearing expiration. In December 2001, Nortel’s R&D CSA was terminated. Accordingly, from December 2001 through March 2002, the Nortel tax group worked with external advisors to craft the specific mechanics of a residual profit sharing method (“RPSM”) for Nortel that could be submitted simultaneously to the CRA, IRS and Inland Revenue, the UK taxing authority, as the basis for proposed APA for the 2000 to 2004 period. It culminated in the Master Research and Development Agreement (“MRDA”) that later came to be so litigated in the Nortel bankruptcy. Indeed, over the course of eight years (2001-08), as APA negotiations with the tax authorities dragged on regarding Nortel’s RPSM, the individual entities (“IE”) made or received billions of dollars in transfer pricing payments under that system. In 2009, following Nortel’s insolvency and more than seven years after the 2002 APA applications, the IRS and CRA finally directed an income adjustment of US$2 billion from NNL to NNI as a condition for resolving the APA for those years. In re Nortel Networks. Inc. 532 BR 494, 507-9 (Bankr D Del 12 May 2015).
¹² “Interim Funding and Settlement Agreement” (visited 20 September 2015), online: <http://bankrupt.com misc NortelInterimFundingAgreement.pdf> [IFSA]. The IFSA settled the inter-corporate tax claim at US$2 billion. See supra note 10. The IFSA was later finalized into the Final Canadian Funding and Settlement Agreement. In re Nortel Networks. Inc. 532 BR at 511-12: Re Nortel Networks Corp. 2015 CarswellOnt 7072 at para 33.
¹³ Ibid at 11: “[T]he entire amount of the Sale Proceeds . . . shall be deposited in an escrow account pursuant to an escrow agreement, the terms of which shall be negotiated and agreed by all Selling Debtors, in each case acting reasonably.”
¹⁴ In re Nortel Networks. Inc. 737 F 3d 265 (3d Cir 2013).
So attractive were these IP assets that Nortel flirted with staying around as a sort of patent portfolio business, but ultimately decided to sell off those assets, too. Google arrived as a stalking horse for $900 million and served as a catalyst to jack up a final bid of $3 billion by a syndicate known as “Rockstar.” All through, the sale of assets netted $7 billion or so to the lockbox.

So far, so good; everyone agreed to pull together to sell assets for their greatest value and make the pie as big as possible. But then, as in many matters commercial, when it came time to divide the pie, things went less well. Despite a provision of the protocol counseling mediation over how to divide the proceeds amongst the three bankruptcy estates Canada, US, and collectively, Europe, Middle East, and Africa (“EMEA”), consensual allocation proved fruitless, much to the dismay of the hapless mediators. Judicial determination, the backstop resolution procedure under the protocol, then had to be invoked.

The protocol provided for joint judicial resolution of the contested lockbox allocation. But joint judicial resolution is a strange beast, and there was no ex ante reason to expect orderly harmonization of those two judicial proceedings in Canada and the United States absent the protocol or the force of the Model Law. Neither was a main proceeding in the jurisdictional hierarchy anticipated by the typical main/ancillary format of the Model Law that would be presumptively entitled to cooperation from the other proceeding. Thus, the parties were venturing out into uncharted terrain. It could very well be that the Canadian court would render its own decision on the assets, which might conflict with the US court’s determination. Indeed, the prospect of conflicting distributive determinations is not just a Nervous Nellie’s nightmare; in the In re Lernout & Hauspie Speech Prods bankruptcy, the US and Belgian courts came to diametric interpretations on the priority rights of aggrieved investors who had fraud claims against the debtor, which but for eventual settlement would have been a jurisprudential disaster.

The Nortel courts avoided disaster. They did so by invoking the procedures of the Model Law that facilitate cooperation as implemented through the protocol. So, for example, the trial

---

15 In re Nortel Networks, Inc. 532 BR at 518; Re Nortel Networks Corp, 2015 CarswellOnt 7072 para 39.
16 In re Nortel Networks, Inc, 532 BR at 514-15; Re Nortel Networks Corp, 2015 CarswellOnt 7072 para 105.
17 Rockstar is a consortium comprising Apple, Ericsson, Microsoft, Blackberry, EMC, and Sony. In re Nortel Networks, Inc, 532 BR at 502.
18 $7.3 billion, to be precise. Ibid at 525.
19 “In no case shall there be any distribution from the Escrow Account in advance of either (i) agreement of all of the Selling Debtors or (ii) in the case where the Selling Debtors fail to reach agreement, determination by the relevant dispute resolver(s) . . .” IFSA at 11.
20 Each Party . . . agrees to submit to the non-exclusive jurisdiction of the US and Canadian Courts (in a joint hearing conducted under the Cross-Boarder Protocol adopted by such Court, as it may be in effect from time to time), for purposes of all legal proceedings to the extent relating to the matters agreed in [the IFSA]. Ibid at 15.
on how to allocate the lockbox proceeds was run in two different courtrooms in Toronto, Ontario and Wilmington, Delaware simultaneously, with the judges engaged in frank and frequent communications between themselves. Witnesses were video-linked from one courtroom to the other, and litigants in each venue could see in live time what was afoot in the other. But as the respective courts made clear, each judge would arrive ultimately at his own determination on what the applicable bankruptcy law demanded for allocation of the lock box proceeds across jurisdictional borders.

ii. The parties’ competing allocation proposals

While coordinated and integrated, the proceedings were still woolly. The parties advanced sharply divergent approaches of how best to allocate the lockbox proceeds. Surprising perhaps no one, the parties’ positions were, as one judge aptly characterized, “self-serving.” Proving the adage that a picture says a thousand words, the US Court graphically demonstrated how each constituency’s approach to dividing the spoils just so happened to accord its members the largest share.

Perhaps, in a way, the naked self-interest of the parties liberated the judges to blaze their own trail, which they did when rejecting all the party-advocated approaches in coming to their own allocation rule.

As mentioned, a considerable part of Nortel’s global assets were tied up in patent portfolios, and so the question became how should the bankruptcy estates share in the proceeds realized upon the sale of those portfolios? Of course, the simplest solution would have been obtained were there only one bankruptcy estate, or perhaps even one main bankruptcy estate: all the money would go into that one pot. Unfortunately, the multi-jurisdictional parallel proceeding posture of Nortel made that simple outcome impossible. Each constituency made its own pitch, boiled down into three major positions as typified by the arguments of the Canadian, EMEA, and US debtors.

The formalist position was advanced by the Canadians, who argued that all the intellectual property was owned by the Canadian entities, and so the sale of that property should
naturally inure to the benefit of the Canadian estate. The EMEA stakeholders took a somewhat Lockean approach and argued that because the legal title to the intellectual property was parked in Canada for arbitrary (or more precisely, tax-related) reasons, allocating all the lockbox value based on that legal location would be unfair if not absurd, especially in light of Nortel’s worldwide operations. Rather, they argued, the allocation should match the means of production, or perhaps factors of production if Research & Development ("R&D") expenditures is a proper proxy: because much of the worldwide R&D effort that occurred to generate those Canadian intellectual assets occurred in Europe and elsewhere, the proceeds from those assets’ sales should be allocated in proportion to each jurisdiction’s share of the R&D spending.\(^\text{28}\)

Finally, the US interests partially joined the EMEA position in rejecting the Canadian debtor’s “ownership” approach but veered off onto their own proposal, which might be called an “economic” approach. This tack was built upon the premise that the purpose of the intellectual property nominally owned by the Canadian entities was to generate money for a once-profitable worldwide business, and the US affiliates brought in the lion’s share of that business. As such, the sale proceeds should be allocated in proportion to the respective affiliates’ contribution to the global conglomerate’s income.\(^\text{29}\)

The courts’ decision, independently reached but surely preceded by Model Law-sanctioned communication, was to reject all these approaches and adopt a novel alternative that they called a modified pro rata allocation.\(^\text{30}\) The pot was divided in proportion to total creditors’ claims.

\(\text{iii. The modified pro rata allocation solution: pro rata}\)

Before explaining the courts’ approach, it is first helpful to situate the outcome at the highest level of abstraction, and that is that the courts rejected the formalism of the Canadian approach and adopted a much more functional, even pragmatic lens toward Nortel’s assets. That is, the “biggest picture” underpinning of the courts’ opinions was to reject the idea that legal title of the intellectual property assets held in Canada entitled the Canadian estate to the proportionate proceeds of the lockbox, let alone the lockbox proceeds related to the business line sales. Rather, the courts accepted the principle of the other creditors, if not each calculation metric itself, that such an approach would shower a windfall upon the Canadian estate that did not reflect the economic substance of the R&D and other inter-connected operational aspects of this global firm.\(^\text{31}\) This departure from focus on physical location in

\(^{\text{28}}\) \textit{In re Nortel Networks, Inc.}, 532 BR at 549-60; \textit{Re Nortel Networks Corp.}, 2015 CarswellOnt 7072, paras 193-249.

\(^{\text{29}}\) \textit{In re Nortel Networks, Inc.}, 532 BR at 553: “The Canadian Debtors are nothing short of narcissistic in allocating the bulk of the Sales Proceeds to themselves and in their failure to recognize the contributions of the other Nortel companies and the realities of the manner in which the Nortel enterprise operated on a day-to-day basis.” \textit{Re Nortel Networks Corp.}, 2015 CarswellOnt 7072, paras 196-97.

\(^{\text{30}}\) \textit{In re Nortel Networks, Inc.}, 532 BR at 549-60.

\(^{\text{31}}\) In so far as the IP is concerned, while the patents were registered in the name of NNL, I would not for that reason hold that NNL is entitled to the proceeds of the IP sales. The patents and application rights to apply for patents were held in the name of NNL as explained by Ms. Anderson and Ms. De Walton, and made management of the portfolio much easier. While these witnesses expressed subjective views that it was NNL who owned the patents, these views are not determinative, as acknowledged in the Monitor’s reply brief at paras 65-66. This was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multi-national enterprise with all RPEs doing R&D that led to
itself is a shattering repudiation of the doctrine of territorialism, a point to be explored below, but the main observation for present discussion is that the courts went beyond asset ownership in crafting an equitable solution to allocation.

Once that door had been opened, one can conjecture it became relatively simple to craft an allocation formula: sharing in the pot was not based on the debtors’ budget or revenue as had been self-servingly proposed, but equally by creditor, invoking a “fundamental tenet” of bankruptcy law in the words of one court. This is the meaning behind the courts’ pro rata allocation decision. In other words, if the total value of the claims in the Canadian estate were $1, and the total claims in the EMEA estate also $1, and the total in the US estate were $2, meaning that there would be $4 of worldwide claims, the courts would order distribution of the lockbox 25% to Canada and EMEA each and 50% to the United States. The result of this was to acknowledge everyone worldwide contributed to the value of Nortel as an MBE and that the conceit of trying to craft each constituency’s precise, perfectly calibrated share was a fool’s errand. It is interesting to speculate that if the non-Canadian estates had offered less self-serving counter-formulae, whether one might have taken root, but that is likely unanswerable. In the end, once recognizing that the Canadians could not take it all and opening the door to worldwide participation, the deep-seated bankruptcy baseline of pro rata equality was difficult to shake. Perhaps viewed

another way, no party made a sufficiently compelling case why the distribution should not be pro rata in light of the courts’ desires to share the allocation beyond Canada.

iv. The modified pro rata allocation solution: modification

Without more, this approach could be described as “pro rata” period. But there was more, because this presumptively pro rata approach was purportedly “modified”. And indeed, the courts went at times to awkward pains to protest that they were most definitely not engaging in pro rata or consolidated distribution of corporate assets. The courts insisted this was not true pro rata allocation, but rather modified pro rata allocation, for two reasons, one accurate and one more confused. First, the courts explained this was not fully pro rata allocation because they were leaving some assets unallocated by the pro rata approach, in other words, just letting those assets lay where they be. Namely, cash on hand in each respective estate was left just where it was territorially. Territorialism’s random lottery of where cash happens to be parked on the day of filing was thereby vindicated, and each estate that happened to have cash or did not, enjoyed a respective windfall or disappointment. For illustration of the tempers this approach engenders, see generally Lehman Brothers. No real attempt was made by either court to defend this outcome intellectually, so perhaps it might just be seen as a combination of (a) administrative ease, and/or (b) an easy, if arbitrary, way to rebut the “seemingly offensive” allegation that they were engaged in fully pro rata sharing by creditors. Whatever the motivation, the distinct treatment of

32 “It is a fundamental tenet of insolvency law that all debts shall be paid pari passu and all unsecured creditors receive equal treatment.” Re Nortel Networks Corp. 2015 CarswellOnt 7072, para 209.
33 “The allocation each Debtor Estate will be entitled to receive from the lockbox funds is the percentage that all accepted claims against that Estate bear to the total claims against all Debtor Estates.” Ibid at para 250.
34 “[Both courts] agree that their methodology does not constitute global substantive consolidation.” In re Nortel Networks, Inc. 532 BR at 551.
35 Ibid.
36 In re Lehman Bros Special Fin Inc v BNY Corporate Tr Sefl’s Ltd (In re Lehman Bros Holdings Inc), 422 BR 407 (Bankr SDNY 2010).
37 The discussion of pro rata allocation requires a discussion of substantive consolidation and, more importantly, why the Court’s approach is not that seemingly offensive outcome... The Court, for
cash on hand was indeed a modification of the otherwise governing pro rata allocation formula.

As just partially presaged, the second reason the courts insisted this was not a fully pro rata allocation rests upon an apparent terror with being accused of effecting a substantive consolidation of the debtors’ estates, which apparently was seen as a consequence of fully pro rata allocation. The US Court was especially fearful of this allegation, the Canadian Court less so. In fact, the Canadian Court cheerfully launched into an alternative discussion saying that even if pro rata allocation was substantive consolidation, that remedy would be fully indicated under Canadian law on the facts of the case. But the US Court would have none of it. Indeed, more broadly, the US Court was anxious to assure that it was not adopting “universalism”, presumably an unwelcome cognate to substantive consolidation.

The source of the Courts’ concerns is hard to pin down, and these comments may not reflect one coherent argument so much as a collection of stray thoughts. The confusion stems in part from a conflation of pro rata allocation with substantive consolidation and or with universalism. Because it is
difficult to grasp fully the Courts’ reasoning, or even direction, it might help simply to break the logical chain that universalism need equate to substantive consolidation. Whether pro rata allocation equates with substantive consolidation is a separate issue explored below. Recall that universalism in its pluralist form advocates the disposition of a multinational debtor’s assets in accordance with the substantive bankruptcy law of its COMI. Universalism, or more precisely, its advocates, has not definitively figured out how to address interwoven corporate groups where multiple corporate debtors within a broader group have different COMI. Universalism thus has nothing conclusive to say on the doctrine of substantive consolidation of corporate debtors. To be sure, squishing all the affiliates together into one giant “enterprise” and finding that enterprise’s COMI, or “E-COMI”, in the literature,

---

38 See ibid.
39 “Even if it could be said that a pro rata allocation involved substantive consolidation, which it cannot, I do not see case law precluding it in the unique circumstances of this international case. Even in domestic cases, CCAA plans involving substantive consolidation are not unknown.” Re Nortel Networks Corp, 2015 CarswellOnt 7072, at para 214.
40 “To be clear, the Court’s pro rata allocation is not the ‘new order’ which the pro rata proponents urge with terms such as ‘universalism’.” In re Nortel Networks, Inc, 532 BR at 558.
41 For example, the courts note that they were recognizing inter-corporate debt. In re Nortel Networks, Inc, 532 BR at 532; Re Nortel
purposes of choice of substantive bankruptcy law would be a form of universalism analogous to substantive consolidation. But that E-COMI approach to corporate groups is not compelled by universalism. Indeed, while insisting upon an E-COMI approach has been recommended by some universalism advocates as the best approach to the corporate groups problem, it has not been advocated, for lack of a better term, universally. For example, a situation of discrete corporate subsidiaries incorporated throughout different jurisdictions without interwoven financial affairs could well yield a universalist outcome subsidiary-by-subsidiary for each entity’s cross-border assets requiring substantive consolidation at the E-COMI level. In short, and contrary to the Courts’ seeming concerns, universalism is agnostic to substantive consolidation.

There is not much point in getting bogged down in this aspect of the Courts’ opinions, however. Little turns on it, other than revealing the Courts’ respective disinclinations toward substantive consolidation and at least one Court’s apparent contempt for universalism. What matters more is the prior point that cash on hand was preserved by estate irrespective of proportionate creditor claims. That fact suffices to justify the label “modified” pro rata allocation, which the courts accurately used.

v. The allocation/distribution distinction

Having jointly decided to take a modified pro rata approach to allocating the lockbox proceeds was not the end of the matter. The Courts’ final step was to take the intriguing gesture of distinguishing allocation from distribution. This distinction is relevant for the debate between universalism and territorialism for the straightforward reason that in true universalism, the COMI state “exports” its substantive distribution rules across national borders to govern local asset distribution. Modified universalism tempers this exportation with various carve-outs for exceptional treatment. Territorialism, by contrast, allows each individual state to implement its own distributive rules to assets within its jurisdiction. By underscoring the allocation/distribution distinction, the Nortel courts appeared to have been mollifying territorialists by assuring that local substantive bankruptcy rules would be alive and well to govern whatever share of the lockbox proceeds ended up being patriated to the respective jurisdictions under the modified pro rata allocation. In other words, Canadian bankruptcy law and priority rules would govern the ranking of claims and distribution of the modified pro rata share of the lockbox proceeds that went to Canada, US rules to the piece sent to the United States, and so forth. While this may seem like fine bologna to slice, the sovereignty-animated distinction was unlikely to have been lost on many. Territorialist concerns of local bankruptcy laws...
Two Cheers for Universalism

applying were expressly acknowledged and respected by clarifying that distribution would be locally governed as a distinct stage subsequent to allocation. Whether this bifurcation was as territorialism-vindicating as might appear on first blush remains to be seen.

vi. Summary

To summarize, the Nortel cross-border bankruptcy was resolved by a consensual, worldwide sale of the enterprise's valuable business lines and then its residual portfolio of patents and intellectual property in a highly coordinated and productive manner. Surely related to this congenial approach was an agreement by protocol to defer the thorny question of proceeds allocation until after the sales had all been completed, and even to try to mediate that question to further consensual resolution. When that mediation failed, the parties proceeded to litigate the matter, as provided by their protocol, before the Canadian and US bankruptcy courts. Those courts conducted a highly coordinated and cooperative joint trial, complete with simultaneous video feeds, containing dozens of witnesses and even more lawyers running around.

Eventually, the courts came to the same conclusion: reject all the parties' arguments and allocate the lockbox proceeds on a modified pro rata approach. Pro rata because the allocation would be in proportion to the amount of claiming creditors in each estate, counting inter-creditor claims in the pot, and modified because only the lockbox assets and not, eg, the cash on hand, would be allocated accordingly. The modified pro rata allocation approach, however, did not speak to ultimate distribution, which would be determined, à la territorialism, in accordance with the substantive bankruptcy laws of each respective jurisdiction receiving an allocation.

The ultimate resolution of the Nortel assets thus has a distinctly territorialist flair to it. Recognizing the separate estates and vindicating an implicit, and at times explicit, presumption that creditors in each estate were entitled to claim the assets within their physical jurisdiction, either ab initio or through allocation from the lockbox, seems to have reflected a territorialist mindset to the distribution question notwithstanding the happy coordination that occurred to get to that stage. And certainly the openly hostile digs at universalism made by at least one of the Courts augments the interpretation that the decisions were attempting to follow territorialism. But that assessment belies the full significance of the opinions. The Nortel case should be seen not as ultimately backsliding into territorialist conceptions of vested right but as actually moving the universalism ball forward, and considerably so.

III. Nortel's Universalism

Properly viewed, Nortel should be seen as a significant step forward for universalism, notwithstanding its first-blush territorialist focus on estate-by-estate distribution. There are at least five ways in which it is accurate to characterize the decision as importantly, although far from completely, universalist.

1. Universalist Cooperation

At the risk of stating the obvious, the courts worked very hard and very well together to synchronize their hearings and avoid the risk of inconsistent judgments that had plagued earlier cases like Lemout & Hauspie. Things were not all smooth sailing, of course. For example, at one stage in the case the Canadian bankruptcy court issued an order clarifying that prosecution of administrative proceedings for a so-called "financial support directive" in favour of UK pension claimants under section 96 of the Pensions Act 2004 in the

52 In re Nortel Networks, Inc. 532 BR at 554: "All claims against each Nortel Debtor, including intercompany claims and court approved settlements, will receive distributions from the separate Debtor Estates."); Re Nortel Networks Corp. 2015 CarswellOnt 7072 (Ont SCJ [Commercial List]), paras 250-51.
UK would constitute a violation of the Canadian automatic stay. The UK pension authorities cheerfully ignored this order and went ahead to take the initial steps to determine potential pension liability anyway. But all in all, the procedural integration of the co-trials, and not just the allocation trials, but indeed the whole proceedings, was commendable and a source of judicial statesmanship.

Fair enough: back-slapping all around. But is this a credit to universalism? After all, deeply sovereignty-conscious states can bask in territorialism yet nonetheless still be cordial and even cooperative with judicial colleagues in cross-border disputes without having to carry the banner of universalism. Thus, to be strictly precise, one might celebrate the profound degree of cooperation in the case not so much as a victory for universalism per se but as a victory for the Model Law and similar instruments that strive for increased judicial dialogue, communication, and cooperation. Captured by its protocol, the Nortel case unquestionably illustrates a high point of cross-border judicial cooperation.

One can take the next step, however, and claim that that cooperation in turn services the broader goals of universalism because it forces a necessary consideration of legal pluralism by counseling an otherwise autonomous judge to at least confer with an extra-territorial, indeed, extra-sovereign, peer. Given that one of the conceptual cornerstones of universalism is the acceptance of outcome differences and given further that incrementalist universalists have predicted an acclimation process whereby increased interaction and immersion in foreign law will desensitize judges to any reflexive resistance to the application of foreign law that universalism requires, it is a fair conclusion that the working together of the two courts in the two countries highlights a cosmopolitan mindset that will advance, even if just conceptually or atmospherically, the universalist agenda.

There is a further, inferential point regarding the importance of the procedural cooperation in this case and others, and that is the possibility that procedural integration increased the likelihood or perhaps otherwise played a causal role in the substantive determination on the allocation question. That is, although the judges insisted strongly they were coming to their own independent conclusions on the proper approach, surely the regular interaction between them allowed them some opportunity to exchange thoughts and ideas on a novel question of cross-border insolvency law. Who else, other than law clerks and the occasional professor, do judges get to bat ideas around with besides other judges? It should shock nobody that two judges working so closely together just so happened to come to the same solution on allocation, especially one that transcended the self-serving approaches of each respective national constituency.

Importantly, it is not as if these two jurists were free from differences of legal opinion. Indeed, a bizarrely long portion of each judgment is devoted to interpretation of the tax-animated Master Research and Development Agreement (“MRDA”). It is bizarre because both courts ultimately held it largely

53 Re Nortel Networks Corp. 2010 ONSC 1304 (Ont SCJ Commercial List).
54 Re Nortel Networks Corp. 2015 ONSC 4170 (Ont SCJ Commercial List) at para 53.
55 See for example, LoPucki, supra note 51, arguing for “cooperative” territorialism.
57 See for example, US Bankruptcy Code, supra note 7, § 1508: “In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”
irrelevant to the allocation decision, and the two courts diverged significantly in their analyses. The focus on the MRDA interpretation could be professional path-dependency, i.e. that so much argument was devoted to the interpretation of this agreement that the courts felt the need to respond to these arguments and offer their interpretations of the document. Or it could be that the courts, mindful of the novelty of their proposed pro rata allocation, where fleshing out alternative conclusions of law in anticipation of the inevitable onslaught of appeals. Whatever the reason, each court went out of its way to remark how it disagreed with the other court on the proper interpretation of the agreement. The Canadian court put more emphasis on legal title of the licensed property, decrying “economic theory”, whereas the US court put more emphasis on what it saw as the economic substance of the location of all

Over 13 pages, Judge Gross rejected the Canadian debtors' argument that the MRDA gave them ownership of the IP and subsequent IP sales proceeds. In re Nortel Networks, Inc. 532 BR 494, 538 (Bankr D Del 12 May 2015). Rather, the US court looked to Nortel's representations to tax authorities and its enforcement and sublicensing practices to find that the MRDA gave the US debtors and the EMEA debtors economic and beneficial ownership, and thus shared ownership, of the IP. Ibid at 540-47. Across the border and over 23 pages, the Canadian court found that while under the MRDA, the Canadian debtors had complete ownership of the IP subject to exceptions, it joined the US court in ultimately concluding that the MRDA itself was not controlling on the question of allocation of the IP sales proceeds. Re Nortel Networks Corp. 2015 CarswellOnt 7072 (Ont SCJ [Commercial List]), paras 169, 171. because “[t]he MRDA was an operating agreement and was not intended to, nor did it, deal with the disposal of all Nortel's assets in a situation in which no revenue was being earned and no profit or losses were occurring.” Ibid at para 172.


As the US Court candidly conceded, “The Courts have different interpretations of the MDRA.” In re Nortel Networks, Inc. 532 BR at 532.

meaningful legal rights to exploit a profit lying at the hands of the licensees.

Perhaps the length of the discussion on this ultimately moot issue was simply a manifestation of two judges who had grown to respect each other trying to make their best case, forcefully but politely, for why the other was mistaken when they agreed on so much else. However, there is another, more strategic possibility that could be complementary to the foregoing explanation. It could be that the judges were showing the world that they were not just deciding everything in lockstep but that they could, and did, disagree on matters. Perhaps they wanted the bankruptcy world to know that the courts were not simply two like-minded jurists who lucked into co-assignment but two judges working together who felt no reservation about expressing differences of opinion when necessary. But when the ultimate question had to be resolved, however, they came together and reached the same result. Given some of the scolding regarding the protracted state of the litigation, it could well be that they aligned as a united front to make clear that this matter had to end, once and for all, and to send a strong signal that they were willing to do so even as judges who could disagree on other matters. In that regard, it is eminently fair to surmise that that convergence of outcome may well have been facilitated by the universalism-fostering cooperation and coordination of judicial proceedings that led to the mutual acceptance of a goal to end this nightmare and try to blunt the appetite for appeals by uniting with the same substantive decision. Procedural coordination may thus have affected substantive convergence.

See supra note 60.

The parties’ complex arguments for their positions and against others [sic] supported by the enormous volume of supporting papers go around and around without end and without a definitive correct answer. It is fair to find that there is validity and error in all of the arguments, largely because the arguments are not rooted in an agreement which applies to the facts.

In re Nortel Networks, Inc. 532 BR at 550.
2. Universal Allocation Offsetting Territorial Distribution

In earlier academic work, I have discussed the role of, and distinction between, two vectors of territorialism, somewhat provocatively labeled “greed” and “pride”. These refer to the two concerns that territorialists have regarding universalism’s encroachment on so-called “local interests”. “Pride” is likely the more intractable and pertains to the sovereignty-conscious desire to see a nation’s normatively rich bankruptcy laws apply to assets within that jurisdiction’s borders. Thus, if a given country has a high priority ranking for labour claims, it is a hard swallow for many to send locally situated assets to a foreign main bankruptcy proceeding afoot in a MBE’s COMI, where that priority will not be recognized, all while local workers sit in the courtroom and look forlornly at the local judge. The “exportation” of the COMI’s bankruptcy laws upon the assets in the local jurisdiction affronts sovereignty or, more cynically, upsets the rent-seeking divisions painstakingly inserted into local bankruptcy law.

“Greed”, by contrast, refers to good, old-fashioned local favouritism and depends on the asset coverage ratio of locally situated assets to cover local claims. Following the example above, local unsecured creditors with no priority couldn’t care less about sovereignty and would be happy with a universalist outcome that destroyed the priority of their employee-creditor rivals under local law. Indeed, this is what happened in *Lernout & Hauspie*. All these creditors care about is sharing the greatest amount of assets with the fewest number of creditors. So “greed” refers to the desire of creditors with a high ratio of local assets covering local claims not to share on a worldwide basis when to do so would dilute their dividend, irrespective of governing bankruptcy law. The reason greed is a less stable territorialist vector than pride is because it is generally only ascertainable ex post. No country can generally know ex ante how creditors in its jurisdiction will shake out in the asset scramble until there is an actual bankruptcy. Policymakers might hope that creditors within their jurisdictions will routinely be in “surplus” situations, in which the ratio of local assets to local claims beats the worldwide average, such that territorialism is attractive. Yet there is just as much chance that their creditors will find themselves in a “deficit” situation, in which case the local creditors will welcome universalism’s worldwide sharing.

Viewing *Nortel* through this lens, it is clear that sovereignty was alive and well: pride, though checked by cooperation, was prevalent. This conclusion is supported by the courts’ pointed insistence on distinguishing between allocation and distribution, with the latter being expressly reserved for the respective sovereign jurisdictions to vindicate their policy-laden distribution rules and thus assuage their pride. As mentioned above, this puts a territorialist gloss on the *Nortel* proceedings.

On the other hand, greed was roundly, if not explicitly, quashed, striking a universalist blow against the insistence, ex post...
of the assets occurred through the exploitation of the licenses located there.\textsuperscript{72}

Yet that is not what happened, far from it. Either recognizing the deleterious effects of incentivizing the territorialism lottery or simply acknowledging the inequity of such a result when applied to a truly integrated MBE like Nortel, both courts moved quickly beyond trying to figure out where the underlying assets "were" in allocating the proceeds of their sale. Rather, they appreciated what universalism advocates have maintained all along, that centralized administration and sharing of an insolvent multinational's assets ultimately is the most efficient and fair way to process a bankruptcy regardless of assets' territorial location.\textsuperscript{73} If territorialism were to rule the day, the EMEA arguments would have been blown out of the water; the fact that there was international R&D contribution to the generation of the value-capturing intellectual property assets would have been interesting from a Marxist perspective but legally irrelevant. In fact, as soon as the Canadian formalist approach was rejected, it was clear the courts were moving beyond territorialism, which necessarily means, toward universalism.\textsuperscript{74}

The final nail in the coffin of territorialist explanations of the asset allocation comes in the courts' rejection of the intriguing

\textsuperscript{72} See for example \textit{In re Nortel Networks, Inc.}, 532 BR at 555, preferring economic approach.

\textsuperscript{73} It was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multi-national enterprise with all RPEs doing R&D that led to patents being granted. It was R&D that drove Nortel's business. R&D and the intellectual property created from it was the primary driver of Nortel's value and profits. All parties agree on that. It would unjustly enrich NNL to deprive all of the other RPEs of the work that they did in creating the IP just because the patents were registered in NNL's name. \textit{Re Nortel Networks Corp.}, 2015 CarswellOnt 7072, para 197.

\textsuperscript{74} "Territorial wrangling significantly diminishes value for stakeholders in a global insolvency involving a highly-integrated multi-national enterprise whose assets are entangled, and ought not to be condoned or rewarded." \textit{In re Nortel Networks, Inc.}, 532 BR at 531.
reliance arguments made by the guaranteed bondholders. Some bondholders holding inter-corporate guarantees essentially claimed that they were entitled to supra-pro-rata recovery because they purchased their bonds in reliance on accessing multiple potential bankruptcy estates through the guarantees should the bonds default, i.e., pro rata in one estate for their primary bond claims and then pro rata again in another for their inter-corporate guarantees. 75

This purported reliance led to a barrage of yield-spread graphs pored over by the courts and even more interesting expert testimony concerning whether there is actually any appreciable difference in bond yields for inter-corporate guaranteed versus non-guaranteed debt. 76 Without jumping into the dispute, it is worth noting the courts’ ultimate rejection of the suggestion that settled expectations would somehow be undermined by sticking with the pro rata allocation formula given the demonstrated non-reliance of the parties. Even more remarkable is the courts’ ultimate questioning whether there is ever actual reliance on inter-corporate guarantees, for there was serious discussion in both courts of the insolvency-state irrelevance of inter-corporate guarantees. 77

The case should not be overstated, of course, because although ignored for pro rata allocation purposes, the guarantees were nonetheless preserved to buttress multiple possible claims at the distribution stage. Still, the foundation of territorialism’s vested rights argument, namely, hypothetical presumed reliance, suffered serious and overdue destabilization in looking at the actual reliance on the guarantee by the parties in this case. 78

3. Nortel’s Specific Application: Near-Universalism

While perhaps not as significant as the prior two aspects of Nortel’s universalist leanings, the specific application of the courts’ holdings to mimic what a universalist result would look like is still important. That is because even though the courts’ insistence on distribution by estate invoked the pride component of territorial concern over local interests, the actual application of that distribution in this case suggests that that pride will be minimally disruptive, almost trivial. In the facts of this particular case, there were no secured creditors claiming the lockbox proceeds, and the biggest potential candidate for an unsecured priority claim, the UK pension claimants, had been adjudicated not to have priority but general unsecured status (those claims to be fixed by UK proceedings). 79 If priority, especially the nettlesome priority of security, is stripped out of a case, then pro rata allocation by estate merges into universalism.

Running some numbers might help substantiate this assertion. Sticking with the earlier hypothetical, 80 consider the situation in which $1 of claims in Canada and $1 in EMEA each compete with $2 of claims in the US. Under pro rata allocation, the lockbox proceeds would be disbursed 25%, 25%, 50% to Canada, EMEA, and the US. It does not matter what the underlying assets are; they could be valued at $X Now

---

75 ibid at 559: Re Nortel Networks Corp, 2015 CarswellOnt 7072, para 229.
76 In re Nortel Networks, Inc, 532 BR at 559: Re Nortel Networks Corp, 2015 CarswellOnt 7072 at para 239.
77 “The guarantees did not restrict NNC or its subsidiaries from lending cash to, or making investments in, affiliates, or from incurring substantial amounts of additional indebtedness investors were warned of the possibility of consolidation, and that under applicable law principal and interest might not be paid. Thus, the Bondholders’ allegations of reliance on the outcome they now advocate are unfounded [sic].” In re Nortel Networks, Inc, 532 BR at 559.
78 See John A E Pottow, “Beyond Carve-Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law” (2014), 9 Brook J Corp Fin & Com L 197, arguing that only actual reliance rather than presumed reliance based on conjectured expectations should generally justify departure from COMI bankruptcy rules.
79 Re Nortel Networks Corp, 2015 ONSC 4170 (Ont SCJ [Commercial List]) at para 54.
80 See supra note 33.
appreciate what would happen under territorialism, and to do so easily, assume that all the assets are located in Canada. Under a territorialist regime where creditors can only file in one estate, which is not necessarily the case with sophisticated creditors but is the approach implicitly assumed in the Nortel courts’ disposition, the outcome would entail all the money going to the Canadian creditors, with the rest getting zero. On a purely universalist regime, however, everyone would file in Canada, or at least file in ancillary proceedings that defer to Canada and all the assets would be sent there for distribution, under Canadian law, although under this hypothetical they are already there. Under this universalist outcome, the Canadians would take 25% of $X$, EMEA 25% of $X$, and the US 50% of $X$, exactly matching the pro rata allocation approach.

The universalist outcome is not necessarily congruent with the pro rata allocation approach, however, because of redistributive bankruptcy priorities. Under the pro rata allocation approach, assets are sent to the respective jurisdictions to be distributed under each local jurisdiction’s bankruptcy laws, whereas under universalism, the distribution would be effected by a Canadian court under Canadian bankruptcy laws. But the principal relevance of distribution laws is whether they confer different priorities and rankings for creditors that would make the choice of distribution law relevant, ie, creating some winners and some losers depending on whose laws applied. In this specific case, however, with no secured claims and the UK pension claimants being non-priority, that potential “distortion” of choice of distribution law is muted if not eliminated. For in the absence of any priority creditors, and a fortiori the absence of any relevance of differences in substantive bankruptcy distribution laws, the pro rata allocation approach will indeed merge fully into universalism. The application of Canadian “vs.” US laws for distribution will be of no moment, and so the bifurcation of allocation and distribution will be irrelevant. Thus, protestations notwithstanding, the courts in Nortel have almost ordered what universalism would look like in this actual case, and the world has not stopped spinning. To be sure, they were not at full universalism — recall the “modified” approach left cash on hand territorially in the local estates — but they got pretty close.

4. Universalism’s “Uniqueness” Not So One-Off as Protested

In ordering the modified pro rata allocation of the Nortel assets, the courts intermittently circled back to words like “extraordinary” or “unique” to describe both Nortel and their novel solution. And in one sense, they were surely correct: Nortel is unique in its worldwide cooperation of an asset sale of billions of dollars, as it might also be unique in its magnitude of squabbling over the distribution of those proceeds. It’s a big,
Two Cheers for Universalism

heady, headline-grabbing case, and thus unique in many respects. But the courts’ factual analyses of the workings of a seething, cross-border behemoth reveal a business model that is not nearly so one-off as characterizations such as extraordinary and unique might imply. Quite the contrary, many of the financial and human resource integration practices explained by the courts seem like they could apply as descriptions of countless other MBE. As the Canadian court summed up: “[Nortel] was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multinational enterprise.” So. too, did the US court find functional integration.

Although employed by a particular legal entity, employees work responsibilities were directed to the entire Nortel. . .

To the outside world, including Nortel’s customers, suppliers, and the rest of the world, the [corporate] logo referred to all of Nortel, and not to any one geographic entity.

Whether Nortel was an exemplar or outlier in how it ran its operations is of course an empirical question, but there is good reason to suspect that Nortel’s practices may be widespread. And if Nortel was indeed something close to a typical MBE in terms of its corporate interweaving of operations, then the case for universalist allocation of sales proceeds may be less unique than suggested. Nortel may thus serve as a focal point of salience for many future cross-border proceedings, further advancing universalism with its asset-sharing approach.

5. The Primordial Allure of Universalism

The final way in which Nortel foments universalism is by underscoring the simple point that sharing pari passu is a deeply ingrained construct in many insolvency systems around the world. It should thus startle few that when the courts threw out the self-serving allocation proposals offered by the parties and looked at the reality of the operational integration of the Nortel empire, they decided to revert to first principles of equality as equity. It further shows the allure of universalism, because wholly apart from its efficiency arguments, which are normatively compelling, universalism fights back at what has been referred to as the lottery aspect of territorialism. Given the ease with which some assets can move across borders, it makes no sense to privilege asset location in spreading losses of financially insolvent MBE debtors across creditors. Indeed, the bond spread analysis of Nortel shows how weak the “vested rights” arguments truly are that get trotted out to defend the charged unfairness of the lottery. While it is ironic

---

86 Re Nortel Networks Corp. 2015 CarswellOnt 7072 (Ont SCJ [Commercial List]), para 197; ibid at para 218 (noting “significant intertwining of the debtor companies, including multiple instances of inter-company debts. cross-default provisions and guarantees and the existence and operation of a centralized cash-management system”).
87 In re Nortel Networks, Inc. 532 BR at 551-52.
88 See Legislative Guide, supra note 44.
89 Modified by the cash on hand, to be sure, but still pro rata in the main.
90 As Lord Hoffmann for the Privy Council puts it best: “[F]airness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.” Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc. (2006) 3 All ER 829. [2006] UKPC 26 (PC) at paras 13-15.
at some level that the assets most territorially privileged in the modified pro rata allocation approach in this case are the ones most susceptible to cross-border territory shopping, namely, cash.\textsuperscript{93} The broader point remains that the unfairness of pinning the creditors’ dividend to the sometimes random location of assets on bankruptcy day — the conceptual lynchpin of territorialism — clearly weighed upon the judges in the case of an integrated MBE when they crafted the pro rata approach. Recall that the situation of the intellectual property in Canada alone was for tax convenience.\textsuperscript{94} As such, whether the courts recognized they were being guided by universalist impulses or not, the equality norm of bankruptcy law, and its implementation through a universalist approach to cross-border proceedings, was strongly on display in Nortel.

**IV. CONCLUSION**

*Nortel* was a remarkable display of judicial cooperation and innovation, designing the nuanced and novel approach of modified pro rata allocation of the proceeds of a globally integrated insolvency sales procedure. Although the focus on estate-by-estate distribution of this pro-rated allocation might at first blush seem territorialist, properly viewed in context, *Nortel* is actually a considerable illustration and advancement of universalism. *Nortel* is far from a full-throated clarion cry for universalism, however, so at most two cheers can be mustered and not a full three.\textsuperscript{95} But universalism is likely only to be reached along an incrementalist path anyway,\textsuperscript{96} and *Nortel* has moved the ball forward. In their own way, perhaps covertly, perhaps subconsciously, perhaps unintentionally, or perhaps simply judiciously, the *Nortel* judges in their two different jurisdictions with their two coordinated and harmonious opinions have shown how universalism can work and how its allure remains strong.

\textsuperscript{93} See Pottow, “Myth (and Realities)”, *supra* note 90.

\textsuperscript{94} See *supra* note 60.

\textsuperscript{95} This territorial backslide can be seen, for example, by the modification to the *pro rata* approach, the vocal protestations that it was neither substantive consolidation nor universalism, and the aforementioned fixation on territorial estates. *In re Nortel Networks, Inc.*, 532 BR at 550, 558, 538; *Re Nortel Networks Corp*, 2015 CarswellOnt 7072 (Ont SCJ [Commercial List]) at paras 88, 212.

\textsuperscript{96} Pottow, “Incrementalism”, *supra* note 3.