2002 MEBCO Alberta Consultation Paper.
(Multi-Employer Benefits Council of Canada is MEBCO, which had Raymond Koskie as one of its founders and has predominantly union and third party administrators as members. KM Lawyer Andrew Hatney and Segal actuary Tom Levy are currently on the MEBCO Board of Directors. This paper argues that mandatory insurance and regulation of long term disability benefits is unnecessary due to the existence of trusts and trustees who must meet the common law requirements for fiduciary duties.)

This paper refers to the case - Cowan v. Scargill, [1984] 2 All E.R. 750 (ch.D.) that provides the definitions for common law fiduciary duties:

Under common law fiduciary duties, the duty of care encompasses four distinct duties, which apply, inclusively, to employee benefit plans:[3]

- To act scrupulously for the benefit of the trust or the beneficiaries and never for himself or herself while carrying out his or her duties. (conflict of interest rule)
- To be active in carrying out those duties and perform them with complete integrity. (the standard of care rule)
- To carry out those duties personally as a result of the trust and confidence reposed in him or her. (the no delegation rule)
- To act impartially between the beneficiaries unless the trust instrument authorizes favoritism. (the even-handed rule)

[3] Cowan v. Scargill, [1984] 2 All E.R. 750 (ch.D.).

From these definitions for breach of fiduciary duties it is reasonable to argue the following:

Nortel through its directors' and management governance committees breached fiduciary duties by not making employer contributions to pay for employee benefits, including often using the assets of the HWT to save making employer contributions. These practices are a conflict of interest between Nortel making higher profits or lower losses itself to the detriment of the HWT beneficiaries. The breach of fiduciary duties under the conflict of interest rule and the even-handed rule should be considered a misappropriation while acting in a fiduciary capacity resulting in no compromise of the LTD income benefit claim without a vote under CCAA S. 19 (2) (c). The even-handed rule requires a solid understanding of who are the HWT beneficiaries as defined by the trust agreement and the actuarial and insurance principles and practices and CRA guidelines. PAYGO benefit claim reimbursement parties are not beneficiaries of the HWT as their benefits are simply administered through the HWT on a unfunded basis.

Nortel earned higher profits or made lower losses by doing the following:

(1) borrowing money from the HWT to avoid paying employer contributions for PAYGO medical and dental claims and life insurance premiums, where the borrowed money is the use of HWT assets there to fund the LTD income and survivor income beneficiaries;
(2) using employee contributions provided for optional to 70% LTD income benefits to avoid paying employer contributions for the core 50% LTD income benefits, which is the use of HWT assets there to specifically fund the employees who bought optional LTD income benefits;

(3) paying for PAYGO retiree life insurance premiums from the HWT assets to avoid paying employer contributions for the retiree life insurance premiums, which is the use of HWT assets there to fund first the LTD income and survivor income beneficiaries;
(4) failing to make employer contributions to fully fund the LTD 50% core income benefit as required by trustee agreement and generally accepted actuarial and insurance principles and practices and CRA guidelines, so HWT never accumulated the assets it should have.