

# Benefits CANADA

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## Nortel employees seek legal clarity around health and welfare trust

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The dissenting disabled employees of Nortel have filed a leave to appeal to the Court of Appeal of Ontario to gain a last minute reprieve from the life of poverty and medical crisis they feel they will face now that their health and welfare trust (HWT) has been terminated, a move that went into affect on Jan. 1, 2011.

A decision on whether the appeal will be heard is expected to come soon.

Many Canadians with disabilities live in poverty due to grossly inadequate Canada Pension Plan (CPP) disability income. A single person with a disability receives a maximum of \$13,521 per year. A disabled parent with two children receives only a maximum of only \$18,408 per year. Nortel disabled employees have average medical costs of \$7,200, with one at \$50,000 per year.

These benefits are under par when compared to benefits in the U.S. and U.K. In the U.S, a disabled person with two children gets \$48, 780 per year from Social Security and the U.K. Pension Protection Fund provides for \$47,509 a year.

This appeal will define whether vested pensioner life insurance benefits are the legal obligation of the employer or of the legally distinct HWT. If the court precedent is for vested pensioner life insurance benefits to be legal obligations of an HWT, 1.1 million Canadians in self-insured disability income plans had better opt out of their employer plans and seek personal disability insurance coverage.

The actuarial liabilities for disability income are always a small proportion of the total actuarial liabilities for pensioners vested life insurance benefits and disability income due to only 0.9% of the workforce is disabled. HWT's are generally not fully funded. When deficient HWT assets are used to pay both pensioners life insurance and disability income on an HWT termination, the disabled get deeply compromised.

In his Nov. 9, 2010 decision, the Nortel Companies' Creditors Arrangement Act judge, Justice Geoffrey Morawetz, added the following words to interpret the meaning of future benefits in the 1980 Nortel HWT Trustee Agreement termination clause: "claims that would certainly have been made in the future." The termination clause says: "The trustee shall also determine on a sound actuarial basis the amount of money necessary to pay and satisfy all future benefits and claims to be made under the plan in respect of benefits and claims up to the date of notice of termination."

The added words allow a lump-sum payment of \$3,500 each to the 10,000 living pensioners from the HWT. The 400 disabled are left with a lump-sum settlement from the HWT that funds just 27% of their disability income until age 65, death or recovery.

The leave to appeal asks that legal interpretation of "future benefits and claims" be made in the context of "incurred claims." Under accepted insurance and actuarial principles and practices, future benefits relate only to incurred claims for insured events that have already occurred prior to the termination of the contract. Deaths

benefits for living pensioners are not incurred claims, because the insured event of death has not occurred prior to the termination of the HWT.

Justice Geoffrey Morawetz's Nov. 9, 2010 Nortel HWT decision conflicts with Canada Revenue Agency (CRA) rules for HWTs. The income tax act has had a clause since 1979, of no tax deduction for employer contributions paying for life insurance beyond the current year. The Nortel HWT has always had pensioners' group one-year term life insurance policies that are automatically terminated upon Nortel's receivership or bankruptcy. CRA ruling documents clearly say that HWT's have no liability for future life insurance premiums and must not have a permanent surplus.

On the other hand, future disability income is part of the incurred claim from the onset of disability before the HWT's termination. According to a 1979 CRA interpretation bulletin, a self-insured disability wage loss replacement plan is to operate on insurance principles and like "an insurance plan." So, the HWT does have a legal obligation to pay the future income of the disabled beneficiaries.

The 1998 Canadian Pacific Railway law case reinforces that HWT assets funding future disability income are not a contingent reserve, but a legal obligation.

It is surprising that income tax act rules for HWTs, which are a CRA defined vehicle, have been ignored by Justice Geoffrey Morawetz and the counsel representing the employer, court monitor, pensioners, and the disabled and continuing employees.

The appeal will clarify whether income tax rules for HWTs and insurance and actuarial principles and practices may be ignored in the interpretation of HWT trustee agreements.

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