CAAT (A)
97C450
L.556.

IN THE MATTER OF AN ARBITRATION

BETWEEN: GEORGE BROWN COLLEGE

AND: ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

AND IN THE MATTER OF THE GRIEVANCE OF WENDY TEVENS - GRIEVANCE #97C450

O.B. SHIME, Q.C.	CHAIRPERSON
F. COWELL	NOMINEE FOR THE COLLEGE
P. SEVILLE	NOMINEE FOR THE UNION

APPEARANCES

ANN E. BURKE	COUNSEL, and others for the College
HUGH R. SCHER	COUNSEL, and others for the Union.

A hearing was held in this matter at Toronto, Ontario on April 2, 1998

AWARD

The grievor was a teaching master at George Brown College, who had approximately twen: (20) years of service. The grievor suffers from chronic fatigue syndrome and other illnesses and sh was also involved in car accidents in 1987 and in 1992. The grievor was first employed by th College in 1977 and for the period 1983 to 1997 she was the coordinator of Court Reporting an Legal studies at the College. The grievor had been on sabbatical leave in 1992 and in Septembe of 1993, she turned to full-time teaching. In September 1994, she applied for short-term disabili benefits under the Collective Agreement and subsequently in March of 1995, she applied for and wa granted long-term disability benefits pursuant to Article 18 of the Collective Agreement. The grievc continued to receive long-term disability benefits until March 6th, 1997, at which time the Sun Lif Insurance Company terminated her benefits on the basis that she was not totally disabled and wa able to work. The grievor sought reconsideration of her claim and her claim was reviewed by th joint insurance committee constituted pursuant to Appendix 4 of the Collective Agreement. He claim was denied and the grievor now seeks to have her benefits reinstated.

The College, by way of a preliminary objection, takes the position that this claim is agains the Sun Life Insurance Company of Canada and that the Collective Agreement does not impose a obligation on the employer to provide benefits; accordingly, this Board of Arbitration is withou jurisdiction to deal with the matter. The College relies on a number of decisions by Boards c Arbitration and the Courts which suggest there is no jurisdiction in a Board of Arbitration to dea with matters of this sort. The College submits that its only obligation, pursuant to Article 18 of th Collective Agreement, is to make deductions from the wages of the employees for the purpose c the LTD plan. The College submits that it is not an insurer and that any mention of a plan does not incorporate the insurance plan by reference into the Collective Agreement.

The Union maintains that where a benefit entitlement arises out of a Collective Agreement, that it is appropriate that the right to the benefit be enforced pursuant to the Collective Agreement. The Union maintains that the statutory framework, as well as the Collective Agreement, suggests that the LTD plan has been incorporated into the Collective Agreement by reference. The Union submits that Article 18, coupled with Appendix IV, indicates that the insurance policy is incorporated by reference into the Collective Agreement. The Union submits that the benefit derives from the Collective Agreement and is the governing factor and accordingly, the Board of Arbitration has jurisdiction to determine the benefits provided by the Collective Agreement.

The relevant provisions of the Collective Agreement are as follows:

Article 17
SHORT-TERM DISABILITY PLAN (STD)

Participation
17.01 A Effective April 1, 1991, all full-time employees shall be covered by this plan.

Funding
17.01 B This plan shall be funded by the College.

Waiting Period
17.01 C New employees will be eligible for benefits under this plan from their first day of service with the College. The annual benefit allocation described in 17.01 F shall be credited at that time.

Benefit Year
17.01 D The benefit year shall be September 1 to August 31. For the balance of the benefit year expiring August 31, 1991, an employee will be credited with the unused credits, if any, standing in the name of the employee on April 1, 1991, under the terms of a previous Cumulative Sick Leave (CSL) Plan, where applicable. Employees hired between April 1, 1991, and August 31, 1991, shall be credited with

a pro-rated number of annual credits, depending on date of hire.

Workers' Compensation and Other STD Insurance

17.01 E Where a full-time employee is entitled to payments under the Workers' Compensation Act and Regulations, or is entitled to payments under any other short-term disability insurance, such person shall be entitled to payments, where required, from this plan to supplement the amount payable under the Workers' Compensation Act and Regulations, or such other insurance, up to the amount otherwise payable under this plan.

Benefits

17.01 F 1 During absences due to illness or injury, participating employees who would otherwise be scheduled to work shall receive 100% of regular pay for up to and including 20 working days in any one benefit year, plus any unused credits carried forward from previous years. Days not utilized in any year shall be considered to be credits (on the basis that one credit represents 100% of regular pay for one working day) and shall be carried forward to the next benefit year. Debits shall be made from the total assigned benefit on a day-for-day basis.

17.01 F 2 During absences due to illness or injury in excess of the accumulated days referred to in 17.01 F 1, participating employees shall be paid 75% of regular pay for up to the difference between the number of accumulated days referred to in 17.01 F 1 and the date the employee would normally qualify for LTD.

17.01 F 3 Where the qualifying period for LTD has expired, and the employee qualifies for LTD, and the employee still has credits standing in his or her name under this plan, such credits may, at the election of the employee, but utilized by the employee instead of LTD benefits, until the employee elects to take LTD benefits, if qualified.

17.01 F 4 During the period defined in 17.01 F 1, a participating employee who is absent due to injury or illness on the day before or after a holiday as defined in 16.01 shall receive pay for the holiday at the rate defined in 17.01 F 1.

17.01 F 5 During the period defined in 17.01 F 2, a participating employee who is absent due to injury or illness on the day before or after a holiday as defined in 16.01 shall receive pay for the holiday at the rate defined in 17.01 F 2.

17.01 F 6 Application for benefits under the plan shall be made at such time and in such manner as the College shall determine and shall be supported by such medical evidence, if any, as the College may require.

Expiry of Credits

17.01 G Subject o 17.01 H, upon retirement, layoff or termination of employment, any credits standing in the name of the employee shall be cancelled and shall be of no effect.

Protection of Existing Rights

17.01 H Notwithstanding 17.01 G, employees hired before April 1, 1991, shall be entitled to utilize available credits (or portions thereof) at the time of retirement, termination of employment or layoff as a lump-sum gratuity calculated in accordance with the terms of the pre-existing Cumulative Sick Leave Plans, where applicable and where the employee is eligible and shall not exceed the amount of one-half the employee's annual salary as of the date of separation.

Article 18
LONG-TERM DISABILITY PLAN (LTD)

18.01 Employees shall pay the full premium of the present Long-Term Disability Plan, the benefit level to be 60% of basic monthly earnings reduced by:

(i) any form of salary continuation from the employer or benefit from an employer sponsored retirement or pension plan;

(ii) any basic disability benefits payable from government sponsored income security programs (e.g. C/QPP, W.C., U.I., or similar programs);

but this amount shall not be reduced by amounts payable under:

(i) any privately sponsored group disability insurance plan;

(ii) any increase in benefit arising from the C/QPP as a result of an adjustment in the Consumer Price Index.

Article 19
OTHER INSURANCE PLANS

Extended Health Plan

19.01 The College shall pay 100% of the billed premium of the Extended Health Plan for employees covered thereby and subject to the eligibility requirements of the Plan.

Post Retirement Extended Health Coverage

19.02 The College shall include eligible retired employees in the Extended Health Plan at the option of the employee under the following conditions:

(i) The retired employee shall pay to the College quarterly in advance the full cost of the plan from the date of retirement.

(ii) Eligibility for such coverage shall be dependent upon:

- The employee qualifying for benefits under the Colleges of Applied Arts and Technology Pension Plan or the Teachers' Pension Plan.
- The employee maintaining eligibility for benefits under O.H.I.P.
- The employee commencing retirement on or after May 1, 1988.

(iii) Insurable benefits payable under O.H.I.P. shall not be payable under the Extended Health Plan.

Dental Plan

19.03 A the Colleges agree to pay 100% of the billed premiums of an insured dental plan (the Plan) based on the Ontario Dental Association (ODA) schedule for the immediately preceding year.

19.03 B Coverage shall apply, subject to the eligibility requirements and conditions of the Plan, to all eligible full-time employees on the active payroll and in the active employ of the College following the completion of six months continuous service during the probationary period. Those employees whose spouses are covered by a comparable plan may elect to be covered by their spouse's plan.

. . . .

APPENDIX IV
JOINT INSURANCE COMMITTEE

Purpose of the Committee

1A The purpose of the Joint Insurance Committee is to facilitate communication between the Council of Regents and OPSEU on the subject of group insurance applicable to the Academic Staff Bargaining Unit, including Basic Life, Supplementary Life insurance, Extended Health Insurance, Long Term Disability Insurance, the Dental Plan and such other negotiated benefits that may, from time to time, be included in the group insurance plan.

1B Nothing herein shall prevent this Committee from meeting jointly with any comparable committee, if established, concerning the Support Staff Bargaining Unit should it be mutually agreed between this Committee and such other Committee.

1C It is understood that the group insurance benefits to be provided to employees and the cost sharing arrangement shall be as set out in the applicable Agreement and the matters for consideration by this Committee shall be only as set out in these terms of reference.

Composition of the Committee

2 The Committee shall be composed of an equal number of representatives from the Council and OPSEU with not more than eight representatives in total. At meetings of the Committee each party may be accompanied by up to two resource persons to provide actuarial or other technical advice. Additionally, when necessary, representatives of insurance carriers shall attend meetings to provide information but shall not act as resource persons for either party.

Duties of Committee

3 The duties of the Committee shall consist of the following:

(i) development of the specifications for the public tendering of any negotiated benefits which may be included in the Group Insurance Plan (to cover the bargaining unit only);

(ii) consideration and examination of all tenders submitted in response to the specifications for tender and preparation of a report thereon;

(iii) recommendation to the Council of Regents on the selection of the insurance carrier or carriers to underwrite the Group Insurance Plans;

(iv) consideration and recommendation to the Council of Regents on the renewal of existing contracts of insurance upon expiry;

(v) review of the financial reports on the Group Insurance Plan, and

(vi) review of contentious claims and recommendations thereon, when such claim problems have not been resolved through the existing administrative procedures.

Specifications for Public Tender

4A When specifications for public tender are required to obtain the services of an insurance carrier, the duties of the Committee shall be to:

(i) develop and recommend specifications for tender;

(ii) consider and examine all tenders submitted in response to the specifications;

(iii) make a recommendation to the Council of Regents with respect to the selection of a carrier(s).

4B The specifications for tender will describe the benefits to be provided, the cost sharing arrangements, the past financial and experience history, the appropriate employee data, the format for the retention, illustrations for each coverage, the financial reporting requirements, and other parameters as appropriate. The tendering processes will be conducted through the Ontario Government's Public Tenders Office. Tenders shall be entertained from any insurance carrier and such carrier may act solely on its own behalf or may arrange reinsurance as may be necessary.

4C The basis for recommendation of an insurance carrier(s) will include the ability of the carrier(s) to underwrite the plan, compliance of carrier's quotation with the specifications for tender, the carriers service capabilities and the expected long term net cost of the benefits to be provided.

Policy Renewals

5A Following receipt of an existing insurance carrier's proposal for renewal of an insurance contracts, the Committee shall:

(i) examine and analyse the proposal, assessing the completeness, fairness and validity of the proposal;

(ii) assess the funding methods employed in the insurance policy;

(iii) assess and monitor the deposit accounts;

(iv) suggest and discuss alternative proposals and funding methods with the carrier; and

(v) make recommendations to the Council of Regents with respect to acceptance of the carrier's renewal proposals, funding methods and deposit account administration.

5B The basis for recommendations for renewal will take into account the level of service provided by the carrier and the expected long term net costs of the benefits.

Experience Review

6A The Committee will also meet as required to review the financial experience under the plans. The specifications for tender will describe the information be included in the financial statements to be prepared by the insurance carrier(s).

6B These statements will include paid premiums, paid claims, changes in reserve requirements for open and for unreported claims, incurred claims, the retention elements of commissions, faxes, administrative expenses, contingency reserve charges and interest credits on claim and other reserves. The Committee shall request the insurance carrier(s to provide such additional information as may be necessary.

Recommendations

7A If the Committee fails to agree on the recommendation to the Council of Regents that is contemplated by these Terms of Reference, the members of the said Committee nominated by the Council and OPSEU may each make a recommendation in writing to the Council of Regents, supported by reasons for the respective recommendations.

7B It is understood that the Council of Regents at all times retains the right to select whatever carrier(s) to underwrite the group insurance plan(s) it may consider in the best interest of the employees and Colleges and, in so doing, is under no obligation to select a carrier(s) that may be recommended by the Committee.

This case is one of a number of similar cases over the years which involves a conflict between both substantive issues and also process issues. Generally, an employer who is required to provide insurance benefits to employees, seeks to have those benefits covered by policies of insurance through an insurance carrier. Employers, not being in the business of insurance, prefer that the risk be borne by an insurance carrier and that the administration of the plan also be dealt with by an insurance carrier. Although some employers self-insure benefits, most employers contract out this responsibility to an insurance carrier. The Collective Agreement, in those instances, usually makes some provision for payment of premiums for the insurance, but the insurance policy is usually not included in the Collective Agreement. Thus, where there is an insurance carrier, it is generally the intent that the employer, having contracted out its responsibility for insurance to the carrier, nc be responsible for any benefits that might arise. The substantive dispute is whether the employe or the insurance carrier is responsible for the benefits. If the insurance carrier is liable for the benefit, it is usually the case that the matter be pursued in the courts..

On the other hand, the employment relationship is covered by the Collective Agreement anc it is the usual intent of the Collective Agreement, and the applicable legislation, that all dispute: between an employee and an employer arising from the employment relationship be dealt with through the grievance and arbitration process under the Collective Agreement. Indeed, the view tha matters of an employment nature should be pursued through the grievance arbitration process anc not through the courts has been approved by numerous court decisions as well as by arbitration awards. See e.g. St. Anne-Nackawic Pulp and Paper Co. v. Canadian Paperworkers' Union, Loca 219 [1986] 1 S.C.R. 704 (1986), 28 D.L.R. (4th) 1. Thus, there is a conflict between processing the matter through arbitration or processing the matter in the courts.

In this case, the conflict arises because the grievor seeks to pursue her claim for insurance against the employer through the grievance arbitration process. However, this employer has contracted with the Sun Life Insurance Company and has assumed that all matters arising from the insurance coverage be dealt with by that outside carrier, and accordingly, any dispute with respec to insurance ought to be dealt with in the courts between the employee and the Sun Life Insurance Company directly.

There are many cases dealing with the problem at hand. Most refer to the four categories of obligations found in collective agreements that are referred to in Brown and Beatty *Canadian Labour Arbitration* 3rd Edition. In my view, to approach the problem, as some cases do, by attempting to slot the situation into the various categories is too mechanical. The better approach suggested by other cases is to approach the problem by going back to first principles, and determining the intent of the parties. See e.g. Re Coca Cola Bottling Ltd. and U.F.C.W. (1994) 44 L.A.C. (4th) 151 (K. Swan). In determining intent two basic questions come quickly to mind.

1. Did the parties intend or contemplate that the benefits be provided by taking out an insurance policy with an outside carrier?
2. If so, did the parties intend that the employees have recourse both to the insurance policy and also to the employer under the aegis of the Collective Agreement?

In answering the first question, if the employer maintains a self-insured scheme without using an outside carrier, that ends the matter and the grievance is arbitrable. However, where it is apparent that the parties have agreed there be an outside carrier one must move to the second question. Clearly, a statement that requires the payment of premiums for an insurance policy, prima facie, demonstrates an intent that there be an outside carrier.

Before turning to the second question, it is important to note that the arbitrator derives his/her jurisdiction from the interpretation, application, administration or violation of the Collective Agreement. To cast the problem in a different or simpler way - the arbitrator derives his/her jurisdiction from "inside" the Collective Agreement and does not have jurisdiction to deal with an insurance policy that lies "outside" the Collective Agreement. The task then is to determine if th parties have demonstrated an intent to bring the "outside" policy, in whole or in part, "inside" th Collective Agreement so as to confer jurisdiction on the arbitrator to deal with the matter. See e.g Weber v. Ontario Hydro (1995) 125 D.L.R. (4th) 583, [1995] 2 S.C.R. 929.

Many Collective Agreements incorporate the insurance policy, in whole or in part, b reference into the Collective Agreement; that is, they have brought the insurance policy "inside" th Collective Agreement so as to confer jurisdiction on the arbitrator. See e.g. Pilon v Internationa Minerals & Chemical Corp. (Canada) Ltd. (1996) 141 D.L.R. (4th) 72. Incorporation by referenc is a relatively easy matter. All that is necessary, for example, is to use language that provides the the "outside" insurance policy shall be a part of the Collective Agreement or to attach the insuranc policy as an appendix to the Collective Agreement. Incorporation by reference should not b confused with those situations where the employer agrees to provide certain itemized benefit or menu of benefits by way of an outside insurance policy. The mere mention of benefits to b provided does not mean that those benefits are incorporated by reference. Of course, the insuranc policy may be compared to the benefits that the employer has agreed to provide to determine if ther is any shortfall or deficiency which might render the employer liable for breach of its primar undertaking *under the Collective Agreement* to provide such benefits. See e.g. Re McDonne Douglas Canada Ltd and C.A.W. Local 1967 (1992) 25 L.A.C. (4th) 211 (O.B. Shime).

Bearing those principles in mind, I now turn to examine the Collective Agreement and to th first question, which is to determine whether the parties intended that the benefits be provided b taking out an insurance policy with an outside carrier. It is interesting to compare Articles 17, 18 and 19 of the Collective Agreement. Article 17 provides for a short-term disability plan (STD) and outlines who shall participate, the waiting period, the benefit year, the relationship to payments under the Workers' Compensation Act and other short-term disability plans, as well as the benefits. But more important, under Article 17.01B "This plan shall be funded by the College". What we have is a comprehensive STD plan, self-insured by the employer, and set out in the Collective Agreement, so as to provide employees procedural access to that plan under the Collective Agreement. Clearly the employer is directly liable for any deficiency in the STD plan

The STD plan may usefully be compared to the Long Term Disability Plan (LTD) under Article 18, which is not funded by the College, but which requires the employees to "pay the *full premium*" of the present Long Term Disability Plan, with a benefit level of 60% of the basic monthly earnings with certain reductions. Also, comparison should be made to Article 19 which provides that "the College shall pay 100% of the billed premium of the Extended Health Plan" and to a similar provision in Article 19.03A with respect to the Dental Plan. When the LTD plan is examined in the context of the other plans and benefits, and more particularly, where the LTD plan is juxtaposed with the STD plan and other plans there emerges a clear intent to cover the risks, inherent in an LTD plan, by utilizing an outside insurance carrier. That intent is confirmed by the actual practice because Sun Life Insurance Company has been the "outside" insurance carrier for the LTD plan since 1972. Also the grievor received benefits from the Sun Life Plan for an initial period and until Sun Life determined she was not totally disabled.

Having determined that the parties intended to cover the LTD risks by utilizing an outside carrier, I now turn to the second question, which is to determine whether the parties intended that the employees have recourse to the insurance policy and to the employer under the Collective Agreement. After considering the Collective Agreement, and particularly the context of the LTD plan, and the comparison to the STD plan, it is our view, the parties intended the LTD plan exist "outside" the Collective Agreement and that the employees have a direct relationship to the LTD plan and to the insurance company. There is no intent that the employer be responsible for the benefits under the LTD plan in the same manner as the STD plan. The relationship between the insurance carrier and the employees is a direct one, with the employees paying the premium directly, and, accordingly, there is no basis for the suggestion that the employer has any liability for LTD benefits, nor does the language evince an intent that the employees shall have access to the plan under the auspices of the Collective Agreement. Indeed, a reading of the Agreement as a whole suggests otherwise.

Initially, there is a requirement that the employee pay premiums, which prima facie, indicates an intent that matters be dealt with by an outside carrier rather than the employer. The Union argued that Appendix IV, which provides for a Joint Insurance Committee, buttresses the position that the LTD plan is incorporated by reference into the Collective Agreement. However, Appendix IV is quite specific and clear in its intent. Part 1A of Appendix IV specifically states that the purpose of the Committee is "to facilitate communication between the Council of Regents and OPSEU on the subject of group insurance". That statement denies any intent by the parties that by providing a Joint Insurance Committee they intended to incorporate by reference those group insurance plans into the

Collective Agreement.

Also Part 1C of Appendix IV suggests that the group insurance benefits to be provided are set out in the "applicable agreement", which in context means the applicable insurance plan or agreement and limits the matters for consideration by the Committee to the "terms of reference" in the Collective Agreement. Alternatively, even if the reference to Agreement means Collective Agreement, that does not negate the very tenor of the appendix which is to have claims paid by the various insurance carriers. The reference to the benefits and cost sharing arrangement being set out in the applicable agreement refers only to the employer's primary obligation, which is to ensure that the insurance plans which it obtains are consistent with its obligations under the Collective Agreement. The reference, in context, does not incorporate the insurance plans into the Collective Agreement because the clear intent of the parties is to have the insurance carrier bear the risk and pay for any claims.

It is also apparent that the terms of reference contemplate that negotiated benefits are to be included in the Group Insurance Plans and that an insurance carrier, or carriers, is to underwrite the plans. The Committee is to review public tenders to obtain the services of an insurance carrier and make a recommendation to the Council of Regents with respect to the selection of a carrier and the Committee is to consider existing carrier's proposal for renewal of an insurance contract and make recommendations. Also the Committee is to review the financial expense under the plans and the financial statements of the carriers under Part 6B are to include paid premiums, *paid claims, changes in reserve requirements for open and for unreported claims, incurred claims etc.* Part 7B provides that the Council of Regents retain the right "to select whatever carrier(s) to underwrite the group insurance plan(s)....."

The Appendix and the provisions contained therein make it perfectly apparent that "outside" insurance carriers are to be retained and that those carriers will pay the claims and underwrite the group insurance plans. The intent of the parties demonstrates that matters falling under group insurance plans and particularly the LTD plan are the concern of the outside insurance carrier and negate any possibility that the parties intended that the Ontario Council of Regents be responsible for paying or underwriting claims. The whole tenor of the Collective Agreement, in our view, is to have the LTD plan administered and the benefits paid "outside" the Collective Agreement by an insurance carrier. The mere mention of a plan, and the utilization of a committee for the purposes enumerated, does not in our view incorporate the LTD plan, either in whole or in part, into the Collective Agreement. Also the ability of the Committee to review contentious claims and make recommendations thereon, does not in context incorporate the plan into the Collective Agreement. Since that plan lies outside the Collective Agreement and since this board of arbitration is restricted to dealing in the matters "inside" or under the aegis of the Collective Agreement, we have no jurisdiction to deal with the issues raised.

The preliminary objection by the employer is allowed and the grievance is dismissed.

However, as a footnote we wish to indicate that as a result of the decision in <u>Pilon</u> v <u>International Minerals & Chemical Corp. (Canada) Limited</u> infra, some concern has arisen in the collective bargaining community as to the proper forum to resolve claims for insurance benefits. Tl grievor and the Union, in good faith, have proceeded to follow the arbitration route rather than proceed in the courts in order to resolve Ms. Tevens' dispute. This board of arbitration reserve decision in anticipation that the issue would be resolved by the courts. See, Sun Life Assuranc Company of Canada v National Automobile. Aerospace Transportation and General Workers Unic of Canada and Honeywell Limited/Aerospace Division and Morton G. Mitchnick unreported, 199 (Div. Ct.). Hopefully, the grievor, in these circumstances, will not be prejudiced by any dela because she elected to proceed by way of arbitration.

DATED AT TORONTO THIS 7th DAY OF June 1999.

O.B. SHIME, Q.C.
CHAIRPERSON

"I CONCUR"

F. COWELL
NOMINEE FOR THE COLLEGE

DISSENT ATTACHED

P. SEVILLE
NOMINEE FOR THE UNION

GEORGE BROWN COLLEGE/ ONTARIO PUBLIC SERVICE EMPLOYEES' UNION, IN THE MATTER OF THE GRIEVANCE OF WENDY TEVENS. FILE #97C450

Pauline R. Seville - Dissent

I have read the Majority Award and with respect, I find I must dissent.
I agree with the Majority when it states that to approach these problems as some cases do, by attempting to slot these situations into the four Brown & Beatty categories can be too mechanical.

Faced with the current unsettled state of the law on cases like these, I also agree that a better approach to these situations is to go back to first principles and determine the intent of the parties, by answering these two questions.

1. Did the parties intend or contemplate that the benefits be provided by taking out an insurance policy with an outside carrier?

2. If so, did the parties intend the employees have recourse both to the insurance policy and also to the employer under the aegis of the Collective Agreement?

I also agree with the Majority that when the LTD plan is juxtaposed with the STD plan there is a clear intent to cover the **risks** inherent by utilizing an outside insurance carrier.

But answering the question of who bears the **risk** of paying a claim, is not determinative of the issue. In my view you have to go further and determine whether the Employer has an **obligation** to provide the benefits, when the Insurance Company is no longer prepared to assume the risk of paying the claim in question.

Determining who bears the **risk** of paying an LTD claim, is not the same as determining who has an **obligation** to see that the benefits are provided, and what should occur in the event they are not.

While the Insurance Company bears the risk of paying the claim, this does not alleviate the Employer from meeting its obligations under the Collective Agreement to see that the benefits are provided. Under the Academic Collective Agreement the Employer undertakes certain obligations with respect to the employee, specifically I want to make note of:

> Article 18
> LONG-TERM DISABILITY PLAN (LTD)
>
> 18.01 Employees shall pay the full premium of the present Long-Term Disability Plan, **the benefit level to be 60% of basic monthly earnings** reduced by:

(emphasis added mine)

Article 18 has to be read in conjunction with the language contained in Appendix 1V Joint Insurance Committee, which stipulates in part:

> 1A. Long Term Disability Insurance . . . and such other **negotiated benefits** that may, from time to time, be included in the group insurance plan,

- and -

> 1C. **It is understood that the group insurance benefits to be provided to employees and the cost sharing arrangements shall be as set out in the applicable Agreement** and the matters for consideration by this Committee shall be only as set out in these terms of reference.

(emphasis added mine)

In my view, this language can only be interpreted to mean that the Employer and the Union have negotiated the level of benefits to be provided and therefore a failure to provide those benefits is arbitrable. Further the use of the words "applicable Agreement" in Appendix 1V, 1C, of the Collective Agreement can only mean the applicable Academic or Support Collective Agreement, because group insurance coverage is referred to in the Collective Agreement as the "Plan," it is never referred to as the "Agreement."

To hold otherwise means the Employer can negotiate with the Union about the extent, type and level of benefits to be provided and then contract out of this **obligation - vs - risk** by signing an insurance contract, to which the Union is not a signatory. This proposition does not make for sound labour relations.

The Collective Agreement clearly refers to **negotiated benefits** and this makes the provision or failure to provide these benefits arbitrable.

When the Majority states at p.12 that the relationship between the insurance carrier and the employees is a direct one, I disagree. There is no direct relationship between the employee and the insurance carrier and employees are only eligible for benefits by virtue of their employment relationship. The employee does not contract with the insurance carrier, the Employer does.

The Majority comments on the ease of incorporating the Insurance Policy, in whole or in part, by reference into the Collective Agreement. The Union believes it has done this by virtue of the language contained in the Collective Agreement, and as noted in the Majority Award, the Plan with Sun Life Insurance Company has been in place since 1977.

When the Majority states at p.14 that "the ability of the Committee to review contentious claims and make recommendations thereon, does not in context incorporate the plan into the Collective Agreement.", I disagree. The overall intent of the parties with respect to the function and purpose of the Committee was that they have an active role in the resolution of disputes. Moreover, the parties clearly addressed LTD benefits in the Collective Agreement and one would expect that as a result they would have the right to enforce any disputes through arbitration.

As an aside, one can only speculate as to why these issues are arising now, some 22 years after the Plan has been in existence, and likewise speculate upon how easy it will be to incorporate the Plan in the Collective Agreement, faced with a decade long climate of take-away and concession bargaining. One can only hope the Millennium will usher in a new era of collective bargaining that allows for improvements, time will tell.

Who then bears the responsibility for taking on the issue of a disallowed claim when the Insurance Company determines it will not continue to pay the claim in question? The Union is not a signatory to the Insurance Contract, the Employer is. Does this impose any obligation on the Employer when the Insurance Company is taking a position they will no longer continue to pay a claim, I believe it does.

Who best to pursue a claim against the Insurance Company, the Employer who is a signatory to the Insurance Contract, or Ms. Tevens who is now without financial resources as a result of the Insurance Company cutting off her benefits.

In my view the answer is that it is the Employer who has an obligation under the Collective Agreement to see that certain benefits are provided to an employee, because that is what was negotiated.

If the Insurance Company is taking the position that it will no longer assume the risk of providing that benefit, then the Employer must provide the benefits in place of the Insurance Company and as a signatory to the Insurance Contract the Employer is then free to sue the Insurance Company in Civil Court to recover the cost of continuing to provide the benefits in question.

The Majority states the employee can sue the Insurance Company in Civil Court. This is true. But as a practical matter, how are affected employees supposed to do this? They have no income and are sick.

The grievor in this case, Ms. Wendy Tevens is 55 years old and has 20 years of service with the College. In Ms. Tevens LTD case, the Sun Life Insurance Company assumed the risk of paying her claim for a period of 2 years, at which time the Insurance Company terminated her benefits. Ms. Tevens suffers from severe chronic fatigue syndrome, fibro myalgia and other illnesses.

In conclusion, the best solution in these types of cases is not to have either the Employer or Employee go to the courts as a first resort, but to have these matters dealt with at arbitration. This allows the parties to:

- Test the terms of the Collective Agreement they have negotiated in good faith; and

- Provide an accessible forum for employees to have their claims adjudicated; and