

Urquhart

To: Dockets-SPS-MFPB (IC)
Cc: Greg McAvoy (dignum.mcavoy@gmail.com); Jennifer Holley (jholley@xplornet.com); Jackie Bodie; Carol Samson; Robert Oliphant (Rob.Oliphant@parl.gc.ca); Navdeep.Bains@parl.gc.ca; navdeep.bains.A1@parl.gc.ca; John.McCallum@parl.gc.ca; Judy Sgro (judy.sgro@parl.gc.ca); Mark.Eyking@parl.gc.ca; Bill.Morneau@parl.gc.ca; Art Eggleton (egglea@sen.parl.gc.ca)
Subject: Self-Insured Group Long Term Disability Benefit Plans are a Contract of Insurance

Mark Schaan
Director General
Marketplace Framework Policy Branch
Ministry of Innovation, Science and Economic Development

Greg McAvoy has advised me that you have some concerns about whether the Nortel self-insured group long term disability benefit plan can be considered a contract, if it were to be prescribed as an Eligible Financial Contract (EFC) in the CCAA Regulations. I am writing to you today to dispel any concerns you may have on this point. We can discuss this at our pending teleconference call.

First and foremost, the power to prescribe an EFC is in the CCAA, where the EFC definition of “*eligible financial contract* means an agreement of a prescribed kind.” While the currently prescribed EFC’s in the CCAA Regulations are bank and institution financial agreements (including derivatives, borrowing or lending of securities, the repurchase, reverse repurchase or buy-sellback agreements with respect to securities or commodities, and margin loans), an EFC may be an agreement of a prescribed kind. Therefore, self-insured group long term disability benefit plans can be added to the list of EFC’s provided the new addition to the EFC list is clearly defined in the CCAA regulation change. [Bill S-216](#) and [Bill C-624](#) provided definitions for a disability plan, disability plan beneficiaries and disability plan liabilities. These could become the definitions for prescribing the new EFC.

Secondly, self-insured group long term disability benefit plans, including that offered by Nortel, meet the tests within Canadian case law for the definition of a contract, and of a contract of insurance, in particular.

I provide precedent cases on contracts and contracts of insurance below and the evidence demonstrating that the Nortel self-insured group long term disability benefits plan specifically meets the tests within Canada case law for a contract of insurance.

A. Case Law on Contract of Insurance

1. UBS Securities Canada Inc. v. Sands Brothers Canada, Ltd., 2007 ONCA 405 (CanLII): = Legal Definition of a Contract

<http://www.canlii.org/en/on/onca/doc/2007/2007onca405/2007onca405.html?searchUrlHash=AAAAAQAYImRlZmluaXRpb24gb2YgY29udHJhY3QiAAAAAAE&resultIndex=7>

[2] We agree with the appellant’s submission that the trial judge erred by not applying the objective test for contract formation. The objective principle of contract formation is sufficiently summarized in Waddams, *The Law Of Contracts* (5th ed.), at page 103:

The principal function of the law of contracts is to protect reasonable expectations engendered by promises. It follows that the law is not so much concerned to carry out the will of the promisor as to

protect the expectation of the promisee. This is not, however, to say that the will of the promisor is irrelevant. Every definition of contract, whether based on agreement or on promise, includes a consensual element. But the test of whether a promise is made, or of whether assent is manifested to a bargain, does not and should not depend on an inquiry into the actual state of mind of the promisor, but on how the promisor's conduct would strike a reasonable person in the position of the promisee.

2. **Canada (Attorney General) v. Confederation Life Insurance Co., 1995 CanLII 7097 (ON SC) = Legal Definition of a Contract of Insurance**

<http://www.canlii.org/en/on/onsc/doc/1995/1995canlii7097/1995canlii7097.html?searchUrl=AAAAAQAwYXR0b3JuZXkgZ2VuZXJhbCBvZiBDYW5hZGEgdi4gQ29uZmVkZSJhdGlvbiBMaWZlAAAAAAAAE&resultIndex=1>

There is no definition of "contract of insurance" in the federal *Insurance Companies Act* but in Ontario, "insurance" is defined in s. 1 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, as follows:

"insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance.

Since a "contract" under the *Insurance Act* simply means "a contract of insurance" and includes "a writing evidencing the contract", Confederation Life's promise to provide the group benefits, as evidenced by the booklets, handbook and retirement pamphlets, and by the group benefit plan documents, would seem to amount to a "policy of insurance". It is evidenced in writing, albeit in one or more documents; and it constitutes "the undertaking by one person [Confederation Life] to indemnify another person [the retiree] against loss or liability from loss in respect of a certain risk or peril to which the object of the insurance may be exposed [i.e., to the risk or peril of illness and the costs of dealing with it]". Why, then, is it not a "written contract of insurance", as contemplated by the *Insurance Companies Act* and therefore a "policy", as contemplated by the *Winding-up Act*? In my opinion, it is.

What is missing from the foregoing analysis, and from the specific definition of "insurance" in the *Insurance Act* is the concept of "premium", an essential characteristic of a contract of insurance—the consideration in exchange for which the benefit is provided. While consideration is necessary, it is well established, however, that it need not take the form of a cash payment: see *Prudential Insurance Co. v. Commissioners of Inland Revenue*, [1904] 2 KB. 658 at p. 663; *California Physicians' Service v. Garrison, Insurance Commissioner*, 172 P.2d 4 (1946) at pp. 17-18, adopted by Pennell J. in *Bendix Automotive of Canada Ltd. v. United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 195*, [1971] 3 O.R. 263 at pp. 270-71, 20 D.L.R. (3d) 151 (H.C.J.). In the latter case, the court held that an employer's obligation under a collective agreement to reimburse employees for what today would be called "extra billing" payments constituted "a contract of insurance" and that the consideration was to be found in the employees' own covenants in the collective agreement. Here, the consideration is found in the retirees' former contributions of labour, skill and knowledge in exchange for which Confederation Life's compensation package as a whole had been offered.

3. **Re Bendix Automotive of Canada Ltd. and United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 195, 1971 CanLII 637 (ON SC) = Legal Definition of a Contract of Insurance**

<https://www.canlii.org/en/on/onsc/doc/1971/1971canlii637/1971canlii637.html>

The basic elements which are common to all of these definitions may be stated as follows:

- i) an undertaking of one person;
- ii) to indemnify another person;
- iii) for an agreed consideration;

- iv) from loss or liability in respect of an event;
- v) the happening of which is uncertain.

Consequently, a contract which would otherwise be a "contract of insurance" does not change its nature merely because the consideration does not take the form of a cash premium. In the present case the consideration is the employees' covenants as found in their collective agreement.

4. Kopet v. Simon Fraser University, 2013 BCCA 143 (CanLII) = Legal Definition of a Contract of Insurance

<https://www.canlii.org/en/bc/bcca/doc/2013/2013bcca143/2013bcca143.html?searchUrlHash=AAAAAQA YImRIZmluaXRpb24gb2YgY29udHJhY3QiAAAAAAE&resultIndex=11>

[3] The master agreement pertaining to the long-term disability plan (51.04(a)) was an agreement between the University and The Manufacturers Life Insurance Company, the plan carrier. It was what is referred to as an administrative services only agreement ("ASO"). Under the ASO, acting only as the University's agent for a fee, Manulife undertook all aspects of the administration of the plan. Manulife determined the entitlement to benefits and paid the amounts to which an employee was entitled out of a fund the University was required to maintain with Manulife by monthly deposits for that purpose. The University remained ultimately liable to its employees for the payment of all benefits and was required to give notice to them accordingly. Manulife did not underwrite the plan and, as the ASO provided, it had no liability to employees for any disability benefits. It was not a third-party insurer. There were no conventional "premiums" the University was required to pay in respect of the long-term disability plan (51.04(c)), although it apparently paid into the operating fund all that Manulife paid out in benefits plus the administration fees.

[7] The judge cited the s. 1 definition of "contract" and "insurance", emphasizing the words "or writing evidencing the contract", and said she was satisfied the long-term disability plan was a contract of insurance and that the Insurance Act applied. In support, she referred to Re Bendix Automotive Ltd. and U.A.W., Local 195, 1971 CanLII 637 (ON SC), [1971] 3 O.R. 263 (H.C.J.); Cooper v. Miller, 1994 CanLII 120 (SCC), [1994] 1 S.C.R. 359; and Asselstine v. Manufacturers Life Insurance Co., 2005 BCCA 292 (CanLII).

[14] ...I am unable to accept the intention attributable to the parties to the collective agreement was other than that the long-term disability benefits be provided as a form of insurance in an insurance plan, administered by Manulife, but underwritten by the University. I do not consider the actual wording employed, establishing the University's obligation, can be ignored, and the plan that was derived does not appear to me to be any less an insurance plan because it was underwritten by the University as opposed to a third-party insurer.

5. Watt v. Health Sciences Association of British Columbia, 2015 BCSC 1290 (CanLII) = Legal Definition of a Contract

<https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1290/2015bcsc1290.html?searchUrlHash=AAAAAQ AYImRIZmluaXRpb24gb2YgY29udHJhY3QiAAAAAAE&resultIndex=117>

[106] The case law indicates that the requirement of consideration under a contract is met if the promisee does some act or suffers some detriment which he or she would not have done but for the promise. In this case, the plaintiffs assert they suffered a detriment in the form of a salary reduction for premium payments. Further, when employers offer benefits to employees, these are often viewed as consideration for the employee's labour. In my view, the same may apply to a trade union, which stands to benefit from increased membership, increased dues and enhanced bargaining power in exchange for agreeing to provide benefits to union members. As such benefits may influence an employee's decision to work for a particular employer provision of benefits by the union may affect the employee's decision to work for that employer as a member of a particular union.

B. EVIDENCE ON CONTRACT OF INSURANCE

1. CCAA LTD Replacement Income and Medical and Dental Claims = Legal Obligation

[Appendix D Revised Illustrative Allocation Scenarios
CCAA Claims Schedule Update February 27, 2016](#)

2. Annual Benefit Brochures = Written Document on Benefit Plan Terms and Employee Expectations of Insurance Coverage

[1993 Benefits in Brief](#)

[1994 Canadian Auto Workers Nortel Benefits](#)

[1994 Flex Benefits in Brief](#)

[2000 Flex Benefits Enrolment Guide](#)

[2000 Special Insert For 1999 Participants](#)

[2001 Brochure d'avantages sociaux a la carte](#)

[2001 Flex Benefits Annual Enrollment Form](#)

[2002 Brochure d'avantages sociaux a la carte](#)

[2004 FLEX Benefits Handbook](#)

[2004 Manuel Des Avantages Sociaux A La Carte](#)

[2005 Flex Benefits Enrolment Guide](#)

[2005 FLEX Benefits Handbook](#)

[2005 Guide D'Inscription Au Regime D'avantages Sociaux A La Carte](#)

[2005 Manuel Des Avantages Sociaux A La Carte](#)

[2006 Flex Benefits Enrolment Guide](#)

[2006 FLEX Benefits Handbook](#)

[2008 Flex Benefits Enrolment Guide](#)

[2008 Flex Benefits Explore Your Possibilities](#)

[2008 FLEX Benefits Handbook](#)

[2009 Flex Benefits Enrollment Guide](#)

[2009 FLEX Benefits Handbook](#)

[2009 New Hire Benefits Information](#)

3. Letters Show Benefits are Part of Job Offer and Total Financial Rewards = Written Document on Employee Expectations of Insurance Coverage and on Offer, Acceptance, and Consideration Paid

[Nortel Employee Offer Letter and Acceptance 1992](#)

[Letter from Nortel John Roth Personalized Rewards Statement May 1998](#)

[Letter from Nortel on what's new for FLEX in 2001 Nov. 24, 2000](#)

[Letter from Nortel re - FLEX benefit changes for 2002 dated November 6, 2001](#)

4. Optional Long Term Disability Coverage and Employee Premiums = Written Document on Offer, Acceptance, and Consideration Paid

[Nortel Your Total Compensation Report page 5 1995](#)

[Nortel FLEX benefits confirmation statement 2000-2003](#)

5. T4's = Written Document on Expectations of Insurance Coverage

[T4A Nortel Networks Health and Wage Loss Replacement 2003](#)

[T4A Sun Life Wage Loss Replacement 2004](#)

[T4A Sun Life Wage Loss Replacement 2007](#)

[T4A Sun Life Wage Loss Replacement 2009](#)

6. Letters received from the Federal Government's Human Resources Canada, and a predecessor Social Development Canada
= Federal Government Communicating With And Making Payments to Their Insurer Or Insurance Company
= Written Document on Employee Expectations of Insurance Coverage

[Letter from Human Resources Canada disability benefit payable to insurer March 5, 2002.pdf](#)

[Letter from Human Resources Canada Payment to Insurance Company Sept. 7, 2005.pdf](#)

[Human Resources Canada Payment Explanation Statement 2005.pdf](#)

[Social Development Canada consent for service canada & insurer to share benefit info April 10, 2006.pdf](#)

[Social Development Canada CPP irrevocable consent to deduct & pay an insurer \[Sun Life\] April 10, 2006.pdf](#)

7. Trustee Agreement = Written Document of Trust and Benefit Funding Obligation on a Sound Actuarial Basis

[Nortel - Montreal Trust HWT Trustee Agreement Jan. 1, 1980](#)

[Nortel - Montreal Trust Reorg HWT Trustee Agreement Transfer Sept. 24, 1984](#)

[Nortel - Montreal Trust HWT Trustee Agreement Amendment June 1, 1994](#)

[Nortel - Northern Trust HWT Successor Trustee Appointment and Acceptance Dec. 1, 2005](#)

[Letter From Nortel To Northern Trust Dec. 1, 2005](#)

8. HWT Financial Statements = Written Document of Trust and Reserves for Benefit Funding Obligation

[HWT Financial Statements 1982-2009 Appendices O-RR.pdf](#)

9. CRA HWT Rules = Written Document of Trust and Benefit Funding Obligation

[IT85R - Pre 1986 Health and Welfare Trusts for Employees Jan. 20, 1975](#)

[IT428 - Wage Loss Replacement Plans April 30, 1979](#)

[IT85R2 - Health and Welfare Trusts for Employees July 31, 1986](#)

[Appendix I - Request for Advanced Income Tax Ruling December 16, 1979](#)

[Appendix J - CRA Advanced Tax Ruling Dec. 28, 1979](#)

[CRA Ruling Document # 9433745 - Trust Wind-up - Nov. 30, 1994](#)

[Canadian Pacific Case on LTD Benefits Not a Contingency Reserve Sept. 10, 1998](#)

[Wawang Forest Products Limited et al. v. The Queen.\[2001\]](#)

[Appendix I - Request for Advanced Income Tax Ruling December 16, 1979](#)

[Appendix J - CRA Advanced Tax Ruling Dec. 28, 1979](#)

10. Legal Document for Benefit = Written Document of Benefit Funding Obligation

Nortel Network Corporation Plan Number 90002 Appendix for LTD Benefit July 1, 1994
Nortel Internal Document Showing Reserve \$ Amount for LTD Claimant May 31, 1999

11. Legal Document for Sun Life Administrative Role for Benefit Claims = Written Document of Benefit Funding Obligation

ASO Agreement with Clarica Insurance Jan. 1, 1999

12. Mercers Actuarial Reports = Written Document of Benefit Obligation

Mercer Valuation of Post-Employment Benefit Liabilities for Accounting Purposes 2003-2004, 2006-2009 Appendices SS-ZZ.pdf
Appendix GGG - Valuation of the Obligations of the Health and Welfare Trust as at September 30, 2005

13. Internal Company Manual 1981 = Written Document of Benefit Obligation

Appendix KKK - Internal Company Manual 1981

Sincerely

Diane A. Urquhart

Independent Financial Analyst

Pro Bono Advisor to the Nortel Canadian Long Term Disabled Former Employees

Cell: (647) 980-7618

urquhart@rogers.com