PENSION AND OTHER BENEFIT ISSUES

ARISING OUT OF COLLECTIVE AGREEMENTS

BARGAINING & NEGOTIATING SEMINAR

MARCH 27 AND 28, 1996

THE KING EDWARD HOTEL, TORONTO

PRESENTED BY THE CANADIAN INSTITUTE

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NEGOTIATING BENEFITS

OVERVIEW

Negotiations in the nineties is very different from negotiations at other times, especially in the late eighties. The days of 10% or better salary increases have been over for some time. Last year average negotiated increases for private sector unionized employees was less than two percent. In this economic climate it is doubly important to control the cost of negotiated benefits.

For many employers the cost of benefits is very difficult to control. If short term and/or long term disability are part of your benefit package, the cost of benefits can increase sharply because of the experience rating of the bargaining unit covered. Often insurance companies will offer an attractive rate in order to write the business. After one or two years,

the experience rating will take effect and benefit costs can increase substantially. I have seen cases where the increase in costs of premiums can amount to more than two percent of total payroll cost.

Employees generally are not aware of the cost of benefits. When the cost of your benefit package increases because of your employees usage, you are unlikely to get any "credit" for this increase at the bargaining table.

The cost of benefits in terms of the overall compensation cost can be as high as fifteen or twenty percent. Once benefits have been introduced it is very difficult to get rid of them. There are strategies however that every employer can use to reduce the cost of benefits.

CONTROLLING BENEFIT COSTS

Controlling the cost of benefits requires a number of related strategies.

Firstly, the benefits that are negotiated in the first instance are important. Some types of benefit plans are much more costly than others. Co-payment options are very effective in reducing unnecessary usage thus effectively controlling premium costs. Dental benefits need not pay on the most current ODA schedule. Most dentists will accept a one, two or even three year old schedule as full payment. When negotiating short term disability coverage be sure you understand the plan you are getting and its ramifications. I have seen

companies adopt a first day accident, hospitalization and sickness short term disability plan without realizing until too late the significance in cost of the last digit.

Secondly, there are other parts of the collective agreement that need to be in place to help you control benefit costs. Before you agree to any disability plan, insist on the right in the collective agreement to have an employee examined by a company appointed Doctor. This right is important not only for the control of disability costs, but also as a deterrent to other inappropriate uses of sick leave. It is not uncommon for an employee to become sick in order to avoid the consequences of poor performance. It is unfortunately all too easy to obtain a doctor's note which merely indicates that the employee is under the Doctor's care and unable to work.

Even if you don't have the right in your collective agreement to have the employee examined by your Doctor, there are other approaches that can assist in reducing inappropriate use of sick leave provisions. You do not have to accept the note containing virtually no information. You can ask the employee for more. You can write to the Doctor and ask specific questions such as: nature of disability, anticipated length of absenteeism, whether or not accommodation is possible. These are questions which in my view you have a right to ask, especially in view of your obligations under the Human Rights Code.

Most insurance companies sick benefit plans contain provisions which require employees to

be seen by a Doctor appointed by the insurance company. Some carriers are less vigilant than others in using this right. If you have questions about the legitimacy of an employee absence, you should discuss this with your carrier. If you are not happy with the response you get, consider changing carriers. Let the insurance company know you are considering the change. In the best circumstances, insurance companies work with the employer, not only to control abuses, but also to insure that employees get the benefits to which they are legitimately entitled.

A consistent absenteeism policy can go a long way to reduce the costs of benefits. When a company becomes lazy about absenteeism, the hard working employees are the most affected. When you tolerate clear abuse from some employees, the hard workers come to resent the Company, not the abusers. This not only increases absenteeism generally, it also decreases the commitment and motivation of your other employees. An effective absenteeism policy will not only decrease benefit usage, it will also improve employee morale and commitment.

Problems which arise during the currency of the contract can create real problems at the bargaining table at renewal. I have seen several instances where the actions of a carrier during the term of a collective agreement created almost insurmountable problems at the bargaining table. Management should monitor benefit administration by the carrier in order to be aware of issues before they become problems in bargaining.

BARGAINING BENEFITS: THE PROCESS

The time to consider benefits is before you start to bargain at all. Costing proposals and options is time consuming. Unless you are a very large employer, there are only certain options available for you from the various carriers. Some insurance companies provide packages that are not offered by others. All too often management goes into bargaining ill prepared to deal with these issues.

I would suggest obtaining the services of a recognized, experienced broker who is familiar with group plans from a number of carriers. Discuss the options available before you start bargaining. If you have existing benefits, ask your broker for suggestions on how costs can be reduced. In one negotiation in which I was involved a change in carrier coupled with the introduction of a modest deductible was able to cut the cost of the benefits in half. This allowed the Company to offer a modest, but in the end acceptable wage increase without any increase in overall cost.

In these days of aging workers and low salary increases, many bargaining agents are increasingly stressing benefits, including pensions. Examine the collective agreements recently negotiated by the Union. Determine, if you can, the priorities in bargaining in other recent sets with other employers. This will give you a fair idea of what you can expect at the bargaining table. Obtain quotes and options from your broker before you start.

Consider taking the initiative in proposing changes especially where they save you money.

GIVING INFORMATION TO THE UNION

For reasons which will be dealt with later, the information you give the union about your benefits may be extremely important to the Company, not only during the currency of the immediate agreement, but potentially for years to come.

Under the labour relations act you have a duty to bargain in good faith. As interpreted by the OLRB, that duty includes the duty to provide the union with the information they require to bargain rationally about any topic. Clearly you are required to provide complete information about the benefit plans you currently provide. In my view the union is entitled to a copy of the terms of the contract between the employer and the carrier (As we will see later, it is to your advantage that the union be given this). Make sure you provide the union with complete information about the benefits you are proposing especially if there is a change.

In my view the Union is not entitled to know the cost of the benefits you provide. However, it may be in your interest to tell them, if not in absolute dollars at least in terms of the percentage of overall compensation their proposals represent. I almost always give the union the company's costing of their benefit requests in percentage terms at the onset of bargaining the monetary issues. In almost every instance the cost of the benefits is not

appreciated by the members of the bargaining team.

It is usually the union representative and not the employee representatives that will push for increases in benefits at the expense of increases in the wage package. Consider bargaining these together indicating that it all comes from the same pie and increases granted in one place mean they will not be granted in another.

Where appropriate, link benefit issues with other issues in negotiations, such as Medical leaves, absenteeism etc. Be very careful in the drafting of Benefit and Pension benefits language. This area, perhaps more than any other can produce very significant problems when drafting is ambiguous.

Let me now turn to some specific areas to discuss some of the issues which can arise.

PENSION and RETIREMENT ISSUES

TYPES OF PENSIONS

There are a number of vehicles which can be used to assist employees when retired. The most common approach in the context of collective bargaining are pensions. Pensions in Ontario are governed by the provisions of the Pension Benefits Act and the regulations made pursuant to that Act. There are similar Acts in all of the provinces and federally.

The Act governs the registration, operation, funding, reporting, and benefits for all pension plans in Ontario to which employers make contributions not governed by other legislation (such as the Federal Statute). The Act and its provisions are beyond the scope of this paper. However, some basic concepts are important for anyone faced with the negotiation of a pension benefit.

1. **IMPORTANCE OF EMPLOYEE STATUS**

   Pensions under the Act are only available to "employees". Although the definition of employee in the Act is not particularly helpful, the Pension Benefits Commission takes the position that pensions are only available for persons who are employees within the meaning of the Income Tax Act. This means that pensions are not necessarily available for all "employees" under a collective agreement.

Certain classes of persons, such as dependant contractors are not treated as employees for purposes of UIC, CPP, and Income Tax. This allows these individuals to take advantage of deductions unavailable to employees. Sometimes the tax status of these individuals is not entirely clear. The employer has an obligation to deduct for all "employees" tax at source and to remit both employee and employer contributions for UIC and CPP. Where persons are being treated as other than employees for purposes of the Income Tax Act, UIC and CPP, the employer will run a very substantial risk if these persons are provided with a pension plan.

2. TYPES OF PLANS

There are basically two kinds of plans available. A money purchase plan requires fixed contributions, either from the employer or from both the employer and the employee. A money purchase plan provides benefits which are probably estimated, but which are usually not fixed. Generally speaking, the estimates tend to be somewhat lower than the actual benefits received at the time of retirement, but this will be determined at the time of retirement. A fixed benefit plan sets the amounts the person will receive on retirement, most typically based on the number of years of employment and on age. Where these plans are funded entirely by the employer (the more common approach), the employer is required to make contributions sufficient to provide the required benefits. The actuarial methods used to calculate

these amounts are set by the Act and Regulations and are conservative. Thus fixed benefit plans often create surpluses when such plans are wound up. There are also variations and mixed plans available.

3. **RRSP CONTRIBUTIONS**

Some employers avoid some of the pitfalls which pension plans can cause and instead contribute to employee RRSP plans. Generally speaking, unions are not enamoured with this approach. The employee on the other hand has full control of the amounts contributed on her behalf and there is no problem with portability. In addition, the RRSP contribution is often more closely linked in the employees mind with real dollar benefits and in my experience there is greater employee acknowledgment of dollars expended for RRSP contributions than there is for equivalent dollars spent on a Pension Plan. The major drawback to this approach is said to be that RRSP contributions are too easy to remove in tough times, thus not providing the income for retirement provided by a pension.

As jobs become more short lived, as people move from employer to employer either voluntarily or otherwise, the advantages of RRSP versus pension plans may diminish the importance of pension plans under the current legislation. To obtain significant benefits from almost any pension plan requires a long term employment relationship. Increasingly, this is becoming the exception.

4. PSEUDO PENSIONS AND RELATED BENEFITS

It is common for senior executives to obtain commitments from their employer to pay supplemental retirement amounts over and above those contained in Pension Plans. As recent case law demonstrates, these amounts are not normally funded and depend on the ability of the employer to pay at the time they come due. These plans are not common in collective agreements. However, some agreements do contain such benefits or similar benefits.

A very common similar benefit has received more prominence of late. Retirement gratuities based on years of completed service, often linked with sick leave plans are commonplace in the public sector. They also exist in some private sector collective agreements. As large numbers of employees reach retirement age, employers are starting to recognize the magnitude of the unfunded contingent liability these provisions can create. If you have such provisions in your collective agreement, it is very difficult to provide ongoing funding for them. On the other hand, with large numbers of employees reaching retirement age you can be faced with an unexpected large number of very expensive retirements in a given year for which no funding is available.

Having established such a plan it is at least arguable that the gratuity earned to date

is "vested". While it is possible to cap such gratuities at the current value, it is not at all clear that they can be eliminated.

BARGAINING PENSIONS

A major question which arises when bargaining for pension benefits is where to memorialize the agreement. Many collective agreements incorporate the plan into the collective agreement. This of course makes disputes which may arise under the plan subject to the grievance and arbitration provisions of the collective agreement. In my view the pension plan should be treated as a separate document. If it is referenced in the collective agreement, which is not necessary, the agreement should provide that the pension plan document and not the collective agreement govern, and further that any disputes are to be dealt with pursuant to the plan document and not the collective agreement.

Sometimes an employer will simply make contributions to an existing union pension fund or other multi-employer plan. In such cases the collective agreement should set out the contributions to be made and then specify that the sole obligation of the employer is to make the contributions as set out in the collective agreement. Before agreeing to contribute to a particular plan insure that it is a properly registered plan. Find out who administers the plan and whether or not trustees are involved. A little time spent investigating a proposed

plan at the front end can save significant difficulties later.

SURPLUSES

As indicated earlier, surpluses often arise when a plan is wound up, or partially wound up and the assets of the plan are greater than required to provide the benefits specified for the existing members.

The present act was amended in 1987, largely as a result of Conrad Black's attempt to obtain the very large surplus he created by purchasing Dominion Stores, and then selling its assets and terminating a large number of employees. The pension plan in question had a very large surplus. The common law rule up to that point had been that the surplus reverted to the "settlor" unless the plan otherwise provided.

The legislation now requires the consent of the Pension Benefits Commission before any payment of surplus can be made to the employer. There are provisions insuring that there is indeed a surplus and requiring retention of some surplus in the plan after any pay out. To be eligible for return of any surplus, the plan must specifically provide for payment of any surplus to the employer on wind up. If the plan does not so provide, the Act deems that any surpluses accruing after December 31st, 1986 be distributed among members and former

members of the plan. There are provisions for notice to be provided to members, former members, unions, other persons receiving payments and any advisory committee established under the Act. All of these persons have the right to make written submissions to the Commission within thirty days of receiving such notice.

PROVIDING BENEFITS TO RETIREES

Many collective agreements, especially in the Automotive Sector have provisions which provide some benefits to retirees. In most cases these provisions date back to a time when benefits were considerably cheaper, and when the number of retirees was low. In the U.S. where there is no public health care, the existence of these provisions makes considerable difference to the employees and retirees concerned. In Canada, provisions of this type received little or no attention until the Dayco decision.

In 1984 Allen Industries, a subsidiary of Dayco at the time closed its plant in Hamilton and moved to Mexico. The collective agreement contained a provision which stated "... Retirees to receive negotiated benefits." On final wind up a close out agreement was negotiated which provided that all employees would receive benefit continuance for six months following the plant closure. The Company also continued benefit coverage for retirees during the same period. The Collective Agreement expired, the Company asked for

conciliation and at conciliation requested a "no board". The no Board was granted. Some time later the benefits for active and retired employees were terminated.

The CAW grieved the termination of retirees benefits. The Company argued that since no violation of the Collective Agreement had occurred during the currency of any agreement, whatever rights the retirees had were individual rights and an arbitrator had no jurisdiction to determine them. The Company also argued that they had specifically dealt with retirees benefits in the close out agreement and that they had complied with what had been agreed.

The issue of jurisdiction was determined separately. The matter went all the way to the Supreme Court. There it was determined that such benefits could be provided for in a collective agreement and that they could, depending on the language of the agreement, "vest". If they were vested in the agreement, an arbitrator would have jurisdiction to enforce them. The matter was remitted to a new arbitrator to determine if they had vested in this case. The matter proceeded before the new arbitrator for several days of hearings and finally settled. Whether or not the language in question did create vested rights was thus never determined.

In the Dayco case the issue of retirees benefits was specifically addressed during negotiation of the close out agreement and yet the ambiguity of language in the collective agreement, negotiated more than ten years previously created the possibility that vesting was intended.

Extraneous evidence of the negotiations conducted more than twenty years earlier thus became not only relevant, but crucial during the rehearing which took place after the Supreme Court decision.

The crucial difference between Canadian and American law is that in Canada, all matters that are put on the table must be negotiated in good faith. In the U.S. only that class of issues referred to as mandatory issues must be negotiated. Retirees benefits are considered not mandatory, but permissive, thus the union cannot use the threat of strike to force the company to negotiate benefits for retirees.

The decision of the Supreme Court thus places employers in Canada in a very real quandary. The Union can force them to negotiate with respect to benefits for retirees. Unless great care is taken, such benefits can vest. In the Dayco case, once the underlying large group of active employees was gone, no insurance company was prepared to provide the benefits in question except on an administration of cost basis.

If you are going to provide benefits for retirees you should insist that the language in the collective agreement state that such benefits are to be provided only during the currency of the agreement and that such benefits are not to be considered as having vested.

Several companies who have experienced significant downsizing now pay more for their

benefits for retirees than they do for their active employees. Whatever you may think of the social utility of this practice, these companies have a significant competitive disadvantage when competing with newer companies, or companies with no such provisions.

Retirement gratuities can be treated the same way. State that the gratuities are to be provided only for those employees who retire during the currency of the collective agreement, and that the provision of this benefit shall not operate as to vest rights in employees who do not retire during the currency of this agreement.

OTHER PROBLEMS ASSOCIATED WITH BENEFITS

EMPLOYMENT STANDARD ISSUES

The *Employment Standards Act* has several provisions dealing with benefits. Part X of the Act prohibits differentiation on the basis of sex, age or marital status, except as permitted in the regulations. These provisions are of long standing and are now incorporated into plans made available by all reputable carriers.

The same cannot be said for the requirements of Part XIV. The termination provisions require that all benefit plans be continued during the period of actual notice, or period in lieu of notice that are provided in this section. Many carriers seem unaware of this

provision. Some will even object to continuation of long or short term disability coverage during this period. But the coverage is mandatory. In my view an employee could bring a complaint through the Employment Standards Branch that an employer failed to provide these benefits and as a result, the employee became disentitled to short or long term disability benefits the Act entitled him to remain eligible for. In an appropriate case the damages could be very extensive.

PREGNANCY AND PARENTAL LEAVE

Part XI deals with Pregnancy and Parental leave. The employer must insure that benefit coverage continues during the statutory leave period. Precisely what benefits are caught by this provision are at this point not entirely clear. There have been decisions going both ways. Clearly the benefits as set out in s. 42(2) must be continued. There is debate about others including vacation entitlement.

Many agreements contain provisions regarding extension of maternity leave beyond the statutory periods. The agreement should provide for continuation or otherwise during this extension, and also provide who is responsible for payment of the premiums.

The question of whether or not an employee continues to accrue vacation pay during the period of maternity and parental leave may depend on the specific provisions of the collective agreement. If the collective agreement calculates vacation pay exclusively as a

percentage of salary earned during the vacation year, then it is likely the maternity/parental leave employee will receive diminished vacation pay without violation of the Act. However, the entitlement to vacation is seen by the Employment Standards Branch as relating to seniority and therefore "... continues to accrue during pregnancy or parental leave." In addition, if your collective agreement contains increments which are earned after a completed period of employment, it is probably contrary to the Act to withhold them by not giving credit for time worked as a result of sub-section 43(3) of the Act.

The Human Rights Code has also been used to interpret issues involving benefits to employees on maternity leave. In some cases it has been argued that denying certain benefits for someone on maternity leave, while not denying them the same benefits while on other types of leave constitutes discrimination on the basis of sex. These cases were decided on their own facts. Suffice it to say this issue is not closed.

TERMINATIONS

There is another complication that arises from the termination provisions. Under the regulations, a lay off that lasts for 13 weeks is deemed to be a termination giving rise to payment of statutory notice. Most collective agreements provide for a lay off to last at least 2 years before the employee loses the right to recall. However, a temporary lay off can be longer than 13 weeks if the employer continues benefits. The regulation does not specify the number of benefits that must be continued for this to occur. Thus continuation of group

life insurance alone would qualify under the Act and under this scenario the temporary lay off would continue without the requirement for notice pay indefinitely. After 35 weeks the employee can elect to take the termination pay to which they are entitled but they forgo the right of recall if they do. Thus an employer by making modest benefit payments can avoid payment of termination pay to an employee who would later be recalled. To achieve this end it is prudent to provide in the collective agreement for the continuation of selected benefits during periods of lay off for a fixed period of time.

THE HUMAN RIGHTS CODE

Recently there have been several decisions dealing with benefits, and Human Rights. Two decisions, one under the Ontario Code, and one under the Federal Act have found it to be discriminatory to not grant family benefits to employees in long term same sex relationships. The more recent decision by R.O.MacDowell (*Re Bell Canada (1994)* 43 L.A.C. 4th, 172) applies the decision of the Ontario Court of Appeal in *Re Haig et al (1992)* 94 D.L.R. 4th, 1. Macdowell relies on the Courts decision as binding on him and refers to the earlier Ontario case *Leshner v. Ontario (1992)* 16 C.H.R.R. D/184 in coming to his decision.

However, this issue is not entirely settled. The Supreme Court of Canada also dealt with the issue in *Egan v. Canada*. In that decision the Court found that while discrimination on the

basis of sexual orientation is contrary to the charter and therefore contrary to the various codes whether or not included in them, a section granting benefits on the basis of spousal status was not discriminatory because the objective of the particular section was found by the court to deal with raising of children.

Recently the Prime Minister has announced legislation in this area. However, it is difficult to see how any such legislation could affect employers not falling under Federal Jurisdiction (generally Federal works or undertakings or those employers falling under specific federal jurisdiction such as Banks etc). Stay tuned.

SHORT TERM AND LONG TERM DISABILITY

The relationship between short term and long term disability coverage and the right of an employer to terminate an employee for innocent absenteeism has been a continuing controversy for some years. Clearly, where an employee under the terms of the policy must still be an employee in order to qualify for long term disability coverage, the employer will not be permitted to terminate for innocent absenteeism. The effect of such a decision would be to prevent the employee from obtaining the very benefit negotiated on his behalf.

In my view entitlement to long term disability should only depend on the employee being an employee at the time the disability commenced. Many policies have this requirement as opposed to the former and are preferable.

Some arbitrators have found that the existence of a long term disability policy prevents the employer from terminating for innocent absenteeism. The theory of these decisions is the parties have contemplated the possibility of long term absence and provided for it in the collective agreement. The better argument, and that adopted in many cases is that the existence of a disability plan does not in and of itself disentitle the employer to terminate for innocent absenteeism. However, a review of the collective agreement and the plan are required to insure that the termination will not effect the employee's eligibility for such benefits.

Some employers self insure for short term and, less frequently, long term disability. This approach is fraught with difficulties. Inevitably eligibility becomes an issue between the company and the employee - which usually means the Union. If you wish to institute this kind of program make sure you obtain the protection normally present in an insurance plan. At the very least you must have the right to have the employee examined by a Doctor of your choosing.

The case law is clear that absent a specific provision in the collective agreement giving the employer the right to have an employee medically examined, no such right exists where the purpose is to check the validity of an employees claim. In certain circumstances an employer is permitted to require an examination where the employee wishes to return to

work. This right is of little assistance when dealing with abuse of sick leave benefits.

The discussion involving medical examination is also germane to controlling the cost of WCB claims. A full discussion of this topic is beyond the scope of this article, however, suffice it to say that strategies useful in controlling abuse of sick leave benefits are of similar value in controlling WCB costs from abuse.

DEFINING THE OBLIGATION

Once you have decided what benefits are going to be provided to the bargaining unit, it is absolutely crucial that the language draft be unambiguous. Ambiguities can arise with respect to benefits perhaps more easily than in other areas of the collective agreement. Most collective agreements do not provide details with respect to the precise benefits which are provided. Often unions will claim that statements were made at the bargaining table representing that certain benefits were available. If the language in the agreement is ambiguous, then these assertions give rise to the introduction of extrinsic evidence.

There are many examples in the reported cases where unions have alleged that certain benefits were included or that ambiguous language in the collective agreement must be interpreted in light of promises made at the bargaining table or other representations made

by representatives of the employer. Inevitably, these hearings become costly and the results difficult to predict. Sometimes statements made as much as ten or even more years previously will be crucial to the determination where the language in the collective agreement is ambiguous.

THE ARBITRAL JURISPRUDENCE

Most employers provide benefits through an insurance carrier. Over the years, the various methods by which benefits are provided have been categorized by arbitrators dealing with disputes concerning such benefits. Many arbitrators have said with respect to this issue as with others that parties are presumed to be aware of the arbitral jurisprudence when negotiating their collective agreement. Thus, the actions that you take in your negotiations will be interpreted as if you were aware of the four categories as described in the jurisprudence whether or not you were so aware.

1. BENEFITS COMPLETELY OUTSIDE THE COLLECTIVE AGREEMENT

There is no requirement that benefits be negotiated and included in a collective agreement. It is possible for an employer to discuss with the union what benefits are to be provided and then to simply provide them by purchasing insurance. Where the employer uses this approach, the traditional arbitral view is that these benefits are provided outside of the collective agreement and are therefore not properly the

subject of a grievance or arbitration. Arbitrators therefore have stated that they have no jurisdiction to deal with any disputes which arise concerning benefits implemented outside the collective agreement. Not surprisingly, unions are reluctant to adopt this approach. It becomes very difficult for a union to enforce rights it has negotiated unless those rights are specified in the collective agreement. Thus, although this approach might be the best from the point of view of the employer, it is probably unachievable in most circumstances.

2. **THE COLLECTIVE AGREEMENT PROVIDES SPECIFIED BENEFITS**

Many collective agreements simply state that the following benefits will be provided to the employees and then list briefly those benefits. It is this kind of collective agreement which can cause the greatest difficulties. Often, such an agreement will merely list benefits, without specifying what they are. Extended health plans, drug plans, dental health plans, and short and long term disability plans have great variations from one carrier to another. Some are capped, some are not; some have co-payment options, some have deductible; some provide benefits which are not provided by others. Where the collective agreement merely provides that the company will give certain benefits to employees, in the event of a dispute it is almost inevitable that extensive extrinsic evidence will be required to resolve the dispute. Evidence about what was said at the bargaining table, evidence about benefits that have been provided in the past, evidence about representations made to

individual employees, all become relevant and material.

For obvious reasons, I do not recommend this approach.

3. **THE COLLECTIVE AGREEMENT INCORPORATES THE PROVISIONS OF THE INSURANCE PLAN**

While this is not the best approach from the view of the employer, it is significantly better than the approach set out in paragraph 2. Here, a specific insurance plan is identified and then incorporated by reference into the Collective Agreement. This eliminates any ambiguity concerning the benefits to be provided (assuming the insurance plan is itself clear), but places a number of significant restrictions on the employer. Firstly, once a particular plan is specified, it is extremely difficult for the company to change carriers. Such a change would of course require the consent of the union. In addition, any disputes concerning whether or not an individual employee is entitled to a particular benefit would be subject to the grievance and arbitration provisions of the collective agreement. Where an employer engages an insurance company to provide particular benefits, and the insurance company determines that an employee is not eligible for those benefits pursuant to the agreement between the insurance company and the employer, it would appear the employer takes the risk in the event an arbitrator disagrees with the insurance company's determination.

4. **THE COLLECTIVE AGREEMENT PROVIDES FOR PAYMENT OF PREMIUMS FOR A BENEFIT PLAN SUPPLIED BY AN INSURANCE COMPANY**

This is the most common approach used by employers who are aware of the arbitral jurisprudence. Appropriate contractual language will first of all outline briefly the types of benefit plans to be provided by the company. The agreement will then go on to say that the company's sole obligation under the collective agreement is to attempt in good faith to obtain coverage for the specified benefits for substantially similar benefits and to pay the required premiums. The agreements most typically go on to provide that the particular benefits provided are as set out in the insurance plan and further that any dispute as to whether or not a particular employee is entitled to receive such benefits is a matter between such employee and the insurance company.

Arbitrators have consistently taken the position to date that the inclusion of language of this sort into the collective agreement restricts their jurisdiction in dealing with the specific benefits provided or the eligibility of a given employee to obtain them. So long as the employer can demonstrate that they have paid premiums in order to provide benefits substantially similar to the benefits as listed in the agreement, arbitrators have indicated that they have no further jurisdiction to make orders concerning whether or not individual employees are or are not eligible.

RECENT CASE LAW

A recent decision of the Supreme Court may challenge the traditional approach. In *Weber v. Ontario Hydro (1995)* 95 C.L.L.C. 210-027, the Supreme Court dealt with a court action commenced by an employee of Ontario Hydro covered by a collective agreement. The court action had been brought after filing a grievance through the union. The court action alleged tort damages and breaches of his rights under the Canadian Charter of Rights and Freedoms. In that case, the court found that where the difference between the parties arises from the collective agreement, the claimant must proceed by way of arbitration. The court went on to find that it had no power to entertain an action in respect of a dispute which arose from a collective agreement. The court found that Section 45 of the Labour Relations Act (now Section 48) required all such disputes to be dealt with through the arbitration procedure. The court found that the jurisdiction of the arbitrator was an exclusive jurisdiction and covered disputes which arise either expressly or inferentially from the collective agreement.

Applying this approach it could be argued that any dispute concerning benefits that are referred to in a collective agreement arises at least inferentially from the agreement and therefore must be dealt with through the arbitration process. However, the court in *Weber*

indicates:

> "It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case the courts of inherent jurisdiction in each province may take jurisdiction."

In my view, it will still be available for the employer to argue in appropriate cases that the arbitrator does not have jurisdiction to provide the appropriate remedy. The insurance company is not a party to the collective agreement, and since the collective agreement specifies that any disputes concerning eligibility for benefits is between the employee and the insurance company pursuant to the contract of insurance, arbitrators lack jurisdiction to deal with the matter notwithstanding the *Weber* decision.

It is clear that *Weber* will be argued in cases dealing with benefits in the future. The language in your collective agreement will, if anything, become more important following the *Weber* decision.

It may be important to note that the *Weber* decision was a split decision with Iacobucci J. dissenting in part. Although his dissent deals with part of the decision in *Weber* granting arbitrators the right to impose charter remedies, his dissent also makes clear the fact that arbitrators are not courts. In my view, this dissent will assist the argument specified earlier

by pointing out that, unlike a court, a Board of Arbitration cannot normally make findings binding on third parties.

CHANGING CARRIERS

Often it is advantageous for an employer to change carriers during the currency of a collective agreement. This may be because new benefits become available at reduced rates or because the company becomes dissatisfied with the service being provided by the current carrier. Whether or not the employer on its own initiative has the ability to unilaterally change carriers will depend upon the language of the specific collective agreement. If you adopt language as set out in paragraph 4 above, you probably have the right to change carriers unless you have made a representation to the union that you will not do so.

The ability to change carriers can be extremely effective in reducing the cost of negotiated benefits. If you are going to change carriers, however, you must ensure that the benefits being provided by the new carrier meet the requirements of your collective agreement. Problems can arise such as naming beneficiaries under life insurance policies when the employer has changed carriers. In a recent case, an employee was not given the opportunity to designate his beneficiary when a new life insurance carrier was engaged by the company. Unfortunately, the employee in question died before the new beneficiary forms were

available. The Arbitrator in this case found that the ability to name a beneficiary was an inherent right of the employee and notwithstanding the fact that the collective agreement in question was found to comply with the principles of paragraph 4 above, the employer was nevertheless in violation of the collective agreement by not ensuring the employee had a proper opportunity to name a beneficiary. In the very unusual circumstances of this case, the only remedy the board provided was declaratory. Because the insurance company had already paid the amount in question into court, the Board of Arbitration found that the deceased employee had received everything the Board could provide. However, this decision does point out the fact that an employer can still be in violation of its obligations under a collective agreement even though they have adopted the approach as set out in paragraph 4 above.

If you have the right to change carriers under your collective agreement, I would advise you nevertheless to inform the union well in advance of the fact you are changing carriers. One way to antagonize unions and create problems which otherwise need not exist is to exercise rights you have in a manner which embarrasses the union.

CONCLUDING REMARKS

This paper is not intended as a thorough primer on benefits or the negotiation of benefits. It is intended to provide guidance with respect to some of the more common problems that arise in the negotiation of benefit plans and other benefits. Even if you do not engage external advisors or lawyers to negotiate your collective agreements, I would strongly recommend that you have contractual language with respect to benefits reviewed by a competent advisor. Disputes concerning benefits can be costly and extremely contentious. Ambiguities are easily created and precision is sometimes more difficult to achieve than in other areas of the collective agreement. Recent case law has underscored the need for such precision.