**In the Matter of an Arbitration**

**BETWEEN:**

**ONTARIO MEDICAL ASSOCIATION**

(the "OMA")

- AND -

**MINISTRY OF HEALTH**

(the "MOH")

(together, "the PARTIES")

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# BOOK OF AUTHORITIES OF THE ONTARIO MEDICAL ASSOCIATION

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# TAB 1

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**The Ministry of Health and Long Term Care**

**And**

**The Ontario Medical Association**

**Before**: William Kaplan, Chair
Dr. Kevin Smith, MOHLTC Nominee
Ron Pink, QC, OMA Nominee

**Appearances**

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The matters in dispute proceeded to a hearing in Toronto on May 24, 25, October 22, 23, 24, November 26, December 18, 19, 20, 2018 and January 13 & 20, 2019.

## Introduction

In June 2018, the Ontario Medical Association (hereafter "OMA") and the Ministry of Health and Long Term Care (hereafter "the Ministry") entered into a Binding Arbitration Framework (hereafter "BAF"). The BAF established an independent consensually selected board of arbitration, and one that was given the mandate to determine and decide outstanding issues respecting the content of the Physicians Services Agreement (hereafter "PSA") for the period April 1, 2017 to March 30, 2021. The BAF provided for the adjudication of outstanding issues in phases. In general, and at issue in this Phase One award, are the following:

1. The OMA proposal for redress in respect of both across-the-board and targeted cuts to payments and programs beginning in 2015 and still continuing;
2. The OMA proposal for fee increases;
3. The OMA proposals for Academic Health Sciences Centres;
4. The OMA proposals for the Northern Ontario School of Medicine;
5. The OMA proposal for additional increases to and a process for reviewing technical fees;
6. The OMA proposal for redress resulting from changes to federal legislation governing physician incorporation;
7. The Ministry proposal for a hard cap on the Physician Services Budget (hereafter "PSB");
8. The Ministry proposal for cuts to certain radiology, ophthalmology and cardiology fees; and,
9. Proposals by both the OMA and the Ministry respecting the delivery of primary care particularly through Family Health Organizations (FHOs).

These outstanding issues proceeded to hearings beginning in 2018 and ending in early 2019. A long list of consequential issues, for example, relativity, and other outstanding matters, remain to be decided in subsequent phases of this process, or as agreed by the parties.

In the meantime, consistent with Section 6 of the BAF, any other compensation term falling within the scope of arbitration under Section 21, together with any other existing term or condition, remain in full force and effect and cannot be altered, deleted, or added to without the agreement of the parties. We remain seized should there be any dispute on these issues.

## Criteria for Decision-Making

Section 25 of the Binding Arbitration Framework sets out the following decision-making criteria:

In making a decision or award on any matters falling within the scope of arbitration, the arbitration board shall take into consideration the following factors and any other factor it considers relevant:

(a) The achievement of a high quality, patient-centred sustainable publicly funded health care system;
(b) The principle that compensation for physicians should be fair (in the context of such comparators and other factors that the arbitration board considers relevant) and reasonable;
(c) Such comparators as the arbitration board considers to be relevant, including but not limited to, physician compensation;
(d) The economic situation in Ontario;
(e) Economic indicators that the arbitration board considers relevant, including, but not limited to, the cost of physician practice;
(f) Evidence-based relativity and appropriateness considerations; and
(g) Data sources agreed to by the parties to be reasonable, or otherwise the most reliable data available.

## Discussion

No single one of these factors has been accorded primacy; but it seems to us that at the centre of our mission in resolving the matters in dispute is to ensure a high-quality patient-centred sustainable publicly funded health care system with fair and reasonable compensation for Ontario's physicians. Needless to say, the other criteria are directly relevant to the achievement of these objectives. Sustainability is to be given a broad reading: appropriateness, value for money, timely access, accountability for results; but it obviously also encompasses economic reality and an appreciation, gleaned from several of the other criteria, that, while ability to pay is not specifically identified, there are funding limitations. We also recognize that Ontario physician compensation accounts for approximately 22% of the Ministry budget. Indeed, in 2016-2017, Ontario spent nearly $56 billion (including capital) delivering health care in the province. Caution in increasing expenditures is obviously called for together with acknowledgement that fiscal resources are not infinite and that an increase in one area – for example, physician compensation – will have an impact in others.

The Board has paid extremely careful attention to the parties' submissions on projected economic growth and the economic conditions as well as the future fiscal prospects of the province. Without question, whenever possible and appropriate, and following best practices, substantial savings and efficiencies need to be introduced into the health care system to ease expenditure growth pressures (separate and apart from delivery reforms). Both parties have important responsibilities in this respect, including working collaboratively, especially in the area, as discussed further below, of "appropriateness" where real opportunity exists to

dramatically reduce costs. But it is worth emphasizing that physician compensation, and practices, is just one piece of a much larger puzzle and achieving sustainability involves a much broader approach.

Any OMA or Ministry proposal not directly dealt with in this award is deemed dismissed.

## Award

The imposition of a hard cap on the PSB would have implications on other issues in dispute and so it needs to be the first issue addressed.

## Ministry Proposal for Hard Cap on PSB

The PSB reflects the value of publicly insured services provided to patients by Ontario doctors. It is based on both price – the cost of services – and quantity – the number of services. Growth in the number of services is known as "utilization". The parties disagree about the factors underlying increases in utilization.

The Ministry takes the position that, while population growth and aging are important, physician behaviour is a major driver of PSB growth, in particular inappropriate tests, treatments and procedures, a situation exacerbated by the fact that Ontario physicians, on average, are working less and seeing fewer patients but billing more (with billing amounts completely disproportionate to, and out of sync with, price increases). The Ministry, therefore, asked us to impose a hard cap on the PSB, but one subject to a 1.9% utilization increase plus

any price increases. As the 2017/18 and 2018/19 contract years have passed, the Ministry proposes that the PSB be increased by 1.9% utilization amount for contract years 2019/20 and 2020/21.

In the Ministry's view, absent a hard cap and a specified utilization growth number, it would be impossible to obtain physician agreement on reducing or eliminating inappropriate practices as economic outcomes would be affected: stated somewhat differently, physician financial interests threatened. In addition to a hard cap with a 1.9% growth amount which the Ministry asserted took into consideration all of the growth factors identified in the BAF, it also proposed that a joint committee be established to identify inappropriate or overused physician services, or physician payments, with an identified target savings amount, together with an arbitral backstop in the event the parties are unable to agree.

## OMA Response to Ministry Proposal for Hard Cap on PSB

The OMA categorically rejects a hard cap and the proposed 1.9% utilization amount, one which it notes, in any event, is based solely on population and aging, an unduly and self-evidently restrictive approach completely skewing the result and one completely at odds with the factors the parties deemed relevant and memorialized in the BAF. The OMA takes the position that, by any fair measure, when all of the relevant factors are addressed, utilization is a multiple of this 1.9% number.

In the OMA's submission, relevant factors include not just population growth and aging, but chronic disease prevalence, increasing patient complexity, technological change and innovation, entry of new physicians, patient preferences, expectations and demands, and other factors too numerous to enumerate. All of these factors, like those catalogued in the BAF, are not just accepted by the parties, but are also widely acknowledged in the literature. More fundamentally, the OMA categorically rejected the assertion that Ontario physicians were deliberately providing inappropriate care to increase incomes, a claim it characterized as baseless and unsupported by any evidence whatsoever. It takes issue with Ministry's claims – described as inflated and without compelling evidentiary foundation – about billings increases, days worked and patients seen by pointing to methodological and other concerns about the presented data – data it also described as misleading and incomplete.

The OMA also rejected the assertion that Ontario physicians should be responsible – which they would be if a hard cap was instituted – for increased utilization. Stated somewhat differently, if the Ministry hard cap proposal was accepted, Ontario doctors would be responsible for any physician spending exceeding the PSB by the proposed 1.9% amount plus normative increases. Any expenditure in excess of this amount would be the financial responsibility of Ontario doctors. The OMA acknowledges, however, Ontario physician responsibility for assessing appropriateness – ensuring that services are actually necessary – providing quality and value, and actually addressing over valued services, underuse, overuse and misuse without, of course, compromising timely and quality patient access.

## Decision - PSB

**I**n our view, the Ministry is responsible for the PSB including growth. Apart from the intrinsic unfairness of a hard cap and an unpersuasive and, in our estimation, discounted utilization number, both the PSB and its growth are the responsibility of government. Replication and identification of the appropriate comparators – key interest arbitration criteria – buttress this conclusion. No other Canadian jurisdiction enforces a hard cap (caps in New Brunswick and Quebec are not applied). If the Ministry wishes to limit the insured physician services patients receive, it can readily do so. What it cannot do is achieve this outcome by requiring Ontario doctors to subsidize public services. That would be the direct result of the imposition of a hard cap. Accordingly, we reject a hard cap. As such, any debate about the utilization increase amount is rendered moot.

## Decision - Appropriateness

While we have dismissed the Ministry request for a hard cap, it is incumbent upon us to address appropriateness – a real issue and a shared concern and one falling squarely within our responsibility to ensure a patient-centred sustainable publicly funded health care system. There is no shortage of guidance: for example, the *2017 Choosing Widely Recommendations*. The fact is that it is entirely within the purview of the Ministry to delist inappropriate and medically unnecessary services. There is an accountability framework providing a mechanism for audit and recovery of unauthorized payments for medically unnecessary services (Physician Payment Review Board) and to the extent it, and other audit mechanisms, require modernization and streamlining, that is a matter that is the immediate responsibility of government and it is one

that needs to be promptly addressed – by government in consultation with the stakeholders. To give just one example, there is evidence that less than 4% - 441 – of Ontario's 11,448 family doctors are responsible for ordering nearly 40% of tests considered low value. Surely, this is a matter worth investigating and, to the extent that the testing is inappropriate, correcting through peer review, audit and enforcement. We cannot state this strongly enough.

Indisputably, and the parties agree about this, it is their shared responsibility to ensure not just quality of care, but the right care at the right time in the right place by the right provider. *Choosing Wisely Canada* and the *CIHI – The Canadian Institute of Health Information* – together estimate that as much as 30% of medical services in Canada are unnecessary and inappropriate. There is self-evidently a real opportunity to achieve significant changes while remaining faithful to the mission. We have heard submissions from both parties on the amount of changes and the process they each propose for identifying where those changes might be found. Having regard to their respective submissions, we have determined that the parties are to establish a joint committee, to be referred to as the Appropriateness Working Group (AWG) with the following parameters:

## AWG

**(1) For contract year 19/20, a committee of the MOHLTC and OMA will be established to discuss and establish evidence informed amendments to payments by eliminating or restricting inappropriate or overused physician services, or physician payments.**

**For purposes of the 19/20 contract year, the committee will endeavor to achieve a settlement by May 1, 2019 with changes totaling $100 million for the period of June 1, 2019 to March 31,**

**2020. If no settlement is achieved, this Board of Arbitration shall remain seized, and will hold hearings with an award by June 1, 2019 that will identify the changes totaling $100 million.**

**If the committee is able to achieve a settlement with changes totaling greater than $100 million in 19/20, the additional amount in excess of the $100 million shall be counted towards the 20/21 savings achievement outlined in paragraph 2 below.**

**(2) For contract year 20/21, the committee will endeavor to achieve a settlement by September 30, 2019 on changes totaling a further $360 million for the period of April 1, 2020 to March 31, 2021. If no settlement is achieved, this Board of Arbitration shall remain seized, and will hold hearings with an award by January 1, 2020 that will identify the changes totaling a further $360 million.**

Furthermore, based on the submissions of the parties, and their narrowing of the differences between them in mediation to which the Chair of this Board was a party, the details and process for the committee forms part of and is attached as an Appendix to this award.

## Redress – The OMA Position

Certainly the most contentious outstanding issue to come before us – and one that has, for years, negatively impacted the relationship between the parties – is the matter of redress.

Some historical context is important. In brief, and discussed further below, the last increase to physician compensation occurred in 2011. In 2012, a Physician Services Agreement (hereafter "the 2012 PSA Settlement") was reached. It was both negotiated and ratified by the parties. It reflected economic restraint, including an agreed-upon 0.5% across-the-board fee reduction**,** and provided for recognition of the OMA as the exclusive bargaining representative of Ontario physicians: *The OMA Representation Rights and Joint Negotiation and Dispute Resolution*

*Agreement*. It also contained a future dispute resolution mechanism but one that nevertheless allowed unilateral government action if there was an impasse following facilitation and conciliation. That is what happened when bargaining for a new PSA began in January 2014 and could not be successfully concluded.

In brief, the parties could not resolve their differences and following facilitation (Dr. David Naylor) and conciliation (The Hon. Warren Winkler), the Ministry, in 2015, imposed unilateral cuts that can be generally described as follows: 3.95% on fee for service, and 2.65% on non-fee for service. It is the reversal of these cuts that the OMA describes as redress (together with the 0.5% reduction agreed to in the 2012 PSA Settlement). The redress being sought is for all of these amounts, described as "across-the board payment discounts", as well as certain targeted fee and program cuts. The OMA estimates that these cuts, taken together, total more than $700 million annually – direct reductions in physician incomes.

The OMA observes – and details about broader sector collective bargaining outcomes were referred to – that, while other publicly funded groups faced wage restraint in and after 2009, the depth and continuing impact of the Ministry's unilateral cuts, in marked contrast, continue to this day to adversely affect physician income. Moreover, the OMA points out that, while Ontario doctors continue to be subjected to these unilaterally imposed cuts, physicians in other provinces have without exception received some form of compensation increase. It was important to remember, the OMA argued, that while some increases were received in 2004 and

2008, they were not, as the Ministry described them, “exceptional and extraordinary” but the response to market forces and other factors following years of cost containment and restraint.

From the perspective of the OMA, and to quote its words, these cuts are “stolen money” as they were unilaterally imposed by the Ministry in the absence of any fair and independent process for resolving physician compensation disputes. In general, the OMA seeks that the across the board payment discounts be ended effective April 1, 2017 by the restoration of the cut amounts effective the commencement date of the PSA settled by this award, and that the value of the targeted and program cuts be returned to each speciality, also effective April 1, 2017, for allocation – the OMA has detailed proposals on point – subject to the agreement of the Ministry, or determination by the arbitration board. Other program cuts requiring redress include resumption of Managed Entry into FHOs– 80 Physicians per month in 2018-2019 and 40 per month in subsequent years, reintroduction of Income Stabilization – to align with Managed Entry, increased payment of the Acuity Modifier and removal of the moratorium on Hospital On-Call Coverage (HOCC), and other changes.

## The OMA – Fee Increases

In terms of fee increases namely, across the board payments, the OMA seeks 1.4% annually for all fee for service and non-fee for service payments for the for the three-year period 2014-2015 to 2016-2017 (i.e. for the period prior to the commencement of the PSA settled by this award, on the basis that there were no normative increases given in those years), for a total of 4.2% (4.26 % compounded) effective April 1, 2017, and then 2.6% in each year of the four years of

the term of the PSA settled by this award. These amounts, the OMA argued, were justified in recognition of no actual increase since 2011 and by reference to comparators, increasing practice costs including rising overhead (as much as 30% of income), positive economic conditions and projections, including losses suffered by inflation between 2015-2017 and other factors detailed in the OMA submissions.

## Redress – The Ministry Position

The Ministry categorically rejected the OMA case for redress. Its review of the negotiation history between the parties – detailed at length and in great detail in its submissions – led it to conclude, and urge upon the arbitration board, the conclusion that there was no "stolen money," and no legitimate claim for redress. At various points over the course of a long relationship between the parties, increases have been implemented; and at other times, there has been economic restraint. What was new, in the Ministry's submission following its chronological review, was any claim for redress following cost containment.

The truth of the matter was, in the Ministry's estimation, that the rollbacks were justified after years of extraordinary increases (including over the 2008 recession when elsewhere in the broader public sector virtually every other group of publicly funded employees were affected by significant wage restraint). Rebalancing through measured adjustments to reflect economic reality did not create a case for redress. There was no absence of due process; the agreed-upon process was followed. By any measure physician compensation in Ontario was generous; the

rates competitive. There was no case for catch-up and no legitimacy whatsoever in the claim for redress.

Indeed, after years of increases, up to and including in 2011, rebalancing was necessary as physician incomes had accelerated, galloped really, at an excessive, indeed far from normative pace. In the meantime, the negotiation process was the one that the parties had agreed upon in the 2012 PSA Settlement. The OMA may not like the facilitation and conciliation recommendations – but they arose out of a process that it had agreed to and it was one in which the OMA was represented by experienced counsel and one, in the circumstances, that could not, therefore, be fairly described as unilaterally imposed. No other group, the Ministry pointed out, received payments to recover "lost earnings" during wage restraint. The Ministry strongly urged the arbitration board to reject the OMA redress request.

## The Ministry – Fee Increases

Insofar as normative increases were concerned, the Ministry proposed 1% annual increases in years two, three and four of the PSA, with the exception of Cardiology, Radiology and Ophthalmology (where it is seeking certain fee reductions). Limited increases of this nature were justified, the Ministry argued, when Ontario physician income was compared with physician income in other provinces (Ontario doctors are paid more; Alberta doctors, for example, have recently agreed to a reopener with rollbacks), and when considered alongside other Ontario public sector and broader public sector settlements, not to mention income outcomes when measured against the Consumer Price Index and the Industrial Aggregate Index,

to name just two. It was also necessary, the Ministry argued, to bear in mind that the Ministry provided Ontario doctors with significant income supports, benefits and subsidies, including for example, CMPA membership fees. There was, moreover, no recruitment or retention issue: Ontario was the number one choice for residency, both by doctors trained in the province and those who received their training outside of it. The Ministry rejected the OMA assertion of a 30% overhead cost – this figure was the result of small sample size and flawed survey methodology. Survey participants clearly understood that their self-interest would be maximized by overstating their overhead and thereby understating income. The actual number, the Ministry suggested, was closer to 20% and did not, in any event, support the OMA's monetary demands.

## Decision – Redress and Fee Increases

## Redress

The OMA asserts that the 2012 PSA Settlement, which contained an agreed-upon .5% discount on all physician payments was never intended to be permanent. However, in our view, this negotiated outcome cannot properly be included in any redress claim as it was voluntarily agreed upon. If the parties had wished to sunset it, they could have easily done so, and it is factually and legally significant that they did not.

The Ministry observes that no other group has received redress or catch-up for lost earnings, and we agree that it would not be proper to award amounts in lieu of what might have been negotiated but for wage restraint and unilateral Ministry action. Accordingly, we reject the

OMA claims for compensation for periods prior to the commencement of the PSA settled by this award. However, we do accept the case for redress. Some further discussion is in order.

If fee reductions were temporary and then restored, there would be no case for redress (and this has happened in the past). The difference here, however, is that the Ministry actually reduced existing compensation, as is indicated on physician billing statements, and has continued to do so for years. Doctors did not have their incomes frozen, but uniquely were the only group to have their compensation cut, and these cuts continue. The billing rates remain the same, but a deduction is imposed. This is not wage restraint normally given expression in a freeze, and while it is not fairly described as "stolen money" it is confiscatory absent agreement, and the facilitation and conciliation process, undoubtedly conducted in good faith, was followed by unilateral action. Absent a binding and independent process for the adjudication of differences – as found in the BAF that governs here – it simply cannot be said that unilateral action taken after a failed conciliation is fair. It cannot constitute agreement.

## Fee Increases

From the Ministry perspective, compensation paid to Ontario doctors was fair, generous and competitive. The OMA disagrees pointing out that there has been a net decline in earnings when the comparators were examined, and a strong case for major increases made when the usual interest arbitration criteria and economic and labour relations indicators were applied (as set out in detail in its brief and reply brief). In addition, the OMA takes the position that the Ministry vastly underestimated overhead costs, while seeking credit for contributions, for

example, to malpractice insurance was completely inappropriate as that was a widely accepted feature across the country of physician compensation.

As noted above, the Ministry proposed 1% for some, but not all, doctors in years two, three and four, with targeted decreases in fees for certain specialists, while the OMA proposed a compounded 4.2% upon commencement of the PSA and 2.6% each year without any restrictions thereafter (along with various other economic improvements), and no targeted fee cuts.

We cannot accept either proposal. Ontario doctors have had their compensation frozen, while their counterparts in other jurisdictions have seen increases. Nevertheless, there is no case to be made for the extraordinary increases the OMA proposes, especially when a total compensation approach is adopted and account is taken of awarded redress. Across the board increases must, under the BAF, be fair and reasonable, and in our view, this can be achieved with an award that is partially reflective of sectoral outcomes during the term of the PSA, but also reflective of other aspects of this award, both in terms of proposals for redress that have been awarded and proposals of the Ministry to moderate increases.

(Parenthetically, the matter of overhead costs is of concern given the delta between the Ministry and OMA estimates. On the one hand, the Ministry's methodology raises concerns, but there are also flaws in the results relied on by the OMA (they are largely self-reported and some of the underlying assumptions raise more question than answers among other issues). We

believe that the parties must jointly collaboratively and comprehensively address this issue prior to their next PSA. An objective and professional study could actually determine what overhead costs were in different practice models and specialities.)

Accordingly, we award across the board increases and redress as follows:

**(1) Effective April 1, 2017**

**For the 17/18 contract year, a 0.75% compensation adjustment to physician payments set out in Section 21(a) of the Binding Arbitration Framework (BAF), For greater clarity, this shall include all payments set out in Appendix A of the BAF, but will exclude OPIP. For further clarity, these increases will apply to office based technical fees and facility fees, but not to hospital technical fees.**

**(2) Effective April 1, 2018**

**For the 18/19 contract year, a 1.25% compensation adjustment to physician payments set out in Section 21(a) of the BAF. For greater clarity, this shall include all payments set out in Appendix A of the BAF, but will exclude OPIP. For further clarity, these increases will apply to office based technical fees and facility fees, but not to hospital technical fees.**

**(3) Effective April 1, 2019**

**For the 19/20 contract year, a 1.0% compensation adjustment to physician payments set out in Section 21(a) of the BAF. For greater clarity, this shall include Appendix A of the BAF, but will exclude OPIP. For further clarity, these increases will apply to office based technical fees and facility fees, but not to hospital technical fees.**

**A portion of this adjustment will be applied to remove the 0.5% payment discount under the 2012 PSA, and will not be subject to distribution or allocation under Phase 2.**

**In addition, the 2.65% for non-fee for service and 3.95% for fee-for service 2015 payment discounts will be removed (the "redress compensation adjustment"). These adjustments will also not be subject to distribution or allocation under Phase 2.**

**(4) Effective April 1, 2020**

**For the 20/21 contract year, a 1.0% compensation adjustment to physician payments set out in Section 21(a) of the BAF. For greater clarity, this shall include all payments set out in Appendix A of the BAF, but will exclude OPIP. For further clarity, these increases will apply to office based technical fees and facility fees, but not to hospital technical fees.**

Except as specifically noted above, the distribution of the fee increases we have awarded is subject to relativity adjustments. The parties have agreed that in years one and two the PSA settled by this award that this distribution is governed by the terms of the parties' interim relativity agreement. The board remains seized in respect of years three and four should the parties be unable to agree, and this matter can proceed in the next phase of these proceedings.

## Other Compensation Matters

While we have concluded that there should be redress, as set out above, for the across-the-board payment discounts applied to both the fee for service and the non-fee for service payments, we have decided not to order the reversal or amelioration of any of the earlier targeted cuts directed to certain fees and schedules. We have also rejected the Ministry's proposals for targeted fee reductions aimed at radiology, ophthalmology and cardiology and the OMA's incorporation redress proposal. In our view, our focus in ordering redress for the unilateral across the board fee reductions, together with the compensation adjustments that we have ordered, reflects an appropriate overall outcome for the 2017-21 PSA.

Finally, as the parties move on to now resolving the relativity issues between them in terms of the normative increase we have awarded, we believe it is appropriate for us to indicate that, at this time, we would not be inclined as a board of arbitration to direct that the fees or compensation paid to some groups should be reduced, in order to increase the fees or compensation paid to other groups, whether on relativity grounds or otherwise. Rather, at this stage of the parties' relationship, and subject to being persuaded otherwise, given the history over the past several years, we do not believe that this is a time for any further reductions to physician compensation. To be clear, we are not precluding the parties from making submissions on this issue if they wish to do so.

## Primary Care

The MOHLTC believes that the FHO model is broken and requires immediate substantial change. The OMA, acknowledging the need for some change, made its proposals contingent on further increasing the number of FHO physicians through Managed Entry (together with income stabilization) and proposed that the parties jointly examine the need for any additional modifications.

There is, in our view, a clear and immediate need for greater patient access to their FHO physician. There are approximately 11 million people in the province currently rostered in comprehensive payment models of which the FHOs are front and center. At the same time, the Ministry has raised serious and far-reaching access issues, and while capitation is intended to pay for primary patient care, alternatives such as walk-in clinics, and FHO physician

unavailability, challenge the system and its sustainability. Capitation is intended to pay for primary patient care, so that inappropriate use of alternatives such as walk-in clinics, or any failure of FHO physicians to provide sufficient access, threaten to undermine the principled basis upon which the entire foundation rests. To elaborate: under the FHO model, a FHO physician receives a capitation amount for the care of a FHO patient. What that means is that FHOs, adjusted for size and population, must provide ready access, and not just during regular working hours. Moreover, the evidence establishes that many FHO rostered patients, for whatever reason, obtain health care from walk-in clinics; health care that is, in the result, publicly paid for twice (and there is no communication between the clinic and the FHO aggravating an already intolerable situation). In our view, this cannot continue as a feature of a publicly funded sustainable health care system

However, at this time, we are not prepared to award any of the OMA or Ministry primary care proposals. Considerable progress toward change, including improved access for residents of Ontario, was achieved during the mediation phase of the proceedings. We are all of the view, however, that a further process of focused discussions could, and would, prove productive. Members of the arbitration board would be willing, if requested, to facilitate or mediate these discussions.

Accordingly, we award the following:

**Multi-Stakeholder Primary Care Working Group**

**The parties will establish a Multi-Stakeholder Primary Care Working Group, reporting to the PSC, and composed of an equal number of OMA and MOHLTC members. The PSC may also appoint stakeholder representatives to the Committee.**

**The Working Group will examine into and make recommendations regarding access and quality issues, walk-in clinics, complexity modifiers for both capitated and non-capitated practices, and such other issues as either party identified during bargaining or as they may agree to address.**

**The Working Group will endeavour to make recommendations to PSC by July 1, 2020. Where both parties agree, they may request the Chair or the board's ongoing assistance.**

## Academic Health Sciences Centre and NOSM Proposals

The innovation fund under the AHSC AFP will be increased by an additional 7.5 million dollars effective April 1, 2019, and by a further 2.5 million dollars effective April 1, 2020 (for a total increase of 10 million dollars).

The compensation adjustments to the NOSM and AHSC AFPs flowing from Section 2 above will increase the existing NOSM and AHSC funding, and will not be subject to distribution or allocation under Phase 2.

In addition, the parties are directed to continue discussions regarding the other aspects of the OMA's NOSM and AHSC proposals, in particular for rightsizing and repair.

Where consensus cannot be reached on AHSC or NOSM issues, either party may trigger further mediation with the assistance of the board or the Chair.

## Technical Fees Proposals

The parties are also directed to continue discussions regarding the OMA's additional technical fees proposals.

Where consensus cannot be reached on technical fees issues, either party may trigger further mediation with the assistance of the board or the Chair.

It is our hope that discussion, mediation and fact-finding during this mediation process will set the stage for efficient and productive future processes.

## Conclusion

At the request of the parties, we remain seized with respect to the implementation of this award. Finally, we are releasing this award to counsel on February 18, but in order for counsel to review it and advise their respective clients, we are directing that this award be embargoed and not be made public until 4 pm on February 19, 2019.

Dated at Toronto this 18th day of February 2019.

*"William Kaplan"*

William Kaplan, Chair

*"Dr. Kevin Smith"*

Dr. Kevin Smith, Ministry Nominee

*"Ron Pink"*

Ron Pink, QC, OMA Nominee

**APPENDIX - APPROPRIATENESS WORKING GROUP (AWG) AND PROCESS**

1. The parties will establish a joint Appropriateness Working Group (AWG) composed of:

   (a) Four (4) representatives from the Ministry of Health; and

   (b) Four (4) representatives from the OMA.

   The AWG will be co-chaired, with each of the Ministry and OMA selecting one of their respective members to act in this position (the Co-Chairs).

2. The purpose of the AWG is to promote the parties' shared commitment to the use of evidence and best practices, in order to improve the quality of patient care by reducing the provision of medically unnecessary or inappropriate medical services without compromising patient access to medically necessary services.

3. In determining whether a service is medically unnecessary or inappropriate, the AWG will be guided by the best available evidence. This could include Health Quality Ontario reports and recommendations, Health Technology Assessments, peer reviewed literature, Choosing Wisely Canada recommendations, consultations with both physicians and experts in the field being examined, any provincial, national or international guidelines for high quality patient care, clinical care standards and principles of professional practice.

4. In carrying out its mandate, the AWG will initially focus on, but not be limited to, the Ministry appropriateness proposals, tabled during the 2017-18 negotiations and mediation process.

5. The Ministry or the OMA may identify additional proposals for appropriateness changes, aimed at identifying medically unnecessary or inappropriate provision of services which are unrelated to meeting clinical needs.

6. The AWG may, in carrying out its mandate, consult with such additional outside parties, organizations and expert panels on an ad hoc basis as the committee considers helpful. The AWG will also consult relevant OMA sections impacted by the proposals under consideration.

7. The AWG will seek to reach agreement on reducing the provision of medically unnecessary or inappropriate services through payment rule changes (including modifying or specifying the indications for treatment), de-listing of a service and/or other rule changes as are responsive to the determination of appropriateness/inappropriateness, and/or through physician peer comparisons/review and physician/patient education. This may also include mechanisms for operationalizing recommendations regarding appropriateness/inappropriateness. However, there is no

scope for the AWG or the arbitration board to set, change or reduce fees for the provision of individual services.

8. The parties will determine the value of the changes arising from the process set out in paragraph 7, which will be deemed to be equal to the difference between the amount paid for the service in the prior fiscal year under the previous payment coverage/rule, and what would have been paid had the revised payment coverage/rule been in effect in that prior fiscal year. By way of example, if a rule change is made, the total value of the change will be equal to the amount that would have been paid for the service in the prior fiscal year had the payment rule change been in effect. If a service is delisted, the total value of the change will be equal to the amount paid for the service in the prior fiscal year. For peer review/comparison and educational changes, the parties will use best efforts to determine the value of the expected changes in the provision of medically unnecessary/inappropriate services. In any case, failure to reach agreement on the value of any changes as determined in accordance with this paragraph will be determined by the board of arbitration. The parties will work together to implement processes in an effort to achieve the expected outcomes.

9. For purposes of the 19/20 contract year, the committee will endeavor to achieve a settlement by May 1, 2019 on the matters set out in paragraph 7 and 8 totaling $ 100M for the period of June 1, 2019 to March 31, 2020. If no settlement is achieved, the Kaplan Board of Arbitration shall remain seized, and will hold hearings with an award by June 1, 2019 that will identify the changes totaling $ 100 million.

10. For the purposes of the 20/21 contract year, the committee will endeavor to achieve a settlement by September 30, 2019 on the matters set out in paragraphs 7 and 8 totaling a further $360 million for the period of April 1, 2020 to March 31, 2021. If no settlement is achieved, the Kaplan Board of Arbitration shall remain seized, and will hold hearings with an award by January 1, 2020 that will identify the changes totaling a further $ 360M.

11. For further clarity, the totals to be achieved as a result of paragraph 9 and 10 above are $480 million.

12. It is understood that if changes of more $100 million are agreed to/awarded in 19/20, the 20/21 amount will be reduced by the excess.

13. In making its determination under paragraphs 9 and 10, the Board of Arbitration may not order that services be delisted absent agreement. Where the parties agreed to delisting changes, the value of those changes determined in accordance with paragraph 8 will be included in the annual total.

14. In the course of its deliberations, the AWG may refer specific appropriateness proposals to an Expert Panel for review. This would involve convening an expert group to provide recommendations, based on appraisals of the evidence, and will typically occur when

the AWG cannot come to a consensus. The AWG will then consider the information/recommendation(s).

15. Any dispute with respect to procedural issues relating to the operation of the AWG, or an Expert Panel, including timelines, will be determined by the chair of the Board of Arbitration.

16. The parties will fund their appointed members of the AWG and provide necessary secretariat support.

# TAB 2

**IN THE MATTER OF AN INTEREST ARBITRATION**

**Between:**

**The Crown in Right of Ontario**

**(Treasury Board)**

**and**

**The Ontario Secondary School Teachers' Federation**

**and**

**The Elementary Teachers' Federation of Ontario**



| | |
|---|---|
| **Before:** | William Kaplan, Chair<br>Bob Bass, Crown Nominee<br>David Wright, OSSTF & ETFO Nominee |
| **Appearances** | |
| **For the Crown:** | Sunil Kapur<br>Kate McNeill-Keller<br>Jessical Wuergler<br>Aya Schechner<br>McCarthy Tetrault<br>Barristers & Solicitors |
| **For OSSTF:** | Susan Ursel<br>Karen Ensslen<br>Emily Home<br>Ursel Phillips<br>Barristers & Solicitors |
| **For ETFO:** | Howard Goldblatt<br>Colleen Bauman<br>Goldblatt Partners<br>Barristers & Solicitors |

The matters in dispute proceeded to a hearing held in Toronto on January 16, 2024. The Board met in Executive Session on January 19, 2024.

**Background**

On November 7, 2019, Bill 124, *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, received Royal Assent. Bill 124 introduced a three-year moderation period during which annual compensation increases were limited to 1%. Both the Ontario Secondary School Teachers' Federation (OSSTF) and the Elementary Teachers' Federation of Ontario (ETFO) were impacted by the legislation and their three-year collective agreements – September 1, 2019, to August 31, 2022 – were subject to its terms (the Moderated Collective Agreements). Both OSSTF and ETFO initiated constitutional challenges. On November 29, 2022, Mr. Justice Markus Koehnen of the Ontario Superior Court declared Bill 124 contrary to section 2(d) of the *Charter of Rights and Freedoms* and not justified under Section 1. The judgment of the court deferred remedy to a further hearing. An appeal was filed and heard in June 2023. It remains under reserve. However, as no stay was sought, Bill 124 is of no force and effect.

This interest arbitration arises out of settlements reached between the parties – the Crown in Right of Ontario and OSSTF and the Crown in Right of Ontario and ETFO – resolving the remedy portion of litigation, the litigation brought by each federation, and several individual applicants, challenging the constitutionality of Bill 124 (the Remedy MOS's). Under the Remedy MOS's (and one is applicable to OSSTF and two to ETFO), the parties agreed on the amount of compensation increases for the first two years of their Moderated Collective Agreements – which otherwise remained unchanged – but referred the quantum for the third year (Year 3) – September 1, 2021, to August 31, 2022 – to interest arbitration with set parameters: it could not be below 1.5% or above 3.25% (in addition to the 1% previously prescribed under Bill 124).

Accordingly, the sole issue before us is the determination of the amount within this agreed-upon range.

The parties agreed that in determining this sole outstanding issue, the Board could take into consideration any factors that it considered relevant, including the criteria set out in section 38 of the *School Boards Collective Bargaining Act* (SBCBA) set out below. Detailed briefs and reply briefs were filed, and the single issue proceeded to a hearing in Toronto on January 16, 2024. The Board met in Executive Session on January 19, 2024.



**Legislative Framework**

By and large, labour relations in the education sector have, since 2014, been governed by SBCBA (with some limited application of the *Labour Relations Act* (LRA)). Under SBCBA, collective bargaining is two-tiered: central bargaining at the central table with the participation of the Crown, and local bargaining at local tables between various unions, including OSSTF and ETFO, and individual school boards.

**The Parties**

**The Crown**

The Crown in Right of Ontario (Crown), represented in these proceedings by the President of the Treasury Board, is not the employer. However, it funds the public education system and participates in central bargaining with OSSTF and ETFO by negotiating all central terms, including compensation. The school board employers – represented by the Ontario Public School Boards' Association (OPSBA) for teachers and occasional teachers and the Council of Trustees

Association (CTA) for education worker bargaining units – did not participate in these proceedings as they were not parties to the Bill 124 litigation and are not parties to the Remedy MOS's.



**OSSTF**

OSSTF represents secondary school teachers and occasional teachers employed by Ontario's public district school boards. It also represents education workers, including educational assistants, who often work with students with special education needs (EAs), early childhood educators (ECEs), professional student services personnel – psychologists, social workers, speech language pathologists – office, technical and clerical staff, custodial, maintenance, plant support personnel, continuing education teachers and instructors, and noon hour assistants.

**ETFO**

ETFO – the largest teaching federation in Canada – represents elementary teachers/occasional teachers and education workers, such as EAs, Early Childhood Educators (ECEs), Educational Support Personnel (ESPs), and Professional Support Personnel (PSPs).

**OSSTF Submissions**

In the OSSTF's submission, an additional 3.25% should be awarded for six reasons:

1. Teacher and education worker wages have been significantly eroded by inflation and below-market wage increases, a situation contributed to and exacerbated by Bill 124, which limited compensation to 1%, and substantially interfered with free collective bargaining, and deprived the OSSTF of its right to strike. Bill 124 compounded earlier

unconstitutional legislation – Bill 115: *Putting Students First Act* – which, among other things, imposed a two-year wage freeze.

2. There was a true recruitment and retention crisis in public education with demand for teachers far outstripping supply. This crisis, and that is what it was, showed no sign of abating. The problem was real, and worsening, with school boards across the province left with no option other than to hire unqualified staff to fill pressing vacancies.
3. Economic and labour market conditions were positive and supported a general improvement in wages.
4. Ontario's fiscal outlook was strong. Budgetary deficits did not reflect an inability to pay (and inability to pay was not raised by the Crown). In fact, Ontario's debt to GDP ratio was improving and debt service cost to revenues was favourable and also improving. There were many other positive economic indicators, meaning no economic impediment to awarding an additional 3.25%.
5. Replication of free collective bargaining and awarded settlements justified the full 3.25% increase. The fact of the matter was that freely negotiated settlement and interest arbitration awards – especially in the Bill 124 re-opener context – established a normative range of between 3 and 3.75% over and above the original 1% in the Moderated Collective Agreements.
6. A 3.25% initial increase in Year 3 would compensate OSSTF and its members for working conditions that could not be bargained because of the imposition of unconstitutional legislation.

Each of these arguments was expanded upon by OSSTF in its brief, and at the hearing.

**Inflation**

OSSTF pointed out that teacher, occasional teacher, and education worker wages have been significantly eroded by inflation over the past decade: falling 17.5% behind from 2012 to 2022. This was especially problematic in Year 3, when OSSTF members received 1% when inflation soared to 6.8%. Even if the full 3.25% were awarded, OSSTF members would still lag inflation on a compound cumulative basis. Consideration of this issue alone, the OSSTF argued, fully justified awarding the full 3.25%.

That conclusion was reinforced when actual teacher, occasional teacher and education worker compensation was carefully examined. While approximately 77% of Ontario teachers were at the highest level of their respective salary grid, a sizeable number were at or near the bottom. Many occasional teachers were denied the suite of benefits full-time teachers enjoyed and were paid at the lowest category on the permanent teacher grid.

The situation was even worse for education workers, most of whom were only employed for ten months of the year, with recurring summer layoffs. A large proportion of these education workers met the definition of low wage employees, earning less than $30 an hour. For ten-month employees, that meant annual incomes below $46,000 (far below the average Ontario income). But this notional annual income was, in many respects, misleading. Many of the education workers were working in part-time or casual positions and earned nothing close to that annualized amount. Their employment was precarious. Notably, women were over-represented in the education worker group.

**Recruitment and Retention**

Also justifying the full 3.25% increase in the OSSTF submission was recruitment and retention. School boards across the province were struggling to find qualified individuals to fill teacher, occasional teacher and education worker positions, a situation that could only be described, in the OSSTF's view, as a crisis. According to the Ontario College of Teachers (College), there was a general teacher shortage with demand far outstripping supply and no relief expected any time soon. The occasional teacher supply was also dire; it had reached problematic lows. This led the government in 2021 to introduce a temporary certificate program as an emergency measure, allowing thousands of Ontario teacher candidates to be hired on daily occasional rosters and for short-term teaching contracts (a measure made necessary by the anticipated shortfall of 7000 occasional teachers across the province). Notably, this temporary measure has been renewed every year since, reflecting the depth of the recruitment and retention crisis.

Another measure – also renewed – and reflecting the growing gap between supply and demand, was the government's decision to increase the number of days that retired teachers were permitted to work while still receiving their pension. Likewise, Letters of Permission – allowing unqualified individuals to teach in Ontario schools – were on the upswing, as the data which the OSSTF pointed to clearly established. Other data, from the College and from the Ontario Teachers' Pension Plan, demonstrated that large numbers of qualified teachers were leaving the public education system early. Notably, there were some 37,000 teaching certificate holders in Ontario who were not employed in public education. Undoubtedly, OSSTF argued, there were many reasons for this, but inadequate compensation was surely at the top of the list. Recruitment and retention of EAs and ECEs was especially problematic, and the OSSTF reviewed the data on

point. In the OSSTF's submission, recruitment and retention were among the most important factors to be considered in determining compensation. Demand far exceeded supply and application of well-accepted principles directed that this key fact inform the arbitration award amount. For all these reasons, and others, OSSTF urged that the full 3.25% be awarded.

**Economic Conditions**

Another reason, the OSSTF argued, in favour of awarding 3.25% was the state of the Ontario economy: it was strong in 2022 and has remained so since with real economic growth, reflected, for example, by falling unemployment rolls which, in turn, led to a measurable increase in wages, except for teachers, occasional teachers and education workers. Ontario's credit rating was positive, interest on debt as a share of revenue was decreasing, the debt-to-GDP ratio illustrated fiscal health and the sustainability of government finances (also demonstrated by $2 billion over four years in direct education transfers to families). All in all, a robust recovery has been underway since 2022. Notably, the OSSTF emphasized, at no point did the government assert that there was an inability to pay; the Crown's proposal reflected an unwillingness to pay justified wage increases.

**The Impact of Unconstitutional Legislation**

Finally, the OSSTF made some submissions about the need to address Bill 124's impact on bargaining: it precluded the OSSTF from pursuing its many legitimate bargaining proposals including job security, class size, improved hiring processes, addressing workplace violence, and benefit improvements. Instead, teachers, occasional teachers and other education workers fell behind inflation while left to grapple with increased class sizes, all the while working under

stressful and challenging conditions of the pandemic. There had been a constitutional breach, and there was, therefore, an entitlement to a constitutional remedy. In fact, there was no dispute about that: the parties in the Remedy MOS's said as much and then went on to identify that remedy – an across-the-board increase – but leaving to the Board the responsibility for determining the amount.



**Application of the Criteria**

The Remedy MOS's were clear: in determining the appropriate result for Year 3, the Board was, the OSSTF argued, to consider any factor it considered relevant, together with the statutory SBCBA criteria (below). Of all the governing criteria, replication was perhaps the most important: to replicate the results that the parties would have reached had they freely negotiated their collective agreements. What would have happened if Bill 124 had not unconstitutionally prevented the parties from bargaining and reaching a collective agreement? This question could be answered by asking another one: What did free collective bargaining results and interest arbitration awards indicate? Re-opener after re-opener award convincingly demonstrated – and the relevant awards were canvassed in the OSSTF brief and at the hearing – that for the period in question, additional across-the-board increases – over and above the prescribed 1% – ranged from 3% to 3.75%. These awards were ubiquitous (and often contained other economic improvements beyond across-the-board increases).

Arbitrators, the OSSTF pointed out – and quoting from awards which were characterized as governing – reached these compensation results for numerous reasons. Addressing inflation clearly played a large part, but so too did recruitment and retention. Both were factors present

here. And both inflation and recruitment and retention led to one conclusion: the award of an additional 3.25%. The OSSTF concluded by asking that the Board award an additional 3.25%.



**ETFO Submissions**

**The Context**

This interest arbitration, ETFO observed, did not occur in a vacuum. There was a context that needed to be considered, and it included Bill 124, imposing an unconstitutional outcome on collective bargaining. ETFO served notice to bargain in June 2019. Bargaining priorities included negotiating additional special education supports and achieving real increases in all forms of compensation for all members, reduction of class sizes, reforming occasional teacher hiring practices and addressing pressing health and safety challenges, particularly classroom violence, among a number of other key demands.

To be sure, OPSBA and CTA also had bargaining priorities (described by ETFO as concessions). Neither party could, however, engage in free collective bargaining because the government introduced and then proclaimed Bill 124, imposing the three-year moderation period and limiting compensation in each of the three years to 1%. At the same time, as bargaining progressed through the fall of 2019 and into early 2020, ETFO was told that the government bargaining team had no authority to negotiate some of its non-monetary proposals, for example, those addressing classroom violence.

The declaration of the pandemic in early March 2020 was another important part of the overall context. It created unprecedented challenges for educators, students, and the education system as

a whole. When schools were closed, and when they were open, ETFO members quickly pivoted to ensure that students could continue to learn – for example, they moved to distance learning modes when the schools were shut down and they ensured that health and safety guidelines were followed when schools were reopened. The objective was straightforward: putting the interests of students first so that public education continued with as little disruption as possible, notwithstanding the enormous increases in workload that followed.



Bargaining ended on March 20, 2020, when tentative collective agreements were reached. The Moderated Collective Agreements made it crystal clear that they were reached without prejudice to ETFO's rights to challenge the provisions of Bill 124 and to seek an appropriate remedy in the event the challenge was successful, which it was on November 29, 2022, when Bill 124 was struck down. The Moderated Collective Agreements explicitly provided for ETFO's right to pursue remedies if Bill 124 was ruled unconstitutional, which it was, leading to the Remedy MOS's and this proceeding.

**Criteria**

The Remedy MOS's directed the Board to take into account any factor it considered relevant, along with the statutory criteria set out in the SBCBA (below). In ETFO's view, replication, the economy and inflation, and recruitment and retention were of particular relevance to this proceeding. ETFO pointed out that the government had not argued any inability to pay, and the reason for that was obvious: Ontario was and remains in an excellent fiscal situation and there was no question as to its ability to fully fund an additional 3.25% increase.

**Replication**

The overarching goal of interest arbitration, ETFO observed, was to replicate free collective bargaining. In doing so, it was now well established that boards of interest arbitration must examine all relevant information from all sectors, not just information that was available at some specific point in time, such as when negotiations were underway or an agreement reached. This approach was not only now normative, it was necessary as there were no directly applicable bargaining patterns or re-opener awards for teacher and education bargaining units to refer to. Various authorities setting out these principles were canvassed by ETFO in its brief and at the hearing.

**The Economy and Inflation**

The economic situation in Ontario was both important and relevant. Economic conditions in 2021-2022 were not, ETFO observed, a matter of prediction – as they would have been had bargaining not been fettered by unconstitutional legislation (assuming for the sake of argument it had been completed in a timely way, which was not the norm for bargaining in this sector). In any event, the prevailing economic circumstances in Year 3 could now be identified with precision. On the one hand, in Year 3, the provincial fiscal situation was excellent, employment was up, all the generally relied upon economic indicators were good, while on the other, inflation was ravaging employee pay (and the particulars of these submissions mirrored in many respects those advanced by OSSTF).

Inflation – especially on non-discretionary essentials – had, and continues to have, a real impact on employees, particularly those who are less well paid. ETFO estimated that coming out of the

Moderated Collective Agreements, real wages for teachers and occasional teachers were effectively cut by 15.6%, and for education workers by 13.8%. Even if the maximum 3.25% was awarded, wages would still trail inflation and not come close to remedying the losses suffered by ETFO members over the past decade. In these circumstances – namely, a robust economy, not a recession, positive economic indicators and a compelling and established need to address inflation –the full 3.25% should be awarded (an outcome that was also completely consistent with the weight of Bill 124 re-opener awards, which ETFO reviewed in detail).



**Recruitment and Retention**

Recruitment and retention were among the statutory criteria to be considered, and when the evidence was objectively assessed it convincingly established that there were growing shortages of teachers, occasional teachers and education workers (and here too, ETFO's submissions and data mirrored that found in the OSSTF submissions). The number of new teachers was plummeting and enrolment in teacher colleges was declining. At the same time, demand was increasing, a not surprising situation considering the rapidly growing Canadian population. The result was inevitable: schools cannot meet their staffing requirements. The evidence of this was dispositive and set out in the ETFO brief. The College predicted that an additional 32,000 educators would be needed within the next five years. Recruitment in some classifications was particularly challenging, but this was a problem that affected all job groupings. The Ontario Principals' Council was categorical: the "Ministry of Education [needed] to step in immediately to deal with this crisis…." The first step, ETFO argued, was awarding an additional 3.25%.

**Crown Submissions**

**The Remedy MOS's are not Wage Re-openers**

In the Crown's view, this proceeding did not arise from a negotiated Bill 124 wage re-opener, and that was legally and factually material. Unlike negotiated collective agreement re-openers, the Remedy MOS's were entered into by it and the OSSTF and ETFO to fully and finally settle any and all claims arising out of their constitutional challenges to Bill 124.

Elaborating on this submission, the Crown pointed out that the Remedy MOS's were completely different from negotiated collective agreement wage re-opener provisions. Instead of negotiating re-opener provisions, OSSTF and ETFO negotiated provisions in their Moderated Collective Agreements indicating that agreement to the prescribed 1% was without prejudice to their rights to seek an appropriate remedy should their constitutional challenges of Bill 124 prove successful. At no time did the parties agree to a collective agreement re-opener.

Another distinguishing feature of this case – with its unique purpose-driven Remedy MOS's, compared to standard negotiated re-opener provisions – was the nature of collective bargaining: collective bargaining in the Ontario educational sector is two-tiered. The legislative framework provides for central and local bargaining. The Crown must agree to compensation before a central agreement can come into effect. In re-opener clauses under collective agreements that were invoked after Bill 124 was held to be unconstitutional, the Crown was not at the table.

The Remedy MOS's, the Crown continued, were straightforward: the OSSTF and ETFO gave up their rights to seek relief from the court, and the Crown gave up its appeal of the court's decision

as it applied to OSSTF and ETFO. The Remedy MOS's set out the quantum increase in Years 1 and 2 – .75% – and remitted to the Board the amount for Year 3 within the agreed-upon range. The Remedy MOS's made this arbitration completely different, therefore, from a classic Bill 124 collective agreement re-opener. Its architecture was completely different: deliberately designed to put the parties back back in the position they would have been in but for Bill 124.

Given this legal framework, the central question that needed to be asked is what would the parties have agreed upon but for Bill 124? That question could only be answered by adopting a point in time approach, meaning looking at the outstanding proposals when bargaining commenced and when the Moderated Collective Agreements were reached. The monetary asks for Year 3, at that time, were significantly less than the 3.25% being sought now, but demonstrated in a legally and factually governing manner what each of these parties' thought was the appropriate outcome. In these circumstances, given the remedial nature of the proceeding, and application of accepted remedial principles, the Board should award no more than what would have been freely negotiated but for Bill 124, and that meant an additional 1.5%.

The Remedy MOS's provided that the Board could consider any factor it considered relevant together with those set out in statute. The Crown did not dispute that but asserted that in considering those factors the Board had to restrict its analysis to the circumstances that prevailed in early 2020 when the parties were bargaining, leading up to them executing the Moderated Collective Agreements. Damages, the authorities indicate, are assessed at the time of the wrong, not at the time of adjudication. The Remedy MOS's stood in place of a court-ordered remedy and must therefore, and to the extent possible, place the unions and their members in the position

they would have otherwise been in, no more and no less. And that meant awarding an across-the-board increase that would have been agreed to at the time; or in other words, what the Crown had on offer.

Accordingly, the Crown urged the Board not to consider any subsequent economic or other evidence. It would improperly skew the result in a process where the parties deliberately did not choose a collective agreement re-opener process when they reserved their rights. In the re-opener cases, the parties (or as directed by boards of arbitration) agreed to re-open their collective agreement on a triggering event: Bill 124 being declared unconstitutional (for the most part). In marked contrast, when they signed off on the Moderated Collective Agreements, the parties intended to preserve litigation related rights, not to re-open those collective agreements in a re-opener proceeding where current economic events could be considered years after the fact. Current economic information was undoubtedly relevant, but to future proceedings, not this one.

**The Factors**

**Replication/Bargaining History**

In the Crown's submission, replication was important, and the starting point was bargaining history. Both OSSTF and ETFO voluntarily agreed on an additional .75% in each of Year 1 and 2. That decision was determinative: if they agreed on .75% in each of the first two years, awarding more than 1.5% in Year 3 would be a radical departure from the pattern the parties themselves set. This conclusion was reinforced by a review of bargaining over time. For the past fifteen years, these parties have a pattern of bargaining outcomes between 1.5 and 3% (excluding net zero and Bill 124 years) with – generally speaking – lower across-the-board increases at the

start of the term and a higher one at the end, just as was being proposed by the Crown here. Deviating from this pattern – in other words, not replicating what the parties have done for a very long time – would constitute a breakthrough and it would be one without established demonstrated need.



**Comparators**

Even assuming, for the sake of argument, that it was appropriate to turn to other comparators – and away from this established bargaining pattern – the comparators to look to first were teachers and other education workers elsewhere in Canada. Ontario's teachers were the highest paid in the country both when Bill 124 was in effect and today (and the Crown contested wage results relied by OSSTF and ETFO as misleading, methodologically suspect, incomplete, inaccurate and failing to reflect total compensation in complete contrast to the apples to apples data it presented). Even within Ontario, education worker classifications were largely among the very best paid when similar positions in other sectors were examined.

ECE's, for example, working in Ontario's public education system, were paid substantially more than those in the childcare sector outside of education. When the data was reviewed, it was clear that wage settlements outside and inside Ontario for comparable employees did not, the Crown pointed out, support the OSSTF and ETFO case. Comparability was a factor and appropriately applied supported the Crown's 1.5% offer. (The notion that many classifications of education workers were precariously employed was rejected for reasons set out in the written materials and at the hearing.)

**Recruitment and Retention**

While recruitment and retention as a factor were often considered in interest arbitration proceedings, this interest arbitration, the Crown argued, was not the appropriate forum to do so. In the Crown's view, issues around labour supply and demand in the education sector are complex and multi-faceted. There was certainly no basis to conclude that any of the challenges were either wage-driven or wage-sensitive, a conclusion that was reinforced by the fact that Ontario's teachers, occasional teachers and education workers were already the highest paid.

Demonstrating the complexity and multi-faceted nature of the problem, other factors were clearly at play, for example, high employee absenteeism explained many of the staffing challenges. The Crown and the parties were not unaware of or indifferent to these issues. A Sick Leave Utilization Task Force had been launched, as well as the Teacher Supply and Demand Action Table to consider how to best address these issues with the participation of multiple stakeholders. These, and other initiatives, were the preferred method of addressing recruitment and retention. There was no reason to believe that a non-normative wage increase to the highest paid teachers, occasional teachers and education workers in the country, as requested by both OSSTF and ETFO, would change the staffing picture in any respect.

**The State of the Economy**

Likewise, the state of the Ontario economy did not justify the OSSTF and ETFO ask. In late 2019 and early 2020 – the relevant time period as required by the point in time analysis – the Province was facing a $15 billion deficit (with substantially larger deficits predicted on the horizon) and the largest subnational debt in the world. Other economic indicators, for example,

the high level of net debt-to-GDP ratios, were similarly negative, with credit rating agencies taking notice of Ontario's deteriorating fiscal situation. The OSSTF and ETFO demands for 3.25% had to be considered in that context, and when they were it was inconceivable that the Crown – the participant in central bargaining for compensation purposes – would ever have agreed to anything other than the most modest of wage increases. That being the case, 3.25% should not be awarded now.



This same conclusion was readily reached when current economic indicators were reviewed – the situation was at worst deteriorating and economic growth was projected to slow; at best, little near-term improvement was predicted. On the other hand, inflation had begun to abate. In any event, both OSSTF and ETFO exaggerated the impact of inflation on wages. In all these circumstances, available public monies – separate and apart from an appropriate wage increase for teachers, occasional teachers and education workers – were needed to pay down debt, not fund unaffordable and unjustifiable collective bargaining demands, especially in circumstances where Ontario's teachers, occasional teachers and educational workers were already the best paid in the country.

**Re-opener Outcomes**

The Crown also urged caution, again assuming for the sake of argument that it was appropriate to look at re-opener outcomes – which for reasons already set out, it was not – in focusing on cherry-picked results from sectors that were simply not comparable such as energy and hospitals. The evidence established that overall the wage re-opener processes across all sectors yielded in 2021 an average total increase of 1.82% (including the original 1%). The average wage increase

awarded in respect of the 2021-2022 period, regardless of sector, was 1.75% (including the original 1%). The Moderated Collective Agreements commenced in 2021, and there were no wage re-opener results for 2021 of an aggregate 4.25% for that year, or even close. An additional increase of 3.25% would not have been the outcome then and cannot be the outcome now. The Crown asked that its quantum amount of 1.5% be awarded.



**Discussion**

It is appropriate to begin by quoting from the Crown brief: "The Crown respects and values the importance of public education and the critical work performed by … bargaining unit members represented by OSSTF and ETFO." It is also appropriate to acknowledge that teachers, occasional teachers, and education workers made an extraordinary contribution to our students and society during the pandemic, often in very trying, stressful and demanding circumstances.

According to the Remedy MOS's, in determining the outstanding issues we are to take into account any factors we consider relevant, together with the statutory criteria found in section 38 of SBCBA:

1. The school boards' ability to pay in light of their fiscal situation.
2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
3. The economic situation in Ontario.
4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of work performed.
5. The school boards' ability to attract and retain qualified employees.

**This is a Re-opener**

Notwithstanding the Crown's submissions on point, it is our view that this proceeding is a re-opener. It is quite correct that the parties, in the Moderated Collective Agreements, did not include a classic collective agreement re-opener provision. What they did do was agree to the Moderated Collective Agreements – in a matter of weeks after the worldwide health emergency was declared – and did so without prejudice to their right to challenge Bill 124 before the courts and to seek appropriate relief if their constitutional challenge was successful. In its April 20, 2020, media release, the OSSTF observed, "these are extraordinary times…while this tentative agreement does not satisfy all our concerns, we recognize the current environment we are in and the need for students to have stability…."

After Bill 124 was declared of no force and effect, the parties met and negotiated the Remedy MOS's. They agreed on Years 1 and 2 and referred to this Board determination of the quantum for Year 3. There is nothing in the language of those Remedy MOS's that has persuaded us that in our task of determining the number for Year 3 we should adopt an approach that is in any way different than if this were a regular Bill 124 collective agreement re-opener.

In this case, and in the re-opener cases, the Board is charged with determining the appropriate level of compensation for one or more years where Bill 124 applied. The jurisdiction in the re-opener cases and this one is the same: to consider any factor we consider relevant, together, if applicable, with the statutory ones, and come up with a result. The process is the same, albeit the scope is slightly different: in most re-openers the re-opening of compensation was not limited to across-the-board increases as it is here. In the present context the terms "re-opener" and

"remedy" are identical. In re-openers, and in this remedy case, the mechanism chosen to resolve the dispute is also identical: interest arbitration, an interest arbitration where the parties agreed that the Board could consider any factors that it considered relevant, together with the statutory factors, and then come up with a quantum for Year 3. There is really no need, in these circumstances, for us to delve deeply into otherwise applicable *Charter* remedial principles. The remedy for the *Charter* breach has been conclusively and finally addressed by agreement between the parties.



**Point in Time Analysis**

There is nothing about this process that could lead one to conclude that we should apply a point in time analysis, as urged by the Crown. It would also be contrary to the weight of authority in almost all the re-opener cases where all relevant information – up to the date of hearing and sometimes even beyond (and there were post-hearing filings by the Crown of relevant authorities) – is considered. Bluntly put, to rely only on economic data – mostly projections – from 2019 and 2020, when actual data is available about what happened in 2022 and following – high and then persistent inflation – would constitute wilful blindness. Stated somewhat differently, bargaining began in 2019, and continued in 2020 when the Moderated Collective Agreements were reached. It is now 2024 and we are deciding the re-opener quantum for 2022.

We know that inflation was 6.8% in 2022. We know that many of the fiscal projections when bargaining commenced were inaccurate. To restrict ourselves to out-of-date and incorrect data in deciding the 2022 increase would be a triumph of form over substance. It would also be completely unfair: not in a values-driven sense but as a matter of due process. And that is why

this broader approach is now normative and generally followed (other than one early outlier award that has been generally rejected).

**Bargaining Pattern not Dispositive**

Likewise, we are not persuaded that there is some governing bargaining pattern. There is a pattern of results – between 1.5% and 3% over time (except when Bill 115 imposed zeros and the annual 1%'s mandated by Bill 124). There is a pattern where larger increases appear at the end of the term rather than the beginning. And there is a pattern of bargaining in this sector taking forever. These parties almost always bargain in arrears. There is no reason to believe that but for Bill 124 and the pandemic, bargaining would have concluded in early 2020. To apply a point in time analysis anchored to the date when the Moderated Collective Agreements were reached, apart from other expressed concerns about this approach, is not persuasive given how long these parties take to bargain.

To be sure, in some cases, bargaining patterns are governing – the Crown cited one such case – but this is not that case. Bargaining patterns can be and often are important, but even if there was one here, the situation dramatically changed in 2022 when inflation peaked at 6.8%. (Year 3 of the Moderated Collective Agreements began on September 1, 2021, and ran until August 31, 2022. For all intents and purposes, the year at issue is 2022). To hold the parties to a bargaining pattern, even one that was long standing, or bargaining positions tabled in 2019, by adopting a point in time analysis, in the face of dramatically changed economic circumstances, would require us to completely ignore the impact of actual inflation on wages and serious issues in

recruitment and retention. It would require us to rely on economic projections that never materialized and to ignore the emergence of recruitment and retention challenges.



**Inflation**

The onset of high inflation in 2022 broke any pattern (the existence of which was, in any event, contested by both OSSTF and ETFO). Another distinguishing feature is that the bargaining pattern relied on by the Crown arose when inflation was at normative levels and there was a teacher surplus. This is the exact opposite of the situation in 2022 and following. The bargaining patterns relied on by the Crown simply do not account for material changes in circumstances that occurred after the Moderated Collective Agreements were ratified.

In considering inflation, it has been both dramatic and persistent; its effects are now baked into prices, especially necessities – increased prices that are more profoundly impactful on lower paid workers. Even if inflation may have now begun to slow, for Year 3 it was 6.8%. Economists are not predicting a return to historical norms – 2% – any time soon. Significant and sustained inflation is normatively addressed by the parties and by interest arbitrators. Addressing inflation replicates free collective bargaining and replicates the overwhelming weight of relevant re-opener cases and voluntary settlements (discussed further below).

**Recruitment and Retention**

There is, for example, an anticipated shortfall of approximately 7000 occasional teachers. This is just but one aspect of the recruitment and retention challenges in education.

The College reported in 2021 that:

> Ontario's decade-long teacher surplus is over, and a new teacher shortage is underway … this situation warrants early action to increase the province's annual supply of new teachers … unemployment is now at levels not seen in 15 years. Province-wide unemployment among Ontario education graduates in their first five years after licensing is now just two per cent. There is no longer any reserve pool … to staff daily occasional rosters and future LTO and permanent job vacancies.

There is also more demand than supply in other classifications, notably EA's. Ontario's population is growing at a rapid rate. Schools cannot meet their staffing needs, and the Crown has had no choice but to resort to ad hoc temporary but then renewed measures to fill vacancies. A comprehensive staffing strategy is obviously called for (perhaps revisiting an earlier policy decision to increase the time required to obtain the qualifying degree put into place when there was a teacher surplus). Recruitment and retention is one of the statutory factors to be considered in assessing compensation, and by any metric there is a staffing shortage, and it is expected to continue.

**Application of Relevant Criteria**

No one seriously believes that compensation alone will turn the recruitment and retention situation around. Increases to compensation are not a panacea because recruitment and retention issues are complicated and demand a curated and targeted approach. However, there is no question but that compensation is a driver in attracting employees to a field and retaining them once they are there. We must point out that the Remedy MOS's require us to arrive at a specific across-the-board percentage, depriving us of the ability to target increases to, for example, the lower (start) end of the teacher grid, or the daily stipend for occasional teachers, or rates for

certain classifications of education workers. Perhaps these are matters that can be addressed in subsequent rounds.

In these circumstances, of high 2022 inflation and an established recruitment and retention problem, one is hard pressed to see how the Crown's offer of 1.5% as the additional quantum for Year 3 comes even close to giving effect to the factors that must be considered in arriving at a result. An additional award of 1.5% would not in any way account for 2022 inflation; nor does it reflect the serious recruitment and retention issues identified in the briefs and at the hearing, a situation described by both OSSTF and ETFO as a crisis, and an issue not persuasively refuted by the Crown given the deployment of temporary measures to promote staffing and other initiatives. This does not mean, however, that the award should come in at the very top of the agreed-upon range in the Remedy MOS's because inflation and recruitment and retention are not the only factors to address.

Obviously, the state of provincial finances must be carefully considered, and has been. Public funds are not unlimited even if there is no inability to pay. We need to be prudent, not profligate, and fiscally responsible, but we must do so in a context, one in which normative and statutory criteria are considered, as they have been, and one where other relevant factors are also taken into account.

The Crown pointed out that compensation for teachers and education workers in Ontario is already at or near the Canadian top and this should lead to the conclusion that any increase must be modest. Justice Koehnen, in his decision invalidating Bill 124, found that "77% of teachers

are at the top step of their salary grid" (2022 ONSC 6658, para. 76). Ontario's teachers are the best paid, or close to best paid, in Canada. OSSTF and ETFO submit this is not even relevant to the determination of quantum in this re-opener proceeding as Ontario has the highest cost of living in Canada and Ontario education wages have never been set by looking to teacher wages in other Canadian jurisdictions.

To be sure, comparability is one of the statutory criteria and one interest arbitrators always examine. These parties have not generally looked to teachers elsewhere in the country as a relevant comparator (although it certainly is relevant – at least to us – to consider how teachers are paid across Canada). Rarely, however, is comparability singularly dispositive; it cannot be applied in the abstract, or without consideration of other criteria. Likewise, higher incomes do not, in our view, necessarily lead to the conclusion that a sub-normative across-the-board increase should follow in a re-opener or in the general course of bargaining. There is no general agreement with the proposition that just because a group of employees is already the best or well-paid that they should not receive an economic increase, or that they should receive a much smaller one than everyone else, in circumstances where there is widespread agreement that inflation and recruitment and retention necessarily drive higher wage increases.

Seventy-seven percent of the teachers are already at the top of the grid, and so there is no grid movement for them. The only increase they receive are the general wage increases. There is no reason to segregate one factor – highest paid teachers in the country – and conclude from that that Ontario's teachers and education workers should get less than everyone else, in the re-opener context and otherwise, in circumstances where inflation and recruitment and retention have led to

higher results in many different sectors. Adopting this approach would be without any rational justification. Inflation, no matter where one lives, or how much one is paid, is relevant and has been considered by parties across the broad swath of the Canadian economy in their voluntary settlements and as imposed in interest arbitration. The same is true about recruitment and retention. These factors have led to re-opener and other collective bargaining outcomes well beyond what is proposed by the Crown.

OSSTF and ETFO relied on a number of Bill 124 re-opener awards and urged that those results be replicated here. For example, in *The Participating Hospitals and ONA* (unreported award dated April 25, 2023), additional across-the-board increases and grid adjustments for a total value of 3.85% (1% + 2.85%) were awarded for 2022. In *The Participating Hospitals & CUPE/SEIU* (unreported award dated June 13, 2023), an additional 3.75% was awarded for 2021-2022 (along with many other economic improvements for a year that is almost identical to Year 3). In *The Participating Hospitals & OPSEU* (unreported award dated August 3, 2023), an additional 3.75% was awarded (along with many other economic improvements). In *OHA & PARO* (unreported award dated September 14, 2023), an additional 3.75% was awarded in 2022 (along with many other economic improvements) In *The Crown & OPSEU* (Corrections) (unreported award dated December 4, 2023), which was technically not a re-opener because, as a result of timing, Bill 124 had not applied, 3% was awarded for 2022, along with an additional 1% as a special adjustment that applied to most of the bargaining unit (along with other economic improvements).

Free collective bargaining results are also instructive, for example between OPG and PWU – 4.75% effective April 1, 2022 (although an outcome influenced in part by private sector comparators) – and 4.75% also for 2022 agreed to by the Government of Canada & PSAC (a settlement that set the pattern for hundreds of thousands of employees federally). In neither of these outcomes was there any recruitment or retention issue.

Also relevant are results from the post-secondary sector. In August 2023, the College Employer Council and OPSEU, representing Ontario's community college academic employees (immediately followed by support workers represented in a different bargaining unit), voluntarily settled their Bill 124 re-opener with an additional 2% in the first and second year of the moderation period, and 2.5% in in the third (total 3%, 3% and 3.5%). The number for 2022 was an additional 2%. Other results mirror these community colleges results, for example, University of Toronto (10% over three years) and Metropolitan Toronto University (8.25% over three years). Queen's University faculty settled their 2022-2025 collective agreement with 3.5% in 2022, and 3% in each of the successive years. There are no recruitment and retention issues with community college and university professors.

Accepting that the parties never previously considered teacher, occasional teacher and education worker outcomes in other jurisdictions, it is also most certainly the case that they have never previously looked to central hospital settlements either. The health care cases are, however, extremely relevant because of inflation and because of recruitment and retention. There is no question whatsoever – the awards are categorical – that the results in those cases arose in large

part in recognition of the impact of inflation and because of serious problems in recruitment and retention.

After these proceedings were concluded, the Crown forwarded two consent awards settling the re-opener issues between the Crown and the OPSEU unified bargaining unit and with AMAPCEO. In *The Crown & OPSEU* (unreported award dated January 21, 2022), covering the Ontario Public Service, re-opener amounts of 3%, 3.5% and 3% (inclusive of the Bill 124 1%) were awarded for 2022, 2023 and 2024, along with a relatively small number of classification adjustments of varying value (covering 8.18% of the bargaining unit) and significant increases for government nurses. The same across-the-board pattern was followed in AMAPCEO (although the classification adjustments in that award are irrelevant). Inexplicably, as inflation was substantially higher in 2022 than in 2023, these awards provided for 3.5% in the second year (2023).

A few observations are in order. There are no recruitment and retention issues in either of these bargaining units (other than what is presumably reflected by the small number of individual classification adjustments). While the Crown submits that these consent awards are highly relevant, and should be followed, we both agree and disagree. We agree to the extent that they are important from a replication perspective as they indicate what the Crown has agreed to with other large bargaining units with which it collectively bargains. That is surely relevant when it comes to replicating free collective bargaining. The fact that they are consent awards amplifies this point. But the overall impact of these awards is also diminished by the absence of

recruitment and retention as a factor (other than as reflected by the small number of classification adjustments) as is also the case with the awards from the post-secondary sector.

If there had been comparable recruitment and retention issues with the unified bargaining unit, with AMAPCEO, with post-secondary, all circumstances where the government was either the party in collective bargaining or the principal funder, that would have been extremely compelling. There are serious recruitment and retention challenges in the publicly funded elementary and secondary education sector. Serious recruitment and retention challenges have been taken into account in other sectors and we are of the view that that must occur here. To adopt the outcomes of these recent consent awards without adjusting for recruitment and retention would be to ignore several of the most relevant factors considered by interest arbitrators. Accordingly, these awards assist only somewhat.

Definitely not instructive are the average re-opener results for 2021 and 2022. Averages can be distorting, and relying on re-opener averages drawn largely from the long-term sector is not compelling. There is no comparison for present purposes between employees working in long-term care facilities and teachers, occasional teachers and education workers in our schools, and their re-opener results are factually distinguishable in every respect.

Taking all the evidence into account, the application of criteria and the overall weight of re-opener awards and settlements – especially those where inflation and recruitment and retention were addressed as they must be here – we have concluded that we should award an increase at the higher end of the agreed-upon range.

**Conclusion**

Accordingly, and for the foregoing reasons, we award an additional 2.75%, for a total of 3.75% (inclusive of the 1% already paid), for teachers, occasional teachers and education workers in the applicable OSSTF and ETFO Teacher/Occasional Teacher/Education Workers Moderated Collective Agreements. This amount is somewhat less than the outcomes in the energy sector (which have private sector comparators), and in the health care sector – where the recruitment and retention challenges are more severe – but somewhat more than the trend in the OPS, and post-secondary sectors where there are no real recruitment and retention issues.

The Remedy MOS's detail the process for implementation of our award and other steps to be taken by the parties. As provided in the Remedy MOS's, and as is normative, we remain seized with respect to the implementation of our award.

DATED at Toronto this 9th day of February 2024.

*"William Kaplan"*

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William Kaplan, Chair

I dissent. Dissent attached.

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Bob Bass, Employer Nominee

I dissent. Dissent attached.

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David Wright, OSSTF & ETFO Nominee

Dissent of the Crown Nominee

I must strenuously dissent from the decision of the Chair.

In my respectful submission, the Year 3 ATB awarded is not supported by the replication principle (in particular in relation to the OPS awards received by the Board), over-emphasizes the impact of inflation, and fails to address key evidence on the question of recruitment and retention.
The Replication Principle is widely accepted as the principal criterion referenced and utilized when resolving disputes at interest arbitration. In reviewing the various Bill 124 outcomes that were presented by the parties, the two key ones are he awards for OPSEU Unified and AMAPCEO. No better examples can be found to apply the Replication Principle. The Crown is the Employer in both cases, both Unions are strong and the bargaining units are amongst the largest in Ontario, representing tens of thousands of Ontario Public Service employees in diverse job classifications. Notwithstanding the Crown's submissions, if the Chair accepts the Unions' position that these are consent awards, that would mean that they represent an agreement of the parties and as such, are much stronger examples for replication than a contested award.

While it is factually accurate that inflation peaked at 6.8% for the period in question, this does not justify the result. The OPSEU Unified and AMAPCEO awards with the OPS were issued in January 2024, with full knowledge of the inflation level during the period (with both awards covering a term that commences on January 1, 2022). The Chair has determined that the "point in time" to be considered must be the present, not the past. In each of the OPSEU Unified and AMAPCEO awards, that is exactly the case - these awards were determined in January 2024, with a full view to the period from January 2022 forward (including the impact of inflation through that period) – as such, they are fully reflective of the present, not the past, arriving at results which have the full benefit of that perspective and information, taking inflation into account. In my view, the application of the Replication Principle "trumps", particularly where inflation was obviously taken into account in such comparator awards. To use inflation to go beyond those comparators is not justified.

The other factor that clearly influenced the award here to a higher level is the Chair's view of issues of recruitment and retention. A number of facts before the Board lead me to a completely different conclusion. First, the extremely significant percentage of the bargaining unit members who are at the top rate of a very long grid. This datapoint alone confirms for me that there are no "retention" issues. Second, the artificial restriction on the supply of teachers created by the requirement of a second year of teacher's college, which reflects that there are clearly issues in the system that may be impacting recruitment that are not wage-driven. And third, and most significantly, there is no dispute that these Ontario employees are the highest paid in Canada. If one accepts that wages are a motivator for recruitment (and the chair must hold that view if the higher increase in this award is based on a view to enhance recruitment), then paying the highest incomes in Canada solves that concern alone and no special further adjustment above the base increase proposed by the Crown is required. There were additional explanations in the evidence before us for current staffing challenges (e.g. extraordinary (and increasing) absenteeism and sick leave usage) and the Crown highlighted the fact that the various sector stakeholders are actively

engaged in an ongoing committee trying to understand the reasons for any staffing shortages (which are complex, multi-faceted and not, in the Crown's view, wage-driven), but from my perspective the three primary reasons I identified make it clear that unlike other cases cited at the hearing, this is not a case where an extra adjustment is justified to address issues of retention and recruitment.

In summary, on the basis of the principle of replication and on a close review of the evidence before this Board, a 3% increase in total (the Bill 124 1% plus an additional 2%), would have been the more appropriate outcome, justified by the OPSEU Unified and AMAPCEO awards, reflective of the impact of inflation on the settlement trends for the year in question, and giving due consideration to all of the evidence presented on recruitment and retention.

Respectfully submitted,

Bob Bass

**DISSENT OF DAVID WRIGHT**
**OSSTF & ETFO NOMINEE**

I respectfully dissent from the award of the Chair.

While I concur with much of the Chair's reasoning, it is my view that his reasoning does not support the result the Chair ultimately reaches – that it is sufficient to award an additional 2.75% increase (for a total of 3.75%) for year 3 of the applicable OSSTF and ETFO Teacher/Occasional Teacher/Education Workers Moderated Collective Agreements.

It is my conclusion that the reasoning of the Chair, and the arguments and evidence advanced by each of the OSSTF and ETFO, clearly support an award of an additional 3.25% (for a total of 4.25%) for year 3 of each of the applicable collective agreements and I would have awarded that amount.

In my view the Chair correctly concludes that this is in fact a Re-opener; that a Point in Time Analysis is not proper or normative; and that there is no pattern of bargaining between these parties in the circumstances at hand that can be relied on to determine the appropriate increase to be awarded.

I also concur with the Chair's findings that in order to replicate free collective bargaining we must consider the dramatic and persistent increase in inflation experienced in 2022 and the significant recruitment and retention issues in the education sector.

Further, I share his conclusion that the fact that compensation for teachers and education workers in Ontario may already be at or near the top in the country does not warrant awarding these workers a lower economic increase than that obtained by others, particularly in the circumstances of high inflation and recruitment and retention issues.

The evidence before us demonstrated that other highly paid workers received large economic increases, even where recruitment and retention were not at issue (for example in the energy, federal, and post-secondary sectors). As the Chair notes, inflation is a highly relevant factor for our consideration, no matter where one lives or how much one is paid.

I also join with the Chair in his acceptance of the relevance of the awards and settlements in the health care, energy, post-secondary and federal public service sectors advanced by the Unions as being highly relevant in our efforts to replicate free collective bargaining.

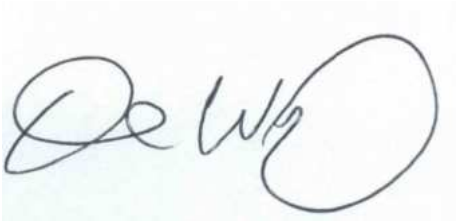
For the reasons given by the Chair, I share his rejection of the awards and settlements in the long-term care sector, the OPSEU unified and AMAPCEO consent awards and the alleged "average" re-opener results for 2021 and 2022 advanced by the Crown. These are not instructive for us in seeking to replicate free collective bargaining.

I would add to the reasons given by the Chair for the rejection of the alleged "average" re-opener results advanced by the Crown the fact that, as demonstrated by the OSSTF and ETFO, those alleged "average" results were skewed and incomplete. The alleged "average" was simply not something that can be relied on.

Where I dissent from the Chair's award is with respect to his conclusion that the application of the various factors he has identified as relevant warrants only an additional 2.75 increase in year 3 of the applicable collective agreements.

Rather, given the reopener increases negotiated where recruitment and retention has, as is the case here, been a material factor, and given the increases in the energy and federal sectors where retention and recruitment was not a factor at all, it is my view that the application of the relevant criteria and factors leads to the conclusion that an award of 3.25% for year 3, the reasonable and fair position advanced by the OSSTF and ETFO, is more than warranted.

As a result, I would have awarded an increase of 3.25% (in addition to the 1% already paid, for a total of 4.25%) for year 3 of each of the applicable OSSTF and ETFO Teacher/Occasional Teacher/Education Workers Moderated Collective Agreements.



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David Wright
OSSTF and ETFO Nominee

# TAB 3

**RE BOARD OF SCHOOL TRUSTEES, SCHOOL DISTRICT No. 1 (FERNIE) AND FERNIE DISTRICT TEACHERS' ASSOCIATION**

*J. E. Dorsey, J. Brewin, S. R. Pearce. (British Columbia) December 21, 1982.*

INTEREST ARBITRATION relating to salary of teachers.

*K. Bradford* and others, for the association.
*E. L. Coffin* and others, for the employer.

AWARD (in part)

I

This salary arbitration board was nominated and appointed and the members' fees and expenses were fixed under ss. 136 and 138 of the *School Act*, R.S.B.C. 1979, c. 375. The disputes to be arbitrated are in Zone 1, which encompasses six school districts in the east Kootneys. There are four disputes involving the Fernie, Cranbrook, Kimberley and Windermere districts which were heard in Cranbrook on December 13th and 14th. These parties agreed the board was properly constituted.

In this award we discuss matters of a general nature that apply to all of our deliberations, but are not repeated in the other three awards.

II

Compulsory interest arbitration of local teacher salaries and bonuses in individual school districts has been a feature of British Columbia employment law since 1937. It is described by Mark Thompson in "Evolution of Interest Arbitration: The Case of British Columbia Teachers" in Joseph M. Weiler, ed., *Interest Arbitration: Measuring Justice in Employment* (1981), pp. 79-97. There is no organized collection of past awards impartially published for the benefit of the *ad hoc* salary arbitration board members and advocates of the parties, all of whom will frequently change.

The salary arbitration board's task is to award salaries and bonuses within a rigidly fixed time frame, during the month of December or the first five days of January. While salaries and bonuses are defined in s. 131 of the *School Act*, we were unable to locate any analysis of the past board or judicial determinations of their limits. There are decisions on this question. For example, in 1980 a board decided it did not have authority to award an educational improvement leave (*Board of School Trustees of School District No. 32 and Hope Teachers' Assoc.* (Nathanson) [unreported]); in 1979 a board decided the issue of non-instructional time is not arbitrable (*Vancouver Secondary Teachers' Assoc. et al. and Board of School Trustees of School District No. 39* (Jordan) [unreported]); in 1980 a board decided it did not have jurisdiction to arbitrate demands concerning preparation time, a leave of absence and a duty free lunch hour (*Trail District Teachers' Assoc. and Board of School Trustees of School District No. 11* (Burnett) unreported]); in 1976 the B.C. Supreme Court decided advance preparation time is not arbitrable (*Powell River District Teachers' Assoc. v. Board of School Trustees of School District No. 47*, December 10, 1976, *per* Munroe J. [unreported]); and in 1980 the court decided maternity leave without pay does not fall within the definition of "bonus" (*Re Langley Teachers' Assoc. and Board of School Trustees of School District No. 35*, October 17, 1980, *per* Munroe J. [unreported], affirmed by the Court of Appeal, unreported, CA 800965, December 2, 1981 [130 D.L.R. (3d) 504, 33 B.C.L.R. 83]).

There are no statutory guidelines on how the board is to approach or exercise its role. What consensus there is indicates other boards have viewed their task to be an adjudicative one which follows unsuccessful conciliation, if employed by the parties. The statute prohibits *ad hoc* conciliators from later acting as arbitrators in the same year or an arbitrator acting in more than

one of the 13 zones. There are no criteria or guidelines in the statute on how the salary arbitration board should approach its task. Settling on criteria in public sector interest arbitration is not an easy or resolved task. The range of current debate is reflected in C. Gordon Simmons and Kenneth P. Swan, *Labour Relations Law in the Public Sector* (1982), pp. 324-48.

There seems to be a consensus in British Columbia that the task of an interest arbitrator is to simulate or attempt to replicate what might have been agreed to by the parties in a free collective bargaining environment where there may be the threat and resort to a work stoppage in an effort to attain demands. This consensus accepts that an arbitrator's notions of social justice or fairness are not to be substituted for market and economic realities. This approach was articulated in *Re Building Service Employees, Local 204, and Welland County General Hospital* (1965), 16 L.A.C. 1 (Arthurs), and *Re Building Service Employees, Local 204 and Peel Memorial Hospital* (1969), 20 L.A.C. 31 (Weiler), and has been repeatedly endorsed in British Columbia (see Joseph M. Weiler, "Interest Arbitration in British Columbia: The Essential Services Disputes Act", *supra*, pp. 99-131).

In the public sector, finding a yardstick in the "real world" to tailor an appropriate replicated or simulated award is an unscientific task. It must not be too rigid and static or it will stifle future bargaining by making the outcome of arbitration too easily predictable. At the same time, it must not be purely speculative or have no basis in rational matching of like circumstances. The award should pay close attention to the concerns of the parties and the information they produce, but it will necessarily be an impressionistic, instinctive assessment of the parties' circumstances, the times and the over-all economic health of the community. Much of that cannot be articulated.

In 1982 the task is made much more difficult by three factors. Unlike in past years, there are no freely negotiated teacher-school board settlements that can serve as a true comparison within the zone or province. Of 75 districts in the province, only 13 are not going to arbitration. Two of these decided in 1982 to piggy back on other settlements or awards. Four including two in this zone, Golden and Creston-Kaslo, settled for no change from 1982 subject to various unknowns. The other seven settled in 1980 or 1981 for 1983. Two are for increases tied to consumer price indices and the other five are tied to a settlement pattern. While we conduct hearings involving four districts in the east Kootneys, 12 other salary arbitration boards are engaging in the same exercise in the other 12 zones. It is a roulette exercise.

The second factor is the province's compensation stabilization programme under the *Compensation Stabilization Act*, 1982 (B.C.), c. 32, and its accompanying guidelines and regulations. While some public sector interest arbitrators do not feel able to apply the letter of this programme, the commissioner has made it clear that he considers they do bind arbitrators dealing with parties covered by the programme: see the commissioner's opinion in *British Columbia Hydro & Power Authority*, No. 2/82, September 14, 1982 [unreported]; *University of British Columbia*, No. 7/82, October 14, 1982 [unreported]; and *Lutheran Senior Citizens Housing Society*, No. 10/82, November 25, 1982 [unreported]. In his opinion the result is that arbitrators must be governed by Guideline 17 and make a concrete judgment about an employer's ability to pay. Guideline 17 states:

> 17. The guidelines establish criteria for limits to increases in total compensation for groups in order
>
> (a) to restrain and stabilize levels of compensation in the public sector,
>
> (b) to retain job security, and
>
> (c) to preserve services
>
> within the employer's ability to pay. The percentage increases in compensation under the Program range downward from 10%.

That criteria, which is not expressly stated in the *School Act*, takes on new meaning when the third factor is introduced. This factor is that in 1982 the Legislature and Ministry of Education imposed restraints on local school boards budgeting and their freedom to locally raise revenue. The *Education (Interim) Finance Act*, 1982 (B.C.) c. 2, came into effect on April 29, 1982. It centralized budgetary decision making in the Minister of Education who first required a global $28 million reduction in spending effective in the last quarter of 1982 and later required an additional $37.5 million reduction. The minister also recently gained the authority to set the amount a school board may raise through local taxes and the power to fix the 1983 budgetary level. There is more. The *School Services (Interim) Act*, 1982 (B.C.), c. 78, effective October 14, 1982, allows non-shareable capital to be used in the 1983 operating budget. It prevents a reduction in the 1982-83 hours of tuition and instruction. It requires a salary reduction equal to five working days' pay. It eliminates paid non-instructional days in the 1982-83 school year. And it directs that a failure of a school board and its teachers to agree to a loss of another days' pay by October 15th would result in a loss of six days' pay before the end of the 1982 calendar year. On the eve of these arbitrations the school boards received administrative

direction on their 1983 budgets which generally results in available funds equal to or less than the 1982 level. These drastic measures have left school boards and teacher associations shell-shocked. Not surprisingly there were few who achieved a collective agreement on their own. Those who have appeared to have thrown up their hands. The last step was an announcement in the week of these hearings that previously frozen federal grants in lieu of taxes would be made available to some school boards.

At this stage we and fellow arbitrators enter the scene with the duty and authority under the *School Act* to award salaries and bonuses. We are told by the Compensation Stabilization Commissioner we have a duty to apply the programme he administers, including Guideline 17. The *School Services (Interim) Act* expressly prevails over the *School Act* (s. 2(3)). The most recent reported announcement from the Minister, which appears in the December 4th issue of the Vancouver Sun, is that the government is working on a new funding formula for 1983 and it would not be available until after the Treasury Board decides on 1983 education financing and the salary arbitration boards conclude their work. (In an adjudicative process it is treacherous to rely on media reports but that is how most learned of the earlier actions this year.) The minister has a new authority to issue budget directives in any year before May 1st applicable to that year's budget (*Education (Interim) Finance Act*, s.12).

In this environment of reduced budgets, legislated reductions in salaries, new statutorily supported criteria, universal failure to voluntarily agree, complete uncertainty about whether there is more to come and widespread simultaneous arbitration (which is further consuming the province's education finances) what is our role? What reasoned criteria do we turn to as an aid to make a rational assessment of 1983 salaries and bonuses? Will what we do make any difference if it does not accord with the Minister's undisclosed plans? Why is this longstanding fragile *ad hoc* process being permitted to go forward when it stands to be permanently tarnished in the eyes of so many who are having their first experience in these impotent times in which the watchword in education financing has been centralized dictating of local decision-making?

Although appointed by the Minister of Education this and the other boards are not bearers of or enforcers of the minister's policies. That must be clearly understood. We act independently and are hopefully acceptable to the parties because of that fact and other qualities. While the choices placed before us in this time

have as much philosophical and political content as they have a labour relations content, our final choices should not be interpreted as endorsing either defiance of sweeping cost savings at the expense of teachers or public education services; a comment on school board efforts to protect their pool of human resources while seeking to preserve standards of public education; or a willingness to ignore current regional, provincial and economic realities.

For what it may or may not be worth, we laboured to bring some appreciation of the parties' dilemma, the current economic situation and a consistent standard to our decisions. There will be no winners, neither the teachers, school boards, the public, or this process. On the one hand are the teachers who have had legislated cutbacks in working days resulting in reductions in earnings of about 3%; who confront inflation and a spread in wages behind other groups; and who face unknown losses in jobs or wage reductions in 1983 depending on decisions by the government or choices by the school board. On the other hand are school boards who are cutting to the bone and have eliminated teacher aide and janitorial positions, 1983 summer student employment, transportation assistance and swim and ski programmes and have reduced finances in all areas of their budget. The twin objectives of delivery of services and protection of teacher employment merge at some point. In this budgeting environment, where salaries are approximately 85% of annual expenses, increased salaries cause reductions in services which in turn cause loss of teacher jobs. Retaining and stabilizing compensation, retaining job security and preserving services, which are the guideline objectives have become incompatible objectives within most boards' ability to pay. And boards, such as the Windermere board, who had the ability to raise revenues locally have had it taken away. Boards, like Fernie, who face expanding enrolment do not have a restrained ability to pay because of a shortage of work, as in the private sector, have a reduced funding and loss of local discretion to respond to local needs.

The result is we are asked to make a decision that will necessarily choose among enforced incompatible objectives because of social policy or fiscal choices by the minister. That is essentially a political decision and this process is not an appropriate forum in which to have the decision made. As in Quebec this year, it should be openly made and debated.

Our conclusion is that we ought not to try to replicate that political decision but what we think the parties would agree to in the environment of the current economy, the compensation stabili-

zation programme, legislated reductions in pay and suddenly announced budget cutbacks. The one element we must give the least amount of attention to is the last one. Like the parties we are totally in the dark as to whether current budgetary levels are the last level of reduction, the harbinger of further cuts, or interim measures from which there will be fiscal relief after salaries and bonuses and 1983 service levels are established.

If the process of salary board arbitration is to have any meaning in 1982 it is to provide the minister with 62 independent judgments about the local circumstances of these school boards. It cannot be simply to quantify his decisions in terms of reduced salaries and teacher lay-offs. We are not his agents. The 62 independent judgments after hearing representations by the parties will form some basis for the future decisions he and the Legislature must make, as in the past few months, to increase or decrease education spending and to have the burden borne by the teacher, taxpayer or student.

In exercising our independent judgment we must not disregard the climate and policy of government restraint, government and private forecasts of improvement in the 1983 economy, and other representations of the parties. But we must not be rendered paralytic by the well understood concerns of parties who fear any increase will "decimate", "destroy", "cannibalize" or otherwise irreparably harm public education in British Columbia. While current equations present the spectre that 8% to 9% salary increases requested by teachers will result in 25% to 35% reductions in teaching staff in the fall of 1983, the interest arbitration process is neither equipped nor intended to accept the responsibility to make these provincial public policy and financial choices. Our local, *ad hoc* task is to act as a substitute for permissible work stoppages as a result of impasses in collective bargaining.

## III

In this milieu what would the parties in all likelihood agree to as a fair and reasonable adjustment to the salary grid in their collective agreement for 1983? We have the same assessment for the four districts notwithstanding the arguments for differences because of local concerns or the merits of accepting or rejecting various comparisons and economic indicators presented to us. We have considered the school boards desires to retain and attract qualified teachers and maintain education standards they have striven to establish. We have considered the reductions compulsorily imposed and voluntarily assumed by the teachers. We have

considered the climate of restraint, recession, unemployment, inflation, the uncertainty of funding and other matters relied upon by the parties. We have also accepted Commissioner Peck's direction and have applied the guidelines.

Like much of collective bargaining, our results are not wholly scientific. They are the result of an adjudicative application of standards and criteria we consider appropriate in these times. If our award cannot be enforced because of funding restraints, removal of local revenue generating authority or unacceptable cuts in educational services and staff, that is a matter for the political decision makers.

In summary, the result in the extraordinary milieu of 1982 is that our final and binding award is really a recommendation of fair and reasonable salary increases. It is for the government to decide whether it will accept our recommendation and make funds available to the school boards, restrain the implementation of our award, take other action or leave the school boards, teachers and communities to deal with the effect of implementing our award.

[The remainder of the award is omitted.

Full award 12 pages.]

# TAB 4

## RE BEACON HILL LODGES OF CANADA AND HOSPITAL EMPLOYEES UNION

*H. A. Hope, Q.C., L. Leibik, A. Francis. (British Columbia) March 31, 1985.*

INTEREST ARBITRATION pursuant to *Essential Service Disputes Act*, R.S.B.C. 1979, c. 113.

*S. Yandle*, for the union.
*L. Page*, for the employer.

## AWARD

### I

This arbitration is brought pursuant to s. 6 of the *Essential Service Disputes Act*, R.S.B.C. 1979, c. 113. We are required to fix the terms and conditions of a collective agreement between the parties. The employer owns and operates a facility in West Vancouver that falls within the long-term care component of the health care industry in British Columbia. It includes two operations, a personal and intermediate care residence, called Beacon Hill Lodge, and an extended care hospital, called Beacon Hill Hospital. The facilities are operated by separate but allied corporations. Employees for both the hospital and the lodge are hired and paid through the corporation operating the lodge. It is with that corporation that the collective agreement is made.

The combined facility employs 112 bargaining unit members working in two basic classifications, 109 in a general classification called "aides" and three in a general classification called "cooks". One of the principal issues in dispute arises from a demand by the union to have the employees divided into several classifications which the union submits is standard in the industry and necessary to reflect differences in the nature of the work.

The basic union position is a demand for terms and conditions of employment at parity with those prevailing under a master agreement in force between this union and the Hospital Labour Relations Association (HLRA) with respect to employees in the acute care component of the health care industry in British Columbia.

The position of the employer is that the HLRA — HEU master agreement does not represent a standard appropriate for the long-term care component of the industry. Its further position, in any event, is that the provisions of the *Compensation Stabilization Act*, 1982 (B.C.), c. 32, govern the dispute and, in effect, prohibit the imposition of terms and conditions equivalent to the HLRA —

HEU master agreement. That basic difference put the parties at odds on the question of compensation, including wages and benefits. A further basic difference arose from the fact that the employer has had considerable flexibility with respect to scheduling shifts and assigning employees to various tasks in various areas of the two facilities. The employer submitted that the proposal of the union would limit that flexibility.

The union position was that the employees were entitled to receive terms and conditions of employment equal to those prevailing for employees performing equivalent work in the community at large. The union said that the best evidence of that standard is the master agreement. There is an impressive line of arbitral authority which stands for the proposition that public sector employees are entitled to be compensated at prevailing rates. Reflective of the reasoning is the decision of Professor George Adams, a former chairman of the Ontario Labour Relations Board, in *Re York Regional Board of Health and Ontario Nurses' Assoc.* (1978), 18 L.A.C. (2d) 255 (Adams). On p. 267 Professor Adams said:

> ... if the taxpaying public, through the legislation, determines that it requires an uninterrupted service then it must be prepared to pay those who provide the service commensurate with community standards.

The employer submitted, as stated, that the *Compensation Stabilization Act* and the Compensation Stabilization Program (CSP) established under it has superseded all conventional criteria and that arbitrators are obliged by law to apply its guide-lines to all public sector interest disputes. The employer pointed out that the commissioner appointed to administer the Act had specifically rejected the prevailing rate approach as appropriate in face of the CSP. In a ruling made in response to a public sector interest arbitration, *Lutheran Senior Citizen's Housing Society*, November 25, 1982, ruling No. 10/82 [unreported], the commissioner said on p. 6:

> However legitimate the "prevailing rate" standard, it cannot prevail in the face of a wage-control programme the very essence of which is the imposition of arbitrary maximum limits. And the *Compensation Stabilization Act* is just such a programme; it is not an industrial relations vehicle and is therefore relatively insensitive to industrial relations considerations, however influential they might be in other circumstances.

The employer submitted that the commissioner's rulings, including *Lutheran Housing Society*, are binding upon this board with respect to the manner in which the Act and the CSP are to be interpreted and applied by interest arbitrators. The effect of the submission is that the commissioner has a role beyond that of

administering the CSP which includes a *stare decisis* jurisdiction to direct the manner in which the Act and guide-lines are to be interpreted and applied by interest arbitrators. The employer saw for the commissioner an appellate role over and above his regulatory role of accepting or rejecting compensation proposals.

Two of the three members of this board dealt with a similar submission in *Royal Arch Masonic Home and Hospital Employees Union, Local 180*, January 10, 1985, unreported. That award was published after the hearing in this dispute and the parties were invited to make written submissions on its application to the facts before this board. The union took the position that the decision applied and should govern our deliberations. The employer repeated its earlier arguments and added the submission that *Royal Arch* was wrongly decided.

We note parenthetically that CSP, whatever its application, does not govern non-monetary language issues. The board in *Royal Arch* concluded that the prevailing standard approach applied to such issues. The employer argued that the prevailing standard approach is inappropriate, even with respect to matters falling outside the CSP, on the earlier stated basis that there is no single standard prevailing in the long-term care component of the industry. On those non-compensation language issues the employer proposed what amounted to a subjective approach to the resolution of the dispute based upon a compromise of the bargaining positions of the parties.

On that articulation of the preliminary positions of the parties, we turn to the specifics of the dispute. Before doing so we note that a collateral question arose with respect to whether certain of the employees should be included in the bargaining unit, a question that is beyond the jurisdiction of this board. We were asked by the parties to reserve jurisdiction on the fixing of rates for those employees pending an agreement as to their status or the resolution of that issue by application to the Labour Relations Board.

## II

The collective agreement arising from this arbitration will be a first collective agreement between the parties. However, it will not be the first collective agreement governing the employees in the bargaining unit. The Hospital Employees Union (HEU) was certified as bargaining agent for the employees on January 3, 1983. Prior to that date the employees were represented by the Service Employees International Union, Local 244 (SEIU). That

relationship was in existence from 1976 until the change was made by the employees to this union in January of 1983. There was a collective agreement in force between the employer and the SEIU at the time of the change in bargaining agents. That agreement expired on March 31, 1983. The parties agree in this dispute on a term commencing on March 31, 1983, and expiring on March 31, 1986. In addition, the employer agreed on a number of non-monetary language demands contained in the union proposal.

That proposal was modelled after a version of the HLRA — HEU master agreement presently in force between the HEU and three other long-term care facilities: Como Lake Private Hospital, Ladner Private Hospital and Parkridge Private Hospital. The union referred to that agreement as the "Pri-Care Agreement". The agreement takes its name from the British Columbia Association of Private Care Facilities (Pri-Care), being one of three employers' associations representing employers in the long-term care component of the industry. It imitates the master agreement in most of its terms with minor variations introduced to accommodate the differences between the long-term care and acute care components of the industry.

The employer urged that certain key provisions of the expired SEIU agreement should be retained so as to reflect existing practices with respect to the management and direction of the work-force. The employer, as stated, was concerned that the language of the master agreement would interfere with its existing practices with respect to shift scheduling, the use of temporary and part-time employees and its right to assign employees to any task in either of the two operations. The employer submitted that its operation was unusual, if not unique, among long-term care facilities in that it combined personal and intermediate care with extended care. That unusual combination, said the employer, created special needs not present in facilities that limited themselves to personal and intermediate care.

The employer submitted that its prior collective agreement permitted it to provide a uniquely personalized level of care wherein employees responded to the needs of residents without regard to differences in job category and work assignment. Finally, the employer noted that the prior agreement permitted it to schedule irregular shifts which permitted accommodation of the peak and changing demands of the two facilities as they unfold over the course of the 24-hour day.

III

In making its submission the employer took the position, in effect, that management in this relationship was more sensitive to the needs and desires of bargaining unit employees than the union and that its proposals with respect to shift scheduling and job classifications were more in accord with the professed desires of the employees than the regime which would be introduced in an application of the master agreement language.

Bargaining unit employees are represented by their bargaining agent and it is the bargaining agent that constitutes the party competent to enter into a collective agreement, not the individual employees: see *McGavin Toastmaster Ltd. v. Ainscough et al.* (1975), 54 D.L.R. (3d) 1, [1976] 1 S.C.R. 718, [1975] 5 W.W.R. 444, 75 C.L.L.C. para. 14,277, 4 N.R. 618. We reject any notion that a board of arbitration can fashion terms and conditions of employment on the basis of a submission that the bargaining agent does not represent the true interests and desires of the bargaining unit.

Even if the employer had adduced evidence as to the desires of the bargaining unit that went beyond the opinion of management, which it did not, the evidence would not permit this board to acknowledge a difference between the bargaining position of the union and the position of the employees it represents. We must take the position of the employees from their bargaining agent.

IV

We turn briefly to a consideration of the structure of the health care industry in this province. It consists of two principal components, being acute care facilities on the one hand and long-term care facilities on the other hand. Virtually all of the acute care employers in the industry are represented by the HLRA. The employees, as noted, are represented by the HEU. The majority of those employers, of which there are in excess of 115, are public hospitals, many of which incorporate extended care beds in their facility.

Employers in the long-term care component of the industry include government facilities, profit-oriented private facilities and non-profit private facilities. An anomaly in the industry is found in the fact that certain public long-term care facilities are signatories to the master agreement directly through HLRA and certain others are represented by HLRA but enter into a separate agreement, sometimes called the standard agreement. Long-term care employers, as stated, are represented by three principal associa-

tions, one of which is the HLRA. The second is Pri-Care and the third is the Continuing Care Employee Relations Association (CCERA). HLRA is the only association active on behalf of employers in both aspects of the industry.

On the union side, there are a number of unions representing long-term care employees but, on the evidence, the majority of long-term care beds are in facilities in which the employees are represented by the HEU, the predominant union in the health care industry. In the majority of those facilities the terms and conditions of employment approximate those of the master agreement. Even so, the position of the employer was that there are other collective agreements in force in the long-term care component that have terms and conditions different from those in the HEU — HLRA master agreement. In the view of the employer that fact is sufficient to defeat a claim for a single industry standard and for parity.

But parity between the two components of the industry has been a steady evolution since before the long-term care programme of the provincial government was introduced on January 1, 1978. That trend was given significant impetus with the advent of the programme. The move to parity in the industry was noted by Hugh G. Ladner, Q.C., in *Haro Park Centre and the Hospital Employees Union, Local 180*, September 23, 1983, unreported. Mr. Ladner said on p. 3:

> All arbitrators who have addressed this issue [parity with the master agreement] have agreed that the master agreement establishes an industry standard and they have applied that standard to the particular dispute with which they were concerned.

It is true, as submitted by the employer, that the move towards parity has been abated to some extent by the administration of the CSP. For example, Donald R. Munroe, the chairman of the board of arbitration which imposed the HLRA — HEU master agreement, also was called upon to fix the terms and conditions of employment under the so-called standard agreement for 15 long-term care facilities represented by the HEU which fell outside the ambit of the master agreement. Mr. Munroe concluded that an existing gap of 5% between wages paid in the two components of the industry should be maintained *pro tempore*. He made that determination in a letter award dated February 9, 1984. That award reads in part as follows:

> First of all, the essential thrust of the long-term care award was that the historical relationship between the standard and master agreements should be maintained for the present. The employees under the standard agreements generally enjoy slightly less favourable conditions of employment than the

> employees under the master agreement. While that will continue to be the case under the new collective agreements, there is not the slightest justification for any widening of the gap. No credible, acceptable justification could possibly be advanced.

The conclusion invited by the employer was that Mr. Munroe had made a determination on the merits that employees in the long-term care component of the industry were not entitled to parity with their acute care counterparts. We do not think that the decision of Mr. Munroe, when it is read in the full context of the letter of February 9, 1984, and the earlier award with respect to the standard agreement published on December 21, 1983, can be interpreted as a determination that the prevailing wage standard for long-term care employees is somehow below that of acute care employees.

The implication in the evidence is that both the master agreement and standard agreement had been exposed to the CSP process and that the determination to maintain the gap was made in the context of the CSP. Mr. Munroe did not give reasons for his determination. But there is no arbitral opinion or evidence to which this board has been directed that supports the proposition that employees in the long-term care component are entitled to less than parity with employees in the acute care component on the basis of differences inherent in the nature of the industry, the work performed or any factor relevant to the fundamental collective bargaining principle of equating wages to the nature of the work performed.

The employer sought to introduce an entrepreneurial approach to the fixing of wages and the other terms and conditions of employment. That approach is suitable to free collective bargaining but it is not suitable in a regime in which collective bargaining is forbidden in response to the public need to maintain public sector services. Certainly there are collective bargaining relationships in the industry where the standard encompassed in the HLRA — HEU master agreement does not prevail. But the standard does prevail with respect to the majority of long-term care employees and the exceptions do not support a conclusion that there is no prevailing or industry standard. They support the conclusion that not all employees, including the employees in this dispute, are at the prevailing standard.

## V

We return to the submission of the employer that the prevailing standard approach in interest dispute criteria must yield to the dictates of the CSP. There is no doubt that arbitrators are bound

by the provisions of the Act. But the Act makes no distinction between arbitrators and the parties who appoint them. The legislation having specific application to this arbitration is the *Essential Service Disputes Act*, and any application of the *Compensation Stabilization Act* by this board must be reconciled with our statutory obligation to apply the provisions of that specific and governing legislation.

Returning to the *Compensation Stabilization Act*, the fact that it applies to arbitrators is made clear in an amendment introduced in 1983 [*Compensation Stabilization Amendment Act*, 1983 (B.C.), c. 13, s. 1]. That amendment reads as follows:

> 2. This Act applies to all
>
> (a.1) arbitrators of arbitration awards containing a compensation plan for public sector employees . . .

But, as stated, the Act does not apply to arbitrators in some fashion distinct from its application to the parties themselves. In particular, there is no concept in the Act that arbitrators will have any jurisdiction to apply the guide-lines. To the extent that the subject is addressed in the legislation, and it is only addressed by implication, it is the commissioner who is given the jurisdiction to apply the guide-lines. A collective agreement is not enforceable until the compensation aspect of it has been approved by the commissioner. The commissioner enforces the guide-lines by granting or withholding his approval.

There is no provision in the act or guide-lines whereby the parties or their arbitrators can anticipate with any precision how the CSP will be applied to their particular agreement. The commissioner has expressed the view that the parties and their arbitrators must attempt to confine compensation agreements to those falling within the CSP guide-lines but there is no adjudicative process whereby an arbitrator can apply the guide-lines. Only the commissioner has the jurisdiction to determine that issue.

A unique feature of the CSP is its approach to the concept of ability to pay. Ability to pay is given the status of a governing criterion in s. 12(1) of the Act. The ability of a public sector employer to pay, as that concept is interpreted under the legislation by the commissioner, consists of budget decrees by the provincial government wherein different employers receive different levels of funding. A decision by the provincial government to limit or withhold funding is seen by the commissioner as creating a lack of ability to pay in the particular employer. However, a lack of ability to pay was not raised as an issue in this dispute.

Here the submission with respect to CSP is that the Act requires arbitrators to limit compensation increases by applying the guide-lines themselves as a separate body of criteria. But no provision similar to s. 12.1 [enacted 1983, c. 13, s. 6] of the Act exists with respect to factors other than ability to pay. If an arbitral jurisdiction to apply the guide-lines is to be found it would have to be found in the part of the guide-lines dealing with "Limits on Compensation". The principal provisions in that section are ss. 17 and 18, as follows:

> 17. The guidelines establish criteria for determining total compensation for groups in the public sector. In reaching or establishing a compensation plan for employees, the parties to the plan or the employer or arbitrator establishing the plan shall give paramount consideration to the ability of the employer to pay that compensation.
>
> 18. The paramount consideration in determining the level of compensation for a public sector group shall be the employer's ability to pay. Subject to the employer's ability to pay, a group is permitted a level of compensation based on:
>
> (a) demonstrable or measurable increases in productivity;
>
> (b) comparable settlements or awards in the provincial public sector;
>
> (c) other matters that the Commissioner may deem to be relevant.

It can be seen that the factors outlined in ss. 17 and 18 are subjective in the sense that they do not consist of quantifiable criteria that will permit an arbitrator to measure the level of compensation permissible in a given dispute. The remaining sections in that part of the guide-lines are equally subjective or are unrelated to the question of criteria. Section 19, for example, sets out a subjective test for assessing increases in productivity. It reads as follows:

> 19. Demonstrable or measurable increases in productivity shall be shared between the employer and the group as determined by the commissioner. Such increases include the following:
>
> (a) cost savings achieved by changes to benefits or working conditions;
>
> (b) any other matter of cost savings or potential cost savings determined to be appropriate by the commissioner.
>
> When increases in productivity form part of a compensation plan, they shall be reported and calculated separately from the other considerations determining the level of compensation for a group.

Clearly the criteria in ss. 17, 18 and 19 are intended to be applied by some authority having jurisdiction to exercise the discretion required to resolve their essential subjectivity. That authority is vested exclusively in the commissioner. The provisions can be compared with the criteria in s. 7(1) of the *Essential Service Disputes Act*. The criteria, which are the criteria governing this board, read as follows:

7(1) In an arbitration under this Act, the single arbitrator or the arbitration board shall have regard to

(*a*) the interests of the public;

(*b*) the terms and conditions of employment in similar occupations outside the employer's employment, including such geographic, industrial, or other variations as the single arbitrator or arbitration board considers relevant;

(*c*) the need to maintain appropriate relationships in the terms and conditions of employment as between different classification levels within an occupation and as between occupations in the employer's employment.

(*d*) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and

(*e*) any other factor that the single arbitrator or the arbitration board considers relevant to the matter in dispute.

The criteria in s. 7(1) do not provide a formula for the calculation of compensation increases any more than the CSP guide-lines. But there are two distinctions between those legislative instruments that address their application by an arbitrator. The first is that the criteria in s. 7(1) afford a potential for objectivity in that they incorporate the prevailing standard approach as a means of resolving issues adjudicatively.

The second distinction is found in a comparison between s. 14 of the *Compensation Stabilization Act* and s. 6(4) of the *Essential Service Disputes Act*. The significance of that comparison is that the application of the CSP guide-lines is vested exclusively in the commissioner under s. 14 and application of the s. 7(1) criteria is vested exclusively in interest arbitrators under s. 6(4). Section 14 reads as follows:

14. The commissioner shall review all compensation plans filed under section 13 and determine whether the plans are within the guidelines.

The CSP rulings relied on by the employer disclose that the commissioner routinely exercises his jurisdiction under s. 14 with respect to collective agreements imposed by interest arbitrators. In making his rulings the commissioner seems to have said that arbitrators are obligated to apply the guide-lines rather than the s. 7 criteria because of s. 28 of the *Compensation Stabilization Act*. That provision reads:

28. If there is a conflict between this Act or the regulations under section 17 or 34 and any other enactment, this Act or the regulations prevail unless the other enactment contains an express provision that it, or a provision of it, applies notwithstanding the *Compensation Stabilization Act*.

The implication in the rulings is that the commissioner views

the CSP guide-lines as having supplanted the s. 7(1) criteria in so far as matters of compensation are concerned. But arbitrators are bound to apply the criteria in s. 7(1). More importantly, any decision they make is binding on the parties under s. 6(4). That provision reads:

> 6(4) The terms and conditions settled by the single arbitrator or arbitration board shall be deemed to be a collective agreement between the parties, binding on them and the employees except to the extent to which the parties agree to vary any or all of them.

We agree that if a compensation plan imposed on the parties by an arbitrator under s. 6(4) is found to be in excess of the guide-lines by the commissioner under s. 14 of the *Compensation Stabilization Act*, his decision will govern. But we do not agree, as is submitted by the employer, that an arbitrator acting under the *Essential Service Disputes Act* has any jurisdiction to apply s. 14 of the *Compensation Stabilization Act* or any means of making an adjudicative finding with respect to the manner in which the commissioner will exercise his jurisdiction under s. 14 in a given dispute.

If any jurisdictional confusion is created, it arises because the commissioner routinely declines to exercise his jurisdiction under s. 15 [am. 1983, c. 13, s. 7] of the *Compensation Stabilization Act*. That provision reads:

> 15. Where the commissioner has determined that a compensation plan is outside the guidelines, he
>
> (*a*) shall notify the public sector employer and any other person the commissioner considers appropriate,
>
> (*b*) may notify the public sector employer and any other person the commissioner considers appropriate of the maximum allowable compensation which the commissioner considers is within the guide-lines for that compensation plan, and
>
> (*c*) shall provide
>
> (i) the parties to the compensation plan, or
>
> (ii) where applicable, the arbitrator or arbitration board which made the award containing the compensation plan,
>
> with an opportunity to reach or establish a plan that is within the guidelines.

In his rulings the commissioner makes findings under s. 14 that arbitration awards exceed the guide-lines, but he does not go on to state under s. 15(*b*) the "maximum allowable compensation" which he considers appropriate in the particular circumstances. The consequence is that the rulings of the commissioner contain no guidance as to how the maximum allowable compensation can be calculated in advance of his ruling.

Clearly the failure of the commissioner to exercise his jurisdiction under s. 15(*b*) is not mere oversight. He has indicated in many of his rulings that the programme is "voluntary" and exercising his jurisdiction under s. 15(*b*) would be inconsistent with that euphemism. In order for the programme to be voluntary it must be the parties or their arbitrators who fix the level of compensation, not the commissioner. A collective agreement is not enforceable under the Act until it has been approved by the commissioner. The commissioner routinely refuses to approve a collective agreement until the parties propose a level of compensation acceptable to him.

The commissioner has the power under s. 16 of the Act to force parties under the regulations where he can impose limits on increases in compensation. But, as stated, the commissioner does not have to resort to the regulations. He simply withholds his approval. In the same vein, the commissioner does not have to give the guidance to the parties contemplated in s. 15(*b*) as to their maximum allowable compensation. The benefit to the commissioner and the government in that approach to the administration of the CSP is that the commissioner is never required to quantify the application of the programme and is never required to defend the imposition of particular compensation limits.

So long as the parties "voluntarily" bring themselves into line, the CSP and its administration by the commissioner is impervious to even the limited power of judicial review permitted under s. 24.1 [enacted 1983, c. 13, s. 12] of the Act and is impervious to criticism because it is the parties themselves who fix and impose compensation limits. A difficulty arises when arbitration intervenes and the "voluntary" aspect of the programme must adapt itself to the adjudicative process.

The *Compensation Stabilization Act* and the guide-lines passed pursuant to it are pieces of legislation that arbitrators must interpret and apply in the course of exercising their jurisdiction and resolving disputes before them. The Legislature has not seen fit to amend its direction to arbitrators under the *Essential Service Disputes Act* or to make any provision in the *Compensation Stabilization Act* permitting or requiring arbitrators to apply the CSP in any adjudicative sense or to respond to it in any sense different from the parties themselves.

The obligation of arbitrators with respect to the interpretation of legislation having application to the dispute before them was set out in the decision of the Supreme Court of Canada in *McLeod et al. v. Egan et al.* (1974), 46 D.L.R. (3d) 150, 5 L.A.C. (2d) 336*n*

*sub nom. Re U.S.W., Local 2894, and Galt Metal Industries Ltd.*, [1975] 1 S.C.R. 517, 2 N.R. 443. It is inconsistent with the approach contemplated in that decision to suggest that arbitrators should consider themselves bound by the opinion of the commissioner with respect to the manner in which the CSP and its governing legislation should be interpreted and applied. Interest arbitrators are bound by rulings made by the commissioner in the specific dispute before them and should give deference to his opinion with respect to general issues of interpretation, but they are duty bound to interpret and apply the Act independently and to give it the meaning they deem to be correct. To subordinate the process mandated under the *Essential Service Disputes Act* to rulings of the commissioner made at large would amount to a declining of jurisdiction.

In any event, we are not at all sure that the commissioner holds the view that arbitrators should apply the CSP in any adjudicative sense. In his ruling in *Simon Fraser University and Simon Fraser University Faculty Assoc.*, March 21, 1983, unreported, No. 2/83, the commissioner said as follows on p. 22:

> First, I would emphasize that I have never stated or implied that arbitrators are meant to enforce this programme. That, plainly, is the job of this office. However, the parties to any relationship which falls under the authority of this Act must attempt to apply the guide-line's factors to their situations.

It is not made clear whether an attempt to apply the guide-line's "factors" implies anything more than being conscious of the guide-lines and responsive to any clear determination of their application in a particular case. But even that somewhat restrained expectation expressed by the commissioner is not supported in any clear terms in the Act or guide-lines. The Act does not specify that compensation plans submitted by the parties must fall within the guide-lines or that arbitration awards which provide compensation that the commissioner later deems to be in excess of the guide-lines will be seen to be in breach of the statute as opposed to being subject to rejection by the commissioner.

An arbitrator should not anticipate the maximum level of compensation allowable and impose that level on employees when a proper application of the criteria under s. 7 will support a higher level. As stated, the decision of an arbitrator is binding on the parties under s. 6(4) of the *Essential Service Disputes Act*. The commissioner has the jurisdiction to reduce the amount of compensation, but cannot increase it. Hence, it would be wrong for an arbitrator to speculate on the maximum level the commissioner would allow and impose that decision on the union, depriving the

employees of an opportunity to have compensation fixed by the commissioner at some higher level.

VII

Turning to a further aspect of the submission of the employer on the application of CSP, we note that the commissioner issues periodic bulletins setting out percentage averages relating to compensation increases in the public sector. In one such bulletin, dated February 1, 1984, the commissioner indicated his view of the manner in which s. 18(b) of the amended guide-lines should be applied. That aspect of the bulletin reads as follows:

> Provided there is no issue over the employer's ability to pay, the guideline for an employee group — now inclusive of increments — will be determined by the current level of settlements in the public sector, to which may be added any demonstrable productivity increase supported by cost savings, immediate or potential.

In the bulletin the commissioner indicated that his office would issue weekly reports setting out average compensation increases calculated on his interpretation of s. 18(b). The employer relied on a further bulletin issued on October 5, 1984, for its submission on the maximum increases it saw as permissible in this dispute. The bulletin read in part as follows:

> The new Program compensation limits were described in general terms in Administrative Circular #10 of February 1, 1984. For the guidance of the labour relations community it is appropriate to offer the following by way of a reminder: excepting productivity increases, the guideline for employee groups is determined essentially by the current level of settlements in the public sector (Guideline 18(b)), provided there is no bar by way of inability to pay.
>
> The current level of settlements in the public sector at October 1, 1984 for each 12 month period is as follows:
>
> | | |
> |---|---|
> | For 1983 — 2.26% | (116,011 employees) |
> | For 1984 — 3.38%* | (150,626 employees) |
> | For 1985 — 2.27%* | ( 53,251 employees) |

The submission of the employer was that the averages set out in that bulletin constituted evidence of the maximum compensation allowable under the CSP. We do not agree with that interpretation of the Act and guide-lines.

The mandate of an interest arbitrator is to provide an industrial relations vehicle for the resolution of a collective bargaining dispute. Hence the perspective of the interest arbitrator differs fundamentally from that of the commissioner. However much the commissioner may exhort an approach that expedites the regulation of public sector wage increases, the duty of the arbitrator is to defend the rights of the parties and to resist any

compromise of those rights that does not arise as an express requirement of the legislation.

The *Compensation Stabilization Act* represents a profound intrusion into the rights of employees to bargain collectively and to negotiate wages and benefits free of government regulation. It represents an equal intrusion into the more limited rights of employees who have already lost their collective bargaining rights under the *Essential Service Dispute Act*. The principles governing the interpretation of statutes require such an Act to be strictly construed with respect to its infringement on vested rights.

The strict approach to the interpretation of such statutes was addressed in the Supreme Court of Canada, by Dickson J., now Dickson C.J.C., in *A.-G. B.C. v. Parklane Private Hospital Ltd. et al.; City of Vancouver v. Parklane Private Hospital Ltd. et al.* (1974), 47 D.L.R. (3d) 57, [1975] 2 S.C.R. 47, 2 N.R. 305. On p. 62 D.L.R., p. 310 N.R., Dickson J., speaking on behalf of the court, said:

> A statute encroaching on private rights or purporting to do so should be interpreted restrictively and the burden rests on those who seek to establish that the Legislature intended to take away the private rights of individuals.

The interpretation of the commissioner, in our respectful view, does not reflect a strict construction of governing legislation. In fact, we view his interpretation as being one aimed at giving the regulatory aspect of the programme a dimension substantially beyond anything the language will reasonably bear. We believe that we would be acting contrary to our statutory duty if we denied to the employees in this dispute wages and benefits that we deem as appropriate under s. 7 of the *Essential Service Disputes Act* by reason of what the employer describes as an obligation to apply CSP.

The only course open to us is to carry out the mandate of s. 7 of the *Essential Service Disputes Act* and leave it to the commissioner to apply the CSP. That does not mean that s. 7 requires us to exclude the CSP from our consideration. If the application of CSP can be measured adjudicatively by an arbitrator, the arbitrator is obliged to respond to its guidance. Our problem is that we have no objective basis upon which to assess how the CSP should be applied so as to reduce the compensation of the employees below that of the standard prevailing in the health care industry.

## VIII

Interest arbitrators appear unanimous in their view that a

board of arbitration should attempt to replicate the result which would have occurred if the collective bargaining process had not been interrupted by arbitration. The authorities in that regard were the subject of an extensive review in *Royal Arch Masonic Home and Hospital Employees Union, Local 180*, January 10, 1985, unreported. It is not necessary to repeat that analysis here, although we will make reference to some of the authorities reviewed in that decision in order to explain our reasoning in this dispute.

Returning to the concept process of replication, it is essential to realize that a board of arbitration is not expected to embark upon a subjective or speculative process for divining what might have happened if collective bargaining had run its full course. Arbitrators are expected to achieve replication through an analysis of objective data from which conclusions are drawn with respect to the terms and conditions of employment prevailing in the relevant labour market for work similar to the work in issue.

We pause to note that the nominee for the employer dissents from this decision. In particular, it is his view that the process of replication does invite a subjective approach and that these parties, particularly the employer, could not be expected to reach agreement in collective bargaining to the implementation of the HLRA — HEU master agreement as the basis for a collective agreement in this relationship. He would prefer us to find, on the basis of the opinion of the employer, that the employer would press certain of the union demands to a strike and that the bargaining unit would not support a strike on those issues. On that reasoning, the nominee for the employee would prefer to reconcile the dispute by a compromise between the bargaining positions of the parties based upon our assessment of how those issues would likely have been resolved if arbitration had not intervened.

The majority do not agree with that approach to the resolution of an interest dispute and prefer the one adopted by interest arbitrators in the numerous decisions canvassed in *Royal Arch*. In particular, the majority is of the view that a board of arbitration in an interest dispute is required to act adjudicatively and to respond to objective criteria. The subjective approach has been consistently disdained in this province and elsewhere: see, for instance, *Grandview Private Hospital and Nursing Home Ltd. and Hospital Employees Union, Local 180*, [1976] 1 W.L.A.C. 165 (Weiler); *Re Board of School Trustees, School District No. 1 (Fernie) and Fernie District Teachers' Assoc.* (1982), 8 L.A.C.

(3d) 157 (Dorsey); *Re Building Service Employees, Local 204, and Welland County General Hospital* (1965), 16 L.A.C. 1 (Arthurs), and *Re York Regional Board of Health and Ontario Nurses' Assoc.* (1978), 18 L.A.C. (2d) 255 (Adams) at pp. 267-8.

The subjective approach has been rejected for the very reason that it is subjective. That subjectivity, in the context of an interest arbitration, would require a board of arbitration to speculate on where the parties may have ended up in the dynamics of collective bargaining if they had been permitted to exert a full range of economic pressure.

Interest arbitration awards should reflect the standard received by employees performing similar work in the relevant labour market. When arbitrators speak of replicating the result of collective bargaining, that is the context in which they speak. That reasoning was summarized by Professor J. M. Weiler in *Grandview Private Hospital* on p. 168 as follows:

> Interest-dispute arbitration under section 73 of the *Labour Code* [the predecessor legislation to the *Essential Service Disputes Act*] is intended to provide a procedural substitute for strike within a process of free collective bargaining. An arbitrator must look at labour market realities, i.e. the relative economic and bargaining positions of the parties, *in attempting to simulate the agreement which could have been reached by the parties under the sanction of a strike or lockout.* The best evidence of this hypothetical agreement is the pattern of development in other comparable hospitals in the community, especially those collective agreements voluntarily concluded.

(Emphasis added.)

The replication approach, or, as Professor J. M. Weiler describes it, the attempt to simulate the agreement the parties would have reached in bargaining under sanction of a lock-out or strike, relies on a market test which consists of assessing collective agreements in relationships in which similar work is performed in similar market conditions. The terms and conditions of employment thus derived are, as stated, referred to as the prevailing standard or prevailing rate.

In some circumstances that standard can be elusive. It is dependent upon finding adequate market data reflective of similar work performed in similar relationships and similar circumstances. It is, at best, an imperfect process and a poor substitute for free collective bargaining. But the task is simplified greatly where there is a coherent and defined industry with a master agreement in force, as is the case in this dispute. The principal question for this board in that circumstance is whether the master agreement does reflect a standard appropriate for employees in the long-term care component of the industry.

That issue must be addressed on the nature of the work performed and the market in which it is performed. On that question, we are unable to conclude that there is any difference relevant to the issue of appropriate terms and of employment that divides the workers in the two components of the industry. For us the question to be addressed is whether it is appropriate to require employees in one component of the public sector to accept terms and conditions of employment on a standard less than employees performing similar work in equivalent circumstances in another component of the public sector.

Obviously the imposition of such a result is inconsistent with the s. 7 concept of equal pay for equal work performed in equivalent circumstances. The entitlement of public sector employees to the market rate for their labour, as noted, has been consistently acknowledged by public sector interest arbitrators. That reasoning applies with equal or greater force where the market at issue is the public sector itself and the prevailing standard is fixed under the terms of a master agreement. Only the most compelling facts would support a departure from that standard. We note parenthetically that the CSP constitutes a compelling fact in that context, but not in the hands of an arbitrator, only in the hands of the commissioner. He alone has the jurisdiction to decree the precise extent to which the rights of employees will be affected in any given relationship.

That circumstance differs from a collective bargaining relationship which occurs in a labour market in which there is no master agreement and in which the terms and conditions of employment vary within a spectrum from employer to employer. Examples of such relationships occur in the primary, secondary and post-secondary fields of education. For whatever reason, no master agreement concept has evolved in those fields and interest arbitrators must construct a prevailing standard from the data available. The employer, in its response to *Royal Arch*, *supra*, relied on one such decision, *Board of School Trustees, District No. 12 (Grand Forks)*, unreported, December 31, 1984 (Kelleher).

The decision was relied on as support for the proposition that an arbitrator must apply the CSP in making an award. But that is not what the board did in that decision. There the board acknowledged the existence of the CSP and the constraints placed on arbitrators with respect to the awarding of compensation. The board went on to award compensation on the basis of the standard prevailing for such services as determined by a consideration of relevant factors, including collective agreements in force in other

school districts. In addition, and more importantly, the board in that case made its decision in the face of an uncharacteristic indication by the commissioner as to what level of increase would exceed the guide-lines in his view. On p. 12 the board said:

> The pattern which emerged from the few districts which settled on a percent increase (instead of an increase which took some other form) is an increase of 3%. It is noteworthy, however, that the commissioner has advised many of these school districts that this increase is in excess of the permissible guide-line increase.

Similarly, the employer relied on the decision in *Cowichan Intermediate Care Society*, unreported, April 17, 1984 (Larson). On p. 8, Mr. Larson said:

> On the evidence, there can be no doubt that the compensation commissioner will not permit the employees of the Cowichan Intermediate Care Society to be brought within the compensation levels of the long-term care standard agreement. With that in mind, I have attempted to construct an award that will meet the requirements of the *Compensation Stabilization Act* as being both within the guide-lines and the employer's ability to pay.

But a reading of that decision discloses that it too was given in response to findings already made by the commissioner with respect to the specific dispute before the arbitrator.

We have no difficulty with the proposition that arbitrators are bound by specific rulings made by the commissioner with respect to the very disputes before them. Decisions made by the commissioner in an exercise of his jurisdiction under the Act are as much binding upon arbitrators as they are upon the parties who appoint them.

In the same vein we emphasize that this award should not be read as reflecting any criticism of the restraint programme. Our obligation as arbitrators is to take the law as we find it and confine ourselves to a consideration of the issues brought before us. In addition, we consider that s. 7 of the *Essential Services Dispute Act* requires us to be sensitive to economic conditions and government programmes aimed at addressing those conditions. Obviously employees in the public sector cannot expect to escape the impact of reduced economic growth and an increase in the competing demands for public revenues.

However, as stated, much of that caution yields in this dispute to the existence of the master agreement. That is particularly so because the master agreement has received approval under the CSP. It was itself the product of an interest arbitration, a fact deemed incestuous by some parties, including the employer in this dispute. But it was not argued that the master agreement suffered as appropriate market evidence by reason of the fact that

it was imposed rather than negotiated. (It is always open to parties to go beyond the particular industry in seeking market data for the development of the applicable standard: see *Re Building Service Employees, Local 204, and Peel Memorial Hospital* (1969), 20 L.A.C. 31 (Weiler) at p. 35.)

We repeat our presumption that the master agreement sets the prevailing standard in the industry and that the fact that it derived from an arbitration rather than negotiation does not necessarily affect its weight. The employer argued otherwise and directed our attention to a decision cited and considered in *Royal Arch,* being the decision in *Re Canadian Union of Operating Engineers, Local 101, and Grace Hospital, Toronto* (1966), 17 L.A.C. 233 (Arthurs) at p. 234.

In that decision Professor Arthurs was critical of the prevailing standard approach but he applied it nevertheless and did not suggest that there was some other adjudicative resource more appropriate for the resolution of public sector interest disputes. In fact, as noted in *Royal Arch,* a careful review of arbitral authorities does not disclose any decision in which some approach other than the prevailing standard approach is taken.

## IX

We turn now to the language issues unrelated to the CSP. We repeat that the employer proposed that the language of the SEIU agreement be retained with respect to certain benefits so as to acknowledge the uniqueness of the facility and the uniqueness of the level of care it was able to deliver by reason of its flexibility in staffing and job classification.

We are not able to find that the employer established a uniqueness sufficient to take itself outside the ambit of the standards prevalent in the health care industry. There are other facilities which provide the same levels of care and which are governed under the disputed provisions of the master agreement. Nor was there a basis for finding that the flexibility sought by the employer cannot be achieved under the master agreement. It may cost more to achieve the same level, but that is the consequence faced by all employees whose terms and conditions of employment are at the master agreement level.

As stated, it was argued by the employer that the prevailing standard approach should be discarded in favour of a "replication" concept which would involve this board fashioning an agreement on a compromise between the bargaining positions of the parties. We previously rejected that approach in general terms. We

confirm our understanding that it has been consistently rejected by arbitrators, not only with respect to issues of compensation but with respect to non-monetary language issues as well.

Interest arbitrators have concluded that the prevailing rate approach is appropriate for the resolution of purely language issues. The subject was addressed by the arbitrator in *C.U.P.E., Local 576, and Trustees of Ottawa Civic Hospital* (1969), 23 L.A.C. 145 (Schiff). On p. 149 Professor Schiff said as follows:

> On principle, these [labour market] factors appear equally applicable to matters other than wages, and indeed the chairman of the board in *Welland County General Hospital* appears to have applied them to non-monetary items in *St. Joseph's Hospital, Toronto*, and *Grace Hospital, Toronto*.

The employer, as stated, did not dispute substantial portions of the language of the agreement proposed by the union. The language agreed upon, in large measure, imitates the language of the master agreement. In our view it is also appropriate, with one partial exception, as a standard against which to settle the remaining language issues. Those issues can be summarized as follows:

(1) The employer proposed that definitions dealing with various categories of employee contained in the SEIU agreement be retained. The master agreement language takes a different approach to the definition of employee. The employer's concern relates to existing manning practices which it wants to retain.

(2) The master agreement will impose a change with respect to how the date of seniority of an employee is to be calculated. In the existing agreement seniority is calculated on the basis of straight-time hours worked by an employee. The master agreement provides for seniority to date from the date of employment. On the calculation of the employer, a move from the existing seniority provision to the provision proposed by the union would result in a 9.16% increase in compensation.

In making that calculation the employer pointed out that the date of seniority affects the increment level at which an employee will be paid and also affects various other benefit provisions having a cost impact. In addition, an application of the provision would result in a change in existing seniority ranking, thus affecting access to various benefits. The employer saw that change as creating a potential for disharmony.

(3) The employer proposed to retain the existing management rights provision because it provides less restriction than the master agreement on the ability of the employer to schedule and assign shifts and to make changes in assignments.

(4) The employer proposed to retain a special complaint provision which makes a discussion of a complaint between a supervisor and the employee a condition precedent to the filing of a grievance. In the same vein, the employer wished to retain the existing grievance procedure provisions because it finds them preferable to the grievance procedure set out in the master agreement.

(5) The employer proposed to retain its existing lay-off provision. The union language requires the employer to give notice of lay-off to employees based upon their seniority, with pay in lieu of notice in the event that the notice provisions are not met. The existing language requires only that the employer give reasonable notice with no obligation to pay wages in lieu of notice.

(6) The employer maintains only two job classifications, being that of "aide" and "cook". The job classifications proposed in the master agreement recognize a number of different classifications with different wage rates. The employer proposed that its approach to classifications be maintained. Subordinate to that issue is a concern of the employer that no job descriptions be prepared as required under the master agreement.

(7) The promotion provision proposed by the union would require recognition of the classifications existing under the master agreement. The employer proposed that the agreement maintain the existing promotion language as part of its general position with respect to job classifications.

(8) The employer seeks an hours-of-work provision that provides a work schedule of 75 hours over a two-week period instead of the 37½-hour week proposed in the master agreement. The employer's proposal reflects the provision in the existing SEIU agreement.

(9) The employer proposed a modification of the master agreement language with respect to the scheduling of work which prohibits the employer from requiring an employee to work more than six consecutive shifts in the absence of mutual agreement between the employer and the union. The employer proposal was to accommodate existing flexibility wherein employees work ten days straight in a two-week period and receive four days off. The employer also resisted the introduction of a fixed shift provision which would limit the right of the employer to rotate employees through shifts. The existing practice is to rotate employees to some degree.

(10) The employer was concerned about the application of a provision dealing with rest periods because it requires two rest

periods in each shift on the assumption that each shift will be a full seven and one-half hours. The fact is that the employer has a number of employees who work shifts of much less than seven and one-half hours. The proposal of the employer is to tie that provision to employees who work six and one-half hours or more in a given shift.

In approaching this dispute we must reject the proposal of the employer that we, in effect, resolve the dispute "on the basis of a reasonable compromise between the negotiating positions of the two parties": see *Welland County Hospital*, *supra*, at p. 2) In our view, the submission of the employer invites the very sort of compromise approach that arbitrators have consistently refused to adopt. In the main, the language proposed by the union reflects the standard in the industry and no case has been made for departing from it that does not amount to an assertion of self-interest.

That is not to deride the pursuit of self-interest in collective bargaining or in interest arbitrations. Collective bargaining is a process in which each party pursues its self-interests. Those interests are frequently in competition with those of the other party and are pursued in an adversarial mode in which each party advances its own position at the expense of the other party. The difficulty is that there is no adjudicative basis for selecting one position over another if the inquiry is limited in scope to the internal elements of the single relationship.

Guidance must be sought from the market existing in the community in which the relationship exists and the work is performed if a fair resolution of the dispute is to be achieved. The position of the union must prevail in this dispute because it reflects the standard existing in like relationships with respect to similar work, not because of anything intrinsic to the union submission that makes it attractive in an assessment of the two bargaining postures. The strength of the union position is that it reflects the going rate.

We pause to note one exception in the union submission. That submission relates to the demand with respect to seniority. We agree that the master agreement language should prevail so as to impose the different method of accumulating seniority in force in the industry, but we do not think that the provision should be imposed retroactively. We cannot see the retroactive imposition of a change in the seniority list as responsive to an industry standard approach. Ignoring the cost impact contemplated by the employer, it would change the existing ranking of employees and would

affect their priority in claiming seniority rights under the agreement. That result is compatible with the future accumulation of seniority but should not be imposed retroactively so as to divest employees of rights presently held. The nominee for the union does not agree with that aspect of the award. He would grant full retroactive application of the seniority position.

In all other respects we order that the language of the master agreement be imposed, as varied in the "Pri-Care Agreement". The union proposed other *ad hoc* amendments which were opposed by the employer. We do not find it appropriate to depart from the industry standard approach. We do not agree with the union that any benefits in excess of those provided for in the master agreement should be retained on behalf of employees any more than we see that approach as appropriate for the employer.

The union acknowledged that fact in certain of its demands. We are of the view that it should apply in all circumstances unless it can be shown that the master agreement language is inappropriate for some reason compatible with the prevailing standard criteria. That reasoning should apply equally to both parties. In the result we award parity with the master agreement as the basis for concluding the collective agreement herein. We will retain jurisdiction to resolve any matters overlooked or obscured in this award.

Immediately prior to publication of the award herein, this board became aware of the recent decision of Spencer J., in the Supreme Court of British Columbia in *Board of School Trustees, District No. 49 (Howe Sound) and Howe Sound Teachers' Assoc.*, March 21, 1985, Vancouver Registry No. A 850445, unreported. That decision arose in response to a motion to reform a decision of the commissioner made by him under s. 14 of the *Compensation Stabilization Act*. In that decision the commissioner had determined that a compensation plan negotiated by the school district and the association was in excess of the guide-lines.

The motion to reform was brought under the provisions of the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209. The facts are not relevant to this dispute and the decision from which the motion was taken did not involve the decision of an interest arbitrator. However, the court had occasion to give some consideration to the extent to which interpretations of the Act and guide-lines by the commissioner are entitled to deference during the course of a judicial review.

Spencer J. relied on authorities which address what may be described as the contemporary approach to the judicial review of

decisions made by statutory tribunals vested with a jurisdiction to address and determine particular issues. That contemporary view is set out in the decision of the Supreme Court of Canada in *Blanchard v. Control Data Canada Ltd. et al.* (1984), 14 D.L.R. (4th) 289, [1984] 2 S.C.R. 476, 55 N.R. 194. That decision was relied on by Spencer J., for the conclusion that deference must be given to the special expertise a statutory tribunal can be expected to bring to its task. On p. 9 he said:

> Lamer J. restated the principle [in *Blanchard*] that the court should exercise judicial restraint in reviewing a decision made by a statutory tribunal in an area of inquiry submitted to it by the Legislature. The policy of the law is to respect the tribunal's expert knowledge and the intent of the legislation that the questions submitted should be settled promptly and finally.

Those comments were addressed in the context of whether it was a reviewable error for the commissioner to proceed on an understanding of the intent of the government in its introduction of a particular amendment to the guide-lines. The court concluded, in effect, that it could be pre-supposed that the government would consult with its commissioner before introducing an amendment to the guide-lines. The court saw such consultation as part of the commissioner's "specialized knowledge of the subject-matter of public sector compensation restraint".

On the subject of whether the interpretation of the Act or guide-lines by the commissioner should earn the deference of the court, Spencer J. said as follows on pp. 11-2:

> The clear line of recent authority from the Supreme Court of Canada is that error on the part of a statutory tribunal in reaching a decision in a matter initially within its jurisdiction may only be reviewed if the decision of the tribunal is patently unreasonable. It may not be reviewed simply on the ground that the court would have reached a different conclusion. This is because the court's role in judicial review is not to sit in appeal and substitute whatever decision it thinks is correct, but to supervise, by ensuring that a statutory tribunal did not exceed its jurisdiction. As well as the *Blanchard* case, *supra*, see also *C.U.P.E. Local 963 v. New Brunswick Liquor Corp.* (1979), 97 D.L.R. (3d) 417, [1979] 2 S.C.R. 227, 25 N.B.R. (2d) 237; *Teamsters' Union Local 938 et al. v. Massicotte et al.* (1982), 134 D.L.R. (3d) 385, [1982] 1 S.C.R. 710, 82 C.L.L.C. para. 14,196. In this province, see also *Re Evans and Workers' Compensation Board et al.* (1982), 138 D.L.R. (3d) 346, 38 B.C.L.R. 86.

It was in the context of that approach to judicial review that Spencer J. considered the interpretation of the disputed guide-line by the commissioner. On p. 13 he summarized his view as follows:

> I therefore think that the commissioner was entitled to interpret the word "unable" as meaning in effect, unable within the mechanism and intent of the Act and guide-lines. That is the thrust of his decision from pp. 10-15 of his ruling. It follows, from what I have said, that I am of the opinion the commis-

sioner turned his attention to whether guide-line 16 could be applied and that the meaning he put upon the word "unable" and his decision it could not be applied were both reasonable and therefore beyond the reach of this court in the exercise of its supervisory powers.

We have reviewed that decision because it addresses one aspect of the jurisdiction of the commissioner to interpret the Act and guide-lines. However, we do not see it as having application to the circumstance confronted by an arbitrator who is invited to apply the CSP and to do so on the basis of interpretations of the commissioner made at large or in other proceedings. The commissioner and interest arbitrators, in jurisdictional terms, are co-ordinate statutory tribunals exercising completely different jurisdictions dealing with completely different issues. The commissioner is charged with the statutory duty of reviewing the compensation aspect of awards made by arbitrators to determine if they exceed the guide-lines and to further determine the maximum compensation allowable with respect to a particular plan. He has no appellate or supervisory powers with respect to the manner in which arbitrators exercise their jurisdiction which relieves arbitrators of the obligation to interpret the CSP and its application to the dispute before them.

Here our obligation is to adjudicate upon terms and conditions of employment suitable for the employees in the bargaining unit. We are governed by the Act and guide-lines but the issue is whether we can determine in advance the manner in which the CSP will be applied by the commissioner either on the basis of a reading of the Act and guide-lines or by a consideration of the rulings of the commissioner and bulletins he distributes for the guidance of parties. For all of the reasons set out herein, we are of the view that we cannot apply the guide-lines or predict adjudicatively how they will be applied by the commissioner.

DISSENT (Francis)

I have had an opportunity to read the majority award. With respect, I am unable to agree with the conclusions or the reasoning set out therein.

My dissent goes to two different areas of the majority award, namely, the treatment of issues related to the Compensation Stabilization Program and the reasoning employed to arrive at the decision to apply the HLRA master collective agreement on all non-monetary items. I will refer to the CSP issues first.

The majority resiles from applying the guide-lines under CSP. While acknowledging that the *Compensation Stabilization Act*, 1982 (B.C.), c. 32, is binding on this board, the majority suggests

that the guide-lines are too subjective to be applied by the board. The majority observes that the criteria in ss. 17, 18 and 19 of the guide-lines are intended to be applied by the commissioner who has exclusive authority to resolve their subjectivity.

The solution to the conundrum posed by the majority is suggested by its own acknowledgement of the authority vested in the commissioner. As part of his administration of the programme, the commissioner issues rulings, administrative circulars and progress reports for the guidance of those affected by the programme. The commissioner has indicated by administrative circulars Nos. 10 and 11 that in the absence of an issue over ability to pay, the guide-line for an employee group will be determined by the current level of settlements in the public sector. The same circular refers parties to weekly progress reports issued by the office of the commissioner as guidance in determining the current level of settlements.

At a minimum, the administrative circulars give useful guidance to parties and arbitrators with respect to applying the guide-lines and determining the level of comparable settlements in the public sector. If the majority is correct with respect to the exclusive authority of the commissioner in these matters, it is entitled to treat the administrative circulars as an authoritative determination.

As part of its case, the employer introduced administrative circular No. 11. The union brought no evidence going to the issue of comparable settlement percentages. Neither ability to pay nor productivity increases were put in issue. I would have applied the appropriate percentage set out in administrative circular No. 11 rather than awarding the rates in the master collective agreement. It may be that an interest arbitration board, if in doubt as to the correct application of the guide-lines, should tend in the direction of generosity to employees. That is because the commissioner has the power only to insist on reduction of compensation plan increases, and has no power to increase them. However, it is my view that an interest arbitration board must make genuine effort to apply the Compensation Stabilization Program on the basis of the evidence before it, rather than abdicating its statutory duty as the majority of this arbitration board has done.

I turn from CSP issues to the balance of the majority award. The majority engaged in long and sophisticated reasoning to arrive at a simple conclusion: that interest arbitrators in the health care industry should award the HLRA master agreement regardless of the nature of pre-existing terms and conditions of

employment. I do not subscribe to the result, no matter what reasoning is applied to achieve it. There are two compelling reasons for my dissent in this regard. The first is that the majority's result cannot by any stretch of the imagination be said to replicate or approximate the result which would have been achieved if the collective bargaining process had not been aborted by a submission to arbitration. The second reason is that awards of this nature undermine the collective bargaining process in the public sector and are therefore contrary to public interest.

With regard to the first of these, it is trite that the fundamental mandate of an interest arbitration board is to approximate, as best it can, the results which would have been achieved by the parties if they had concluded an agreement through collective bargaining. In this case, the employer had a bargaining relationship with the Service Employees International Union, Local 244 (SEIU) from 1976 to January of 1983. The employer and the SEIU had collective agreements which were very different in many respects from the acute master agreement. The collective agreement which is established by the award of the majority of this arbitration board is the first collective agreement between Beacon Hill Lodges and the HEU.

In circumstances such as this, there is no reasonable basis for believing that collective bargaining, if taken to its conclusion, would result in complete adherence to a standard industry agreement by the employer, especially the acute care master agreement. On the contrary, the dynamics of collective bargaining are sufficiently responsive to the special circumstances of the parties involved to permit many variations and deviations from an industry norm. Assuming that parties move towards an industry standard bargaining in a context such as this, it may take gradual change over several agreements to arrive at that point. Moreover, even within the context of industry agreements, there may be variations and deviations agreed to for a specific employer to accommodate local practice and operational concerns.

In this case, the employer indicated to the board a willingness to move to the master agreement provisions in many respects, but sought to retain the provisions of the SEIU agreement in several important areas. Its reason for doing so was rooted in tangible operational considerations which, on the evidence before the board, were entirely valid. These considerations are referred to briefly at p. 292, *ante*, of the majority award. I am satisfied in the evidence that the violence done by the majority award to those provisions is likely to have an adverse effect on the delivery of care to the residents.

The approach of the majority is to sweep these considerations and facts aside in favour of the deceptive and simplistic formula of "prevailing standard". I would take the prevailing standard into account as a test which has been developed for the guidance of interest arbitrators in carrying out their mandates. However, I would not apply it wholesale without regard to the circumstances of the parties and the facts before the board. The prevailing standard approach should not be used to achieve a result where, as here, it is improbable that the same result would have been achieved through collective bargaining. In other words, an objective or rational standard may be indispensable in the adjudicative process, but it should be a reference point, not an inflexible template.

With regard to the second major reason for my dissent, an imposition of the master agreement, I must express grave concerns about the award of the majority from a policy perspective. Concern has been expressed by many with respect to the "narcotic" effect of interest arbitration. I am convinced that since its introduction, the interest arbitration option under the *Essential Service Disputes Act*, R.S.B.C. 1979, c. 113, has resulted in a chilling of meaningful collective bargaining in the sectors affected by the Act. In those sectors, interest arbitration has become an almost universal practice, instead of a last resort.

Interest arbitration in essential services, if it is to be an acceptable and viable alternative to economic warfare, should not become an institutionalized substitute for the collective bargaining process.

Yet the approach of the majority, which is applied to both monetary and non-monetary items, is counterproductive in respect of these policy considerations. If interest arbitration boards can be relied upon to impose an industry standard agreement without regard to the circumstances, the collective bargaining process is robbed of any driving force.

Section 7(1)(*a*) of the *Essential Service Disputes Act* directs this board to have regard to the interests of the public. The policy considerations which I have outlined are, in my view, matters going directly to the interests of the public. Section 7(1)(*e*) of the Act directs this board to have regard to any factor it considers relevant to the matter in dispute. I consider many circumstances of this case to be relevant, including the provisions of the SEIU agreement which the employer and the SEIU negotiated and the manner in which the employer operated its facility for a number of years. I would not have brushed those factors aside in pursuit of the holy grail of the prevailing standard.

On the basis of the evidence before the board, I would have retained the job classification provisions, the flexibility in shift lengths and the art. 9 complaint procedure from the SEIU collective agreement. I would not have imposed the fixed shift provisions of the HEU master agreement.

# TAB 5

# Re University of Toronto and University of Toronto Faculty Association

[Indexed as: University of Toronto (Governing Council) and University of Toronto Faculty Assn. (Re)]

*Ontario*
*Winkler R.S.J., J. Sack, Q.C., and L. Bertuzzi*

*Decision rendered: March 27, 2006*



Interest arbitration pursuant to memorandum of agreement between university and association.

*L. Steinberg*, for the association.
*C. Riggs*, Q.C., *E. Brown* and *D. Michaluk*, for the university.

AWARD

[1] The parties to this arbitration are the University of Toronto (the "University") and the University of Toronto Faculty Association

(the "Association"). The arbitration was conducted pursuant to Article 6 of the Memorandum of Agreement (the "MOA") between the University and the Association. The MOA was originally negotiated in 1977 and has since been subject to amendment from time to time.

[2] At the outset of the arbitration, the Panel was asked to issue a recommendation (award) on salary and benefits for the University's faculty members and librarians for the one-year period ending June 30, 2006. However, the Panel has since been advised that the parties have agreed that it is within the jurisdiction of the Panel to determine whether it should issue an award regarding salaries and benefits for only that period or whether its award should encompass a two year period ending June 30, 2007. The Panel has determined that the latter should prevail and therefore this award deals with salary and benefits over a two year period commencing on July 1, 2005 and concluding on June 30, 2007.

[3] The jurisdiction of the panel was also questioned with respect to certain other issues that the University characterized as being outside the ambit of Article 6 of the MOA. However, it was determined by both parties that those issues, including some proposals relating to the benefit plan and the formation of working groups to deal with certain matters, should be placed on "hold" to be resolved between the parties. Consequently, they are not included in this award.

[4] Before reaching the substance of the award we would like to acknowledge the efforts of counsel and the parties in providing the panel with extensive and thorough submissions that were of great assistance to us in our deliberations. In addition, we would be remiss if we did not also acknowledge the work of previous panels in developing general principles that have served as guideposts for the parties in respect of their submissions to this panel.

[5] Two of those general principles deserve particular exposition in that they are in essence the key pillars in the contextual framework of this award.

[6] The first is the "replication principle" which mandates that an award emanating from an arbitration conducted pursuant to Article 6 of the MOA should, as closely as possible, reflect the agreement that the parties would have reached had they been able to reach an agreement in free collective bargaining.

[7] The second underlying principle is found in the mutual commitment of the University and the Association to ensuring that the University is a leader among the world's best teaching and research institutions of higher learning.

[8] It is obvious that in the context of this dispute, the two principles are inextricably interrelated. Any attempt to replicate an agreement that might have been reached between the parties has to take into account the fact that the parties would be bargaining on common ground with respect to their mutual, commendable devotion to the excellence and reputation of the University.

[9] Utilizing the replication model, the logical starting point is the framing of the issues between the parties. In broad terms, those issues are as follows:

1. Compensation, including an Across the Board Salary increase;
2. Progress through the Ranks (PTR) increase;
3. Pension Plan amendments;
4. Professional Expense Reimbursement (PERA) amendments;
5. Extended Health Care amendments;
6. Research and Study Days for Librarians amendments.

[10] The positions of each of the parties on the issues are as follows:

| Issue | University Position | Association Position |
|---|---|---|
| Salary | 2.5% ATB increase effective July 1, 2005 | 4.0% ATB increase effective July 1, 2005<br>An amount of 0.5% of total salary shall be set aside for the purpose of addressing salary inversion and anomalies. Allocation shall be retroactive to July 1, 2005.<br>The senior salary category for faculty and librarians shall be abolished, effective June 30, 2006. |
| PTR | Distribute a special one time PTR allotment July 1, 2005 calculated on the basis of $500 per FTE for Professoriate and prorated amounts for Lecturers and Librarians. Ten percent of the additional amount will be set aside to be added to Provostial and Decanal merit pools. | Each PTR pool shall be increased by 1.0% of total salary in that pool, effective July 1, 2005. |

| | | |
|---|---|---|
| Pension | Maintain current position | All retirees shall receive augmentation to their pensions in an amount equal to full inflation catch-up as July 1, 2005. This applies to all pensions from RPP, OISE and SRA.<br><br>At the time of retirement, individual faculty and librarians shall have the option of receiving a monthly pension or a lump-sum payment equal to the commuted value of the individual's pension. Those who opt to receive the lump-sum payment shall be eligible to receive benefits on the same basis as those receiving a monthly pension. |
| EHC | A Health Care Spending Account ("HCSA") will be introduced effective July 1, 2006 as an alternative vehicle for funds available under the Professional Expense Reimbursement ("PER").<br><br>Prior to July 1st of each University Year (July 1" to June 30th), Faculty members and Librarians entitled to the PER will be able to elect the following allocation of the PER funds for that University Year: 100% to the PER (default election); 50% to the PER and 50% to the HCSA; 100% to the HCSA.<br><br>The timing and form of the election will be prescribed by the University, subject to consultation with the Faculty Association, and the election will be irrevocable, | The current benefit for massage therapy, physiotherapy, and chiropractic care shall be increased to $1,000 maximum annually and shall be extended to include the services of a licensed optometrist.<br><br>Orthodontics: Expenses shall be covered with the employer paying 50% of the orthodontic expense costs up to $3,500 per person per lifetime for active and retired faculty and librarians and their dependent children.<br><br>The long-term disability plan shall be modified to enable disability pension recipients to return to work on a part-time basis for indefinite periods of time without financial without penalty.<br><br>Faculty and librarians who retire before 1981 shall have the same benefits as those who retired during and after 1981, effective January 1, 2006. |
| PERA | Introduce a Health Care Spending Amount as an alternative vehicle for funds available under the Professional Expense Reimbursement (PER) as described above. | The PERA shall be increased from $775 to $1,000 per year effective July 1, 2005<br><br>All part-time faculty represented by |

| | | |
|---|---|---|
| | | UTFA shall receive expense reimbursement pro-rated at 33% per full-course equivalent of the PERA rate effective July 1, 2005. |
| Research and Study Days for Librarians | Maintain current position | The annual number of Research and Study Days for librarians shall be increased from 5 to 20. |

[11] While the replication principle is a key consideration, it must also be acknowledged that there is a certain amount of artifice involved in attempting to "replicate" the agreement that the parties "would have" reached. The very fact that third party intervention has been engaged means that the parties, based on their current positions, are at an impasse for which they foresee no resolution absent the assistance of the third party. Therefore, although the application of the replication principle theoretically results in an award that represents the likely meeting point between the parties' positions had bargaining continued, that award will, in the circumstances, almost certainly be imperfect because that in effect is the very nature of collective bargaining. As stated by Arbitrator Shime in *Re McMaster University and McMaster University Faculty Assn.* (1990), 13 L.A.C. (4th) 199 at 202:

> Arbitrator/selectors recognizing the limitations of third party intervention have always looked to free collective bargaining for assistance in decisions concerning wage determination. The use of this criteria [*sic*] carries with it an implicit recognition that collective bargaining is an economic power struggle where wage determination is governed by market-place conditions and therefore, arbitrator/selectors have recognized that no union, or employer is ever really satisfied with the ultimate wage settlement. But inherent in these settlements is a recognition of market conditions and what the exercise of an economic power struggle will yield or not yield at any given time. Settlements do not reflect satisfaction and are, in effect, an acquiescence by the parties in the exigencies of the market-place at a given time.

[12] Determining an award in replication of an agreement that might have been reached in the context of the "economic power struggle" and the "exigencies of the market-place" identified by Mr. Shime requires consideration of a number of dynamic elements including the specific employer-employee relationship, the specific "industry" or "industry segment" and the general economic conditions and climate in which both exist.

[13] In respect of the specific employer-employee relationship, the parties express divergent views on whether "the fiscal context"

is a relevant concern. The University argues that "it is impossible to determine what agreement would have resulted without due regard to the fiscal context in which that bargaining would have been negotiated." In that respect, the University contends that fiscal context includes the consequences of government underfunding, the accountability expectations attached to government funding and the "continuing competitive position of salary and benefits at the University", which taken together, constitute more important criteria than comparisons to salary increases at other institutions.

[14] The Association counters that the "fiscal context" is not a guiding principle that has been adopted by interest arbitration boards in Ontario. Further, the Association contends that the University submissions on the point are simply an attempt to import the generally rejected principle of "ability to pay" as a relevant consideration in the panel's ultimate recommendation.

[15] Arbitrator Shime in *Re McMaster University* gave cogent reasons for rejecting the "ability to pay" argument in respect of public sector awards at pp. 203-204:

> ...there is little economic rationale for using ability to pay as a criterion in arbitration. In that regard I need only briefly repeat what I have said in another context, that is, public sector employees should not be required to subsidize the community by accepting substandard wages and working conditions... (internal citations omitted). ...Thus, for example, if I were faced with data showing that the salary scale for assistant professors at McMaster was less than that of other universities in Ontario, I would have no hesitation in increasing the amount to achieve the same standard for McMaster regardless of the university's fiscal position.
>
> ...
>
> The universities are funded by the provincial government. In recent years the funding has not been as generous as it might be, which no doubt has eroded the salaries of university professors. If arbitrator/selectors were to consider the funding level of universities for the purpose of salary determination, they would in effect become handmaidens of the government. Arbitrator/selectors have always maintained an independence from government policies in public sector wage determinations and have never adopted positions which would in effect make them agents of the government for the purpose of imposing government policy. Their role is to determine the appropriate salary range for public sector employees regardless of government policy, whether it be funding levels or wage controls.

I adopt this reasoning.

[16] However, the determination of the appropriate compensation does require the arbitrator to have regard to some market and economic factors. As noted by Arbitrator Adams in *Re Beacon Hill Lodges and S.E.I.U.* (25 June 1982) at pp. 4-5:

> The ideal of interest arbitration is to come as close as possible to what the parties would have achieved by way of free collective bargaining in the sense that to do more would affect an unwarranted subsidization of nursing home employees by the public and to do less would result in nursing home employees subsidizing the public. ... While wages are "discussed" at the bargaining table in terms of cost of living trends, productivity, justifications for the catch-up and the overall compensation, such arguments are ultimately subject to the inherent bargaining power of parties to impose their wills on each other. It is this aspect of free collective bargaining that interest arbitration cannot reproduce. But, because there is no exact litmus test for bargaining power, boards of arbitration try to set out in detail a rational justification for their economic awards.

[17] There is a single coherent approach suggested by these authorities which may be stated as follows. The replication principle requires the panel to fashion an adjudicative replication of the bargain that the parties would have struck had free collective bargaining continued. The positions of the parties are relevant to frame the issues and to provide the bargaining matrix. However, it must be remembered that it is the parties' refusal to yield from their respective positions that necessitates third party intervention. Accordingly, the panel must resort to objective criteria, in preference to the subjective self-imposed limitations of the parties, in formulating an award. In other words, to adjudicatively replicate a likely "bargained" result, the panel must have regard to the market forces and economic realities that would have ultimately driven the parties to a bargain.

[18] This reasoning brings us full circle to revisit the common ground between the parties regarding the commitment to the pursuit of excellence. As both parties are surely aware, more than mere lip service to the ideal is required for the due administration and execution of a commitment to excellence. In that respect, the University acknowledges that "the excellence of the University owes much to the quality of its faculty and librarians". However, as the Association similarly implicitly acknowledges, "comparability and general economic conditions" are relevant factors providing a context within which the panel might determine what degree of influence adherence to the principle would exert in bargaining.

[19] In our view, while the commitment to excellence is clearly a significant factor in the relationship between the University and the Association, assessing its impact on the bargaining requires that it be considered in the context of the "marketplace" in which it is pursued.

[20] In essence, the University has staked out a position at the top of the relevant market or "industry segment". It implicitly admits that maintaining that position depends to a large degree on maintaining the quality of its faculty and librarians. That in turn requires, leaving aside the intangibles, ensuring that the total compensation package available to those faculty members and librarians is sufficient to place them at the top of the market as well. That will be the starting point for our analysis of the specific proposals.

[21] We accept the University's position that we should have regard to the total compensation package rather than viewing each of its elements in isolation. We also accept that in collective bargaining it is legitimate for parties to make choices as to how total compensation is to be allocated in respect of salary, benefits and other forms of compensatory remuneration and, equally, that the manner of allocation may be a point of contention between the parties. However, we do not believe that the acceptance of these propositions should serve to preclude the panel from setting out a brief analysis of each individual proposal and providing a rationale for its conclusion.

*Salary*

[22] The University proposes a 2.5% ATB increase for salaries while the Association proposes 4.0%. The University submits its position is driven by a desire to allocate scarce resources to items other than faculty and librarian salaries, reasoning that since such salaries are at the top of the market now, a more modest increase is sufficient to maintain leadership status. We cannot accept this rationale. Taken to its logical conclusion, it effectively amounts to a request to accept the heretofore rejected "ability to pay" principle with a resulting subsidization of the objectives of the University by the Association members. While it is possible that such an approach could be actually bargained if market forces and general economic conditions dictated, we are not persuaded that those factors are currently of the nature that would permit the University's position to prevail in this round of bargaining.

[23] On the other hand, the Association proposal of a 4.0% ATB increase includes consideration of CPI increases, "catch-up" and market place wage settlements. There is some dispute between the parties as to what the actual CPI increase is for the current year but neither submit that it is negligible and it is obviously a relevant factor, falling as it does in the area of general economic climate and conditions. However, it is clear from past settlements and awards that salary increases have never been pegged dollar for dollar to increases in the CPI in a given year or multi-year period. In some instances, increases have been below the corresponding CPI increase and in others, above. Some years the results were driven by economic conditions and in others by legislatively mandated restraint on wage increases. The net cumulative effect over the course of approximately 25 years of bargaining history is to leave salaries (not including increases generated by Progress Through the Ranks payments) somewhat less than they would have been had they been pegged to CPI increases. It is this fact that serves as the basis for the Association's argument that some element of "catch-up" should be included in any award recommended by this Panel.

[24] Although collective bargaining is generally conducted in the shadow of past agreements, settlements are forward looking. In the absence of an express acknowledgement by both sides, it is difficult to apply a concept that mandates the cumulative tally of past wage settlements against an external standard in the expectation that a demonstrated shortfall against that standard will serve as a basis for an increase. As stated by Arbitrator Shime in *McMaster University*, *supra*, the "concept of historical catch-up carries with it a number of difficult issues and problems" [p. 201]. That said however, in our view, the comparable institution wage settlements justify an increase in salaries that exceeds the quantification of the CPI increase advanced by either party, and therefore, it is unnecessary in the present circumstances to allocate a portion of the award to "catchup" even though it may have the effect of narrowing the gap between historical CPI increases and wage increases.

[25] We turn then to the marketplace wage settlements. In that regard, we prefer to give more weight in the analysis to the comparator institutions, both in Ontario and nationally, whose aims and

objectives with respect to the combination of education and research most closely resemble those of the University. Logically this market is limited but that is not surprising. It is the natural result of a successful pursuit of excellence for an institution so dedicated to find itself in circumstances where there are few comparables. Wage settlements in that group averaged 3.19% for the year 2005-2006 and averaged 3.17% for 2006-2007. We do not find that either the University's proposal of 2.5% or the Association's proposal of 4.0% would have ultimately held sway in bargaining against this market data. An amount more reflective of the marketplace realities as demonstrated by the settlements at comparable institutions for the periods in question, would likely have been the result of bargaining. This would maintain the leadership position of the University while at the same time giving effect to its commitment to excellence with due consideration of the marketplace reality.

[26] As we approach this award from the perspective of total compensation, and given the additional increases provided for below, the appropriate award is a 3.0% across the board increase for the year 2005-2006 and a further 3.25% across the board increase for the year 2006-2007. The 2005-06 award is to be applied retroactively from the date of confirmation of this award to July 1, 2005. The 2006-07 award is to be implemented on July 1, 2006.

*Salary Anomalies*

[27] The Association's position with respect to the demand it characterizes as addressing "salary inversion and anomalies" is that the manner in which the University negotiates compensation with new hires or deals with retaining individual current faculty members often creates an "inversion" or "anomaly" in compensation with respect to longer serving faculty members. The Association submits that this situation should be addressed on a collective basis by dedicating a specific amount to rationalizing compensation in such circumstances. According to the University, there is no evidence that the manner in which the University deals with individual members of the Association is driven by anything other than market forces and, since it is common ground between the parties that market conditions are a consideration in their collective bargaining, there is no principled reason to accept the Association's approach either in whole or in part. In our view, to give effect to the Association's

demand would put the cart before the horse. This matter has yet to be examined by the parties in a working group to be established for that purpose. As a result, we do not believe that the Association's position would be successful in this round of collective bargaining.

[28] On the other hand, we accept the Association's position that the senior salary category for faculty and librarians should be abolished effective June 30, 2006.

*PTR*

[29] With respect to the competing PTR proposals, in consideration of determination that this should be a two year award, we conclude that the University's proposal to make a special allotment to the PTR pool more closely reflects the likely bargained result than does the Association's proposal to increase respective pools by 1% of salary. We extend it to apply in equal terms to the second year of the agreement. The PTR pool has historically been available to ensure that the meritorious achievement of faculty members is properly rewarded. In that respect, while PTR amounts have the dual effect of increasing the base pay of faculty members once awarded and a continuing impact thereafter in regard to faculty wide ATB increases, the available pool has never been tied specifically to the total salary allocation. The Association proposal to increase the PTR pool by the amount suggested has ramifications that require consideration of the effect on the overall economics of the relationship.

[30] In our view, the University proposal to "distribute a special one time PTR allotment July 1, 2005 calculated on the basis of $500 per FTE for Professoriate and prorated amounts for Lecturers and Librarians", coupled with an identical special allotment to be distributed on July 1, 2006 would have been an acceptable result for both parties in bargaining. As a point of further clarification, these amounts are special allocations for the years in which they are awarded and do not constitute ongoing obligations of the University beyond the term of this award. Finally, we do not believe that the University proposal to set aside 10% of the increased funds for Provostial and Decanal awards, as opposed to the current norm of 5%, would similarly have carried the day in bargaining. This goes to the heart of the Association's concern regarding the avoidance of arbitrariness in the determination of individual merit awards.

Accordingly, the additional amounts will be subject to the same current 5% allocation for Provostial and Decanal awards as the existing pool.

*Pensions*

[31] We turn now to the issue regarding pension augmentation. This is clearly a central point of contention between the parties. From the University's perspective, this issue invokes considerations of principle beyond the simple present day cost of the proposal advanced by the Association, which in actual quantum is a cost of approximately $475,000 per year.

[32] In part, the University's objection to the Association proposal is driven by the fact that the pension plan, based on the assumptions now being used with respect to rate of return on investment and the future obligations, is currently in an actuarial deficit. According to the University, augmentation of pension benefits has never been granted when the plan has been in deficit and to do so now effectively means that full indexing is the assumed norm. That scenario, according to the University, would require additional modifications to the current modeling assumptions which would increase the current deficit of accrued liability of the plan by $110 million.

[33] The Association contends that the current deficit is the result of a reduction in the actuarial assumptions regarding rate of return from 7.0% to 6.5% on a going forward basis. This change has been made in the face of actual returns over the past two years of 15.4% and 10.9% respectively. In effect the Association takes the position that the University is creating the deficit through revisions to the actuarial assumptions.

[34] In truth, the only real surplus or deficit in a pension plan is that which remains after a plan has been wound up and all accrued liabilities have been accounted for. Actuarial surpluses or deficits in the interim exist only as mathematical constructs produced by applying certain assumptions to the assets and obligations of the plan. As such they are no more than snapshots in time and subject to the periodic fluctuations driven by the dynamics of the investment market and the changing makeup of the plan's beneficiary class. While prudent management practice and regulatory oversight require the taking of such snapshots in respect of pension plans, the

resulting picture does not necessarily drive a particular result in bargaining.

[35] Based on the material before us, it appears that the plan has generally operated in an actuarial surplus, at some points so robust that the University was able, indeed required by law, to take contribution holidays. In the past several years, a combination of factors has led to an actuarial deficit. In that regard, the evidence before the panel was that the University is actually taking aggressive steps to reduce the deficit, paying more into the plan on an annual basis than was required to fund both the current service cost and the legislatively mandated deficit reduction.

[36] The fact that the plan was in an actuarial surplus over a substantial period of time skews historical perspectives somewhat. However, even when the plan was in an actuarial surplus, improvements to the plan, contribution holidays for the Association members and the utilization of excess funds were matters of bargaining and choice. The mere existence of a current actuarial deficit provides no compelling reason to depart from that bargaining model. Here the Association chooses to seek augmentation to the pension benefits available to its members as part of its total compensation package. In our view, the Association's proposal is reflective of a bargained result when total compensation is considered in the context of a two year term.

[37] Although we are granting the Association's proposal on the pension augmentation issue, I do not accept the Association's position that augmentation to 100% should become the norm in the sense that it is enshrined in the plan in perpetuity. It has traditionally been a matter of bargaining and so it should remain. We award augmentation to 100% for the two years covered by this award, to come into effect in the year commencing July 1, 2006.

[38] We do not believe that the Association proposal to provide an option to commute pension benefits on retirement reflects a result that would have been bargained between the parties. It imposes an undue burden on the plan and fundamentally alters its purpose from a defined benefit plan to a hybrid that renders the actuarial calculations even more uncertain. Accordingly, this Association proposal is rejected.

*Health and Professional Benefits*

[39] It is common in all collective bargaining that there are major issues and those whose importance is somewhat less so. As experienced collective bargainers are aware, the parties prioritize bargaining issues and bargain in order of priority. Trade-offs are made and bargains struck in a reality where significant issues are bargained against significant issues and lower priority issues are bargained in like fashion. The remaining issues would fall into the lower priority category and we accordingly deal with them summarily.

[40] In the table set out above, the positions of each party have been set out under a number of headings. Under the heading "EHC" in our view, the University position regarding a Health Care Spending Account would not have been a bargained result. On the other hand, the Association would not likely have received much of its shopping list. The likely result of bargaining would have been acceptance of the Association proposal to include the services of a licensed optometrist in the "paramedical" coverages. Accordingly, we award the additional coverage sought by the Association in the amount of $250 on a biannual basis, to be effective for the year commencing July 1, 2006. The University proposal and the remaining proposals of the Association are rejected.

[41] With respect to the Professional Expense Reimbursement, the Association position is reasonable and reflective of the current practice among comparable institutions. We would implement this award in two stages, with an increase from $775 to $900 effective for the year commencing July 1, 2005 and an additional increase to $1,000 in the year commencing July 1, 2006. We do not accept the Association's proposed change to the pro-rata allocation to part-time faculty.

[42] In our view, an increase in Research and Study days for librarians is justified based on the University's commitment to excellence and the practice at comparable institutions. However, the dramatic increase sought by the Association is not currently warranted. A more likely bargained result would have been an increase of the current allotment from 5 days to 8 days. Accordingly, our award in this respect is an increase to 8 days from the current 5 commencing in the year beginning July 1, 2006.

*Summary*

[43] Our award may be summarized as follows:

| | |
|---|---|
| Salary | 3.0% ATB, effective from the date of affirmation of this award, retroactive to July 1, 2005; |
| | 3.25% ATB effective July 1, 2006; |
| PTR | $500 per FTE special allotment to the PTR pool to be distributed on July 1, 2005; |
| | $500 per FTE special allotment to the PTR pool to be distributed on July 1, 2006; |
| | No continuing obligation of the University to make further special allotments to the PTR pool; |
| Pensions | Augmentation to 100% of CPI indexing for the years commencing July 1, 2005 and July 1, 2006 respectively to be instituted in the year commencing July 1, 2006; |
| EHC | Inclusion of optometrists, at an amount of $250 on a biannual basis, to be effective in the year beginning July 1, 2006; |
| PERA | Professional Expense Reimbursement to be increased from $775 to $1,000, with increase to be implemented in two stages, going to $900 in the year beginning July 1, 2005 and to $1,000 in the year beginning July 1, 2006; |
| Librarians | Increase in Research and Study days from 5 to 8 days, to be implemented commencing July 1, 2006. |

[44] In addition, those matters upon which the parties have reached agreement are set out in Schedule A and form part of this award.

[45] We remain seized of this matter.

SCHEDULE "A"

*Matters Settled*

*Mandatory Retirement*

On March 14, 2005, the parties entered an agreement to end the mandatory retirement of academic staff. This agreement includes provisions for unreduced early retirement as well as a three year phased retirement program which includes phased reduction to part-time appointments while continuing to earn pension benefits on

the basis of full-time salary plus a significant retiring allowance. The University has also made a Statement of Commitment to Retired Faculty and Librarians.

*Matters Not in Dispute*

The following changes to salary and benefits are not in dispute.

- Effective July 1, 2005 the minimum salary for Librarian III and IV to be increased from $48,600 to $62,500 and from $55,400 to $75,700 respectively.
- Effective July I, 2005 the salary ceiling for Librarian II ($51,200) to be eliminated.
- Effective July 1. 2005 the minimum for Lecturers to be increased from $52,100 to $62,500.
- Effective July 1, 2005 the minimum per course stipend rate payable to part-time non-sessional appointments represented by UTFA and faculty members teaching on overload to be increased from $10,338 to $12,500.

ADDENDUM OF UTFA NOMINEE (Sack)

[1] I subscribe to the general principles set out by the Chair in his Award and, while not necessarily in agreement with the disposition of every item in dispute, concur in the Award as a whole which in my view represents a fair and balanced accommodation of the interests and concerns of both parties.

[2] As for pension augmentation, the only issue which the Administration's Nominee has specifically addressed in his Dissent, there is no reason, in my opinion, to abandon the parties' past practice of augmenting pensions to fully compensate for inflation (rather than, as is currently the case under the formula in the pension plan, only 75%).

[3] The fact that the pension plan has been in surplus when augmentation has occurred in the past does not, as the Administration submits, establish that the University should decline to do so when it is in deficit. As the Chair points out, the mere existence of a current actuarial deficit provides no compelling reason to depart from the bargaining model in which augmentation is part of the total compensation package that is bargained by the parties.

[4] Indeed, whether the pension plan is in surplus or deficit at any given time depends on many factors, such as fluctuations in the investment market as well as actuarial assumptions regarding rates of return, which may or may not accord with actual experience. Thus, there would in fact be no deficit at all but rather a surplus in the pension plan if the assumed market rate of return on investments had not been unilaterally changed from 7% to 6.5% when in fact the actual return was 15.4% and 10.9% in the past two years.

[5] The suggestion is made in support of the Administration's position that allocation of funds to pension augmentation is not an ideal expenditure of money because most active employees would receive no benefit from it during the term of the current agreement. This assumes that the Administration is proposing to assign the funds involved to some other employee benefit, but such is not the case. In any event, the same observation could be made regarding pension benefits generally, i.e. that they enure to the advantage of retirees. However, it can safely be assumed that all faculty and librarians are cognizant of the fact that they will at some point retire, and thus all benefit from maintaining the real value of the pension plan. Also, the notion that the cost of augmentation would diminish the prospect of future surpluses, with attendant contribution holidays, seems unconvincing when it is understood that the decision to take contribution holidays is made unilaterally by the Administration, and the giant share of the saving since 1987 has been absorbed by the University rather than by the faculty and librarians.

[6] Moreover, it seems to me, the persuasiveness of the Administration's position in opposing pension augmentation for faculty and librarians, in the absence of a surplus in the pension plan, is seriously undermined by the following factors which are referred to in the materials filed by the parties: (1) the policy against providing pension augmentation only when the plan is in surplus is not a legal requirement but is one that has been adopted unilaterally by the University's business board; (2) the business board has decided to contribute twice as much as is stipulated in the *Pension Benefits Act*, R.S.O. 1990, c. P.8, to the reduction of the deficit, and the amount of the excess is much larger than would be necessary to pay for pension augmentation; (3) the cost of augmentation could be funded from the surplus that currently exists in the Supplemental Retirement Allowance but the business board has simply chosen not to exercise this option.

[7] Finally, and in a collective bargaining sense most importantly, the plausibility of the Administration's position is undercut by the fact that it has agreed, during this very same period, to provide a pension benefit for its unionized administrative staff that is considerably more costly than the pension augmentation requested by the faculty and librarians, and it has done so in the face of a threatened

strike by the administrative staff who have collective bargaining rights under Ontario's *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A. If this Panel's task is to replicate free collective bargaining — an approach that no one disputes — there could be no better evidence of the settlement that these parties should have reached, and of the Award that this Panel should make.

PARTIAL DISSENT (Bertuzzi)

I have had an opportunity to read the Award of the Majority and, while I agree with many of the individual findings, find that I must respectfully dissent from that part of the decision dealing with augmentation of the pension plan for retirees.

The evidence which we received revealed that the parties have only agreed to augmentation in the past when there existed a surplus in the pension plan, based on the actuarial determinations known to the parties at the time of such agreement. Augmentation has never been agreed to, or awarded, when the pension plan was in an actuarially determined deficit position. Under the replication model, mandated on the Panel by Article 6 of the Memorandum of Agreement, this Panel should be reluctant to award any provision in circumstances where the parties themselves have failed to agree to same in their 30+ year relationship.

The retirees already have a generous indexing provision in their pension plan which adjusts their annual pension by seventy-five percent (75%) of inflation. They last received augmentation to the 100% level up to July 1, 2004. It has been the parties' practice when they have agreed to augmentation to catch up all inflation since the last augmentation. Thus, any loss to inflation occasioned by not awarding augmentation in this agreement would be caught up when the parties subsequently agree to augment in a future agreement.

In view of this, the addition of the projected $475,000 cost for each of the next 15 years, to cover *ad hoc* augmentation to July 1, 2005, would seem to me to be a less than ideal expenditure of money. Augmentation up to July 1, 2006 may well cost even more. Almost all of the active employees would get no benefit from augmentation during this agreement while, at the same time, the increased costs would add to the growing deficit and diminish the

prospect of future surpluses, with attendant pension increases and/or faculty contribution holidays for active members.

Accordingly, I would not have awarded that the Association's pension augmentation proposal be imposed.

All of which is respectfully submitted.

# TAB 6

**IN THE MATTER OF AN INTEREST ARBITRATION**

**BETWEEN:**

**The Participating Hospitals**

**and**

**CUPE/OCHU & SEIU**

**(Bill 124 Reopener)**



**Before:** William Kaplan, Chair
Brett Christen, OHA Nominee
Joe Herbert, Union Nominee

**Appearances**

**For the OHA:** Craig Rix
Hicks Morley
Barristers & Solicitors

**For the Unions:** Steven Barrett
Goldblatt Partners
Barristers & Solicitors

Jonah Gindin & Doug Allan
CUPE/OCHU

Matthew Cathmoir
SEIU

The matters in dispute proceeded to a hearing in Toronto by Zoom on May 10, 2023. The Board met in Executive Session on May 25, 2023.

## Introduction

As is well known, on November 24, 2022, the *Protecting a Sustainable Public Sector for Future Generations Act*, generally known as Bill 124, was ruled unconstitutional. The November 3, 2022, award between these parties contained a normative reopener provision. With their agreement, an attempt was made on March 23 and 24, 2023, to mediate the reopener, but when it was unsuccessful, CUPE and the SEIU (the unions) and the Participating Hospitals filed detailed briefs and the reopener proceeded to a hearing held by Zoom on May 10, 2023. The Board met in Executive Session on May 25**,** 2023.

The unions have different collective agreement terms: CUPE, September 29, 2021, to September 28, 2023, and SEIU, January 1, 2022, to December 31, 2023. For all intents and purposes, however, the reopener years are 2022 and 2023 and will be referred to as such (although the precise terms will be used for the economic awards).

## Statutory Criteria

T*he Hospitals Labour Dispute Arbitration Act* (*HLDAA*) governs these proceedings and sets out the specific criteria to be considered:

**Criteria**

9 (1.1) In making a decision or award, the board of arbitration shall take into consideration all factors it considers relevant, including the following criteria:

1. The employer's ability to pay in light of its fiscal situation.
2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
3. The economic situation in Ontario and in the municipality where the hospital is located.
4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.

5. The employer's ability to attract and retain qualified employees.

**Issues in Dispute**

There are six issues in dispute:

1. General Wage Increase
2. RPN Adjustment
3. Call Back Premium
4. Shift and Weekend Premiums
5. Vacation Entitlement
6. Health and Welfare Benefits

**Union Submissions**

**Summary**

The position of the unions can be readily summarized. During the period of the reopener, or stated somewhat differently, for 2022 and 2023, Ontario's hospitals were and are in the throes of an unprecedented staffing crisis; a crisis that affects all employee classifications. Recruitment and retention – one of the *HLDAA* criteria – had to be immediately addressed and one way of doing so was by substantially increasing wages, premiums, benefits and vacations, with additional attention paid to RPN rates. Further justifying, indeed demanding, a significant wage increase was inflation. It had, over the two years of the term, seriously eroded buying power and the award had to take this into account and provide an adjustment so real wages did not continue to fall behind. In addition, the unions were of the view that this reopener provided an overdue opportunity to acknowledge and appropriately recognize the extraordinary contribution of union

members who helped keep Ontario's hospitals open during the most challenging days of the pandemic.

**Recruitment and Retention**

The staffing crisis, the unions argued, was real and the pandemic had made this persistent problem even worse. Ontario had fewer healthcare staff per capita than the other Canadian provinces. Resignations were substantially up. Turnover was substantially up. Vacancies were also substantially up. Working conditions were deteriorating daily. Hospital hallway healthcare was real. Emergency room closures were now chronic and continuing. In 2022, for example, the Financial Accountability Office (FAO), a government appointed body that provides independent analysis of the province's finances, trends in the provincial economy, and related matters, reported 145 emergency room closures. This had happened once before: a single unplanned closure in 2006. Emergency room shutdowns have continued in 2023. Lack of healthcare workers – the unions' members – was the reason. They could not be recruited and retained.

Surgical procedures have been cancelled across the system and there were 93,812 fewer surgeries in 2022, a 14% reduction from 2019. Wait times were 49% longer in 2022 than in 2019 (with the FAO reporting that more than 100,000 patients were waiting longer than the maximum clinical guidelines for their surgeries, an all-time high). The FAO had observed that "without additional measures" Ontario would not achieve its goal of reducing the surgery waitlist to pre-pandemic levels. A big part of the explanation for this, like the emergency room closures, was the human resources deficit. The FAO reported that hospital staffing shortages would go from

bad to worse – especially among the regulated professionals: RNs and RPNs, and also PSWs – from 24,000 currently to 33,000 by 2027.

Even these numbers, in the unions' view, vastly understated the demand for healthcare workers – given predicted population growth, not to mention an aging citizenry and the anticipated collateral increase of high acuity hospital patient admissions that would inevitably accompany it. So called prophylactic measures, such as, for instance, the expansion of private healthcare, would not solve any of these problems, the unions argued: they would make an intolerable situation even more untenable by draining personnel from the Participating Hospitals to private clinics with better hours and compensation. This was not, the unions argued, a controversial view: it was the view of the President of the Ontario Hospital Association (OHA), who, in announcing his organization's concerns about the expansion of private healthcare, observed, "We certainly aren't interested in seeing members of the hospital teams being poached by other employers."

Admittedly, the unions acknowledged, there was no single answer to solving Ontario's healthcare human resources crisis, but real improvements in terms and conditions of employment were an important part of the solution. In fact, the unions argued that the OHA had said just that in its *Practical Solutions to Maximize Health Human Resources*, February 2022 (*Practical Solutions*):

> The Ontario Hospital Association (OHA) has repeatedly heard from members and other stakeholders that health human resources and staffing concerns have become the most urgent and pressing issue emerging from COVID. This document discusses the concerns and practical solutions raised to enhance health human resources now and into the future.
>
> …

In our discussions with members and system stakeholders, it has become clear that workforce issues are at a tipping point – solutions are needed immediately.

…

## Challenges and Concerns about Future Health Care Workforce Supply

### HHR Issues Exacerbated by COVID-19

Hospital staffing models prior to the pandemic were finely tuned and calibrated to be efficient and safe to respond to patient demands amid the funding realities of the time. As of 2020, Ontario had 609 registered nurses per 100,000 population employed in direct care (CIHI) – the lowest in the country when compared to other provinces.

COVID-19 has disrupted this balance both by its impact on existing health care workers and on the need to hire net new positions across hospitals. Hospitals have seen an increase in turnover, largely driven by health care worker resignations. During the pandemic, there have been significant investments and opportunities for hospitals to hire additional staff to respond to COVID-19 through creating net new positions. Both factors have resulted in an overall increase in the number of vacancies that have to be filled in hospitals in a competitive labour market.

### System Wide Capacity Challenges

HHR challenges are being felt across the entire system impacting the care continuum and patient flow. Difficulties accessing primary care during the pandemic negatively impacted emergency departments (ED) which saw a rise in the acuity level of patients seeking care. In addition, HHR challenges and decades of fiscal constraints within long-term care (LTC) and home care also negatively impacted hospitals' ability to discharge patients to more appropriate settings.

As of mid-January 2022, there are approximately 5,800 patients waiting in hospital beds for alternate levels of care (ALC). While there was an influx of beds in 2020 by government (approximately 3,100), some targeted to addressing the ALC issues, the capacity challenges continue. The focus remains on improving the flow of patients across the continuum of care, away from acute care/bedded capacity. Mitigating the ALC challenge and facilitating patient flow can only be successful if we take a system view to HHR solutions.

### Bill 124 and Compensation Restraint

Under the already challenging circumstances, Bill 124 (which restricts health care worker and other public sector employee compensation to a maximum increase of 1 per cent annually for a term of three years) has been raised as potentially one of several factors leading to health care worker recruitment and retention challenges.

The OHA and its member hospitals were not supportive of Bill 124 when it was introduced and sought an exemption from this legislation prior to it being passed. At the time, the OHA expressed concerns that temporary wage restraint would have unintended consequences that could negatively impact hospital employees and create financial and operational disruption that would overshadow the impact of any short-term cost avoidance on compensation increases. In particular, the OHA raised that wage restraint legislation would create uncertainty, risk and anxiety amongst front-line employees and health care employers during a period of health care transformation. The OHA also objected to government intervention on free collective bargaining on a principled basis and further questioned the necessity of these measures given that hospitals have a history of responsible compensation outcomes.

### HHR Issues at a Critical Point

Our members have suggested that exhaustion and ongoing workloads have led to burnout of experienced, late career nurses who have decided to leave frontline clinical practice or the profession entirely. There is anecdotal evidence to suggest that some nurses are leaving hospitals to work for agencies and/or other health care facilities (e.g., public health, surgical centres, independent health facilities) or leaving the industry entirely for a more balanced

lifestyle. Members felt that these issues affecting nursing care are a risk to the delivery of the most critical services in EDs, operating rooms, and intensive care units. Some hospitals and other health providers have no alternative but to fill vacancies by relying more on agency staff than in the past, often spending significant dollars doing so.

In northern hospitals, utilization of agency nurses combined with a heavy reliance on locum physicians is significantly impacting patient care – concerns were raised that some of these professionals do not have the necessary cultural and/or Indigenous training needed to work within these regions. With limited HHR supply in these environments, aggressive recruitment efforts by staffing agencies and increasing top-ups are driving up hospital costs. Many hospitals report that they are spending inordinate amounts of time, energy and dollars trying to recruit permanent or semi-permanent staff.

**HHR Issues Are Impacting the Delivery of Care**

Many hospitals are dealing with an abundance of one-two sick day calls and an increased number of staff, including physicians, taking extended sick leaves. Members reported that the increased amount of sick time leave is impacting the ability of hospitals to deliver care in specific programs. For example, we have heard about shuttering of neonatal intensive care units, birthing units and surgical wards.

There are also growing concerns that HHR issues are impacting the operations of EDs. Most recently, several hospitals within rural and northern communities have considered potential closures to their EDs because of a lack of nurses in the region. Others have had to scale down or close other programs to staff their EDs or other critical areas of care.

A review of the ED metrics (November 2021) shows increases in ambulance offload times, time to physician assessment of patients and wait times for patients being admitted to an inpatient bed. These increases are being observed all while ED volumes remain relatively low, when compared to previous years. Hospitals and ED physicians have indicated that these increases are due, in part, to HHR challenges, as well as the increasing complexity of care which is in turn straining hospital resources.

**Profound Challenges to Operating Essential Services in Rural and Northern Communities**

For hospitals in small, rural, and remote communities, the challenges to safely operate and provide essential programs and services are now insurmountable given their long-standing HHR concerns. Currently there are more than 300 physician vacancies within rural and northern communities. Hospitals are doing their best to maintain services and keep hospitals open, however significant gaps in nurse and physician coverage are putting hospitals at risk for poor outcomes and creating disincentives to recruitment efforts. To avert a crisis, there is an immediate need for practical solutions to maximize capacity in the short, medium and long-term.

*Practical Solutions* proposed, among other things, a series of measures to address the staffing shortages including the creation of "robust retention strategies," "immediate funding to bolster staffing models," and filling vacancies "in real time to ensure that there are no service delivery gaps," and by doing so, "create more manageable workloads for staff, help increase retention rates…." *Practical Solutions* was clear: "Our members have suggested that exhaustion and ongoing workloads have led to burnout of experienced, late career nurses who decided to leave frontline clinical practice or the profession entirely." The government's announced creation of

3,100 new hospital beds was a start but given that Ontario had the lowest nurse per capita rate in the country, there was a need to hire at least 10,000 RNs and 3,500 RPNs over the next five years to meet anticipated needs. There was also a need to redress the consequences of Bill 124: "it has been raised as a significant concern impacting healthcare worker morale and potentially one of several factors leading to health care worker recruitment and retention challenges." The unions translated: working conditions and low, suppressed wages drove employees from the hospitals and made it difficult to recruit replacements.

Unfortunately, the unions observed, instead of instituting system-wide "robust retention strategies" and the other measures that *Practical Solutions* proposed – solutions which the unions endorsed and were seeking to achieve in these proceedings – many of the Participating Hospitals were taking matters in their own hands by, for example, and completely outside and offside of the provisions of the central collective agreement, offering employees double overtime including on call back to incentivize the unions members to work even harder. Other incentives include referral, recruitment and retention bonuses and tuition reimbursement. The excessive use of agency nurses – being paid a multiple of the rates received by Participating Hospitals nurses – demonstrated, as if more evidence was required, a healthcare system in freefall, one that had failed to adequately and systematically address the recruitment and retention issues that everyone agreed – and as *Practical Solutions* made clear – demanded urgent attention.

The fact of the matter was that the wage rates of union members had fallen seriously behind because of state intervention; Bill 124 unconstitutionally suppressed union member wages, and the reopener had to address that. At the same time, the economic picture had changed, and that

meant taking into account inflation – the overall economic context which was another one of the *HLDAA* criteria – in determining the appropriate wage outcome.



**The Economic Context**

Not only were substantial compensation improvements necessary to address the recruitment and retention crisis, but also essential were increases that ameliorated the corrosive and continuing effect of several years of high inflation. Even if inflation has begun to abate – a somewhat dubious proposition and one that in any event remains to be seen – several years of high past inflation was now baked into prices leading to a significant increase in the consumer price index and concomitant decline in the value of wages and living standards (consumer inflation was 3.5% in 2021 and 6.8% in 2022 with at least 3.6% forecast for 2023). Substantial compensation improvements were justified on this basis and providing them was demanded by the proper application of *HLDAA* criteria.

Government revenues were up, job growth was up, a recovery not a recession was underway, reflected in a dramatic improvement in the government's fiscal situation, all as detailed in the unions' submissions. These factors and others have led, the unions observed, to a series of awards and settlements beginning in mid-2022 providing higher than usual wage outcomes in all sectors but including healthcare, in some cases substantially so. These compensation outcomes were carefully reviewed in the unions' brief and at the hearing, but with a qualifier: Of all the awards that were reviewed, the unions made clear their position that the ONA reopener awards were not dispositive or in any way governing for failing as they did to give both recruitment and retention and the impact of inflation adequate, if any, real consideration. There are two ONA

reopener awards: (*ONA & Participating Hospitals*, unreported award of Stout dated April 1, 2023 (Stout Reopener 2021 Award) and *ONA & Participating Hospitals*, unreported award of Gedalof dated April 25, 2023 (Gedalof Reopener 2022 Award).



At one time, indeed for a long time, settlements in the Participating Hospitals followed or resembled each other, but that could no longer be the case. The employees the unions represented, including substantially lower paid service and clerical workers, could not be bound by ONA's asks in its two reopener processes, or the substandard results that were obtained. A further distinguishing feature which the unions urged this Board to consider was that the ONA post-Bill 124 adjudication for a new collective agreement was underway in marked contrast to the unions with their yet-to-expire current collective agreements. In any event, a separate bargaining unit representing a single different classification and advancing different priorities should not be permitted to set the pattern for these service and clerical units. The unions made it clear that they would not voluntarily be bound by the ONA outcomes, which they argued were completely inadequate to address the demonstrated need that they had established: Demonstrated need to address recruitment and retention and demonstrated need to ameliorate against the corrosive continuing impact of inflation.

**Across-the-Board Wage Increases and Other Adjustments**

In the result, the unions submitted that the following wage increases should be awarded in this reopener: 8.5% in 2022 and 11.8% in 2023. Together with wages, the union sought premium, benefit and vacation improvements. Furthermore, the unions advanced their case for a special RPN adjustment.

**RPN Adjustment**

The unions represented approximately 12,000 RPNs, about 25% of the CUPE members, and 30% of the SEIU members. RPNs and RNs had a unified scope of practice. Like RNs, RPNs were regulated health professionals – regulated by the very same college. However, RPN wage rates had not kept up and were, in fact, lagging far behind their peers elsewhere in Canada. Exacerbating the compensation situation was an unfortunate and unjustifiable compression with PSW rates, far from the historic spread: in some hospitals the rates were now separated by less than one or two dollars (in part the result of a recent permanent PSW wage enhancement). The low wages and decreased delta unfavourably compared on the one hand with PSW rates and, on the other, and also unfavourably, with RN rates. Specifically, the wage gap between RPNs and PSWs shrunk from an average of $6.72 in 2021 to $4.78 in 2022, or in other words by nearly 30%. At the same time, the wage gap between RPNs and RNs grew from $17.16 to $19.19, or an increase of 12%. This was largely the result of the Participating Hospitals refusing over successive terms to bargain RPN rates centrally. For the first time, in this bargaining round, the Participating Hospitals agreed to making RPN rates a central issue providing an unprecedented opportunity to redress a longstanding historical wrong by awarding a classification adjustment; one that was completely justified by any objective examination of the unions' established claim of demonstrated need.

There was a benefit to low RPN wages, the unions observed, to the Participating Hospitals: it served their interests to increasingly rely on RPNs to deliver hospital nursing healthcare, but at rates much lower than those paid to RNs. This was hardly a surprising result given the current 90% overlap in RPN-RN competencies. The Participating Hospitals were saving money by using

RPNs but, at the same time, refusing to pay them proper rates. This was demonstrated in the data: a 41% increase in hospital RPNs since 2015 from 17,737 to 25,028 (while hospital RN numbers had remained largely stable).

The trend was clear: RPNs were increasingly providing more and more direct hospital care. RPNs were working in most, if not all, areas including those providing acute care. As *Practical Solutions* established, there were recruitment and retention issues across the system, but recruitment and Retention of hospital RPNs stood out. An RPN hospital vacancy rate of 6.75% in 2017 grew to 10.24% in March 2022 and11.89% by October 2022 (the overall hospital vacancy rate was 8.84%). As of October 1, 2022, there were 2,355 hospital RPN vacancies, a situation that has only worsened. Participating Hospitals were addressing the issue with various *ad hoc* measures (earlier described). They were clearly doing this out of extreme necessity because of the dire staffing shortage. There was evidence, canvassed in the brief, of extremely high RPN turnover, a symptom to be sure of the extraordinary recruitment and retention challenges – a specific *HLDAA* criteria the unions again pointed out.

A classification adjustment for RPNs, the unions argued, should not be a contentious matter: the Participating Hospitals readily acknowledged the "evolving and increasingly overlapping scope of practice of Registered Nurses (RNs) and Registered Practical Nurses (RPNs)." Indeed, the Ontario government had gone so far as to introduce legislation providing for compensation enhancements to encourage recruitment and retention. One government measure, for example, was the Community Commitment Program for Nurses (CCPN). Its features include providing a $25,000 grant in exchange for a two-year commitment to an eligible employer. Other hospitals

were providing market adjustments to incentivize RPNs to come to work. During the pandemic, the government provided a $4 per hour increase – albeit temporary – to RPN rates reflecting its appreciation of the actual value of the work given the unprecedented demands for hospital RPNs.



**Union Proposal RPNs Adjustment**

The unions proposed, given the recruitment and retention challenges, not to mention the PSW compression and the eroded relationship with RN rates that was completely unjustifiable on any principled grounds given the shared scope, that as of the first day of each applicable term, the Participating Hospitals, prior to any awarded general wage increase, adjust the maximum rate for RPNs to $35.17 and adjust all other steps on the grid to maintain the existing differential. This would reflect a $4 per hour increase to the lowest current RPN job rate.

**Participating Hospitals Submissions**

**Summary**

In its brief, the Participating Hospitals agreed that there should be a wage increase, over and above the 1% previously awarded: an additional .75% in each of the two years as "reasonable and appropriate in the circumstances…[and]…that no additional non-wage monetary increases are warranted in the circumstances." At the hearing, however, the Participating Hospitals presented a somewhat revised economic submission; again the .75% in each year, but some very modest premium and other changes as well. In the submission of the Participating Hospitals, the wage settlement should be governed by historical bargaining patterns, patterns in which the unions normally received less than ONA. Notwithstanding this dispositive bargaining history,

there was no basis for the unions – over the course of the term – to receive more than what was awarded in the Stout and Gedalof 2021 and 2022 Reopener awards.

**Reopener Wage Increases**

The question to be asked, and answered, is what would have been awarded but for Bill 124? Neither party, the Participating Hospitals submitted, should be put in a better or worse position due to the passage of time or events that arose after issue of the initial award. Replication demanded that an identifiable, relevant and clear pattern be followed where there was a long-established practice of these parties doing just that; namely, following ONA but generally not doing as well. Both the Stout and Gedalof 2021 and 2022 Reopener awards were wrongly decided according to the Participating Hospitals: they went much further than appropriate in making economic improvements; but even so, they established the pattern. Another part of the overall context had to be assessed as well: When Bill 124 was in effect, the Participating Hospitals were effectively prescribed from pursuing any of their non-monetary bargaining objectives, a situation that continued under the reopener because it was limited to compensation. Moreover, there was a correlation between government funding and wage increases – not between inflation and wage increases – and data was referred to in support of this submission (and the point was also made that many increases in government funding were targeted and unavailable to support general wage increases). There was no reason to believe that if the unions' proposals were awarded, government funding would follow.

**The ONA Re-Opener Awards and the Proper Economic Outcome**

The Stout Reopener 2021 Award – which the Participating Hospitals argued was the comparator for the first year of this reopener – granted an additional 1%, for a total of 2%. To the extent that the Stout Reopener 2021 Award took inflation into account, it nevertheless awarded an increase substantially below prevailing rates. This was in full accord with the authorities, the Participating Hospitals pointed, out referring to the decision of Arbitrator Hayes in *Homewood Health Centre & UFCW* (unreported award dated June 1, 2022) and its observation that "the harsh reality is that no-one can expect to be fully immunized from the negative impacts of extraordinary inflation. This award does not come close," (at para. 31, a finding that has been adopted with approval in other cases cited by the Participating Hospitals). Inflation, the Participating Hospitals argued, may be a factor in determining the appropriateness of a wage outcome, but there is no reason to conclude that wage increases must match or exceed the rate of inflation. That was clearly the conclusion reached in the Gedalof Reopener 2022 Award, which the Participating Hospitals argued was the comparator for the second year of this reopener, and which awarded an additional 2%, for a total of 3%. (The Gedalof Reopener Award also eliminated the 25-Year Step and made significant compressions to the grid to the overall economic advantage of RNs.)

The Gedalof Reopener Award, the Participating Hospitals pointed out, categorically took into account changes in circumstances since that Board's initial award was issued:

> … where comparator bargaining patterns have previously been well established, there is little or no reason to depart from those patterns. But where there have been significant intervening events (in this case a global pandemic, a staffing crisis in nursing, soaring inflation, and freely bargained and awarded outcomes that depart from the asserted pattern) arbitrators exercising their jurisdiction under *HLDAA* will have regard to those considerations (at para. 36).

Having taken these diverse circumstances into account, including specifically, "soaring inflation," the Gedalof Reopener 2022 Award and its additional 2% compensation was the best

comparator for replication purposes. It was not an exaggeration to say that the Stout and Gedalof 2021 and 2022 Reopener Awards were by the parties own longstanding bargaining patterns effectively governing. Accordingly, these two reopener awards set the upper limit of what could be achieved in this case; namely an additional 1% in the first year, and an additional 2% in the second. This conclusion – that any wage increases had to be no greater that what was awarded in these reopeners – was the only outcome that would give effect to long-established bargaining patterns and the replication principle.



In addition, as noted, Arbitrator Hayes (followed by others) was on record that there can be no expectation that awards fully ameliorate against inflation. Such an approach, as adopted in these two reopener awards reflected the funding reality of Ontario hospitals: their funding was not indexed to inflation, imposing structural constraints on how much inflation can be considered, which was almost not at all. And this conclusion was further reinforced by careful consideration of the recruitment and retention situation, so heavily relied upon by the unions in their submissions in support of large across-the-board increases. To be sure, there was no basis to take into account settlements outside of healthcare, and the Participating Hospitals argued they were irrelevant and inapplicable, especially because there were established bargaining patterns to follow.

**Recruitment and Retention**

The Participating Hospitals acknowledged that recruitment and retention were among the *HLDAA* factors to be considered. There was no dispute but that there were health human resources challenges in Ontario hospitals and across the healthcare sector more generally. But

this was the result of a dramatic increase in capacity: more beds meant a need for more employees. Normally, growth in hospital capacity would be accompanied by increases in staffing, but the exigencies of the pandemic did not allow this to occur (even though cumulative numbers – the headcount – have increased).

The OHA had assessed recruitment and retention across the Participating Hospitals, looking at resignations and retirements, turnover and vacancies. There was, as detailed in its written submissions, growth in turnover/vacancies. Part of that was due to employees moving from hospital to hospital, and most of that was due to the increase in capacity. In fact, retirements were stable. The Participating Hospitals were not unique in facing staffing challenges; it was part and parcel of a country-wide labour market shortage. It was correct that some hospitals had hired agency nurses and initiated temporary incentives to deal with urgent, usually seasonal, staffing challenges. However, this did not establish demonstrated need to justify the unions' demands, which, on a wage and total compensation basis, were virtually unprecedented in any sector.

In these circumstances, there was no reason to believe that an increase in compensation would generate new employees. *Practical Solutions* did not say that, and there was no evidence that it was true. In any event, unlike the private sector, publicly funded institutions like the Participating Hospitals could not increase the cost of their services to offset increases in wages. The Participating Hospitals had to live within their means and that meant within the funding provided by the provincial government. This funding was not sufficient to meet ongoing operational needs, much less to pay for inflationary increases.

A solution to the staffing issues was required, but that solution was province-wide initiatives involving all the stakeholders as outlined, among other places, in *Practical Solutions* including:

- Establish a government-led provincial, multi-stakeholder strategy to advice, plan and implement system-wide solutions to address health human resources in the near and longer term.
- Develop a centralized strategy and evidence-based capacity plan that includes health human resources.
- Increase supply through expansion of the Extern program.
- Support inclusive and comprehensive tuition strategies.
- Strategically design and locate clinical placements in high vacancy areas.
- Engage health system providers and colleges and universities in efforts to create innovative education and training opportunities.
- Regulate nursing agency fees.

Other proposed initiatives included providing equitable opportunities to access internationally educated nurses and other nursing support. These and like measures would address the workforce issues, not compensation increases, either across the board, or premiums, benefits and improved vacation, and certainly not, an unnecessary, unjustified RPN adjustment. One thing was certain – and the Participating Hospitals emphasized this – was that *Practical Solutions* may have catalogued staffing concerns, but it never ever suggested nor agreed that major compensation increases, such as those sought by the unions here – were a solution much less a panacea for complicated human resource issues that required a sophisticated multi-party approach. Such major compensation increases were unfunded, unaffordable, extreme, and would do very little, if anything, to address the underlying issues.

**The Proposed RPN adjustment**

This was, the Participating Hospitals observed, the first time that RPN adjustments have been negotiated centrally; but it was not the first time the unions sought RPN increases; additional compensation had been sought in local issues bargaining over successive rounds. In previous local rounds these requests were rejected, as they should be this time too. A centralized RPN rate was not sustainable or appropriate given the realities of the *Pay Equity Act* and the continuing obligations – and challenges – of local parties to maintain pay equity locally. PSW compression was not in issue as the government subsidy of PSW rates was not to be incorporated into the PSW grid. For all these reasons, and others, the Participating Hospitals argued against any RPN adjustment.

**Discussion**

As earlier indicated, this Board of Interest Arbitration is subject to *HLDAA*, which sets out the criteria we are to consider in determining the proper outcome. Some specific criteria are listed, and as elaborated below, have been carefully considered. Also relevant is the fact that the legislation makes it crystal clear that the Board is to take into account "all factors it considers relevant," not just the enumerated ones. Likewise, it is generally accepted that *HLDAA* does not ascribe a particular weight to any single factor; all relevant factors, including the listed criteria, must be considered in overall context. In general, that context is one in which compulsory interest arbitration is imposed because a public policy decision has been made to substitute adjudication rather than strikes and lockouts as the means to reach a collective agreement. The overriding objective is to replicate what the parties would have agreed to do in free collective

bargaining where there is the right to strike or lockout. Neither party is to be advantaged or disadvantaged by the substitution of an interest arbitration regime.

In the normal course of adjudicating interest disputes, one looks to the comparator settlements and awards that occurred for the term in question and one then fashions an award that takes those outcomes into account together with any other relevant considerations. Usually, that means looking at the applicable and prevailing comparator bargaining trends at the time of bargaining/hearing because those are the results that are memorialized in agreements and awards for those same or similar terms. In this case, the initial award was circumscribed by legislation later found to be unconstitutional and our task, under the reopener, is to determine the appropriate compensation for 2022 and 2023. (There is no basis to conclude that since one of the terms begins three months before the end of 2021, while the other begins on January 1, 2022, that 2021 is the first year of the term.) For the reasons given in *OPG & The Society* (unreported award dated May 8, 2023), it is our view that all relevant information – especially information about the economy and awards and settlements since the issuing of the award – which, after all, was not that long ago – must be considered in best replicating free collective bargaining. It now goes almost without saying that there is no basis to fetter this or any other similar adjudication by looking only at information about settlements, awards and the economy at the time of the initial hearing, or before.

Notwithstanding their primary position that compensation increases should be limited to .75 in each year, the Participating Hospitals nevertheless argued that the Stout and Gedalof 2021 and 2022 Reopener Awards were the beginning and, effectively, the end of the analysis. They took

this position for the reasons outlined above: over successive bargaining rounds the unions have followed ONA outcomes, and regularly fell short. There was no basis to depart from long-standing consensual bargaining patterns. We agree that there is a historical pattern but disagree about its continuing relevance.

The Stout Re-Opener 2021 Award is not even applicable, applying as it does to 2021, and the first year of this term by any fair analysis is 2022. (ONA asked for an additional 1% in that award and was granted what it requested and there were some other improvements as well.) The Gedalof Re-Opener 2022 Award is arguably relevant, and in normal times, given historical bargaining patterns, might have been followed. In that case, ONA asked for an additional 2% and was granted what it requested (along with some costly changes to the grid to the benefit of a majority of RNs with an approximate value of 1.75%). It is impossible for us to say what underlay these modest asks, but they would normally be consequential for these parties, given historical patterns.

What can be said is that in response to the ONA asks, the Stout and Gedlaof Reopener 2021 and 2022 Awards fall far short of adequately addressing either inflation or recruitment and retention (albeit both awards are fully responsive to the proposals put before them). Neither award – and time constraints were in issue as both arbitrators were asked to issue decisions on an expedited basis – engage with the corrosive impact of inflation on wages, not to mention a true RN recruitment and retention crisis in Ontario's hospitals.

There are other reasons not to follow these two ONA reopener awards.

It is correct that over a long period of time the unions prioritized non-monetary collective agreement provisions, mainly job security, and regularly received less than ONA. Given the current, continuing and real recruitment and retention crisis, job security has, at best, moved to the back burner. This makes sense: job security is not threatened – the recruitment and retention challenges make that self-evident – and wage gains are, in the current economic context, imperative. The unions cannot be held in perpetuity to an earlier, albeit longstanding, bargaining approach when that approach is clearly now of historic interest only. In addition, the unions have presented evidence, primarily about recruitment and retention and the effect of inflation on wages, that establishes demonstrated need for increases beyond what was awarded in either of the ONA reopeners. It would be perverse to follow those reopener awards; awards that did not fully and comprehensively engage with the hospital healthcare staffing crisis and which imposed economic outcomes – albeit requested ones – well below inflation in either year in supposed fealty to a bargaining relationship and approach that manifestly no longer applies. For whatever this observation is worth, the day in which it was readily accepted that lower paid workers receive lower across-the-board increases than higher paid workers – at least in hospital healthcare – are almost certainly over.

**Application of the Criteria**

Under *HLDAA*, a Board of Interest Arbitration is to consider the employer's ability to attract and retain employees. The evidence presented establishes that there is truly a recruitment and retention crisis in Ontario's hospitals: *Practical Solutions* – an OHA report – is unequivocal about this. That is why it recommended "robust retention strategies," and "immediate funding to bolster staffing models." *Practical Solutions* repeated the unions' refrain: their members were

leaving their jobs because vacancies were not being filled, creating unmanageable workloads leading to burnout and exhaustion driving employees from the workforce. The evidence referred to in this award unambiguously establishes that there are historic numbers of vacancies which generally take very long to fill, and the suggestion that this can be explained by employees moving intra-hospitals is not supported in the evidence. Increased capacity with staffing not yet catching up may be a small part of the answer. As the Participating Hospitals' data establishes, the resignation rate for employees represented by the unions has grown significantly since pre-pandemic (even if it may recently have begun to plateau). However, there is no reason to believe that any of the proactive steps raised in *Practical Solutions* would, even if fully and immediately implemented, address the recruitment and retention problem in the short or medium term. It is unlikely that the economic proposals of the Participating Hospitals, an additional 1% in the first year and 2% in second, together with an increase in shift premiums by .02¢ and weekend premiums by .09¢, would assist in attracting and retaining staff. These increases would not be considered responsive by the unions to the impact of inflation on pay, nor to the recruitment and retention crises, and we cannot disagree.

Hospitals are using agency nurses because they are compelled to do so. Hospitals are offering inducements, offside and outside the collective agreement, because that is the only way in which they can meet their staffing needs: that is also the only explanation for hiring agency nurses at double or triple the collective agreement rates; because compensation is a, if not the, key driver in attracting employees. The province is offering a buffet of policies and programs – almost all financial in nature – to incentivize employees to careers in healthcare because of its axiomatic conclusion that this approach will work; at least that is the underlying premise. The Participating

Hospitals suggest that compensation increases will not solve these problems, but this submission fails in a context when many of their members are using financial incentives to attract and retain staff, and the government is adopting and backstopping this same approach. Wage increases can reasonably be expected to keep people in the workforce, attract people who have left to return, and incentivize future employees. There is no reason we can think of, why members of the unions – who are generally speaking, the lowest paid in hospital healthcare – should receive wage increases that do not even come close to restoring lost earning power.



**The Economic Situation in Ontario and the Employer's Ability to Pay**

The Participating Hospitals argued that there was no guarantee that any awarded increases will be funded and urged us to keep that in mind in fashioning our award. We decline this invitation in that allowing the Province to determine the results of our award through its funding allocations would fetter the independence of this process, which is to replicate free collective bargaining and arrive at an award that achieves this result. The economic situation in Ontario is another matter. The FAO in its May 31, 2023 *Ontario Health Sector: 2023 Budget Planning Review* estimates that the province has allocated a total of $4.4 billion more than what is necessary to fund existing programs and announced commitments from 2022-23 to 2025-28. There is, however, a sobering flip side: the FAO also projected that if all hospital employees were awarded retroactive compensation, hospital spending could increase by an additional $2.7 billion over this period. On the other hand, recent Federal Government GDP updates establish reasons for optimism about the overall economic situation, and high employment augers well for recovery, not recession.

**The Unique Economic Circumstances of this Reopener**

Taking the current state of the economy into account is fully in line with what the OHA argued in an earlier proceeding with another one of its central partners, OPSEU.

In June 2009, the Participating Hospitals and OPSEU (on behalf of paramedical employees) proceeded to an interest arbitration hearing to resolve their collective agreement with a term of April 1, 2009, to March 31, 2011. The Board's unanimous award was issued on November 4, 2009 (*Participating Hospitals & OPSEU,* unreported award of Gray, hereafter Gray Board). The award noted that a global economic crisis had begun in the fall of 2008, some months before the parties began their bargaining. Uncertainty about the length and duration of the downturn, when recovery would begin, and how long it would take, not to mention its longer-term effects, were among the factors the Gray Board identified as leading to a bargaining impasse and the referral of the matters in dispute to interest arbitration. It was obvious that the effects of this downturn on the Ontario economy and public spending were profound.

Some further context is in order. In 2008, ONA and the Participating Hospitals signed a three-year deal with the following increases: 3.25% (2008), 3% (2009) and 3% (2010). Before the Gray Board, OPSEU sought the 3% increases negotiated by ONA for 2009 and 2010 (like ONA they had received 3.25% for 2008). The Participating Hospitals disagreed. Any pre-existing pattern did not matter; what governed were the changed economic circumstances: "The hospitals argued that whatever comparative value the last two years of their central agreement with ONA might otherwise have had was diminished by the fact that that settlement was made before the downturn began" (at para. 19).

The Participating Hospitals insisted that the Gray Board take subsequent economic events into account and not follow the pattern. Put another way, the Participating Hospitals argued that because of a real change in economic circumstances, the Gray Board should not follow the pattern and award lower increases reflecting the dismal economic situation. OPSEU rejected this approach, arguing that the pattern should be followed. In effect, these contrary views mirror the contemporary context except that the union and employer positions were reversed.



In that same way, the Participating Hospitals also insisted that the Gray Board cast a wide net and take into account settlements outside of healthcare. In particular, the Participating Hospitals asked the Gray Board to "reopen our hearing to receive further evidence about quite recent settlements…" (at para. 26).

> The hospitals argued that whatever comparative value the last two years of their central agreement with ONA might otherwise have had was diminished by the fact that that settlement was made before the downturn began … the hospitals … referred to the more modest post-downturn settlements in the public service federally and provincially, as well as even more modest post-downturn settlements in portions of the private sector, some of which included no wage increases (para. 19)

Over OPSEU's objections, the Board concluded that it would hear representations from either party "about *any* event(s) that may have occurred since our hearings in June that the party considers pertinent…" (at para. 27, emphasis ours). In response to the Gray Board's ruling, both parties referred to settlements in sectors beyond healthcare including the Ontario and federal governments, teachers, municipal police, the OPP, fire fighters, LCBO, municipalities, and energy, to just name some of the bargaining outcomes canvassed by the Gray Board in its award. To repeat, this is another mirror of the situation – also with positions reversed –where the unions rely on settlements from many sectors and the Participating Hospitals say they should be disregarded.

Ultimately, the Gray Board concluded that the lens to examine and adjudicate the economic proposals was as proposed by the Participating Hospitals – that meant contemporary evidence about the economic lay of the land and evidence about how the larger collective bargaining landscape was affected by the changed economic circumstances:

> The recession that began in the fall of 2008 has clearly had an impact on collective bargaining outcomes (para. 58).
>
> …
>
> … the recession cannot be ignored. One of the reasons for wages increases is to offset inflation. The wage increases needed to counter the effects of inflation over the course of an agreement for the period April 2009 to March 2011 would certainly be more modest that might have been thought in February 2008, when the hospitals agreed with ONA to increases of 3% for each of those years … This consideration weighs in favour of an outcome in which wage increases are more modest than they might have been if the period in question had been the subject of agreement between these parties in February 2008… (at para. 59).

In the result, the Gray Board deviated from the pattern and awarded a lower increase than would have otherwise been the case.

In the submission of the Participating Hospitals, the changed economic circumstances relied on by the Gray Board, and its decision not to follow the existing pattern and to award reduced compensation, did not apply to these reopener proceedings because the economic circumstances have not changed since issue of the Stout and Gedalof Reopener 2021 and 2022 Awards. Inflation has not changed since those cases were issued mere weeks ago and a consideration of inflation obviously informed both these outcomes, as did recruitment and retention, clearly matters of concern to ONA and RNs. The Gray Award was distinguishable because of a much longer time lag between the time when the comparator settlement was entered into and the hearing and that Board's deliberations, which was another important factor to consider.

With respect, we disagree. In our view, the Gray Board – as requested by the Participating Hospitals – quite properly looked at the changed economic circumstances – like inflation today, because the recession in that case represented a sea change from when the ONA deal was initially entered into (and which would otherwise have certainly been followed). It would have been wilful blindness for the Gray Board to refuse to consider the dramatically changed economic context and settlements and awards from all sectors that reflected what was actually occurring especially the freely bargained outcomes. It is factually and legally significant that in fashioning its award, the Gray Board looked at absolutely everything: it examined, as set out above, settlements in sectors beyond health care including the Ontario and federal governments, teachers, municipal police, the OPP, fire fighters, LCBO, municipalities, and energy. We agree with this approach given the equally dramatic and profound changes to the economic landscape before us.

In these circumstances, the Stout and Gedalof Reopener 2021 and 2022 Awards are not determinative or, indeed, persuasive. Before the Stout and Gedalof Boards, ONA resurrected earlier asks that had been formulated at a time when inflation had not yet taken root. However, in the meantime, annual inflation hit 3.5% in 2021 and 6.8% in 2022. The fact that ONA did not change its proposals to reflect intervening events does not make this change in circumstances any less material. The fact that ONA relied on its earlier asks cannot mean that the unions are somehow bound to follow reopener awards that failed to address relevant interest arbitration criteria such as the state of the economy and recruitment and retention. Following either of these reopeners would not be replication since the overall settlement trend is completely contrary to either of these outcomes. Cleary, this settlement trend is being reached without taking either of

these reopeners into account given their unique distinguishable circumstances. But to the extent that either of these awards takes inflation and recruitment and retention into account, they fail to do so in any meaningful fashion and we cannot, therefore, be constrained in any manner by either of these outcomes. (We have already concluded for the reasons given that the unions are not locked into previous bargaining patterns where the interests underlying them no longer apply.)

Obviously, there is no opportunity in this reopener for the Participating Hospitals to pursue any of their legitimate non-monetary interests as the focus on the reservation of jurisdiction is compensation. However, it is also the case, experience indicates, that there would be challenges in this reopener to the Participating Hospitals extracting or trading for concessions given the economic circumstances and the recruitment and retention situation. Earnings have fallen because of inflation with increases in the cost of living embedded in prices. Notably, the unions have categorically rejected the ONA reopeners awards as in any way governing; and there is no basis to conclude that they would ever agree to either of these outcomes that would put their members even further behind, all in the hope of catching up at some point in the future. Such an outcome would not replicate free collective bargaining.

Much was made by the Participating Hospitals of an *obiter* observation in a long-term care award of Arbitrator Hayes. All we can say about that is that these *obiter* observations are not governing – even if picked up in other long-term care awards – and they cannot direct the outcome of these proceedings. Long-term care has never been a comparator for central hospital negotiations, although in line with our general approach we have considered settlements from

this sector. These observations are also inconsistent with bargaining patterns of the unions and the Participating Hospitals that are generally the opposite when it comes, over time, to the relationship between inflation and general wage increases. There is absolutely no evidence of collective bargaining settlements of these parties of wage settlements less than half the level of inflation. And this is, of course, another reason for declining to follow either the Stout or Gedalof Reopener 2021 and 2022 Awards. The Stout and Gedalof Reopener 2021 and 2022 Awards, as noted, are not dispositive but having considered them and their context, we find them *sui generis*.

Settlements outside of healthcare have not generally been considered in determining central hospital outcomes. On the one hand, the unions assert given the dramatically changed economic landscape that they must be reviewed, and on the other, they are rejected as comparators by the Participating Hospitals as either relevant or useful. They were however, as just discussed, in the unique circumstances of a recession considered by the Gray Board. They were also previously considered and applied to central hospital parties the last time inflation was high and persistent.

In *Participating Hospitals & CUPE* (unreported award of Weiler dated June 1, 1981), the arbitrator reached a number of conclusions that we follow (because the Board in that case, like the Gray Board and the Board in this one, had to address extraordinary economic circumstances). In summary, the Weiler Board held that the appropriate standard for decisions in this sphere should be drawn from external collective bargaining between sophisticated union and management negotiators whose bargains are shaped by real economic forces: “The parameters of change in the Hospital system as a whole must be drawn from and be compatible with the external world of collective bargaining in the Province” (at 6).

Adopting this exact approach, we agree with both the Gray Board – acting at the behest of the Participating Hospitals and with Arbitrator Weiler and many others – that in extraordinary circumstances it is entirely appropriate to look at settlements from sectors not normally considered. Having done so, we find that the best evidence of free collective bargaining is the OPG and PWU settlement – authorized by Ontario's Treasury Board – and the recent settlements between the Government of Canada and PSAC covering 155,000 core public servants and employees of the Canada Revenue Agency. For whatever reason, including possibly happenstance, in terms of the numbers, these settlements – again freely negotiated in strike/lockout regimes – are identical.

In OPG and PWU, wage increases of 4.75% and 3.5% were agreed upon for 2022 and 2023, along with signing bonuses of $2,500 in each year, along with a number of other significant compensation improvements. In the federal government PSAC settlement, the parties agreed on the exact same percentage general wage increases for 2022 and 2023, along with a $2,500 signing bonus, and some other (more modest) compensation improvements. These two settlements are extremely instructive and have informed our view of how to best replicate free collective bargaining in this reopener. These settlements are among the best evidence available of free collective bargaining in a high and sustained inflation environment. They fall far short of what the unions have requested – and they do not fully immunize against inflation – but our job is to replicate what the parties would have done in free collective bargaining because we follow free collective bargaining. The last time significant inflation so dramatically affected spending power, arbitrators, like Professor Weiler in the case earlier cited, awarded double-digit increases.

But in doing so the Weiler Board was following free collective bargaining outcomes, not leading them.

It is our view that freely bargained outcomes are the touchstone – and in the federal sphere were achieved after relatively lengthy strikes. We conclude that these voluntarily negotiated outcomes covering so many employees in the public and quasi-public sector are the best comparator for setting compensation in the current circumstances. Our job, as noted above, is to replicate free collective bargaining, and to ensure that the parties end up no better and no worse than if their right to strike and lockout had not been curtailed. It is impossible for us to conclude that the unions would have surpassed these outcomes, even taking the dire recruitment and retention situation into account (not a real factor in either of these settlements). While we are not awarding any lump sums, we are making adjustments to the RPN rate and premiums and benefits beyond the general wage increase in response to the recruitment and retention challenges, among other reasons in application of the statutory and normative criteria.

For all these reasons, we have awarded an across-the board-increase in 2022 of 4.75% (or 3.75% of new money) and 3.5% in in 2023 (or 2.50% of new money). While the Participating Hospitals have not – in this reopener – had the opportunity to pursue their non-monetary bargaining objectives, we are not reducing either of these general wage increases because of our findings of demonstrated need based on recruitment and retention.

We are fully satisfied that a case has also been met for an RPN adjustment. The small spread between PSWs and RPNs is not justifiable (and we categorically reject any notion that the

provincially funded PSW wage increase is separate and apart from the wage grid). There is no rational job classification system that would ever arrive at this result given education, scope and responsibility. We are not tying the RPN rate to some percentage of the RN rate, but we express the general proposition that RN rates are the ones to look to in determining compensation for RPNs.

On premiums, we are increasing compensation which also reflects the *ad hoc* measures that a number of the Participating Hospitals have already put in place on their own initiative to meet the staffing shortage. It does not make sense to us that members of the unions should be treated any differently when it comes to call-back after completing a shift as the inconvenience to them – and the provision mostly applies to RPNs – is exactly the same as that experienced by ONA members. The same reasoning justifies an increase in the shift and weekend premiums while making it clear in the CUPE agreement, as it is with SEIU, that the shift and weekend premiums are distinct and both are to be paid for relevant hours (maintaining and memorializing the preponderant Participating Hospitals practice). On massage and vision, there is simply no justification for the discrepancies between the unions and ONA (and the $7 cap per visit in the CUPE agreement renders the massage benefit entitlement meaningless and we, therefore direct its elimination). Massage and vision cost the same no matter what union an employee belongs to.

To the extent that this is still actually an issue, it is our view that the funding arrangements for the PSW adjustment are categorical and the additional hourly amount must be included in the PSW wage grid and that any across-the-board wage increases are to be applied thereafter. There is no practical barrier to applying the differing amounts where a Participating Hospital operates a

long-term care facility within the hospital bargaining unit. Different rates apply and the different rates - $2 vs. $3 – are to be included, as appropriate, in the wage grid.

All of these adjustments are made effective date of award and are subject to superior conditions.

**Award**

**Wages (New Money)**

**CUPE**

September 29, 2021: 3.75%

September 29, 2022: 2.5%

Full retroactivity within 90 days to current and former employees.

**SEIU**

January 1, 2022: 3.75%

January 1, 2023: 2.5%

In accordance with Article 29.03 of the Collective Agreement.

**RPN Adjustment**

**CUPE & SEIU**

Effective date of award add $2 to the preponderant maximum RPN rate in effect on the expiry of the prior agreement - $31.18 – and adjust other rates accordingly.

For further clarity, the first year maximum RPN rate at any Hospital, will not be less than $33.18 prior to the general wage increases for the two years of this agreement. Establishing a "floor" maximum RPN rate in this way, is in line with previous Local Issues awards between these parties, which have raised the "floor" for a Hospital's RPN rates when those fall below the "floor," as we do here. Hospitals providing maximum RPN rates above the "floor" will continue those RPN salary grids, modified of course by the general wage increases for the period of this agreement.

This RPN adjustment is effective the date of this award.

**Call Back**

**CUPE & SEIU**

Effective date of award increased to double time.

**Shift and Weekend Premiums**

**CUPE & SEIU**

Effective date of award increase by $1 for shift premium, and $1.50 for weekend.

Parties to amend CUPE central agreement to ensure that both premiums paid if both shift and weekend are worked. Any superior conditions maintained.

**Benefits (Massage & Vision)**

Union proposals awarded effective date of award. Per visit massage cap is replaced by "reasonable and customary" limitation.

**Conclusion**

At the request of the parties, we remain seized with respect to the implementation of our award including, if necessary, to address any issues that may arise should the government's Bill 124 appeal prove successful.

DATED at Toronto this 13th day of June 2023.

*"William Kaplan"*

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William Kaplan, Chair

I dissent. Dissent attached.

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Brett Christen, OHA Nominee

I dissent. Dissent attached.

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Joe Herbert, Unions Nominee

## Dissent

I respectfully dissent from the Award of the Chair dated June 13, 2023 (the "Award") and the reasons therein.

The Award is a supplemental award to an award dated November 3, 2022 (the "Initial Award") and addresses compensation issues not addressed in the Initial Award which was issued when the *Protecting Sustainable Public Sector for Future Generations Act*, 2019 ("Bill 124") was in effect. The Initial Award contained a typical reopener clause which allowed for monetary issues to be re-visited in the event that Bill 124 was determined to be unconstitutional. After the Initial Award was issued, the Ontario Superior Court declared Bill 124 to be unconstitutional and of no force or effect.

The Award addresses the additional compensation to be awarded under the reopener provision. Like other situations involving reopeners, there was no opportunity for the hospitals to negotiate any trade offs against the monetary gains sought by the Unions.

The two collective agreements under consideration have slightly different terms and the Chair determined that the years covered by the reopener award were best described as 2022 and 2023 for the purpose of considering appropriate comparators (at p.19). As noted by the Chair at pp. 9-10, there have been two recent reopener awards between ONA and the Participating Hospitals: the Stout Reopener 2021 Award and the Gedalof Reopener 2022 Award. The latter award determined the additional compensation to be awarded to ONA for the last year of ONA's moderation period under Bill 124 and predominantly relates to 2022. That is, the Gedalof Reopener 2022 Award addresses the same period as the first year of the Award.

In addition to some non-wage benefit amendments, Arbitrator Gedalof awarded a total ATB wage increase of 3% and a change to the ONA wage grid to the immediate benefit of bargaining unit members with 8 or greater years of service. Whatever one may think of the Gedalof Reopener 2022 Award, upon its issuance it became a highly relevant comparator for the reopeners involving the Participating Hospitals for 2022. ONA has long been a significant direct comparator for OPSEU in the hospital sector and a relevant comparator considered in CUPE and SEIU negotiations. This established relationship between settlements involving the major bargaining agents in the hospital sector has provided predictability in the sector and has served the parties well by discouraging resort to interest arbitration to settle bargaining disputes.

The Award declines to follow the Gedalof Reopener 2022 Award and awards a total ATB wage increase of 4.75% for 2022.

ONA has been the traditional leader in the hospital sector and it proceeded to litigate its two reopeners first. The other hospital unions had full knowledge that ONA was proceeding first and of the traditional implications of an ONA award upon their settlements. In these circumstances, I would have preferred that the Chair awarded no more than the wage increase in the Gedalof Reopener 2022 Award for 2022 to maintain the traditional relationships in central bargaining in

the hospital sector. This is particularly the case where there was no opportunity for the hospital to obtain non-monetary trade -offs in exchange.

When relevant central comparators in the hospital sector are not followed the risk of inappropriate leapfrogging/whipsawing greatly increases. For example, here the Chair awarded an increase to the call back premium to maintain parity with an increase to call back ONA received in its initial interest arbitration under Bill 124's compensation restraint which was wholly unjustified.

In advancing their case before the Board, the Unions very heavily relied upon the recruitment and retention problems facing hospitals. Staffing issues in hospitals, however, are significantly exacerbated by provisions in both collective agreements that restrict the hospitals' ability to efficiently schedule and assign employees to address staff shortages within the hospital. These are exactly the provisions that the hospitals would have sought to amend in exchange for the significant monetary increases obtained by the Unions in this proceeding had they not been precluded from doing so in the reopener process. Amendments to these provisions will presumably be carefully considered in future negotiations and interest arbitration awards to ensure that interest arbitration works fairly for both of the parties involved in the process.

The Award also grants significant amendments sought by the Unions to several benefits. In light of the wages awarded for 2022 and 2023, and having regard to the interest arbitration principles of incrementalism and total compensation, I would have awarded more modest benefit changes or deferred any benefit increases to the next round of bargaining.

Finally, I would note my strong disagreement with the interpretation of *Practical Solutions* asserted by the Unions to the effect that that document proposes increased wages as a solution to staffing shortages.

Dated June 13, 2023

*"Brett Christen"*

Brett Christen
Nominee of the Participating Hospitals

**DISSENT**

In a unique time of high inflation, significant real economic growth, and of acute staffing problems in Ontario's hospitals, an award which prevents hospital workers' wages from even keeping pace with inflation surely falls short.

Three factors have traditionally governed wage determination in pattern-setting awards such as this one. These are 1) inflation; 2) the presence, or absence, of 'real' (as opposed to nominal) economic growth, and; 3) settlements. In addition, and exacerbating the need for a substantial wage increase in this particular case, there are present somewhat unprecedented difficulties in recruitment and retention in Ontario hospitals.

The best analysis of the interaction of these factors is to be found in Professor Weiler's seminal 1981, *Participating Hospitals and CUPE* decision. Adoption of the same approach here, ought to have resulted in higher wage increases in each of the two years, where, instead of trailing inflation real wage growth ought to have occurred. Here's how these factors, properly considered, ought to have shaped this award differently.

*Inflation*

According to the O*ntario Budget, 2023*, headline inflation for 2022 was about **6.8%**. The most recent (April 2023, released in May) 2023 CPI indicator shows an uptick to inflation, annualized at another **4.4%**. Significantly, the Index in this period has been driven by increases to key consumer items, food and fuel prices, and more recently, housing prices. These are of course, essential needs, and the reduction of employee purchasing power against these basic needs signals a decline in employee wealth. That is particularly so for employees such as these who are not advantaged by higher incomes.

Professor Weiler's analysis tracks the relationship of wage increases against inflation. Although he would measure inflation differently, his general premise is the obvious one – that wage increases that fail to keep pace with inflation leave workers with a decline in purchasing power. The one economic factor that could justify such a result, a loss of employee purchasing power, is a real decline in economic growth. He wrote:

> The ideal towards which interest arbitration aims is to replicate the results which would be reached in a freshly-negotiated settlement. The negotiators at the bargaining table typically work towards a figure which will protect the worker against unanticipated inflation and provide real income gains to the extent these are permitted by rising productivity in the economy. It is important to emphasize that the rise in the cost of living — whether measured by the Consumer Price Index or otherwise — is not the be-all and end-all of rational wage determination. *If there is real per capita growth in the economy, wage gains can and do exceed the rate of price inflation.* (emphasis added)

The conclusion, an easily reached one, that wage growth should exceed the rate of inflation in times of real economic growth, is echoed in later Central awards. In the 1985-1987 award, another of the major influences on modern day interest arbitration, arbitrator Kevin Burkett, awarded these employees wage increases of 5% and 4.5%, when inflation was at or slightly above 4%, thus providing enhanced real purchasing power to employee wages in a period of economic growth. In the following round, arbitrator Stanley did the same while noting:

> General economic indicators taken into consideration by arbitrators, include the rate of inflation and the rate of economic growth. Clearly employees in the public sector are entitled to share in the prosperity of the province as evidenced by real growth.

Arbitrators Burkett and Stanley awarded wage increases greater than those awarded here, in times of economic growth when CPI was increasing at a lesser rate than it is now. But more telling, each awarded increases that provided some real growth to employee earnings, i.e. *above* the rate of inflation, when inflation less than its present rate was matched with real economic growth. Never before the present award, to my knowledge, during the entire period of application of the *Hospital Labour Disputes Arbitration Act*, has there been an occasion where an arbitrator has awarded real wage diminution to these classifications of employees, totaling as it does here about 3% during the period of a single collective agreement, when there

has been concurrent real economic growth. This award, for these employees at least, provides an unappealing first in that regard.

*Economic Growth and Settlements*

The Ontario Budget, 2023, notes real GDP growth for 2022 of **3.7%**. That is real growth in the economy measured in constant dollars, not a mirage created either by inflation or currency fluctuation. For 2023, the Budget was more conservative, predicting actual real growth but only at the level of .2%. However, the May 31, 2023 federal government update shows that the economy is instead growing in 2023 at an annualized rate of **3.1**%. The economic downturn in 2020 was entirely, or almost entirely, made up for by real growth in 2021. The economic growth in 2022 and 2023, the years covered this award, is both real and substantial.

The arbitrator has paid particular attention to recent major public sector settlements, and following Professor Weiler's admonishment against a singular "incestuous" focus within the same sector, on the settlements at Ontario Power Generation, and virtually identical settlements at the federal government's Treasury Board bargaining tables, as well as the federal Canada Revenue Agency. The latter two settlements, at federal Treasury Board and Canada Revenue Agency, cover approximately 155,00 people. I make two observations.

First, and of lesser importance, these settlements included other significant wage-related payments beyond the 4.75% and 3.5% across-the-board increases – not the least of which were additional lump sum payments of $2,500 made twice in the OPG settlement, and once in the federal Treasury Board and CRA settlements.

Second, and of more importance, ours is a pattern-setting award for RPN's, service, clerical and maintenance employees across Ontario hospitals. While other settlements are important to consider, they do not necessarily have the same weight in my view, in a pattern-setting award such as this one, as they would in one that is instead following a pattern. That is particularly the

case when one examines the evidence put before us in respect of recruitment and retention – problems which have arisen to a different extent in Ontario's hospital sector than they have elsewhere.

*Recruitment and Retention*

In the entire period of operation of the *Hospital Labour Disputes Arbitration Act*, save perhaps for the RN recruitment and retention crisis of the 1980's/1990's, there has never been a period rivalling the present one for hospital-sector staffing shortages. Closings of emergency rooms across the province and record lineups for surgeries are now rooted not in pandemic causes, but instead in the chronic and systemic inability of hospitals to adequately staff for normal hospital services.

In our case, the unions were able to demonstrate numerous financial incentives – several pages of them in fact – where hospitals involved in this case have instituted payments to employees over and above those contained in the collective agreement, and in many cases in violation of the terms of the collective agreements - recruitment payments, retentions bonuses, enhanced pay, enhanced overtime premiums, enhanced shift premiums.

Recruitment and retention difficulties are not necessary to prove in order for unions to gain a real wage increase for their members during a period of economic growth. However, difficulties of the current degree, augment an already substantial case that these employees ought to have received wage increases somewhat greater than the rate of inflation.

In the 1987-1989 central round of hospital bargaining, arbitrator Stanley awarded CUPE increases of 6% and 5% during a time when there was, like the present, real economic growth and when the rate of inflation was somewhat lower than it is now. In my view, a proper balancing of the above normative factors – the increases to CPI in the context of underlying real economic growth - would have resulted in real wage gains for these employees, that is,

increases somewhat greater than the rate of inflation in each of the two years under consideration.

The case put forward by the Hospitals did not, in my respectful view, successfully rebut those normative factors which called for a higher wage increase. The Hospital's case was premised largely upon giving inflation little or no weight, while claiming that the award in *Participating Hospitals and ONA*, April 25, 2023 (Gedalof), hereafter the 'Gedalof award', established the upper barrier to what could be awarded here. According to the Hospitals, a 'new consensus' has emerged among arbitrators, or at least among arbitrators Gedalof and Hayes, that wage increases during periods of elevated inflation are to necessarily trail the rate of inflation. Gone apparently, are traditional considerations of whether there is actual real per capita economic growth. Instead, it is to be taken as a 'given' that even when the economy and productivity are expanding and creating new wealth, such new wealth should not find its way into wage outcomes, and instead elevated inflation will eat into the real earnings of workers. Indeed, inflation is given such little weight in arbitral outcomes it was suggested, that the time has come for it to be excluded as a factor altogether.

In my view, the Gedalof award can only be properly understood within its context. By the time of the Stout and Gedalof wage re-openers, the ONA was well advanced in its bargaining for the subsequent renewal collective agreement beginning in 2023. In fact, by the time of the ONA Bill 124 're-opener hearings', those parties were at the arbitration stage for the renewal 2023 collective agreement and had already been bargaining the Association's economic proposals for the renewal agreement. Accordingly, the two interest boards that had adjudicated the collective agreements covering the Bill 124 period, those chaired by arbitrators Stout and Gedalof, were asked to quickly issue re-opener awards for the Bill 124 period within a few weeks of each other, to be issued in advance of the May 2023 arbitration hearing for the collective agreement that would begin in April 2023.

And it is in that 2023 collective agreement, currently subject to adjudication, that the ONA had already been bargaining to make the sorts of gains necessary to address the changed economic circumstances of recent inflation, and to further address issues of recruitment and retention. For the purposes of the 're-opener awards', including the Gedalof award, ONA was content to proceed with its original proposals formulated before the current economic climate and high inflation took hold. Thus, in front of arbitrator Gedalof, ONA pursued only the 3% wage increase for 2022 it had sought when it began its bargaining for that collective agreement years before, with the 'main event' set to occur in May 2023 at the hearing for the renewal collective agreement. And in that re-opener, arbitrator Gedalof fully awarded the across-the-board increase sought.

Those circumstances are significantly different from the ones here. These employees do not have another collective agreement, and another arbitration hearing, lined up at which they can deal with the economic world which emerged in 2022. Here, for the employees covered by this award, the terms and conditions of employment are being determined in 'real time' for the 2022 and 2023 period. There is no 'other' bargaining that has been under way for a later agreement, there is no other collective agreement in which the current economic realities can be addressed. It would be unreasonable to assume that these unions would permit another bargaining agent's bargaining strategy, adopted in the different context described above, to eliminate their own ability to address the present economic circumstances in their present collective agreement.

And if I am wrong in that, if as the Hospitals argue the Gedalof award stands for the proposition that hospital workers should lose almost 4% of their purchasing ability (the difference between 6.8% CPI and a 3% salary increase) in a single year, despite a growing economy and the creation of new wealth that has been normatively been shared, then such an award constitutes a radical departure from well-established interest arbitration principles in this sector, without any rational justification given for such an extreme outcome. If the Gedalof award were to be understood as the Hospitals argue, then it would simply be one that does not warrant being

followed on its merits. I do not think however, that the Hospitals' approach to the award is the correct one.

*Conclusion*

Present economic circumstances support the need for a higher wage award, in both of the years covered by this award, than has occurred. A 'real' (i.e. above the rate of inflation) increase to incomes was warranted on the basis of traditional economic factors, and further supported by demonstrated problems in recruitment and retention. Instead, employees have been awarded increases that will not keep place with inflation, inflation occurring in particularly sensitive consumer items, resulting in an easily observed loss of purchasing power – one generally unprecedented for these employees, and certainly unprecedented during a period of significant underlying real per capita growth.

I should note that my criticism of the wage outcome is not intended to suggest that the Chair has not approached this matter in a manner of utmost fairness. Simply reading his award makes it clear that he has.

I do note that the other areas of the award – the RPN adjustment, the increase to call-back and shift/weekend premium increases in particular – will hopefully assist with staffing problems that have resulted in hospitals providing compensation over and above that set out in the collective agreements in these areas. I also obviously agree with the modest improvements made to health benefits of massage and vision.

Dated this 13th day of June, 2023.

Joe Herbert, Nominee of CUPE/OCHU, and of the SEIU

# TAB 7

**IN THE MATTER OF AN INTEREST ARBITRATION**

**BETWEEN:**

**OPG**

**and**

**The Society**

**(Bill 124 Reopener)**



| | |
|---|---|
| **Before:** | William Kaplan<br>Sole Arbitrator |

**Appearances**

| | |
|---|---|
| **For OPG:** | Tom Moutsatsos<br>Jessica Toldo<br>Hicks Morley<br>Barristers & Solicitors |
| **For The Society:** | Michael Wright<br>Nora Parker<br>Wright Henry<br>Barristers & Solicitors |

The matters in dispute proceeded to a mediation on March 14, 2023, and to a hearing held by Zoom on April 19, 2023. Further written submissions were completed on May 4, 2023.

**Introduction**

On December 3, 2021, I issued an award resolving the collective agreement between the parties. The collective agreement settled by the award – with a term of January 1, 2022 to December 31, 2023 – was subject to the *Protecting a Sustainable Public Sector for Future Generations Act* generally referred to as Bill 124. Bill 124 imposed a three-year period of wage restraint requiring these parties, and many others, to restrict total compensation during this moderation period to 1% a year. As was customary, I retained jurisdiction "to reopen compensation issues should outstanding constitutional challenges prove successful or should Bill 124 be otherwise modified or repealed with retroactive effect or for some other legally relevant reason."

On November 29, 2022, Justice Markus Koehnen determined that Bill 124 was contrary to Section 2 (d) of the *Charter of Rights and Freedoms* and was not saved by Section 1. Justice Koehnen concluded that the statute was "void and of no effect." The Society immediately requested that the proceedings be reconvened to deal with the reopener. Instead, the parties were directed to return to the bargaining table; and they did so, but without success.

In the meantime, the Government of Ontario did not seek a stay of the decision pending its announced appeal. Accordingly, and in consultation with the parties, a mediation/arbitration process was agreed upon with mediation occurring in mid-March and, when it was unsuccessful, an arbitration on April 19, 2023. The parties then filed further written submissions, a process which was completed on May 4, 2023.

**The PWU Settlement**

Before turning to the submissions of the parties, mention must be made of a collective bargaining settlement between this employer and its other large bargaining unit: the Power Workers Union (PWU). On March 10, 2023 – just days before the mediation between these parties – the PWU announced freely negotiated Minutes of Settlement (PWU-MOS) that had been reached one week earlier. The PWU-MOS announcement stated that there were "**no concessions**." Among very many PWU financial gains were the following:

**Wages**

April 1, 2022: 4.75%

April 1, 2023: 3.5%

**Lump Sum**

Date of Ratification, lump sum payment of $2500 to all active Regular and Term Employees. A further lump sum payment of $2500 on April 1, 2023.

Notably, the two-year term at issue in this reopener substantially overlaps the two years of the PWU-MOS: PWU-OPG April 1, 2022 to March 31, 2024, versus Society-OPG January 1, 2022 to December 31, 2023. One further fact bears mention: at the arbitration hearing leading to the initial award, the Society sought 2.5% general wage increases in each year notwithstanding the fact that this result was prohibited by Bill 124. At that time, the Society asked that the award indicate what amount would have been awarded but for the wage restraint legislation, an invitation that was not accepted.

**Society Submissions**

The Society sought increases of 4.9% in each of the two years (3.9% of new money), a one-time catch-up payment of 1% to begin to remedy what it described as a decade-long internal relativity gap between it and the PWU, and the reactivation of Article 24 – an Escalator Clause that it had previously agreed to suspend. Reactivation of this COLA provision was required to ensure that Society wages did not fall even further behind.

In the Society's view, it was not bound by the outcome it sought when the case first proceeded to hearing. Events had long overtaken any circumstances that may have then been present, most notably continuing and increasing inflation – inflation that was reaching historic numbers not seen for decades – creating a real erosion in spending power. A failure to consider current economic conditions would be akin to participating in a game of make believe.

Extremely important, in the Society's submission, was the PWU-MOS which was the result of free collective bargaining: free collective bargaining unhindered by unconstitutional legislation covering most of the same period of this reopener. This settlement was reached just as these parties were meeting to address the reopener. This was, in the Society's submission, telling. The story it told was of a normative freely bargained economic result for essentially the same two years under review, a result that should, at the very least, be replicated here. This conclusion was made even more manifest by the application of other governing interest arbitration criteria, including those set out in the collective agreement.

Likewise, and separate and apart from the dispositive PWU-MOS, all the Society's long acknowledged comparators – comparators not subject to Bill 124 – continued to achieve compensation outcomes along the lines of the Society's current proposal. The replication principle directed that they also be followed. For instance, Society-represented staff at Bruce Power – the best and most regularly referred-to comparator for bargaining purposes, and one regularly relied upon by the parties and by interest arbitrators adjudicating their disputes — received salary increases of 5.19% in 2021 and 6.03% in 2022 (2.20%/2.00% negotiated amounts and 2.99%/4.03% COLA increases). This formula would be followed by the Society and Bruce Power – with anticipated comparable numbers – for determination of 2023 wages.

In these circumstances – elaborated in more detail in the Society's written submissions and at the hearing – additional increases of 3.9% in each year were necessary to (i) address the inflationary ravages of 2022 and those expected to continue in 2023, (ii) achieve wage parity with established external comparators and (iii) ensure the relatively gap at OPG did not further widen. The Society's proposed wage increases, correction of the relatively gap and reinstatement of the Escalator Clause would give best effect to the replication principle. This result was also in full accord with the overwhelming weight of recent awards that provided significant inflation adjustments, awards that the Society carefully and extensively reviewed.

**OPG Submissions**

What mattered most, in OPG's view, was the bargaining context that existed in the fall leading up to the hearing and the issuance of the December 3, 2021 award. Virtually none of the awards and settlements from that time justified the current ask. In OPG's submission, no more than an

additional 1% should be awarded in each year of the reopener. At the very most, the Society was limited to what it sought in that bargaining round: 2.5% in each year of the agreement, so an additional 1.5%.

The reason for that was obvious, and compelling: at interest arbitration in the fall of 2021 the Society described a 2.5% increase as "fair and reasonable." There could, in these circumstances, be no award that provided more than what the Society itself said was the right number. Doing otherwise would turn the replication principle on its head. How, OPG asked, could the Society now seek an economic outcome beyond what it clearly and repeatedly indicated was the appropriate result, one that was "fair and reasonable" if Bill 124 was not in effect? Accordingly, OPG expressed the view that the Society's best case was an additional amount of 1.5%: namely, what the Society asserted, to repeat, was "fair and reasonable" at the time.

OPG's main proposal for the reopener, however, was 1% in each year, and only in the alternative an additional 1.5% in each of the two years. These proposed increases gave effect to the collective agreement criteria: Society employees were already highly paid, there were no retention issues, compensation increases would compound regulatory pricing scrutiny, business challenges and risks were demonstrable – to give just one example, the Pickering Station Closure/Refurbishment – external relativities did not support the Society position, the Society comparators were inapposite and the PWU-MOS was simply "not relevant."

Elaborating on this point, OPG was of the view that that the PWU-MOS should not be considered in these proceedings for many reasons, starting with the fact that the Society

bargained in the fall of 2021 and the interest arbitration award was issued in December 2021. In contrast, the PWU-MOS was reached in the winter of 2023. It was, accordingly, an agreement reached in a completely different context, at a different time and with different trade-offs.



Indeed, OPG was of the view that it would offend the replication principle to pay any attention whatsoever to the PWU-MOS, especially if that led to an increase beyond what the Society would have settled for in 2021. OPG cited with approval the *ONA & Participating Hospitals* reopener decision of Arbitrator Stout (unreported dated April 1, 2023, hereafter the Stout Award) where the arbitrator awarded what had been proposed at the time, an approach OPG insisted should be followed here.

In that case the Board held:

> The interest arbitration board's task is to replicate what the parties would have agreed upon but for Bill 124. This means that we are to examine the parties' proposals made at the time in the context of the collective bargaining environment as it then existed when we issued our June 8, 2020 Award (para 18).
>
> ..
>
> Interest arbitration is an artificial exercise by necessity. However, it is informed by objective evidence, including evidence of collective bargaining and the economic environment at the time of the board's award (para 20).
>
> …
>
> We … are of the view that the wage increases ought to be limited to what was proposed at the time of our June 8, 2020 Award (at para, 22).

These principles were, OPG argued, governing. To be sure, Arbitrator Gedalof took a different approach in the second *ONA & Participating Hospitals* reopener (unreported decision of Gedalof dated April 25, 2023, hereafter the Gedalof Award), but that case was completely distinguishable because there was no evidence of earlier bargaining proposals to rely upon. OPG was of the view that to the extent the Gedalof Award stood for the proposition that it was appropriate for an

arbitrator in a reopener to consider facts and circumstances arising after the date of the interest arbitration award, it was incorrectly decided; indeed, wrong.

In addition, there were other distinguishing factors that should lead to a completely different result than that memorialized in the PWU-MOS. The PWU was in a legal strike position when it negotiated its deal – the Society and OPG were subject to a voluntary interest arbitration process. If PWU were to strike, OPG would have to immediately commence the shutdown of all its nuclear generating facilities. There would be other serious negative consequences to the electricity supply. It was in this context that OPG sought and obtained a renewed bargaining mandate that led to the PWU-MOS. Reaching a settlement with the PWU was imperative, less so with the Society and its interest arbitration default. There was also no opportunity in this reopener to reflect collective bargaining give and take. OPG asserted that in return for the PWU-MOS it achieved many efficiencies and cost savings: "OPG obtained items of Significant Importance."

According to the OPG these items of significant importance were:

(a) Extension and amendment of the Nuclear Staffing Agreement and
Corporate Staffing Agreement;
(b) Newly negotiated Letter of Understanding Concerning the Transition of Pickering Nuclear Generating Station;
(c) Newly negotiated Small Modular Reactors Letter of Understanding;
(d) Newly negotiated Authorized Nuclear Operators Letter of Understanding;
(e) Equity, diversity and inclusion related items.

These items, OPG observed, provided it with critical tools to respond to current and future challenges, streamline its operations and obtain various important operational efficiencies and cost savings. They are described in detail in OPG's written submissions. In OPG's view, it would be the exact opposite of replicating free collective bargaining if the Society were able to obtain

increases in compensation equivalent to the PWU without it obtaining trade-offs of similar value. The bottom line, however, was that the PWU-MOS was irrelevant and should not be taken into account.

OPG also took the position that "there is no demonstrated need to address inflation in this case" (para 31 OPG Brief) and "inflation is a non-issue and does not warrant greater salary increases" (para. 178 OPG Brief). High inflation, OPG argued, should not automatically result in increased wages, especially for people who were already highly paid. Most of the time, Society wage settlements exceeded inflation. To the extent inflation was an issue – and OPG suggested it was transitory and should not be embedded in its cost structure – any inflation deficit could be made up in future bargaining rounds.

OPG argued that the Escalator Clause was a settled matter and should not be revisited. Similarly, this was not the time or place to address the Society's relativity gap proposal. What should, however, be addressed – in the context of either a 1% or 1.5% increase in each of the two years – were its proposals to save money through collective agreement efficiencies. While it was true that OPG had withdrawn these proposals at the hearing, it only did so in the context of understanding that they would not be awarded when Bill 124 was in effect. Once Bill 124 was declared null and void, it was entirely appropriate when considering compensation matters to bargain these compensation items and OPG asked that its three proposals be awarded. In any event, given that Bill 124 was under appeal, OPG requested a re-reopener clause should Bill 124 eventually be sustained.

**Discussion**

Having carefully considered the submissions of the parties, I am of the view that the appropriate outcome is a further wage adjustment in the first year of 3% and in the second, 2.25% (over and above the 1% in each year as set out in the initial award).

A few initial observations are in order followed by more detailed discussion of the specific reasons for the award.

The Society sought a 1% special adjustment to address what it described as a long-standing relativity wage gap between it and the PWU dating back a decade – a proposal advanced without success in previous bargaining. The Society also sought the reactivation of the Escalator Clause, which it agreed to suspend in the last round. For its part, OPG advanced three of its own proposals that it had withdrawn in bargaining: increasing rotation timelines to the benefit of OPG, institution of a cap on banked time to the benefit of OPG, and liberalization on the use by OPG of temporary employees to the benefit of OPG.

In my view, the Society's relativity gap proposal is a compensation matter and it is appropriately before me. Any compensation item is fair game. While it also relates to compensation, the Escalator Clause is different: the Society and OPG agreed to its suspension. There is no reason not to give effect to their agreement and every reason to do so (which does not lead to a conclusion that the Society is somehow precluded from seeking wage increases that reflect current economic conditions as argued by OPG). OPG's three proposals, however, cannot be part of this compensation reopener process. These three items are not compensation as defined in Bill

124. While perhaps justified by demonstrated need or for operational and other reasons, they are work rule concessions, not compensation. Simply put, compensation issues are proper subjects for this reopener, but other changes are not. Trade-offs can still occur, but they are limited to compensation items.

I am not, needless to say, oblivious to the bargaining reality that in the normal course compensation increases are exchanged for non-monetary adjustments, usually to work rules. That is just not possible given the extremely limited reservation of jurisdiction in this Bill 124 reopener process (a situation which nevertheless must still be accounted for as discussed below).

The purpose of a Bill 124 reopener is to address compensation outcomes that were restrained by (now unconstitutional) statute. It is limited to considering compensation, not various other items of interest in normal bargaining. In fact, it is fair to say that an interest arbitrator in a compensation reopener would likely be found *functus officio* if there were an attempt to completely open up an already settled agreement (other than compensation items for which jurisdiction was specifically retained).

That then leaves the matter of the relativity gap and general wage increase. I am declining to award the relativity gap proposal having chosen, as was done in the PWU-MOS, to focus on the across-the-boards. One key reason for doing so – and consistent with replicating free collective bargaining – is that OPG and the Society agree that there should be a wage increase in each year of the reopener; they only disagree about the amount. Determining this number requires consideration of the collective agreement criteria, the application of the replication principle –

which includes considering the PWU-MOS – and, at the same time, taking into account the unique circumstances that apply to this particular reopener; namely, the detrimental effects of substantial and continuing inflation, a material change in circumstances by any definition.



**The Criteria**

The collective agreement sets out the criteria to be assessed in determining compensation:

> The mediator-arbitrator shall consider the following issues as relevant to the determination of the award on monetary issues:
>
> a) a balanced assessment of internal relativities, general economic conditions, external relativities;
>
> b) OPG's need to retain, motivate, and recruit qualified staff;
>
> c) the cost of changes and their impact on total compensation;
>
> d) the financial soundness of OPG and its ability to pay.

While this is only one of the reasons supporting the result, the application of these criteria – and not all of them need to be applied in a single case – leads to the conclusion that there should be an economic increase that reflects the PWU-MOS.

It is quite clear – referring to the economic data in the submissions – that OPG is both financially sound and has ability to pay. Maintaining internal relativities between PWU and the Society supports the result. Bargaining data demonstrates compensation correlation over an extended period (1999 to 2021). Stated somewhat differently, a comparison of year-over-year Society-PWU economic increases establishes that they frequently followed each other over the course of the past two decades, although especially in the earlier years.

It would actually be unprecedented for a delta along the lines proposed by OPG to be either freely negotiated or awarded at interest arbitration. The same is true when external relativities are considered. Sector comparators – in particular, the long-relied-upon Bruce Power results – must be considered and they establish what actually happens when free collective bargaining is not constrained by legislation. If either a 1% or 1.5% additional increase were awarded – the appropriate possible outcomes according to OPG – it would have obvious impacts on the recruitment, retention and, above all, motivation of staff. There is no doubt but the appropriate application of the negotiated criteria supports a substantial increase but, as noted at the outset, this is not the only reason for reaching this result.

**The Replication Principle and the PWU-MOS**

There are many criteria that govern the determination of interest disputes, but it is fair to say that the guiding principle is replication: replication of free collective bargaining. By that one means attempting to replicate the result that would most likely flow from free collective bargaining. In this case, the PWU-MOS is the best evidence of what a freely bargained result would look like.

The term of the PWU-MOS closely parallels this reopener, which starts and ends three months earlier. For all intents and purposes these terms are the same. While OPG insisted that the compensation increases in the PWU-MOS were part and parcel of a larger negotiated agreement in which it achieved significant efficiencies and cost savings – discussed in the briefs, at the hearing and in this award – it did not provide any costings. Experience in these matters indicates that OPG would not have come out of the bargaining empty-handed; however, without actual costings it is extremely difficult to determine what the trade-offs actually were.

Had OPG provided more granularity about the costings of the PWU-MOS, one would be better placed to attempt to more accurately replicate that freely bargained settlement. The fact that it did not do so, however, is not, in my view, sufficient to ignore the reality of collective bargaining: it rarely produces freely negotiated agreements with only lateral, not bilateral, benefits. OPG wanted me to award some of its proposals from the last round, but they are not compensation in nature – even when giving that term the widest possible meaning. And so that means replicating the PWU-MOS but doing so while taking into account how free collective bargaining works. In the same way – discussed below – that one cannot be blind to economic circumstances at the time of the reopener where there has been a material change, one equally cannot ignore bargaining reality. As OPG noted, and notwithstanding the PWU's assertion that there were "**no concessions**," OPG succeeded in obtaining numerous items of interest and benefit to it and described them as "significant". This fact must be considered, albeit given the lacunae in data, without precision, in determining the result. Nevertheless, it must, as already noted, be reflected in the outcome.

Related to this point is another matter of importance. As OPG pointed out, the PWU-OPG are in a strike-lockout regime. The Society and OPG have voluntarily agreed on interest arbitration to resolve their differences. In the face of an overwhelming strike vote, OPG obtained a new collective bargaining mandate from Treasury Board, returned to the bargaining table, and entered into the PWU-MOS. While that is a pressure that the Society cannot introduce into the system having agreed to go to interest arbitration, it is generally understood that for the purposes of applying the replication principle, negotiated outcomes, especially those with the same employer,

are the very best evidence of free collective bargaining. There is no reason to depart from the long-established principle.

**The Unique Circumstances of this Reopener**

There is no dispute about the unique circumstances of this reopener. OPG asserts that "there is no demonstrated need to address inflation in this case" (para. 31 OPG Brief) and "inflation is a non-issue and does not warrant greater salary increases" (para. 178 OPG Brief). These submissions are categorically rejected. Inflation is not, as hoped, transitory. The advent of significant and sustained inflation constitutes a material change. Inflation is entrenched and even if it now begins to abate, inflationary increases are baked in and have significantly affected real wages of employees in the two years of the term.

OPG, quoting from the Stout Award, suggested that the wage reopener should be governed by "evidence of collective bargaining and the economic environment at the time of the board's award." The Society could, OPG observed, make up any shortfall in the next collective bargaining round. With respect, this is a position with which I cannot agree.

In the normal course of adjudicating interest disputes, one looks to the settlements and awards that occurred for the *term* in question and one then fashions an award that takes those outcomes into account together with any other relevant considerations (emphasis mine). Usually, that means looking at the relevant and prevailing bargaining trends at the time of bargaining/hearing because those are the results that are memorialized in agreements and awards for those same or similar terms. However, bargaining cycles vary. Some parties bargain before expiry and some

bargain during the renewal term. No one seriously thinks that some static and identifiable moment in time provides a cut-off, following which the information and evidence needed to come up with a fair result can no longer be taken into account, especially when relevant comparator agreements with a similar term have been subsequently freely bargained and/or where there is some other material change.

Very simply, one does not look to a particular moment in time to anchor an award and then close one's eyes to anything that happened since: one looks to other settlements and awards that cover the same term, more or less, together with other relevant information, because that is how interest arbitrators replicate collective bargaining. It is important to note that while not specifically referred to by OPG, Arbitrator Stout also recognized in the decision OPG so heavily relies on for other reasons that "interest arbitration does not operate in a vacuum, and interest arbitration boards are regularly called upon to consider relevant court decisions issued after the hearing but before a final decision is made … an interest arbitration board cannot completely ignore subsequent events…" (at para. 18). These observations reflect the fact that interest arbitration is widely understood as the continuation of collective bargaining with the same ultimate goal: a collective agreement. That is what is happening here: continuation of the economic part of the process that was interrupted by the passage of legislation that has now been found to be unconstitutional.

The lens with which we view this reopener is very important: on the one hand, is it an artificial exercise that takes a blinkered approach to foundational changes in the bargaining landscape by focusing on a specific moment in time, such as the date bargaining proposals were exchanged,

the hearing, or date of the award, or is it, on the other, one that appreciates and attempts to take into account contemporary and subsequent settlements and awards for the same term together with relevant evidence about dramatic, unforeseen and material changes to the bargaining landscape that have taken place?

Stated somewhat differently, it is true that but for Bill 124, all compensation issues would have been addressed in December 2021. Now that Bill 124 has been nullified, the compensation reopener must be decided, and in deciding it now the best information available has to be taken into account. That is clearly what was anticipated in the reopener language in the original award. There is no reason to tie this outcome to information that was available at a specific point in time in 2021. We now have better information, more complete information – about relevant comparators and their settlements and the economy – covering the relevant period. It would not make collective bargaining sense to artificially ignore this information by taking a reductive approach and identifying some arbitrary cut-off following which information must be deliberately ignored.

That means considering the settlements and awards earlier reached for the same general term but it also means considering agreements and settlements reached more recently for the same general term, especially highly relevant agreements such as the PWU-MOS. It also means looking at economic factors where there has been a material change.

The reopener, as designed, requires that compensation issues be addressed in the event Bill 124 was set aside, but, as it turns out, subsequent events have dramatically changed the overall

context. The PWU-MOS for the same general term is one such subsequent event. Inflation is another.

It cannot go unremarked that the PWU-MOS was reached on the eve of these proceedings and includes one of the parties to this proceeding. It is the very best evidence of the appropriate application of the replication principle because it tells us what this employer – OPG – and its other large union voluntarily agreed to in free collective bargaining for the same term, give or take, at the very same moment this reopener was proceeding.

Inflation is the other subsequent event, and it is compelling, as was recognized by OPG in the PWU-MOS. Inflation is not now a "non-issue." Accounting for inflation is now firmly a part of the interest arbitration matrix. Recent electricity sector awards – along with increasing numbers of awards across the system – not just the PWU-MOS – make this clear.

Considering all relevant information was the approach taken by Arbitrator Gedalof in *Participating Hospitals & ONA*, the final year reopener between the Participating Hospitals and ONA after the Stout Award. Arbitrator Gedalof rejected the OHA submission – which broadly stated is identical to the one made by the OPG here – that the board was limited to considering circumstances that existed at the time.

Arbitrator Gedalof observed that generally,

> … where comparator bargaining patterns have previously been well established, there is little or no reason to depart from those patterns. But where there have been significant intervening events (in this case a global pandemic, a staffing crisis in nursing, soaring inflation, and freely bargained and awarded outcomes that depart from the asserted pattern) arbitrators exercising their jurisdiction under *HLDAA* will have regard to those considerations (at para. 36).

Adopting OPG's approach would ignore the replication principle and would be arbitrarily indifferent to the substantial hit on wages that inflation has created. Even if inflation has slowly begun to abate, the increases in the cost of living are now fixed (absent a sustained period of de-inflation, which no economist is predicting). Inflationary increases are both dramatic and entrenched. It would be an entirely artificial exercise to attempt to recreate circumstances as they once were fixed to a particular moment in the past without addressing, to use a colloquial expression, the elephant in the room. Inflation is not now a "non-issue." It is not something – as the PWU-MOS makes clear – to be punted to a future collective bargaining round. Addressing inflation in settlements and awards has become normative.

A decision that did not meaningfully consider awards, settlements and economic conditions that existed at the time of the hearing – in this case the PWU-MOS and inflation – would not be credible for it would ignore the best evidence and information available. The Society, to be sure, is a beneficiary of timing but this is for reasons entirely beyond its control. Holding it to the wage proposal it made in 2019 would be a complete triumph of form over substance.

**Award**

There is no assessment of the overall PWU-MOS that would lead one to any conclusion other than there were benefits in it for both the PWU and OPG. In this reopener there is an absence of trade-offs – the reservation of jurisdiction limits the scope of this proceeding – and that has to be considered in reaching a result: one that reflects the PWU-MOS but does not mirror it. As was observed in the Gedalof Award:

> We do, however, wish to acknowledge the Hospital's argument that in the normal course it could seek to extract non-monetary concessions in exchange for monetary improvements, and the terms of the monetary re-opener preclude it from doing so here. The absence of any such *quid pro quo* is clearly a factor we must take into

consideration in assessing the parties' proposals and making our award. But the absence of any such *quid pro quo* is not a reason to ignore evidence that speaks directly to the application of the guiding principles of interest arbitration (at para. 39).

Replicating collective bargaining – with all its inevitable gives and takes – leads to the conclusion that the PWU-MOS economic results must be moderated, not duplicated, because of the constraints on the reopener, and this has been done albeit and admittedly imperfectly. This task was made challenging by the absence of real detail about the value of the benefits that OPG received in return for the economic improvements that were agreed to.



**Additional Compensation**

January 1, 2022: 3%

January 1, 2023: 2.25%

Retroactive payments to current and former employees within sixty days.

**Conclusion**

I continue to remain seized of the original award and this reopener award including, if necessary, to address any issues that may arise should the government's Bill 124 appeal prove successful.

DATED at Toronto this 8th day of May 2023.

*"William Kaplan"*

William Kaplan, Sole Arbitrator

# TAB 8

IN THE MATTER OF AN INTEREST ARBITRATION PURSUANT TO THE PROVISIONS OF THE *HOSPITAL LABOUR DISPUTES ARBITRATION ACT*

B e t w e e n:

**BRIDGEPOINT HOSPITAL**

(the "Hospital")

- and -

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 79**

(the "Union")

and in the matter of two collective agreements covering full-time and part-time service workers for the period September 29, 2009 to September 28, 2013.

Russell Goodfellow – Sole Arbitrator

APPEARANCES FOR THE HOSPITAL:

M. David Ross, counsel
Stav D'Andrea

APPEARANCES FOR THE UNION:

Doug Wray, counsel
M. Atkinson, student-at-law
A. Dembinski
H. Manning
V. Nguyen

A hearing was held in this matter in Toronto on October 18, 2011.

# AWARD

This award arises out of an interest arbitration under the provisions of the *Hospital Labour Disputes Arbitration Act*.

The Union represents two bargaining units of service workers at the Hospital: a full-time unit and a part-time unit, each with their own collective agreements. There are approximately 257 employees in the full-time unit and 256 employees in the part-time unit.

The dispute concerns renewal collective agreements for the period September 29, 2009 to September 28, 2013. The parties have agreed upon all aspects of the agreements but one: the wages to be paid to employees in the middle two years of the agreements – those commencing September 29, 2010 and September 29, 2011.

The parties' agreement calls for wage increases of 2% in each of the first and last years of the agreements. The Union seeks the same increases in the middle two years. The Hospital opposes that request. The Hospital submits that there should be no wage increases in the middle two years and, at the very most, lump-sum payments should be made.

The parties advanced their arguments with brevity. I will be similarly brief.

The essence of the Union's case is that increases of *no less than* 2% are the established norm for some or all the period in question, notwithstanding the provisions of Bill 16 and the difficult economic climate (which, it submits, is actually less difficult than projected when Bill 16 was passed). While relying on as many as 18 awards and settlements in the health care field, the Union submits that the best comparator is the settlement involving the Participating Hospitals and CUPE covering the same kinds of employees at the same kinds of institutions for the same time periods. That settlement was for 2% increases in all four years of the agreement.

Other close comparators, the Union submits, are the awards in the *Participating Hospitals and OPSEU*, dated November 4, 2009 (Gray), covering technical and paramedical employees, and the *Participating Hospitals and SEIU*, dated November 5, 2010 (Burkett), also covering service workers. Indeed, the Union notes that the OPSEU award, which established a two-year agreement commencing April 1, 2009 and ending March 31, 2011, was for *2.5%* increases commencing not just on April 1, 2009 but also April 1, 2010. The SEIU award, also for a two-year period, was for increases of 2% and 2% in each of the years commencing October 11, 2009 *and* October 11, 2010. While the Union concedes that in a few recent cases lump sum payments have been awarded in respect of similar time periods, it submits that they are far outweighed by the other awards, especially the CUPE settlement. Further, lest there be any doubt that increases at the 2% level continue to be "the norm", the Union refers to the recent award of Arbitrator Weatherill in the *Participating Nursing Homes and SEIU*, dated September 8, 2011. That award, which also covers service workers, was for a one-year period commencing September 15, 2011 and provides for a 2% increase.

As noted, the Hospital submits that there should be no increases at all for the years in question and, at most, lump sum payments should be made. For the Hospital, the key is in the timing of the making of the awards and settlements. The Hospital points out that many of the awards and settlements to which the Union refers – particularly the Participating Hospitals and CUPE settlement – were arrived at *prior* to the full weight of the economic downturn becoming known and prior to the effective date of Bill 16. The Hospital submits that, having regard to these factors, the more recent "trend" has been for there to be no increases, albeit, in some cases, with lump sum payments.

The Hospital refers to the awards in the *Participating Hospitals and ONA,* dated June 2, 2011 (Devlin) and the *Participating Hospital and OPSEU*, dated June 17, 2011 (Kaplan), both of which produced no increases in wage for the first two years of three-year agreements, commencing April 2011 and April 2012, albeit with a request for lump sum payments. The Hospital notes that those awards cover a vast number of hospital employees across the province and, in the Hospital's submission, provide the best indication of what, pursuant to the principle of replication, should guide this award. To the same effect, the Hospital submits, are the awards in *Ontario Shores Centre for Mental Health Services and OPSEU*, dated January 10, 2011 (Raymond) and *Ontario Agency for Health Protection and Promotion and OPSEU*, dated June 7, 2011 (Lee). Finally, the Hospital submits that consideration should also be given to "internal equity", noting that other bargaining units at this very Hospital (*e.g.* a unit of stationery engineers represented by the IUOE, an OPSEU unit of some technical and/or paramedical workers, and a large unit of nurses and paramedical employees represented by this same CUPE

local) either have agreed upon or may be about to agree upon no wage increases, with or without lump sum payments depending on the unit.

In reply, at least in respect of the Hospital's final point, the Union submits that this simply bears out the importance of the appropriate comparator – nurses to nurses, OPSEU technical or paramedical to OPSEU technical or paramedical, service workers to service workers, etc. – represented by the central settlements or awards (and reflected in my own award in *Bridgepoint Hospital and CUPE, Local 79*, dated March 28, 2010). As for the IUOE settlement, the Union submits that it is simply irrelevant. These parties have never looked to that unit to inform their collective bargaining choices.



**Decision**

As revealed by both parties' submissions, at least where there is a substantial record of awards and settlements covering the relevant time periods, the goal of replication in this heavily normative industry is substantially achieved through comparability. Comparability puts the flesh on the bones of replication, providing the surest guide to what the parties would likely have done, in all of the circumstances, had the collective agreement been fully and freely bargained.

Taking that approach here, it is obvious that the only *real* issue between the parties is whether wage rates should be increased for the years in question or whether lump sum payments should be made. As revealed in the Hospital's own submissions, there is simply no substantial basis for the suggestion that there should be no form of

compensation improvements *at all* in respect of the middle two years of the agreements. There is, however, *an* argument to be made for lump sums.

Apart from the various economic factors relied on by the Hospital, the lump sum proposal draws support from two substantial recent awards, as well as two others of perhaps lesser significance, covering similar time periods. The two more prominent awards are the *Participating Hospitals and ONA* and the *Participating Hospitals and OPSEU*. It is worth noting, however, that the outcomes relied on in both of those awards were in respect of 24-month periods that commenced eight months *after* the first of our two dates and, more importantly, in both cases the payments were *preceded* and *followed* by increases that were *greater* than those to which the parties have already agreed here. In the case of ONA, the increases in the preceding and following years – which relate, albeit in the same somewhat inexact fashion to the first and last years of this agreement – were at the 3% and 2.75% levels, respectively; while in the case of OPSEU, the increases were 2.5% and 2.75%, respectively. Here, the parties have agreed upon *lesser* increases of 2% for the roughly corresponding time periods. Outside of those awards, as the Union points out, the predominant approach has been for increases of *no less* than 2%.

To my mind, however, the strongest comparator is the central agreement covering the *same types of employees* working in the *same kinds of institutions* for the *identical time periods* between *this same trade union* and the Participating Hospitals. It is that agreement that, far and away, provides the best comparator for this bargaining unit and it is that agreement that these and other non-participating "CUPE hospitals" tend to

track and which, in other respects, these parties appear to *have* tracked. While the timing of the making of the central settlement is, perhaps, a factor to be considered, along with the others relied on by the Hospital, it is not sufficient to persuade me to depart from the most historically relevant and dominant comparator, thereby placing these employees behind other CUPE represented service workers at other public hospitals for the identical time periods. I do not believe that that is a step that these parties would have taken. I agree with the Union that comparability requires an "apples-to-apples" comparison and that any other results of significance at this Hospital can be properly understood on that basis, *i.e.* by reference to the relevant central settlements or awards involving the same types of bargaining units or employee groupings at this hospital.

I therefore award the Union's proposal and direct the parties to enter into collective agreements forthwith that include all of the agreed upon terms, together with 2% increases for the years commencing September 29, 2010 and September 29, 2011.

I will remain seized in respect of the implementation of this award.

DATED at Toronto this 22nd day of November 2011.

Russell Goodfellow – Sole Arbitrator

# TAB 9

**IN THE MATTER OF AN INTEREST ARBITRATION**
**PURSUANT TO THE *HOSPITAL LABOUR DISPUTES ARBITRATION ACT, R.S.O. 1990, C.H. 14***

**BETWEEN**

**F.J. DAVEY HOME**

**(the "Employer")**

and

**CANADIAN UNION OF PUBLIC EMPLOYEES AND ITS LOCAL 4685-00**

**(the "Union")**

**BOARD OF ARBITRATION:** **John Stout, Chair**
**Carla Zabek, Employer Nominee**
**Wassim Garzouzi, Union Nominee**

**APPEARANCES:**

**For the Employer:**
Malcom Winter-Bass Associates
Fran Connoly

**For the Union:**
Andrew Ward-Advocate
Dave Hauch
Laura Delhenty
Noelle Douitsis

**HEARINGS HELD BY VIDEOCONFERENCE ON OCTOBER 3, 2020**

## INTRODUCTION

[1] This interest arbitration board (the "Board") was appointed by the parties pursuant, to the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990 c.H. 14, as amended ("*HLDAA*"), to resolve the outstanding issues in dispute between the parties with respect to their renewal collective agreement.

[2] The parties filed extensive written briefs presenting their positions on the issues remaining in dispute. The hearing was held by videoconference on October 3, 2020. The Board met in executive session thereafter.

## BACKGROUND

[3] The Employer operates a charitable nursing home known as F.J. Davey Home, located in Sault Ste. Marie, Ontario (the "Home"). The Home has three hundred and seventy four (374) beds. The current facility opened in 2004 and it replaced a smaller one hundred and eighty-four (184) bed facility.

[4] The Union (also referred to as "CUPE") is Canada's largest union, with over 700,000 members across the country. In Ontario, CUPE represents 269,239 members of which over 63,000 are employed in the health-care sector and over 30,500 work in long-term care (LTC).

[5] The bargaining unit consists of approximately 380 employees, of which 192 are full-time and 194 are part-time. The employees work in classifications such as Health Care Aide, Registered Practical Nurse and Dietary.

[6] The Home was one of two facilities formerly operated as the Algoma District Homes for the Aged under the direction of a District Board of Management. The other facility is Algoma Manor located in Thessalon, Ontario. When the two facilities were municipal homes for the aged, both of the facilities enjoyed additional funding from local governments in the District of Algoma, including

Thessalon and the City of Sault Ste. Marie. The Union represented employees at the Home and Algoma Manor and prior to 2004 they bargained jointly. As a result, the Algoma Manor collective agreement and the agreement between these parties contains similar language and the employees enjoy similar compensation.

[7] In 2002, the City of Sault Ste. Marie decided they could no longer provide funding for the two facilities. It was around this time that the Home was scheduled for redevelopment, which would involve additional related costs. Therefore, an agreement was reached between the City of Sault Ste. Marie, the Ministry of Health and the Employer that provided for the rebuilding of a larger facility as a not-for-profit nursing home.

[8] Subsequent to the new facility opening in 2004, the Union no longer conducted joint bargaining with Algoma Manor. Between 2008 and the most recent collective agreement, these parties were able to settle all but one collective agreement through free collective bargaining. The only exception was the 2011-2013 collective agreement, which was settled by an interest arbitration board chaired by Arbitrator Stanley. The most recent collective agreement between the parties was freely negotiated and provided for a three-year term from April 1, 2016 until March 31, 2019.

[9] Notice to bargain was served on February 8, 2019. The parties met in negotiations on September 25, 2019. Conciliation took place on January 7, 2020. A “no board” report was issued on January 15, 2020 and the matter was referred to interest arbitration. There is no dispute that the Board was properly appointed and has jurisdiction to resolve the issues in dispute.

[10] To their credit, the parties were able to reach agreement on quite a number of items during negotiations, including the term of the renewal collective agreement, which shall be from April 1, 2019 until March 31, 2022. These agreed upon items shall be included in the renewal collective agreement.

## STATUTORY AND OTHER CONSIDERATIONS

[11] As a replacement for free collective bargaining, this Board is tasked with a broad discretionary mandate that is guided by the legislative criteria set out in *HLDAA*, which includes the following:

> **Criteria**
>
> (1.1) In making a decision or award, the board of arbitration shall take into consideration all factors it considers relevant, including the following criteria:
>
> 1. The employer's ability to pay in light of its fiscal situation.
> 2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not Increased.
> 3. The economic situation in Ontario and in the municipality where the hospital is located.
> 4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
> 5. The employer's ability to attract and retain qualified employees. 1996, c. 1, Sched. Q, s. 2.

[12] In addition to the *HLDAA* criteria, we are also bound by the recently enacted public sector wage restraint legislation, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* ("*Bill 124*"). *Bill 124* was granted Royal Assent on November 7, 2019 and it applies to this Home. The legislation imposes a "moderation period" of three years. During the moderation period, no collective agreement or arbitration award may provide for an increase of greater than one percent (1%) in the salary rate for each 12-month period of the moderation period. In addition, no collective agreement or arbitration award may provide for an incremental increase to existing compensation entitlements or for new compensation entitlements that in total equal more than one percent (1%) on average for all employees covered by a collective agreement for each 12-month period of the moderation period. The one percent (1%) increase in compensation entitlements includes in its calculation any increase in the salary rate that is limited to a maximum of a one percent (1%) increase for each 12-month period.

[13] We acknowledge that CUPE, along with other trade unions, have launched a constitutional challenge to *Bill 124*. CUPE has also requested an exemption from the Minister pursuant to section 27 of *Bill 124*.

[14] This Board is clothed with jurisdiction pursuant to legislation (*HLDAA*), but we are also constrained in how we exercise our jurisdiction by *Bill 124*. In the absence of CUPE being granted an exemption or a court of competent jurisdiction declaring *Bill 124* invalid, we are bound by the salary and compensation restraints found therein. We are not permitted to inquire into the validity of *Bill 124*, that jurisdiction lies with a court of competent jurisdiction. However, as has been the established practice, we will remain seized and grant a re-opener on monetary items so that the parties shall have an opportunity to address how we ought to exercise our jurisdiction if CUPE is granted an exemption, or if the legislation is declared invalid, amended or repealed.

[15] The *HLDAA* criteria specifically provides that a board of arbitration shall take into consideration all factors it considers relevant. In this regard, we have taken into account the well-accepted arbitral principles, including "demonstrated need", "total compensation" and in particular "replication" as informed by comparability.

[16] In simple terms interest arbitration is an extension of collective bargaining for unions who are precluded from exercising the right to strike and employers who are precluded from locking-out their employees. Essentially interest arbitration is an extension of the collective bargaining process with an arbitrator or interest arbitration board (whichever is applicable) acting as the final decision-maker when the parties cannot reach a voluntary settlement.

[17] As stated by Arbitrator Teplitsky Q.C. in his August 31, 1982 award between *SEIU and a Group of 46 Participating Hospitals*, "Interest arbitrators attempt to emulate the results of free collective bargaining…Interest arbitrators interpret the collective bargaining scene. They do not sit in judgment of its results."

The collective bargaining scene includes both comparable settlements and awards, which are themselves based on relevant comparators. It is relevant comparators that provide context and objective evidence of the collective bargaining landscape.



[18] As a statutory replacement for free collective bargaining, it is an interest arbitration board's duty to attempt to replicate the result that would most likely have occurred in free collective bargaining. The replication principle is succinctly summarized by Chief Justice Winkler in *University of Toronto v. University of Toronto Faculty Assn. (Salary and benefits Grievance)* (2006), 148 L.A.C. (4th) 193 at paragraph 17, where he states:

> There is a single coherent approach suggested by these authorities which may be stated as follows. The replication principle requires the panel to fashion an adjudicative replication of the bargain that the parties would have struck had free collective bargaining continued. The positions of the parties are relevant to frame the issues and to provide the bargaining matrix. However, it must be remembered that it is the parties' refusal to yield from their respective positions that necessitates third party intervention. Accordingly, the panel must resort to objective criteria, in preference to the subjective self-imposed limitations of the parties, in formulating an award. In other words, to adjudicatively replicate a likely "bargained" result, the panel must have regard to the market forces and economic realities that would have ultimately driven the parties to a bargain.

[19] The application of the replication principle is an objective exercise, driven by the use of objective evidence of market forces and the economic realities, which assists the interest arbitration board in determining what the parties would have likely achieved in free collective bargaining. The posturing of either party is neither helpful nor relevant to the exercise because it is easy for either party to take a hard line and refuse to bargain when there is no threat of a strike or a lockout.

[20] The application of replication does not mean that an interest arbitration board is required to religiously and slavishly follow other awards and settlements. The replication principle does not equate to duplication of other outcomes without consideration of the particular circumstances. There can be no predetermined

result based on precedent in interest arbitration. Interest arbitration is not an exact science nor is it based on a mathematical formula. There is considerable room for debate with respect to the results of interest arbitration. Ultimately, the goal of the exercise is to arrive at an appropriate award that falls within the range of fair and reasonable outcomes, which reflects what the parties would have likely agreed upon if left to their own devices.

[21] There is an adjudicative element involved in interest arbitration, but it is exercised in the context of collective bargaining, applying the replication principle. The process involves an examination of objective evidence of the market forces that influence collective bargaining and a determination of what the parties would have agreed upon if the collective bargaining process proceeded to a natural conclusion.

[22] Most relevant to the application of replication is the consideration of objective evidence of relevant comparators, both internal and external, either freely negotiated or imposed by interest arbitration. The use of relevant comparators assists in evaluating the competitive and economic conditions that are at play when determining what the parties may have negotiated on their own. As stated by Arbitrator Goodfellow in *Bridgepoint Health and CUPE 79,* 2011 CanLII 76737 (ON LA), “comparability puts the flesh on the bones of replication, providing the surest guide to what the parties would likely have done, in all the circumstances, had the collective agreement been fully and freely bargained.”

[23] In terms of the relevance of comparators, we note that the most relevant comparators are those that most closely mirror the situation before the interest arbitration board, which would include similar type facilities with similar employee classifications working in similarly situated communities. The provincial landscape must also be given consideration, particularly in this sector. However, in our view particular attention must be given to similar facilities in the same geographical area and especially those facilities owned or operated by the same employer and those facilities where employees are represented by the same union.

[24] While the parties have a recent history of free collective bargaining that reflects normative patterns, it is noteworthy that prior to 2004 CUPE bargained jointly with the Employer and Algoma Manor. Many of the articles in the parties' collective agreement are common to the Algoma Manor collective agreement and the employees enjoy similar benefits. There can be no doubt that Algoma Manor represents a very relevant comparator.

[25] It is acknowledged that *Bill 124* has in effect created a "new norm" that interferes with free collective bargaining by imposing limitations on wages and total compensation. It is not our place to pass judgment on the decision of the legislature, that is made clear by the legislation itself. The best we can do is try to craft an award that respects the limitations found in *Bill 124*, while at the same time attempting to apply the replication principle.

[26] In terms of the matter before us, we are clearly limited to awarding one-percent wage increases in each year of the renewal collective agreement. We are also limited to one-percent in total compensation for each year of the three-year moderation period. However, we note that s.3 of *Bill 124* provides that subject to the other provisions of *Bill 124*, the right to bargain collectively is continued. In our view, this provision permits this Board to award normative or other proposals that we find are warranted, so long as the effect of awarding such proposals does not result in total compensation being increased by more than one-percent for any year of the three-year moderation period. In other words, while we are constrained with respect to the three-year moderation period, we are not prohibited from awarding what we would have otherwise awarded so long as we comply with the one-percent total compensation limitation provided for in *Bill 124*.

[27] Therefore, we have carefully crafted an award that respects the *HLDAA* criteria and the *Bill 124* constraints, but also applies the principle of replication as informed by comparability. In particular, with respect to monetary increases, we have awarded the one-percent wage increases permitted by *Bill 124.* In addition, we have increased the minimum call out payment, which falls well within the *Bill*

*124* limitations. We have also awarded the Union's proposal to increase the life insurance benefit. Based on the Employer's costing, this monetary proposal would be well beyond the limitations found in *Bill 124*, if awarded effective the date of our award. Therefore we have delayed implementation so that it does not run afoul of the *Bill 124* limitations.

[28] Before setting out our award, we believe it is necessary to make some comments about the Union's proposal to eliminate the two-day waiting period under the Weekly Indemnity (WI) plan for payment of benefits for sickness, which they advise is a "top priority." There is no doubt that prioritization of this proposal is linked to the current COVID-19 pandemic. The COVID-19 global pandemic has taken a particularly heavy toll on long-term care in Ontario. Many residents have died and so have a number of the heroic employees who are entrusted with their care. There is certainly a risk that if an employee can't afford to stay home, then they may come to work when they are not feeling well. This risk becomes a health and safety concern and an infection control concern during an outbreak. It is understandable that during these difficult times the Union would make this issue a priority.

[29] We accept that it is not the task of an interest arbitrator or board of arbitration to apply social justice and award terms or conditions that they deem to be fair in a moral sense. Rather, the task is to provide a fair and reasonable award that falls within the ball park of what the parties would have likely agreed upon, based on the objective comparative labour market.

[30] In this case, the most recent collective agreement provides in article 19.01 for "sick leave benefits as prescribed in the Insurance Company Agreement.." We are advised that prior to this language being agreed upon, the employees enjoyed an accumulating sick day plan with a 100 day cap. The accumulating plan was replaced with a WI plan, presumably the one referenced in article 19.01, and the employees could draw upon their frozen sick banks to "top up" sick leave benefits and receive pay for any unpaid days of illness. The sick banks have now all been

depleted and the current government removed the two paid personal emergency leave days that were formerly required under the *Employment Standards Act, 2000*, S.O. 2000, c.41. As a result employees are currently not entitled to any additional compensation for absences due to illness beyond the compensation found in the WI plan.

[31] We have requested a copy of the current WI plan, but the Employer advised the Board that there is no written documentation related to sick leave. Based on what we have been told by the parties, the practice has been to provide coverage on the first day of hospitalization and accident, but on the third day of sickness following a two day elimination (waiting) period. However, it is our understanding that during the current COVID-19 pandemic, and to its credit, the Employer has paid benefits on the first day of sickness.

[32] While we appreciate the Union's arguments, we do not believe it is prudent or necessary at this time to amend the collective agreement with respect to the WI plan. Currently the Employer is paying WI benefits on the first day of sickness and the parties will soon be back at the bargaining table. Therefore, based on the current situation there is no demonstrated need to grant the proposal. In our view, at this time, it is best to leave this issue for the parties to address in the next round of bargaining.

## AWARD

[33] After carefully considering the submissions of the parties, we hereby order the parties to enter into a renewal collective agreement that contains all the terms and conditions of the predecessor collective agreement, letters of understanding, and appendices, save and except as amended by this award as follows:

- **Term:** The term of the collective agreement shall be three years, from April 1, 2019 to March 31, 2022, as agreed by the parties.

- **Agreed to items:** Any previously agreed upon items shall be included in the collective agreement.

- **Wages:** The following adjustments are to be made to the current wage rates:

    - Effective April 1, 2019 all rates increased by 1%.
    - Effective April 1, 2020 all rates increased by 1%.
    - Effective April 1, 2021 all rates increased by 1%.

    - Retroactive pay will be paid in accordance with Article 28.01 with the dates amended to reflect the increases awarded above.

- **Union dues:** Amend article 6.02 in accordance with Union proposal to add the following:

    "…regular wages, total hours worked, regular hours worked…"

- **Promotions and Staff Changes:** Amend article 15.0, by adding the following:

    A part-time employee may apply for subsequent vacancies that will result in monetary gains (i.e. increase in hours, increase in pay, etc.)

- **Call Out:** Amend article 17.13 to provide for "a minimum of three (3) hours at applicable premium rates."

- **Training:** Add a new article to provide as follows:

    "When the Employer requires training outside of working hours it will compensate employees."

- **Benefits:** Effective April 1, 2021 increase the life insurance benefit to two times annual salary.

[34] Unless specifically addressed in this award, all outstanding proposals are dismissed without prejudice to future bargaining.

[35] We remain seized in accordance with subsection 9(2) of *HLDAA* until the parties have signed a renewal collective agreement. We also remain seized with respect to a re-opener on monetary proposals in the event that the Union is granted an exemption, or *Bill 124* is declared unconstitutional by a court of competent jurisdiction, or the Bill is otherwise amended or repealed.

Dated at Toronto, Ontario this 17th day of February 2021

"John Stout"
John Stout – Chair

I agree
Wassim Garzouzi- Union Nominee

I agree with an Addendum
Carla Zabek– Employer Nominee

## Addendum of the Employer Nominee

As pointed out in the award, the Board was limited by the constraints specified in *Bill 124*. In terms of non-wage compensation items, the threshold is one percent in total compensation for each year of the three-year moderation period. In this case, we awarded an increase in life insurance benefits in the third year. This makes perfect sense in the circumstances, given life insurance cannot be applied retroactively; it could have been increased in three equal increments in each year to achieve the two times salary in the third year. In essence, the award provides a notional increase of one percent total compensation each year, ultimately spending the amount necessary to accomplish the foregoing in the third year. Furthermore, the result is consistent with the level of life insurance coverage in another LTC in the same region, Algoma Manor, which is operated by the same Employer and whose employees are also represented by CUPE.

Respectfully submitted,

**Carla Zabek**

# TAB 10

**CITATION:** Ontario English Catholic Teachers Assoc. v. His Majesty, 2022, ONSC 6658
**COURT FILE Nos.:** CV-20-00-636089-0000; CV-20-636421-0000; CV-20-00636524-0000; CV-20-00636529-0000; CV-20-00637314-0000; CV-20-00638156-0000; CV-20-00646385-0000; CV-20-0084683-0000; CV-20-00653134-0000; CV-20-00653130-0000;
**DATE:** 20221129



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| | ) | |
| ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION; ALEXANDRA BUSCH; AND KAREN EBANKS, | ) | *Paul JJ Cavalluzzo, Adrienne Telford, Balraj Dosanjh,* Ontario English Catholic Teachers Association; Alexandra Busch; and Karen Ebanks |
| | ) | |
| Applicants | ) | *Susan Ursel, Karen Ensslen, Emily Home,* for Ontario Secondary School Teachers' Federation; Paul Wayling; and Melodie Gondek |
| | ) | |
| AND NINE OTHER APPLICATIONS IN THE MATTER OF THE PROTECTING A SUSTAINABLE PUBLIC SECTOR FOR FUTURE GENERATIONS ACT, 2019 LISTED IN SCHEDULE 1 HERETO | ) | *Howard Goldblatt, Benjamin Piper, Lise Leduc*, for The Elementary Teachers' Federation of Ontario; Association des enseignantes et des enseignants franco-ontariens; Jade Alexis Clarke; Christine Galvin; and Yves Durocher |
| | ) | |
| | ) | *Kate Hughes, Jan Borowy, Danielle Bisnar*, for Ontario Nurses' Association; Vicki McKenna; and Beverly Mathers |
| | ) | |
| **– and –** | ) | *Steven Barrett, Colleen Bauman; Joshua Mandryk; Melanie Anderson*, for Ontario Federation of Labour et al. |
| | ) | |
| | ) | *David R. Wright, Mae J. Nam, Rob Healey, Rebecca Jones*, for Ontario Public Service Employees Union; and Warren ("Smokey") Thomas; Eduardo Almeida; Sandra Cadeau; Donna Mosier; Erin Cate Smith Rice; and Heidi Steffen-Petrie |
| | ) | |

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| | *Fay Faraday, Unifor Legal Department, Anthony F. Dale, Dijana Simonovic, Jenna Meguid*, for Unifor; Kelly Godick; Sarah Braganza; and Kathleen Atkins |
| | *Michael Wright, Danielle Stampley, Nora Parker, Alex St. John*, for Society of United Professionals, Local 160 of the International Federation of Professional and Technical Engineers; Jo-Ann Kinnear; Cindy Roks; and Velma Francis |
| | *Andrew Lokan, Shyama Talukdar,* for Power Workers' Union (Canadian Union of Public Employees, Local 1000); Andrew Clunis; and Robert Busch |
| | *Samantha Lamb, Dina Mashayekhi,* for Carleton University Academic Staff Association; and Angelo Mingarelli; Root Gorelick; and R. Gregory Franks on their own behalf, and on behalf of all of the members of the Carleton University Academic Staff Association |
| HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE PRESIDENT OF THE TREASURY BOARD, MINISTER OF HEALTH, MINISTER OF LONG-TERM CARE AND MINISTER OF EDUCATION, AND THE ATTORNEY GENERAL OF ONTARIO | *Rochelle Fox, S. Zachary Green, Savitri Gordian, Waleed Malik, Karlson Leung, Priscila Atkinson*, for the Respondents |
| Respondents | |
| | **HEARD:** September 12-16, 19-23, 2022 |

**KOEHNEN J.**

**REASONS FOR JUDGMENT**

## Overview

[1] In June 2019, the Government of Ontario introduced the *Protecting a Sustainable Public Sector for Future Generations Act*, *2019*,[1] commonly known as Bill 124. For ease of reference, I will refer to it as Bill 124 or the Act in these reasons. Its most material provision limits wage increases for approximately 780,000 workers in the broader public sector to 1% per year for a three-year moderation period. I say broader public sector because the Act applies to more than just employees whose salaries are paid directly by Ontario.

[2] The Act comes into force with respect to any particular bargaining unit on the expiry of the collective agreement that was in force as of June 5, 2019, when the Act was introduced. As a result, the Act has already run its course for some bargaining units but has not yet started to apply for others.

[3] A broad range of labour organizations have challenged the constitutionality of the Act in 10 separate applications. Between them the parties filed 96 volumes of application records, 11 volumes of cross-examination transcripts plus factums, briefs of authorities and compendiums. All 10 applications were heard consecutively before me over 10 days in September 2022.

[4] The applicants argue that the Act limits the freedom of association, freedom of speech and equality rights of their members under the *Canadian Charter of Rights and Freedoms*. Ontario denies that the Act infringes on any of these rights and, in the alternative, submits that if the Act does infringe on any *Charter* rights, it is saved by s. 1 of the *Charter* as a reasonable limit that is demonstrably justified in a free and democratic society.

[5] For the reasons set out below, I find of that the Act infringes on the applicants' right to freedom of association under s 2(d) of the *Charter,* does not violate the applicants' freedom of speech or equality rights under the *Charter* and that the Act is not saved by s. 1 of the *Charter*.

[6] The Supreme Court of Canada has granted constitutional protection to collective bargaining and the right to strike as part of the freedom of association guaranteed under s. 2(d) of the *Charter*.

[7] It is well-established that *Charter* rights are to be interpreted generously and purposively. The constitutional right to collective bargaining therefore goes beyond merely the right to associate in the sense of having a right to meet together. Rather, it guarantees the right to a meaningful collective bargaining process that allows workers to meet with employers on

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[1] S.O. 2019, c. 12 ("Bill 124").

more equal terms, to put forward the proposals they wish and to have those proposals considered and discussed in good faith.

[8] Supreme Court of Canada jurisprudence also holds that governments infringe on this right when a government measure "substantially interferes" with collective bargaining. State action substantially interferes with collective bargaining when, among other things, it prevents or restricts subjects from being discussed as part of the collective bargaining process.

[9] The Act prevents collective bargaining for wage increases of more than 1%. This restriction interferes with collective bargaining not only in the sense that it limits the scope of bargaining over wage increases, but also interferes with collective bargaining in a number of other ways. For example, it prevents unions from trading off salary demands against non-monetary benefits, prevents the collective bargaining process from addressing staff shortages, interferes with the usefulness of the right to strike, interferes with the independence of interest arbitration,[2] and interferes with the power balance between employer and employees I find that these detrimental effects amount to substantial interference with collective bargaining both collectively and individually.

[10] In the context of this case, the Act is not a reasonable limit on a right that can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

[11] A justification under s. 1 requires the government to establish a pressing and substantial objective, a rational connection between the means and the objective, minimal impairment of the *Charter* right and that the benefit of the Act outweighs its detriment.

[12] The Supreme Court of Canada has held numerous times that budgetary considerations will not ordinarily constitute pressing and substantial objectives under s. 1.

[13] Although there is a line of cases that has upheld the constitutionality of certain wage restraint legislation, those cases are distinguishable. They almost all arise in situations where the government was facing a financial or economic crisis. The legislation at issue in those cases also set limits on wage increases at a level that was consistent with results that were achieved in free collective bargaining negotiations when the legislation was introduced. On my view of the evidence, Ontario was not facing a situation in 2019 that justified an infringement of *Charter* rights. In addition, unlike other cases that have upheld wage restraint legislation, Bill 124 sets the wage cap at a rate below that which employees were obtaining in free collective bargaining negotiations.

[14] With respect to rational connection, there is a rational connection between the objective and wages that Ontario pays directly. The Act, however, goes far beyond that. In some

[2] A process discussed in further detail later in these reasons in which essential workers who have been denied the right to strike submit disputes they cannot resolve to arbitration.

cases it applies to wages that are in no way connected to Ontario's budget or deficit. In others, like the university sector, it applies to wages that are only indirectly related to Ontario's budget but in respect of which Ontario already has other contractual protections that control Ontario's contributions.

[15] With respect to minimal impairment, the same considerations apply as with respect to rational connection. In addition, Ontario was free in any collective bargaining negotiation to take the position that it could not pay wage increases of more than 1%. It appears that Ontario was reluctant to take that position because it could lead to strikes. As noted, the right to strike is constitutionally protected. On this theory, Ontario was imposing a statutory limit of 1% on wage increases because it feared that taking that position at the bargaining table would lead employees to exercise their constitutionally protected right to strike. That does not amount to a reasonable limit on the right to collective bargaining that can be demonstrably justified in a free and democratic society. Although inconvenient, the right to strike is a component of a free and democratic society. Strikes bring issues to the public forefront and allow their resolution to be influenced by public opinion.

[16] With respect to balancing the benefits and negative effects of the Act, in circumstances where Ontario has not provided any satisfactory explanation for why it could not limit wage increases during collective bargaining negotiations, the negative effects of the Act outweigh its benefits.

[17] I hasten to add that the court is not expressing any critical view about the fiscal policies that the government wishes to pursue. Fiscal prudence and ensuring the sustainability of public services are essential responsibilities of government. The only question before the court is whether it was appropriate to breach *Charter* rights to do so. On my reading of the jurisprudence from the Supreme Court of Canada, it was not.

[18] As a result, I declare the Act to be contrary to be void and of no effect.

# I. Preliminary Matters

[19] Before turning to the specific *Charter* challenges, I address two preliminary matters: the operation of Bill 124 and the burden of proof.

## A. Operation of Bill 124

[20] The Government of Ontario introduced Bill 124 on June 5, 2019. Although the Bill received royal assent on November 8, 2019, s. 9 provides that it applies retroactively to any collective agreement that was concluded since it was tabled on June 5, 2019.

[21] Section 5 of the Act provides that it applies to a wide range of employers, employees and unions in the broader public sector including the Crown in Right of Ontario, Crown agencies, school boards, universities, colleges, public hospitals, non-profit long term care homes, children's aid societies and every authority, board, commission, corporation, office

or organization of persons that does not carry on its activities for profit of its members or shareholders and that received at least $1 million in funding from Ontario in 2018. The funding need not be for salary. If the organization receives funding for any purpose, it is caught.

[22] The Act does not apply to municipalities because, as Ontario explained, they have their own taxing powers. Similarly, it does not apply to for-profit enterprises because they are subject to free-market discipline.

[23] Sections 9 and 10 create a three-year moderation period and impose a limit on salary increases of 1% during each 12-month period of moderation. The 1% limit applies to both collective agreements and arbitration awards. The moderation period begins at the end of the collective agreement in force as of June 5, 2019. As a result, many collective bargaining units have not yet been subject to the 1% limit but will be in the near future. The timing provisions can result in a broad period being covered by the Act. By way of example, the moderation period for the applicant Ontario Public Service Employees Union ("OPSEU"), ranges from 2017 to 2026. This is because certain bargaining units saw their collective agreements expire in 2017 but had not concluded a new agreement by the time the Act was introduced. Others have not yet become subject to the Act and will not so do until their collective agreements expire; some as late as 2023.

[24] Ontario says the three-year moderation was structured to avoid unilaterally amending existing collective agreements. In this way, Ontario says the Act respects collective bargaining.

[25] Section 2 defines compensation broadly to mean: "anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments".[3] As a result, any increases to employee benefit plans or pension plans would count towards the 1% salary limit. In addition, on the evidence before me, employers have taken the view that any other form of quantifiable benefit including meal allowances, parking, expense allowances for personal protective equipment, vacation time or bereavement leave is quantified as part of the overall 1% limit. By way of example, awarding employees one day of bereavement leave that they did not previously have comes to 0.38% of their annual salary.[4] Awarding three days of bereavement leave would exceed the 1% salary cap.

[26] Pursuant to s. 11, if existing plan benefits become more expensive, the increased cost of an existing plan is not factored into the 1% salary increase. If, however, benefits are added or

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[3] *Ibid*, s. 2 (definition of "compensation").

[4] 5 days per week x 52 weeks equals 260 days. 1 day is 0.38% of 260. While the precise calculations may differ from one workplace to another depending on the number of days worked per year, the directional point is that any benefits of this sort are quantified for the purpose of calculating the 1% cap.

improved, then the cost of those improvements is calculated as part of the 1% salary increase.

[27] Pursuant to s. 26, The President of the Treasury Board may in his or her sole discretion declare that a collective agreement or arbitration award is inconsistent with the Act. In such a case, the terms of employment that applied before the impugned collective agreement was concluded are reinstated[5] and "the parties shall conclude a new collective agreement that is consistent with" the Act.[6] If an arbitration award is found to be inconsistent with the Act, the earlier terms of employment are also reinstated, and the matter is remitted to the arbitrator to issue an award consistent with the Act.[7]

[28] Section 24 prohibits an employer from providing compensation before or after the applicable moderation period to compensate employees for compensation that they do not receive as a result of the 1% cap.

[29] Section 25 empowers the Management Board of Cabinet to require employers and employers' organizations to provide such information concerning collective bargaining or compensation as the Management Board considers appropriate for the purpose of ensuring compliance with the Act.

[30] There was some debate between the parties about the extent to which I should take developments that arose after the act was introduced into account in my analysis. The applicants submit that I should take post enactment developments into account, principally the increased rate of inflation and the additional stress that the COVID-19 pandemic placed upon many front-line workers. Ontario submits that I should not take the increased rate of inflation into account. Ontario does rely on certain developments that arose in light of the COVID-19 pandemic. In my view, it would not be appropriate to take the increased rate of inflation into account. That is a relatively recent phenomenon in respect of which that neither party has had an opportunity to provide evidence. It would also be assessing the constitutionality of the Act with the benefit of hindsight; a luxury Ontario did not have.

## B. Burden of Proof

[31] The parties agree on the burden of proof. The applicants, as the parties alleging a *Charter* breach must prove the breach on a balance of probabilities.[8] The evidence must be cogent

[5] See Bill 124, s. 26(5)(b).
[6] *Ibid*, s. 26(5)(c).
[7] *Ibid*, s. 26(6).
[8] See *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, at paras. 107-13.

and prove the harm. The "evidence must amount to more than a web of instinct."[9]

[32] If the Applicants prove a *Charter* infringement, Ontario bears the burden of proof to justify that the infringement is demonstrably justified under s. 1 of the *Charter.*

# II. Does the Act Violate Section 2 (d) of the *Charter*?

## A. Difference in Interpretive Approach

[33] Section 2(d) of the *Charter* provides that everyone has the right to freedom of association.

[34] In *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*,[10] the Supreme Court of Canada held that s. 2(d) provides constitutional protection for collective bargaining. In *Saskatchewan Federation of Labour v. Saskatchewan*,[11] the Supreme Court of Canada held that s. 2(d) also provides constitutional protection for the right to strike. In *Health Services,* the Supreme Court equally held that s. 2(d) is infringed if a government measure "substantially interferes" with collective bargaining.[12]

[35] What then does this mean?

[36] Ontario submits that the constitutional protection given to collective bargaining is defined narrowly. It cites extracts from certain Supreme Court of Canada decisions to the effect that constitutional protection is afforded only to the right to associate and to make collective representations. It does not guarantee a particular outcome in the collective bargaining process,[13] does not guarantee a particular model of labour relations,[14] and is conceived as a limited right to a process by which employees can come together and make collective representations to an employer.[15]

[37] Ontario argues that the Act does not in any way interfere with the right of employees to free association and does not interfere with their ability to make representations to their employers. Ontario submits that the essence of the Applicants' claim is that they want the court to guarantee an outcome of a wage increase higher than 1% when outcomes are not constitutionally protected.

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[9] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at para. 34.
[10] 2007 SCC 27 ("*Health Services*").
[11] 2015 SCC 4, at para. 3 ("*Saskatchewan Federation of Labour*").
[12] *Health Services*, at para. 19.
[13] *Ibid*, at para. 89. See also para. 91.
[14] See *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, at para. 67 ("*Mounted Police*").
[15] See *Health Services*, at para. 91. See also paras. 19, 92, 107, 109 and 129; *Meredith v. Canada (Attorney General)*, 2015 SCC 2, at para. 47, *per* Rothstein J. (concurring) ("*Meredith*").

[38] On my reading of the case law, Ontario takes too narrow a view of the right to freedom of association as it applies to collective bargaining. Ontario's submissions run contrary to the general approach to *Charter* interpretation, the specific purposes for which collective bargaining was given constitutional protection, and the meaning that the Supreme Court of Canada gave to "substantial interference" in collective bargaining.

### i. General Interpretive Approach to *Charter* Rights

[39] It is well established that s. 2(d) of the *Charter* is to be interpreted generously and purposively having regard to both to the larger objects of the *Charter* and the purpose behind the particular associational right at issue.[16]

[40] In *Mounted Police*, the Supreme Court of Canada held that to determine whether a restriction on the right to associate violates s. 2(d), courts must look at the associational activity in question in its full context and history and that neither the text of s. 2(d) nor general principles of *Charter* interpretation support a narrow reading of freedom of association.[17]

### ii. The Purpose of Collective Bargaining

[41] According to the Supreme Court of Canada, the purpose of collective bargaining is to empower weaker members of society to meet the more powerful, including the state, on more equal terms:

> Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.[18]

[42] In *Health Services*, the Supreme Court made the following additional observations about the purposes of collective bargaining:

> (i) Collective bargaining enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of

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[16] See *Mounted Police*, at paras. 47, 57-59.
[17] *Ibid*, at para. 47.
[18] *Mounted Police*, at paras. 35, 57, citing *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at para. 87, *per* Dickson C.J. ("*Alberta Reference*"). See also *Mounted Police*, at para. 58.

> workplace rules and thereby gain some control over a major aspect of their lives, their work.[19]
>
> (ii) It alleviates the historical inequality between employers and employees.[20]
>
> (iii) It enhances democracy by allowing workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace.[21]

### iii. The Meaning of Substantial Interference

[43] Ontario cites two passages from *Health Services* to support its narrower interpretation of s. 2(d) rights:

> Section 2(d) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity …
>
> …
>
> To amount to a breach of the s. 2(d) freedom of association, the interference with collective bargaining must compromise the essential integrity of the process of collective bargaining protected by s. 2(d).[22]

[44] Ontario submits that it has not interfered with the "essential integrity" of collective bargaining. It says it has in no way limited associational activity and has not limited the ability of employees to band together or make representations to employers.

[45] A proper interpretation of the constitutional protection cannot stop at these isolated passages. The passages must be read in the full context of the Supreme Court of Canada's decisions to understand what is meant by "essential integrity" of the process and what is meant by "substantial interference."

[46] The Supreme Court of Canada made it clear in *Health Services* that legislative provisions that take issues off the bargaining table can amount to violations of s. 2(d) even though they do not formally limit the ability of employees to associate with each other. For example, in *Health Services* the Supreme Court stated:

> Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their

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[19] See *Health Services*, at para. 82.
[20] *Ibid*, at para 84.
[21] *Ibid*, at para 85.
[22] *Ibid*, at paras. 90, 129.

> employer may substantially interfere with the activity of collective bargaining …
>
> …
>
> Sections 4 to 10 of the [*Health and Social Services Delivery Improvement*] *Act* have the potential to interfere with collective bargaining in two ways: first, by invalidating existing collective agreements and consequently undermining the past bargaining processes that formed the basis for these agreements; and second, by prohibiting provisions dealing with specified matters in future collective agreements and thereby undermining future collective bargaining over those matters…
>
> We pause to reiterate briefly that the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion. This rebuts arguments made by the respondent that the Act does not interfere with collective bargaining because it does not explicitly prohibit health care employees from making collective representations. While the language of the Act does not technically prohibit collective representations to an employer, the right to collective bargaining cannot be reduced to a mere right to make representations. The necessary implication of the Act is that prohibited matters cannot be adopted into a valid collective agreement, with the result that the process of collective bargaining becomes meaningless with respect to them. This constitutes interference with collective bargaining.[23]

[47] In *Mounted Police*, the Supreme Court voiced similar sentiments:

> The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve.
>
> …

[23] *Ibid*, at paras. 96, 113-14 (emphasis added).

> The function of collective bargaining is not served by a process which undermines employees' rights to choose what is in their interest and how they should pursue those interests. The degree of choice required by the *Charter* is one that enables employees to have effective input into the selection of their collective goals.[24]

[48] These passages suggest that a government measure will interfere with collective bargaining if it:

(i) Prevents or denies meaningful discussion about working conditions.

(ii) Prohibits provisions from being dealt with in collective agreements.

(iii) Prevents employees from having their views heard in the context of a meaningful process of consultation and discussion.

(iv) Imposes arbitrary terms on collective agreements.

[49] In my view, these passages rebut Ontario's narrow interpretation of the right to collective bargaining under s 2(d). The *Charter* protects not just the right to associate but also the right to a meaningful process in which unions can put on the table those issues that are of concern to workers and have them discussed in good faith. Legislation that takes issues off the table interferes with collective bargaining.

[50] The question then becomes, when does this interference rise to the level of the "substantial interference" that the Supreme Court of Canada established as the test for a *Charter* infringement in *Health Services*.

[51] In *Health Services* the Supreme Court explained that substantial interference is more likely to be found in measures that affect matters central to the ability of the unions to achieve common goals. This requires an investigation into the nature of the affected right. In addition, the way in which the measure affects collective bargaining is equally important. Even if an issue is of central importance to collective bargaining, if the change has been made through a process of good faith consultation that directionally replicates collective bargaining, it is unlikely to have adversely affected the employees' right to collective bargaining.[25] If the effect is to seriously undercut or undermine the activities of workers joining together to pursue common goals of negotiating workplace conditions and terms of employment, then it amounts to substantial interference with collective bargaining.[26] That inquiry is contextual and specific to the facts of each case.[27]

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[24] *Mounted Police*, at paras. 72, 85.
[25] See *Health Services*, at para. 129.
[26] *Ibid*, at para. 92.
[27] *Ibid*.

[52] The Supreme Court then proposed that courts ask the following two questions to determine whether interference rises to the level of substantial interference:

(i) How important is the matter affected to the process of collective bargaining?

(ii) How does the measure impact on the right to good faith negotiation and consultation?[28]

[53] I turn then to address those two questions.

## B. The Effect on Collective Bargaining

### i. The Importance of the Issue to Collective Bargaining

[54] In *Health Services,* the Supreme Court of Canada drew a connection between the importance of the issue and the capacity of union members to come together to pursue collective goals.

[55] If the interference relates to a minor matter, it is unlikely that it would affect the ability of employees to pursue goals in concert. If the interference deals with a more significant matter, the analysis may be different. As the court put it in *Health Services,* the more important the matter, the more likely that there is substantial interference with the s. 2(d) right.[29]

[56] Here, the issue concerns the imposition of a 1% cap on salary increases.

[57] As Cory J. explained in *P.I.P.S. v. Northwest Territories (Commissioner)*, "[w]ages and working conditions will always be of vital importance to an employee."[30] That comes as no surprise. The reason most people work is to earn money to survive. That often makes salary one of the most important issues in a collective bargaining negotiation.

[58] The issue of wages assumes even greater importance here because inflation was running at 2.4% when the Act was introduced and the incomes of many of the affected employees, like teachers, had not kept up with inflation over a longer period.

[59] The wage limit becomes still more important when one considers that, as set out below, demands for wage increases are often used as trade-offs to obtain improvements on issues unrelated to compensation. I am satisfied in the circumstances of this case that the issue of a 1% limit on wage increases is highly important to the ability of the applicants to engage in effective collective bargaining.

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[28] *Ibid*, at para. 93.
[29] *Ibid*, at para. 95.
[30] [1990] 2 S.C.R. 367, at para. 69 ("*P.I.P.S.*").

### ii. How Does the Measure Affect Good Faith Negotiation and Consultation?

[60] I assess the impact of the 1% wage cap from the following perspectives:

a. The financial impact of the wage cap.

b. The Impact on trading salary against other issues.

c. The impact on staffing.

d. The impact on wage parity between public and private sector employees.

e. The impact on employee self-government.

f. The impact on freely negotiated agreements.

g. The impact on the right to strike.

h. The impact on interest arbitration.

i. The impact on the relationship between unions and their members.

j. The impact on the power balance between employer and employees.

[61] On my view of the evidence, there is no doubt in my mind that the affect of the Act on these various issues easily amounts to substantial interference with collective bargaining.

#### a. The Financial Impact of the Wage Cap

[62] Ontario submits that any limits that the Act places on wage increases does not affect collective bargaining because *Charter* protection of collective bargaining does not protect outcomes but protects only a process.

[63] While this may be true, the imposition of a 1% pay cap has a material effect on the process of collective bargaining. It has taken off the table any discussion of wage increases above 1%. That materially limits the ability of employees to put issues on the table for negotiation. If a collective goal of employees was a wage increase of more than 1%, that is no longer possible. Moreover, if one of the underlying purposes of collective bargaining is to equalize power imbalances between employees on the one hand and employers or the state on the other hand, that purpose is fundamentally undermined when the state intervenes by imposing limits on wage increases. In that latter situation, collective bargaining does not equalize power. Rather, it exacerbates inequality by allowing the state to prevent employees from having a meaningful discussion about the issue. While the *Charter* may not protect outcomes, it should also not allow the state to predetermine outcomes.

[64] The way in which the 1% cap affects negotiations is perhaps best seen by comparing the 1% cap with salary results of collective bargaining negotiations that are not subject to the Act.

[65] When Bill 124 was introduced, collective bargaining negotiations in the broader public sector resulted in overall salary increases of approximately 1.6%. After the Act was introduced, public-sector wages that were not affected by the Act resulted in wage increases well above 1%.

[66] By way of example, the York Regional Police Association, which was excluded from the Act as a municipal police force, negotiated an annual wage increase of 2.12% over a five-year term after its collective agreement expired on December 31, 2019. Other freely negotiated wage settlements fell in a range of 1.37-2.26% for 2019, 0.93% to 2.21% for 2020, and between 1.5% to 4% for 2021.[31]

[67] Ontario's own collective bargaining expert in this application, Professor Christopher Riddell, conceded on cross-examination that "Bill 124 has significantly interfered with or constrained or limited what [would]… have been the appropriate outcome had there been free collective bargaining."[32]

[68] In an effort to demonstrate that the 1% cap reflected the common result of collective bargaining when the Act was introduced, Ontario points to situations in which collective bargaining resulted in salary increases of 1% or less. By way of example, Ontario relies on an interest arbitration involving the Victorian Order of Nurses which resulted in salary increases of .7% as of April 1, 2021, and April 1, 2022. That award notes, however, that the employer was under bankruptcy protection under the under the *Companies' Creditors Arrangement Act*[33] and had closed a number of branches. In reaching its decision, the arbitral Board concluded:

> This Board wants to be clear that there are unique circumstances leading to this award based on the financial information about the employer's operations shared with ONA. Given the unique circumstances of this case and the particular economic environment under which this collective agreement was being negotiated the Board does not intend this award to be setting any precedent, or be otherwise relevant, with respect to ONA in terms of replication.[34]

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[31] See Exhibit 3 to Affidavit of Beverly Mathers, affirmed January 14, 2021 ("Wage Increase in Ontario across different Collective Agreements" table, at para. 27); *Bradgate Arms v. United Food and Commercial Workers, Local 175*, 2022 CanLII 8995 (Ont. Arb. Bd.) (L. Steinberg), at para. 9.

[32] Cross-Examination of Christopher Riddell, held June 21, 2022, Q. 1642 (brackets in original) ("Riddell Cross, June 21"). See also QQ. 1534, 1600-2, 1702-3, 1797 and 1992; Cross-Examination of Christopher Riddell, held June 10, 2022, Q. 1439 ("Riddell Cross, June 10").

[33] R.S.C. 1985, c. C-36.

[34] *Victorian Order of Nurses v. Ontario Nurses Association*, 2021 CanLII 63762 (Ont. Arb. Bd.) (M. Wilson), at pp. 5-6.

[69] In addition, Ontario points to approximately 27 freely negotiated public sector collective agreements in which wage increases were less than 1% before the Act was introduced. These must be understood in their proper context. The 27 were part of 2,574 separate bargaining units that were affected by the Act. Expressed in percentage terms, 1.05% of the public sector's collective agreements arrived at increases of less than 1% at the time the Act was introduced. In other words, the 27 agreements Ontario points to do not reflect what was generally available in collective bargaining.

[70] The compensation cap further limits the collective bargaining process because of the way the cap works. It does not apply to the overall payroll of an employer but applies to each individual salary. Unions will often try to adjust relative wages within a bargaining unit by increasing the wages of lower paid workers by more than those of higher paid workers. That is no longer possible if the increase for the lower paid worker is more than 1% of their salary even if the increase in the overall payroll is limited to 1%. Similarly, unions sometimes negotiate a flat rate increase for all employees, regardless of wage level. This benefits lower income employees because the flat rate increase gives them a higher percentage increase than it gives higher paid employees. That too is no longer possible if the result is a wage increase of more than 1% for the lower income employee.

[71] This places serious limitations on the ability of employees to collectively identify common goals and pursue them with their employer.

[72] Ontario submits that the Act does not interfere with collective bargaining because it allows negotiation on monetary issues within the salary cap and permits unrestricted negotiations on nonmonetary issues.

[73] The fact that the Act allows for negotiation within the 1% limit does not demonstrate an absence of substantial interference. As noted above, it is evidence of substantial interference. To use a directional analogy, it is not unlike authoritarian state claiming it permits freedom of speech provided the speech remains within the narrow limits the state allows.

[74] As concerns negotiations on nonmonetary issues, Ontario points to the ability of the Service Employees International Union ("SEIU") to negotiate a benefits package for employees at Circle of Care Senior Home Care which provided them with drug, dental and vision care for the first time in exchange for a 0% salary increase. What this analysis misses is the chilling effect of the Act. The Act's wage cap inevitably distorts the collective bargaining goals of union members. By way of example, employees at the Circle of Care bargaining unit earn an average of approximately $31,200 per year. A 1% salary increase amounts to $312 per year or $6 per week. Employees then face the choice under the Act: accept an additional $6 per week or try to negotiate benefits that cost the employer no more than $6 per week but that may be worth more than that to individual workers. Here the employees preferred health benefits. That is not to say, however, that health benefits are now a sign of successful collective bargaining. It is merely to say that given the constrained

choices that the Act imposes, the employees of Circle of Care preferred health benefits to an additional $6 per week. Had employees been given the choice between larger wage increases and benefits, they may have chosen the former or they may have tried to negotiate both. The point is that the Act robbed them of that choice and robbed them of the self-determination that collective bargaining is supposed to afford.

[75] Moreover, the ability to negotiate "nonmonetary" issues is somewhat overstated given that even nonmonetary issues may be quantified for purposes of the Act. By way of example, a union that negotiated an additional vacation day for employees would be told that a one-day benefit amounts to .38% of annual compensation. The additional vacation day would therefore swallow a good part of the 1% pay increase the Act permits.

[76] Ontario next argues that the impact of the 1% salary limit is softened by the fact that it does not impede the ordinary progress of an employee up through salary grids that increase wages with experience. Any softening here is limited. The evidence indicates that 77% of teachers are at the top step of their salary grid. In addition, 44% of nurses in Ontario have between eight and 25 years of experience. There are no grid increases for nurses between eight and 25 years. After 25 years, their hourly wage increases from $47.69 to $48.53 per hour. An increase of $0.84 or 1.76% after an additional 17 years of service. At the lower end of the wage scale, grid increases are even smaller. By way of example, after one year of experience, a nurse's hourly wage increases from $33.90 per hour to $34.06, an increase of $0.16 per hour or 0.47%. When an annual increase of 1% is added, the total wage increase between first and second year is 1.47%; still well below the prevailing rate of inflation when the Act was introduced.

[77] Ontario also submits that Bill 124 does not preclude the payment of performance pay or bonuses. In a union context, performance pay and bonuses are rare. If anything, allowing performance pay and bonuses gives rise to a further perception of inequality. At Centennial College for example, while unionized employees were capped at 1%, 75 managers received performance pay increases or bonuses of more than 5%. Seventeen received more than 10%, two received 22% and two received 31%. Two managers received increases of $105,000. Those two increases alone would have provided an additional 1% salary increase to 420 employees earning $50,000 per year. This is not to say that the management employees should not have received increases or bonuses. It merely brings home the applicants' perception of the inequality of bargaining power that the Act imposes on unionized employees.

**b. The Impact on Trading Salary against Other Issues**

[78] The applicants filed an expert's report from Professor Richard Hebdon in which he expressed the view that the 1% salary cap prevents unions from using higher wage increases as a bargaining tool to obtain other, non-monetary benefits. As he describes it, by taking the possibility of wage increases above 1% off the table, a union's bargaining power is weakened such that it lacks the leverage to make necessary trade-offs to obtain

meaningful gains on non-monetary issues.[35] Put another way, the Act inhibits the normal bargaining trade-offs between compensation and non-compensation issues.[36]

[79] These views have been echoed by a number of senior and well-respected interest arbitrators. In *Foyer Richelieu Welland v. CUPE, Local 3606*, for example, Arbitrator Keller stated:

> The Act clearly limits, or straitjackets, the ability of the parties to engage in the normal give-and-take of collective bargaining that is key to successful negotiations.
>
> …
>
> In free collective bargaining, there will be of necessity, trade-offs. That is, each party determines what their needs are and, in order to achieve those needs to the greatest extent possible must be willing to give up something in order to achieve what they consider to be important. For example, often that involves the employer 'paying' for something sought by the union in return for achieving one of its own collective bargaining aims as, for example, more flexibility in how it manages its operations. **Under the Act, those trade-offs are not possible.**[37]

[80] The views of Professor Hebdon and these arbitrators are also reflected in the experience of the applicants. A large number of the applicants' affiants have sworn affidavits attesting to the way in which the Act limited collective bargaining. By way of example, the applicant OFL filed 23 affidavits from union members. Ontario cross-examined eight of those but not on their evidence about their collective bargaining experience under the Act.

[81] By way of further example, in 2019 – 2020, the Ontario Nurses Association had identified two collective bargaining priorities as being the adjustment of full-time and part-time staffing ratios in line with longstanding expert recommendations and changes to language surrounding job security. The representative employer group, the Ontario Hospital

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[35] See Exhibit A to Affidavit of Robert Hebdon, affirmed February 25, 2021, at para. 18 ("Hebdon Affidavit").
[36] *Ibid*, at paras. 55, 75. See also Riddell Cross, June 21, Q. 1608 (agreeing that "to the extent that those traders will be in excess of the 1% cap, there's no traders to offer").
[37] 2020 CanLII 97972 (Ont. Arb. Bd.) (B. Keller), at p. 3 (emphasis added) ("*Foyer Richelieu*"). See also Affidavit of David Hauch, sworn January 27, 2021, at paras. 62-64 ("Hauch Affidavit"); Exhibit MM to Hauch Affidavit; Exhibit NN to Hauch Affidavit; Affidavit of Daniel Pike, sworn January 20, 2021, at para. 24; Affidavit of Susan Wurtele, sworn January 20, 2021, at para. 271, Affidavit of Darren Pacione, sworn January 21, 2021, at para. 32; Affidavit of Colleen Burke, affirmed January 6, 2021, at paras. 21, 57; Reply Affidavit of Matthew Hill, affirmed April 11, 2022, at para. 14.

Association declined to accommodate those wishes taking the position that with only 1% available, nothing could be negotiated or traded.

[82] The Act also limited Unifor's ability to bargain terms to address long-term staffing, recruitment and retention issues in not-for-profit long-term care homes that were subject to the Act.[38] The government's own 2020 *Long-Term Care Staffing Study* found that "staffing in the long-term care sector is in crisis and needs to be urgently addressed."[39] It identified as "priority areas for action" increasing staffing, improving workload and working conditions for Personal Service Workers (PSWs), increasing wages, improving benefits, and maximizing opportunities for full-time hours.[40] The Act prevents Unifor from bargaining about these issues even as understaffing was exacerbated during the Covid 19 pandemic.[41]

[83] Finally, with respect to negotiations, the Act removed from the negotiating table any discussion between unions and Ontario of billions of dollars in tax cuts at the same time as Ontario was asking employees to limit wage increases to below the rate of inflation. Jay Porter, the Director of the Broader Public Sector Labour Relations Initiatives Branch at the Treasury Board Secretariat and Ontario's chief affiant in this proceeding, acknowledged that government revenue is something the parties "would take into account and would certainly want to understand" as part of the collective bargaining process.[42]

[84] Ontario responds to this with evidence from Professor Riddell to the effect that unions were able to negotiate non-wage benefits such as the health benefits at Circle of Care discussed above and other examples.[43] Whether these are true gains depends in part on the cost to the employer, the details of which are not before me. Moreover, the fact that unions were able to make some small gains such as access to equity data in the case of a bargaining unit at Queen's University does not mean that the compensation cap did not substantially interfere with the ability of unions to use wage increases as a bargaining chip for other

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[38] See Affidavit of Katha Fortier, affirmed on March 8, 2021, at para. 65 ("Fortier Affidavit").
[39] Exhibit J to Fortier Affidavit, at p. 26.
[40] *Ibid*, at pp. 27-30, 33-36.
[41] See Affidavit of Kelly Godick, affirmed June 29, 2021, at paras. 74-90 ("Godick Affidavit").
[42] Cross-Examination of Jay Porter, held June 28, 2022, Q. 2249 ("Porter Cross, June 28").
[43] See e.g., in Ontario's factum, at para. 98, OECTA reduces secondary class size averages (although it was only a reduction from what management's initial proposal was and was still a small increase above current sizes) and the new Supports for a Student Fund; at para. 102, ONA improves health and safety language to ensure access to Personal Protective Equipment; at para. 104, CUPE, Local 3902 (which represents academic and contract faculty at the University of Toronto) obtains improved hiring criteria and better workload protections; at para. 105, three CUPE locals representing union members that work at Queen's University obtain equity data; at para. 111, OPSEU obtains improved seniority calculations for fixed-term employees, job security language, and equity related gains; at para. 113; The Society obtains new contract terms related to redeployment, improved work-from-home language and repatriation of work from a third-party contractor to Ontario Power Generation; at para. 114, PWU obtains improved employment security provisions and improved access to vacancies for PWU members.

benefits. It simply means that Ontario has been able to point to some limited improvements in limited areas.

[85] Nor did Ontario lead any contrary evidence about collective bargaining from employers or government officials from sectors affected by the Act to contradict the evidence of the applicants.

[86] The reduction in negotiating power that the Act has brought about prevents employees from having their views heard in the context of a meaningful process of consultation that could lead to an improvement of working conditions.

**c. Impact on Staffing**

[87] The Act coincided with a serious long-term recruitment and retention crisis in the health care, home care, hospital, and long-term care sectors.

[88] The extent of the staffing crisis in long-term care homes was recognized by Ontario's own Long-Term Care COVID-19 Commission, which confirmed the long-standing recruitment and retention challenges in long-term care homes, and which recommended improved compensation as key to addressing the staffing crisis in that sector.[44]

[89] The Act has prevented employers and unions from negotiating solutions to address this crisis even though the government's own study linked the staffing crisis to compensation.

[90] The inability to address staffing issues directly affects the working conditions of the remaining employees. This is graphically demonstrated through the affidavit of Kelly Godick.

[91] Ms. Godick works as a personal support worker ("PSW") at a long-term care facility in Thunder Bay. The home at which she works as a variety of care floors. Some are for elderly residents. Some are locked units for residents with dementia and aggressive behaviours. Roughly 10% of the population is between age 20 and 50 who come to the facility after catastrophic accidents and brain injuries. They are physically more difficult to care for because they are more physically fit, larger and stronger than older residents. This poses particular challenges when they are aggressive.

[92] Of 600 members in the bargaining unit at Ms. Godick's facility, 390 are part-time. Her employer provides no short-term or long-term disability benefits to any of the bargaining unit members beyond a maximum of 18 sick days per year. The facility has a chronic shortage of PSWs. Its ordinary ratio is one PSW for each 10 or 11 residents. Staff shortages mean that the ratio is often 1 to 16 residents. There are times when the ratio

[44] See Exhibit J to Fortier Affidavit ("Ontario Long-Term Care Staffing Study Advisory Group, *Long-Term Care Staffing Study* (July 30, 2020)"); Exhibit G to Hauch Affidavit ("Interim Report, Ontario's Long-Term Care Covid-19 Commission, October 22, 2020").

becomes 1 to 32. The facility had 40 part-time PSW positions they could not fill in June 2021. Since 2018 there have never been fewer than 35 PSW vacancies. At the same time, 21% of its full-time Registered Practical Nursing positions were vacant and 18 of its 26 part-time registered practical nursing positions (69.2%) were vacant.

[93] These shortages mean that existing staff must work even harder on a given shift than they would ordinarily do. They do so for no extra pay.

[94] Short staffing takes a toll on the mental and physical health of employees. Given the increased physical workload, employees are more prone to injury when working short staffed. Many residents have no family or friends. Staff provides their only social interaction. When staff are too busy to do so, the mental and physical health of residents deteriorates.

[95] For many residents, the only luxury they have is a weekly bath. In cases of under staffing, even that most basic need cannot be accommodated and must be replaced with quick localized washing in bed. Patients die regularly. When approaching death, they often seek the comfort of an employee. The employee has a stark emotional choice: Tell the dying patient they have no time for them; or deny other patients basic care.

[96] It is left to overworked, frontline, low-wage, employees to witness the deterioration in their patients' condition because staff shortages render employees unable to provide residents with the level of care they require. It is for the same employees to live with the disappointment of patients who cannot receive something as basic as a weekly bath. It is for the same employees to deny a dying patient the comfort of another human being as their lives end. Employees live with this day in day out. They break down in tears. They exhaust themselves. They burnout. They leave for less stressful jobs thereby further exacerbating the vicious cycle of short staffing.

[97] Wages are not high. In Thunder Bay where Ms. Godick works the hourly wage for PSWs is in the $21/22 range. Ms. Godick has had employees breakdown before her because of the shame they feel in having to access food banks while working as hard as they do in circumstances as traumatic as they are.

[98] Ms. Godick was not cross-examined on her affidavit.

[99] An additional complication is the prevalence of part-time or casual work. Employers prefer part-time or casual employees because they are paid less, do not receive benefits, and do not receive pensions. This creates additional barriers for PSW's to move up the salary grid. While it takes a full-time employee only two years to reach the highest pay grade based on 1800 hours per year, it takes part-time employees longer. Not only because they work part-time but because the 1800 hours must be accumulated in a single workplace. Thus, although many long-term care home workers have multiple part-time positions in different homes, it is only their hours in a particular home that count towards upward wage movement at that particular home.

[100] In the long-term care sector, 65% of jobs are part-time. In extreme cases, bargaining units have two to four times as many part-time as full-time employees even though workers want and need full-time work.[45] In the hospital sector, less than 50% of CUPE employees are full time. Approximately 30% to 40% of the part-time workers have more than one job to make ends meet. In the nursing sector, 45% of nurses are less than full-time. Thirty percent are part-time and 15% are casual. Many parttime employees hold two or more jobs to make ends meet.

[101] The often traumatic conditions under which employees in the healthcare sector work leads working conditions caused by staffing issues to be a significant priority. These are key collective bargaining issues. Given staff shortages, the collective bargaining power of employees would generally be increased in a way that would enable them to improve wages, ameliorate staff shortages and improve working conditions. The 1% salary cap has taken that power away from employees.

**d. Impact on Public and Private Sector Wage Parity**

[102] In the long-term care sector, the Act has disrupted long-standing bargaining relationships and patterns.

[103] In the long-term care sector, not for profit, for profit and municipal long-term care homes have negotiated as a sector and have looked to each other's awards to maintain relative wage parity across the sector for the past 30 years. Since the Act took effect, the portion of the long-term care sector covered by the Act and the portion not covered by the act have begun to bargain separately. Disparities between wages in homes covered by the Act and those not covered by it have now begun to arise.

[104] After the Act was introduced, municipal and for-profit home employees negotiated wage increases of 1.5% to 2% per year.[46] This is significant because the evidence before me is that:

(i) Wage settlements in not for profit and for profit/municipal homes have tended to track each other.

(ii) The work in all three categories of homes is identical.

(iii) All three categories of homes receive identical provincial funding in the form of a fee per patient per day.[47]

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[45] See Fortier Affidavit, at paras. 38, 88 and 108; Affidavit of Kathleen Atkins, affirmed June 29, 2021 (71% part-time and casual workers, calculated from table at para. 12) ("Atkins Affidavit"); Godick Affidavit, at para. 10.
[46] See Hauch Affidavit, at paras. 55-57; Affidavit of Ricardo McKenzie, affirmed January 22, 2021, at paras. 74-84; Reply Affidavit of David Hauch, sworn April 13, 2022, at para. 25.
[47] Although the fee may differ based on the level of care the patient requires.

It is therefore highly probable that in the absence of the Act, wage settlements at not-for-profit homes would have tracked those of municipal and for-profit homes.

[105] Similar trends have emerged in the nursing sector. Wages for nurses have historically followed a pattern whereby private and publicly employed nurses are paid the same wage. In most cases, interest arbitrators in the public sector followed the results of agreements achieved through collective bargaining in non-public agreements and vice versa. Bill 124 has led arbitrators in non-public agreements to depart from the principle of parity because the results of interest arbitration in the public sector no longer reflect those of freely negotiated agreements or independent decisions by interest arbitrators.

[106] As Arbitrator Kaplan noted in *Regional Municipality of Niagara Homes for the Aged v. ONA*:

> The difference, however, is that Bill 124 interferes with free collective bargaining by imposing a 1% total compensation cap: the rightness or wrongness of that is for others to decide. But we cannot accept the invitation to impose a statutorily mandated settlement in the face of incontrovertible evidence of an actual free collective bargaining settlement that would have otherwise almost certainly applied – the one voluntarily agreed to with the central hospital comparator group, and the one that the arbitrator in the Participating Hospitals & ONA case said he would have awarded, which would then have been followed here.
>
> Our main mission is to replicate free collective bargaining not to impose an economic outcome on employees who were deliberately excluded from provincial wage restraint legislation. As the nurses here were excluded from Bill 124, it would not be appropriate to sweep them in by mechanistically concluding that they should be required to follow a legislatively mandated central award, especially in light of the evidence of an applicable free collective bargaining result. Put another way, it is quite correct that the nurses covered by this award consistently follow central hospital outcomes, but it would be a complete triumph of form over substance, and would, as the Association argues, be the exact opposite of replicating free collective bargaining, to impose upon the affected nurses a result mandated by a statute that does not apply to them in face of actual evidence of the results of free collective bargaining that would have otherwise governed their compensation.[48]

[48] 2020 CanLII 83199 (Ont. Arb. Bd.) (W. Kaplan), at pp. 6-7.

[107] Fragmenting bargaining units into public and private sector units interferes with the unions' ability to choose who bargains together.

**e. Impact on Self - Government**

[108] Unions tend to develop their bargaining positions based on a democratic solicitation of their members views on issues of concern. Unions prioritize their negotiating positions based on those results. Bill 124 prevents the unions from advocating for those measures beyond the 1% limit. This undermines the self-government that the Supreme Court of Canada has identified as one purpose of collective bargaining.[49]

**f. Impact on Freely Negotiated Agreements**

[109] As noted, the Act gives the Treasury Board Secretariat the power to override collective agreements that have been freely agreed to. The Treasury Board has done so.

[110] On June 14, 2019, the SEIU concluded a collective agreement with Mariann Homes that provided for increases of between 2% and 6.4% in its first year, subsequent increases of 1.4%, 1.6% and 1.75% per year, improved bereavement leave, two additional sick days, and doubled employer pension contributions. The union and the employer submitted a joint request to be exempted from the Act. The President of Treasury Board rejected the joint request. A subsequent request for reconsideration was also denied. As a result, the union and employer had no choice but to comply with the 1% wage and overall compensation increase limits even though neither thought it was in their interest to do so and even though the collective agreement would not have required any additional money from Ontario.

[111] The Treasury Board Secretariat has used this power on six occasions involving the Ontario Nurses Association with respect to collective agreements entered into both before and after the Act received royal assent.

[112] In *Health Services*, the Supreme Court of Canada held that laws that unilaterally nullify significant negotiated terms in existing collective agreements substantially interfere with collective bargaining.[50]

**g. Impact on the Right to Strike**

[113] Ontario submits that the Act does not affect the right to strike because s. 4 says "nothing in this Act affects the right to engage in a lawful strike or lockout." The applicants submit

[49] See *Health Services*, at paras. 81-82.
[50] *Ibid*, at para. 96.

that the Act has effectively limited their right to strike because it is impractical to strike over non-monetary benefits.

[114] In response, Ontario points to a list of the strike actions that certain unions have taken, notwithstanding the Act. For example, before the pandemic, Ontario English Catholic Teachers Association ("OECTA") and the Ontario Secondary School Teachers Federation ("OSSTF") engaged in escalating work to rule action and walk outs. The fact that there are a few examples of work to rule campaigns or one day walk outs (although one union engaged in a two-week strike) does not necessarily mean that the Act does not substantially interfere with the right to strike.

[115] This question must be approached with a degree of practicality. During a strike, employees are not paid. Consequently, the issue over which employees strike must have sufficient economic importance to them to warrant not being paid. As noted, the Act's 1% salary is costed out against non-wage benefits. One percent amounts to approximately 2.6 days of pay.[51] As a result, if employees strike for 2.6 days, they have exhausted the financial benefit associated with any gain from the strike. That provides a substantial disincentive to strike.

[116] In *Saskatchewan Federation of Labour*, the Supreme Court of Canada recognized the right to strike as being constitutionally protected under s. 2(d) of the *Charter*. In doing so it made the following observations:

(i) The right to strike is an "indispensable component" of meaningful collective bargaining.[52]

(ii) The possibility of a strike allows workers to negotiate with their employers on terms of approximate equality without which "bargaining risks being inconsequential — a dead letter".[53]

(iii) The right to strike is the "powerhouse" of collective bargaining.[54]

(iv) The ability to strike allows workers "to refuse to work under imposed terms and conditions." "This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives."[55]

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[51] One week of paid equals 1.92% of salary. One day therefore equals .384%. 2.6 days at .384% comes to 1%.
[52] *Saskatchewan Federation of Labour*, at para. 3.
[53] *Ibid*, at para 55.
[54] *Ibid*.
[55] *Ibid*, at para. 54.

[117] The Act, in effect, imposes the financial terms and conditions under which the applicants must work. It says you must work for an annual wage increase of no more than 1% and makes striking to obtain more futile. That, in the words of the Supreme Court of Canada, removes from employees the "powerhouse" of collective bargaining and the one tool they have that allows them to refuse to work under imposed terms and conditions. While employees may technically retain the right to strike, it has been rendered financially meaningless because the total benefit that they can receive by striking is a wage increase of 1% or an increase of benefits equal to 1% of wages; a benefit that is exhausted after 2.6 days of striking.

[118] Although Ontario could have taken the position in any collective bargaining negotiation that it would not pay any more than 1% in salary increases, Jay Porter explained during his cross-examination that if the government did so, this "could have impacted service delivery and ultimately could have impacted the sustainability of public services" because that position could have led to "labour disruptions."[56] In other words, it could have led to strikes or work-to-rule by teachers, something that was described by the Supreme Court in *Saskatchewan Federation of Labour* as an "indispensable component" of meaningful collective bargaining.[57] Although Ontario denies that it was trying to render strikes futile, the effect of Mr. Porter's evidence is to the contrary. The advantage of legislation capping salaries at 1% meant that Ontario could avoid the "labour disruptions" that might arise if Ontario took a hard-line position during collective bargaining.

[119] Depriving workers of the right to strike, either explicitly or implicitly, amounts to substantial interference with collective bargaining.

[120] Ontario notes that Dr. Hebdon also provided an expert's report in *Manitoba Federation of Labour et al v. The Government of Manitoba*,[58] and that the Manitoba Court of Appeal rejected his opinion that strikes would, in all likelihood, be "futile" under the Manitoba legislation. In doing so the Court noted that Manitoba's legislation, like Ontario's, gave the Treasury Board the ability to exempt individual collective agreements from its scope.[59] The Court then noted that nothing precluded a union from striking to compel the Treasury Board to grant an exemption.[60] That, however, is not a possibility in Ontario. Numerous Labour Relations Board panels have held that a strike to obtain a right that one is not legally entitled to is an illegal strike that can be prohibited by the Board and that can result in heavy fines against the union and the union representatives who instigated the strike.[61]

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[56] Porter Cross, June 28, QQ. 2034-2035.
[57] *Saskatchewan Federation of Labour*, at paras. 3, 55.
[58] 2021 MBCA 85 ("*Manitoba Federation of Labour*").
[59] *Ibid*, at para. 101.
[60] *Ibid*, at para. 103.
[61] See e.g. *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A., ss. 100, 102-109 ("*Labour Relations Act*"); *Croven Ltd. v. U.A.W., Local 1090*, [1977] O.L.R.B. Rep. 162 (specifically considering wage restraint legislation, at paras. 6-

[121] In response to a question from the bench, Ontario's counsel advised that in Ontario's view, the Act does not prohibit people from striking to earn more than 1%. Although I am grateful to counsel for seeking that clarification during the course of argument, there remain several limitations to it. First, Ontario is not the employer of a large number of the employees caught by the Act. The employers are school boards, hospitals, care homes, universities and so on. Those entities are not bound by the government's position and could invoke well-established *Labour Relations Act* principles that would hold such strikes to be illegal.

[122] Second, OSSTF notes that this late breaking concession from Ontario must be considered in light of the applicants' requests for information about how to obtain an exemption. No applicant was ever advised that they could strike to obtain an exemption or that they could strike for a salary increase of more than 1%.

**h. Impact on Interest Arbitration**

[123] Certain "essential workers" do not have the right to strike. Their work is considered too important to risk interruption. If they are not able to reach a collective agreement with their employers, the dispute is subject to a regime of binding interest arbitration.

[124] Interest arbitration is conducted by three-person Boards consisting of an employer representative, a union representative and an independent chair. The independent chairs are chosen from a relatively small body of experienced, respected labour arbitrators.

[125] The principle underlying interest arbitration is replication. That is to say, interest arbitrators try to replicate the results achieved in freely negotiated collective agreements. They do so using objective criteria such as collective bargaining results in similar sectors and by having regard to the market forces and economic realities that would have driven the parties to a collective agreement.[62]

[126] In *Saskatchewan Federation of Labour*, the Supreme Court of Canada affirmed that legislative prohibitions on the freedom to strike must be accompanied by a dispute resolution by a third party. The purpose of doing so was to ensure that "the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers."[63] It further noted that, to be an effective

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7); *U.S.W.A., Local 9011 v. Radio Shack*, [1985] O.L.R.B. Rep. 1789, at para. 36*; G.C.I.U., Local 34-M v. Southam Inc.*, [2000] Alta. L.R.B.R. 177, at paras. 55, 56 and 58; *Otis Elevator Co. v. I.U.E.C.*, 35 D.L.R. (3d) 566 (B.C. C.A.), at paras.40-42.

[62] See *University of Toronto (Governing Council) and University of Toronto Faculty Assn. (Re.)* (2006), 148 L.A.C. (4th) 193 (Ont. Arb. Bd.), at para. 17, *per* Winkler R.S.J. (as he then was).

[63] *Saskatchewan Federation of Labour*, at para. 94, citing *Alberta Reference*, at para. 116.

and constitutional alternative to the right to strike, interest arbitration must be a meaningful process that replicates free collective bargaining.[64]

[127] The right to strike of nurses and other health care workers was removed in 1965 after a particularly contentious labour dispute. Approximately 90% of the ONA's 68,000 nurse members do not have the right to strike. Their labour regime is governed by the *Hospital Labour Disputes Arbitration Act*[65] which creates a process of interest arbitration to resolve disputes if collective bargaining fails.[66] Section 9(1.1) of the *Hospital Labour Disputes Arbitration Act* provides that the board of arbitration shall take into consideration all factors they consider relevant including the following criteria:

> 1. The employer's ability to pay in light of its fiscal situation.
>
> 2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
>
> 3. The economic situation in Ontario and in the municipality where the hospital is located.
>
> 4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
>
> 5. The employer's ability to attract and retain qualified employees.

[128] Sections 10 and 11 of the Act bind interest arbitrators and subject their awards to rollbacks by the Treasury Board Secretariat.

[129] In effect, the Act prohibits arbitrators from considering the factors they are statutorily mandated to apply by s. 9(1.1) of the *Hospital Labour Disputes Arbitration Act.* By way of example, factor five above requires interest arbitrators in hospital arbitrations to take into account an employer's ability to attract and retain qualified employees. During a time of labour shortages, that would translate into increased wages. A series of interest arbitrators has held that they would have awarded wage increases of more than 1% but for the application of the Act.[67]

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[64] See *Saskatchewan Federation of Labour*, at paras. 92-96.
[65] R.S.O. 1990, c. H.14, ss. 9(1.1), 10 and 11.
[66] See *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 (for a useful summary of the evolution of the development of interest arbitration in the nursing sector, at paras. 52-62).
[67] See *Mon Sheong Home for the Aged v. Ontario Nurses' Association*, 2020 CanLII 8770 (Ont. Arb. Bd.) (E. A. Gedalof) ("but for the application of Bill 124 we would award across the board increases of 1.4% and 1.75% for the

[130] As Arbitrator Gedalof put it:

> What is readily apparent in reviewing the parties' economic proposals, however, is the extent to which the application of Bill 124 is a threshold issue that limits to a very significant degree what it is even possible for this board to consider in this round. Arguments about ability to pay, impact on services, the state of and future prospects for the Ontario economy, whether comparisons to more generous settlements are or are not appropriate, and whether or not it is necessary to improve monetary terms in order to attract and retain nurses, all become academic if the most that can be done is to award 1% increases, which increases are not opposed by the Hospitals.
>
> …
>
> To put it bluntly, therefore, when it comes to the application of Bill 124 in this proceeding, the parties' and **this Board's hands are tied**.
>
> …
>
> Even highly normative and modest improvements to health and welfare benefits—commonly awarded by past boards of interest arbitration between these parties—are beyond the scope of our jurisdiction under Bill 124.[68]

[131] Other arbitration boards have expressed similar views:

(i) The **Act "clearly limits, or straitjackets"** the ability of the arbitration board to "'negotiate' … trade-offs during the course of its consideration of the submissions of the parties".[69]

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two years of this contract", at para. 24); *Participating Hospitals (Ontario Hospital Association) v. Ontario Nurses' Association*, 2020 CanLII 38651 (Ont. Arb. Bd.) (J. Stout) ("Under normal circumstances, applying replication, we would have awarded a wage increase of at least 1.75% to keep nurses in line with other hospital employees who already settled their collective agreements for this period of time. However, we are constrained by the application of Bill 124 and we can only award a 1% salary increase for each twelve month period of the moderation period", at para. 33); *Résidence Saint-Louis c. Syndicat canadien de la fonction publique, section locale 3189*, 2020 CanLII 33859 (Ont. Arb. Bd.) (C. Schmidt) ("Nous notons que, n'eût été l'application de la Loi 124, ce Conseil d'arbitrage ordonnerait des augmentations salariales qui correspondent aux tendances établies dans les sentences arbitrales et les règlements de ce secteur, soit de 1,4 %, 1,4 % et 1,5 %.", at para. 4).

[68] *Participating Hospitals v. Ontario Nurses Association*, 2021 CanLII 88531 (Ont. Arb. Bd.) (E. A. Gedalof), at paras. 20, 23 and 39 (emphasis added).

[69] *Foyer Richelieu*, at pp. 3-4, *per* Arbitrator Keller (emphasis added).

(ii) The Board was **"subject to the dictates of Bill 124,"** which "profoundly limited" the Board's jurisdiction over monetary issues.[70]

(iii) The Act constrains the ability of arbitration boards to apply longstanding criteria and normative principles of interest arbitration (most significantly replication and comparability).[71]

[132] Many arbitrators have remained seized of their awards and have retained jurisdiction to revisit the awards if this application is successful.[72]

[133] One consideration in assessing the constitutionality of limits on interest arbitration is whether it redresses the loss of balance caused by removal of the right to strike.[73] As Firestone J. noted in *Canadian Union of Postal Workers v. Her Majesty in Right of Canada*:

> … An outcome dictated by unilateral legislative action, and uninformed by any union consultation or input, is not a resolution to a bargaining impasse; it is the legislative abolition of a bargaining impasse, something quite different. The resolution of an impasse surely requires that the parties at loggerheads have their voices heard and have some input in the decision that solves the impasse. A resolution to an impasse that takes no heed of the parties is an entirely artificial one …[74]

[134] Professor Riddell denies in his report that the Act threatens arbitrator independence. He concedes that it may limit arbitral discretion but maintains that arbitrators retain the ability to make unconstrained, independent determinations on a wide range of terms and conditions of employment. In my view this misses the point. The issue is not the distinction between independence or discretion, or whether arbitrators retain the ability to

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[70] *Shepherd Village Inc. v. Service Employees International Union Local 1 Canada*, 2020 CanLII 51703 (Ont. Arb. Bd.) (D. Randall), at pp. 2-3 (emphasis added).
[71] See *Participating Charitable Nursing Homes v. Ontario Nurses' Association*, 2021 CanLII 106877 (Ont. Arb. Bd.) (J. Stout), at para. 12 ("*Participating Charitable Nursing Homes*"); *F.J. Davey Home v. Canadian Union of Public Employees, Local 4685-00*, 2021 CanLII 10816 (Ont. Arb. Bd.) (J. Stout), at paras. 25-26 ("*F.J. Davey Home*"); *Broadview Foundation (Chester Village) v. Canadian Union of Public Employees, Local 3224*, 2021 CanLII 11850 (Ont. Arb. Bd.) (R. Goodfellow) ("*Broadview Foundation*"); *Glebe Centre v. Canadian Union of Public Employees, local 3302 - 00*, 2021 CanLII 36600 (B. Keller) (Ont. Arb. Bd.) ("*Glebe Centre*"); *Mon Sheong Richmond Hill Long-term Care Centre v. Service Employees International Union Local 1 Canada*, 2020 CanLII 40950 (Ont. Arb. Bd.) (D. Randall), at p. 2 ("*Mon Sheong RH*").
[72] See e.g., *Participating Charitable Nursing Homes*, at para. 14; F.J. Davey Home, at para. 35; Broadview Foundation, at p. 2; *Glebe Centre*, at p.10; *Mon Sheong RH*, at pp. 5-6.
[73] 2016 ONSC 418, at para. 212.
[74] *Ibid*. at para. 213.

make determinations in other areas. The issue is whether the Bill amounts to substantial interference with collective bargaining.

[135] Professor Riddell agreed in cross-examination that if arbitrator independence is measured in terms of their ability to award the wage increase they see fit, then the Act limits their independence.[75] As noted earlier, wages are matters of "vital importance" to employees.[76]

[136] Ontario submits that interest arbitration is not constitutionally protected under s. 2(d). It cites the Supreme Court of Canada's language in *Saskatchewan Federation of Labour* to the effect that "alternative dispute resolution mechanisms are generally not associational in nature"[77] and the Court's observation that this was why Dickson C.J. addressed arbitration mechanisms in the *Alberta Reference* case in his s. 1 analysis and not as part of his s. 2(d) analysis.

[137] In *Alberta Reference*, however, Dickson CJ noted:

> Serious doubt is cast upon the fairness and effectiveness of an arbitration scheme where matters which would normally be bargainable are excluded from arbitration. "Given that without some binding mechanism for dispute resolution, meaningful collective bargaining is very unlikely, it seems more reasonable to ensure that the scope of arbitrability is as wide as the scope of bargainability if the bargaining process is to work at all."[78]

[138] Ontario submits further that while the concept of replication in interest arbitration may be important, it is not constitutionally protected either. Ontario says all that is required is that arbitration be impartial and effective.

[139] It is difficult to see how arbitration can be impartial or effective if the government imposes limitations on wages that are lower than what the arbitrators say they would have awarded had the Act not constrained them. In this context the arbitral awards do not reflect the fruits of impartial decision-making but that of state fiat.

[140] Ontario then refers to *Gordon v. Canada (Attorney General)*,[79] where the Ontario Court of Appeal also noted that interest arbitration may not be subject to the same constitutional protection as the right to strike. However, the Court in *Gordon* concluded its analysis on this point by pointing out that the object of interest arbitration was to replicate collective bargaining and that since the compensation limits imposed by the legislation in *Gordon* reflected the results of collective bargaining, imposing the same limit on arbitration awards

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[75] Riddell Cross, June 21, Q. 1726.
[76] *P.I.P.S.*, at para. 69.
[77] *Saskatchewan Federation of Labour*, at para. 60.
[78] *Alberta Reference*, at para. 123 (citations omitted).
[79] 2016 ONCA 625 ("*Gordon*").

would have arbitral awards replicate collective bargaining.[80] As noted earlier, however, the Act's 1% limit does not reflect freely negotiated collective bargaining results either when it was introduced or since.

### h. Impact on the Relationship Between Unions and Their Members

[141] Bill 124 and the way in which Ontario has acted under it, has undermined the relationship between unions and their members.

[142] By way of example, after nurses achieved only a 1% salary increase, members of the nurses' union, the Ontario Nurses Association ("ONA) were enraged. They did not blame the government for the 1% limit but blamed the ONA. Facebook groups entitled Ontario Nurses for a Protest and ONA Nurses for Change grew to over 21,000 members. Posts on these groups were highly critical of the ONA and blamed its leadership for the 1% pay cap. They circulated media articles about the generous wage and benefit increases to municipal police and firefighters accompanied by calls to replace ONA President, Vicki McKenna with a "male President" and a "male union" which they believed would allow them to achieve increases similar to those obtained by municipal police forces and firefighters.

[143] A consultant hired by the ONA to examine the divisions within the union noted that divisions of this nature weaken the ability of the ONA "to frame the public and political discourse" on issues of concern consume organizational resources and, in the longer term, destabilize the union and its influence.

[144] Ontario answers by pointing to a number of pandemic related pay measures for some, but not all, front-line staff in hospitals, long-term care homes and correctional facilities as evidence of flexibility under the Act to support its constitutionality. Although these pandemic pay programs ended in August 2020, Ontario introduced further wage enhancements for certain employees in October 2020 and made those enhancements permanent in April 2022.

[145] Far from improving the Act's constitutionality, these measures are evidence of even further substantial interference with collective bargaining. Pandemic pay benefits were introduced without consulting the unions. They were presented as evidence of generosity and benevolence by Ontario. Wage increases of that nature would ordinarily be the product of collective bargaining. Here Ontario created a system where collective bargaining could produce only 1% increases. The government's "generosity" led to additional pay benefits outside of the collective bargaining process.

[146] As the Ontario Labour Relations Board noted in *Teamsters Canada Rail Conference, Division 660 v. Bombardier Transportation Canada Inc*.,

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[80] *Ibid*, at paras. 136-39.

> The starting point for the Board's analysis in this case is where an employer provides an incentive payment to employees, outside of the collective agreement, without the consent of the exclusive bargaining agent, the union's representational authority is presumed to be eroded or compromised.[81]

[147] The whole collective bargaining regime presupposes that wages and other benefits are to be negotiated between the employer and the representatives of the collective bargaining unit. Among other things, this allows employees to decide through democratic means, how financial and other benefits should be divided amongst members in a collective bargaining unit. By unilaterally deciding which employees received the financial benefit, Ontario deprived collective bargaining units of this fundamental right of self-determination and imposed arbitrary terms on them.

[148] At some point, providing benefits to employees outside of the collective bargaining process would understandably lead union members to ask what purpose collective bargaining serves if employees can get more outside of the collective bargaining process than within it. This substantially undermines the purpose of collective bargaining. Whether intended or not, in the long term this tends towards behaviour commonly referred to as union busting. That quite obviously substantially interferes with collective bargaining.

**j. Impact on Power Balance Between Employer and Employees**

[149] In *Canada (Procureur général) c. Syndicat canadien de la fonction publique, s. locale 675*, the Quebec Court of Appeal held that:

> In this case, it can be said that this interference has a unique flavour, as it takes place in the context of the State's relations with its unionized employees. A real dialogue between the parties cannot be achieved or sustained if the shadow of the legislator looms large behind the government purporting to discuss working conditions with its union counterparts, or if promises made at the bargaining table are too frequently withdrawn or neutralized elsewhere. In other words, the State cannot make a habit of giving with one hand (the government's) and taking with the other (the legislator's); otherwise, bargaining risks becoming an artificial process.[82]

[150] Jay Porter admitted during cross-examination that the commencement of education sector bargaining was "a key consideration with respect to the timing of the legislation."[83] This suggests that the "shadow of the legislator" was intended to "loom large" in collective

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[81] 2018 CanLII 36714 (Ont. L.R. Bd.) (D. Ross), at para. 21.
[82] 2016 QCCA 163, at para. 40 ("*Syndicat canadien*").
[83] Porter Cross, June 28, Q. 2165.

bargaining negotiations. The government was using its legislative power to avoid real collective bargaining and to tilt the balance of power in favour of the government.

[151] It has been held that legislation that renders collective bargaining "effectively feckless" amounts to substantial interference with the right to collectively bargain.[84] It is difficult to see how there can be an effective collective bargaining system when the employer has been given the trump card of compensation increases lower than the rate of inflation and lower than freely bargained agreements.

[152] The impact of the salary cap is even more acute here in the context of overall labour shortage in Ontario. A shortage that is particularly acute in the healthcare and long-term care sectors. As already noted, labour shortages would ordinarily give workers greater bargaining power. The Act removes that power.

[153] The effect of Bill 124 was immediate. It led employers to withdraw offers of wage increases above 1% that had already been made in negotiations that were in progress when the Bill was introduced. In other cases, the government set aside collective bargaining agreements reached before the Bill took effect thereby requiring employees to bargain from scratch with considerably less leverage.

[154] There can be no doubt that the imposition of a 1% salary cap interferes in the balance of power between employers and employees when bargaining about salaries. Given the importance of salaries in collective bargaining, the 2.4% rate of inflation in 2019 and the fact that going rate increases were 1.6%, that interference is substantial. The Act skews the collective bargaining process materially in favour of the employer.

[155] Ontario points to the decision of the British Columbia Court of Appeal in *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, where the Court disagreed with the union's articulation of the substantial interference test as being whether the legislation disrupts the balance between employer and employees.[85] The court did not, however, disagree with the concept that disrupting the balance of power could result in substantial interference. It simply reiterated the test as being that of substantial interference and not that of an imbalance of power.

[156] Imbalance of power remains a factor that courts have and continue to examine when determining whether there has been substantial interference with collective bargaining.

[157] The Supreme Court of Canada recognized this in *Mounted Police* when it said:

> The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and

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[84] *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184, at para. 284 ("*BC Teachers' Federation* (BCCA)").
[85] 2016 BCCA 156, at para. 90 ("*Dockyard Trades*").

> regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining.[86]

[158] In *Gordon*, the Court of Appeal noted:

> Meaningful collective bargaining maintains a balance of bargaining power, or "equilibrium", between unions and employers.
>
> …
>
> Labour relations legislation and s. 2(d) of the *Charter* both aim to establish and preserve the balance of power between the employer and unions.
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> …
>
> As noted, following the 2015 labour trilogy, the right to strike is protected by s. 2(d) of the *Charter* because it functions to maintain the balance of bargaining power between employers and employees.[87]

[159] On my view of the evidence, an analysis of the foregoing factors demonstrates that the Act has substantially interfered with collective bargaining.

### iii. Union Communications

[160] Ontario submits that the continued effectiveness of collective bargaining under the Act is demonstrated by a string of communications from unions to their members highlighting the improvements the unions obtained in agreements negotiated under the Act. In my view this does not represent a fair contextual reading of the statements in question.

[161] The unions were legally obligated to "sell" the collective agreements to their membership. To do otherwise would amount to bad faith bargaining. The unions' comments were made

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[86] *Mounted Police*, at para. 72.
[87] *Gordon*, at paras. 39, 97 and 135.

in the context of what was possible to achieve given the constraints that the Act placed upon collective bargaining. Many of the communications note that the Act complicated the bargaining process, negatively impacted collective bargaining, created challenges for collective bargaining or limited the unions' margin of manoeuvre. The improvements of which the unions spoke must also be viewed in the context of the employers' initial bargaining position which was often to revoke benefits that workers had successfully negotiated for the past. In that context, preserving the status quo was a "win." The applicants referred to this as being forced to bargain themselves out of a hole. In the absence of legislation that capped salary increases at 1%, that strategy would not have been nearly as successful as it was for employers. The communications tend to focus on pushing back on employers' requests for concessions. Moreover, many of the communications note that the collective agreements contained an escape clause that reopen the agreements if the Act is found to be unconstitutional. That is not a provision one would find in a collective agreement that unions thought was fair.

[162] Recall here also that the test is whether the Act substantially interferes with collective bargaining, not whether some unions managed to obtain some sort of improvement on non-monetary issues. The test is not whether collective bargaining has been reduced to a completely useless exercise. Any improvements the unions obtained must be weighed against the significance of the limitation on wage increases and the ability of the unions to have obtained further improvements in the absence of wage constraints.

### iv. Experts on Collective Bargaining

[163] The parties introduced evidence from two experts on collective bargaining: Robert Hebdon for the applicants and Christopher Riddell for the respondents. Each side vigorously criticized the reliability of the other side's expert. That requires me to assess the reliance I place on each report. Both are highly qualified experts in their fields.

[164] Robert Hebdon has focused his entire career on labour relations. He has taught/teaches on the topic at Cornell University, University of Manitoba and McGill University. He has acted as a labour arbitrator for five years, has a long list of journal articles books, and chapters in books that focus on labour relations.

[165] Ontario submits that the evidence of Professor Hebdon should be rejected because he worked for OPSEU for 24 years and has testified only on behalf of labour unions. Ontario notes that Professor Hebdon gave evidence in the *Manitoba Federation of Labour* case similar to the evidence he gave in this case and that the Manitoba Court of Appeal found no *Charter* infringement. I will address that case later in these reasons but note for the moment that the first instance judge in Manitoba Federation of Labour accepted Professor Hebdon's evidence. I would prefer to base my assessment of both experts on the quality and reliability of their evidence in this proceeding, not on what they have done or how they have been received by others in the past.

[166] Christopher Riddell is equally qualified. He has a PhD. in labour relations, and has taught courses on collective bargaining at Cornell, Queens and Waterloo. He too has published numerous articles in refereed journals and has received a variety of research grants. In recent years his emphasis appears to have switched more to economics and statistics than pure labour relations.

[167] The principal issue on which Professors Hebdon and Riddell provided evidence was the degree to which a cap on wage increases limits a union's ability to negotiate on non-monetary issues. Hebdon says it does. Riddell says it does not. Both also testified more generally on the extent to which the Act substantially interferes with collective bargaining. Again, Hebdon says it does. Riddell says it does not.

[168] I prefer the evidence of Professor Hebdon to that of Professor Riddell.

[169] Professor Hebdon's evidence about the limits that the compensation cap placed on the ability to negotiate on nonmonetary issues coincides with the evidence of numerous fact witnesses. Professor Riddell did not review the affidavits of fact witnesses although he had copies of them. In addition, Professor Riddell appeared to be unclear about the scope of the Act and was not aware until his cross-examination that Ontario Power Generation was covered by the Act even though its wages are in no way funded by Ontario.[88]

[170] Professor Hebdon's evidence also coincides more closely with common sense. If a union has the ability to demand unlimited wage increases, the union can surrender its wage demands in exchange for concessions on nonmonetary issues. A limit on wage increases of 1%, seriously hampers the leverage a union has in this regard.

[171] Professor Riddell's evidence to the contrary is based on what he referred to as his personal experience at the University of Waterloo where he teaches. On cross-examination Professor Riddell admitted that his personal experience consisted of reading information that the union circulated to its members and to the public. In response to Professor Riddell's report, the Ontario Federation of Labour filed a report of Professor Bryan Tolson who was the chief negotiator for the Faculty Association at the University of Waterloo. According to Professor Tolson, the Act prevented any meaningful collective bargaining at the University of Waterloo. Ontario did not cross-examine Professor Tolson on his report.

[172] More significantly, Professor Riddell fairly conceded on numerous occasions in cross-examination that the Act constrained collective bargaining. For example, he agreed that:

(i) The Act is "clearly a serious restraint" on a memorandum of understanding at the University of Waterloo which provides that the starting point of any

[88] See Riddell Cross, June 10, QQ. 1416-17.

collective bargaining negotiation on compensation is the annual change in the Canadian Consumer Price Index.

(ii) The Act imposes a significant constraint on the unions' ability to bargain for cost-of-living increases when inflation is over 1%.

(iii) The goal of interest arbitration is replication. A 1% cap imposes limits on the ability to achieve replication in both negotiations and interest arbitration if comparator wages have increased by more than 1%.

(iv) The design of the legislation contains an imbalance between employers and employees.

(v) Costing non compensation issues under the Act as part of the 1% pay cap imposes constraints on collective bargaining.

## v. Exemption Process

[173] Ontario points to the ability to apply for an exemption from the Act as further evidence that the Act is balanced and does not infringe the *Charter*. There has been one exemption granted under the Act. The evidence does not disclose the details of that exemption aside from a one-page letter granting it. All other exemptions have been rejected even when they were joint submissions from employer and union and even when the employer required the exemption to discourage staff from leaving for better paying positions in the private sector.

[174] The exemption process has also entailed lengthy delays. Unifor notes that it has filed a request for an exemption that has remained unanswered after two years.

[175] During collective bargaining negotiations with OSSTF, Ontario refused to discuss the exemption process. It refused to provide OSSTF with information about how the exemption process would work or what criteria would be taken into account in considering exemptions. A discretionary exemption process in which the criteria relevant to an exemption are not disclosed is of limited value when assessing compliance with the *Charter*.

## C. Consultation

[176] Certain applicants take the position that Ontario had a duty to consult with them before passing the Act. Ontario and certain other applicants disagree with that position.

[177] The weight of the case law establishes that the Crown has no constitutional obligation under s. 2(d) to consult with unions or their members when it develops policies or legislation concerning compensation limits.[89]

[178] That said, the case law does appear to suggest that consultations can provide constitutional protection for potential breaches of s. 2(d) if the consultation meets certain requirements. As an alternative to its primary submission that the Act does not violate s. 2(d), Ontario submits that, if there were an element of the statute that could breach the *Charter*, any such breaches are saved because the government engaged in good faith consultations before passing the Act. For the reasons set out below, I am unable to accept this submission.

### i. When Do Consultations Provide Constitutional Protection?

[179] In *Health Services,* the Supreme Court noted that legislators are not obliged to consult with affected parties before passing legislation but that it might be useful to consider whether the government did so as part of the Court's minimal impairment analysis under s. 1 of the *Charter* because consultation may indicate whether the government considered a range of other options.[90]

[180] In *BC Teachers' Federation*, Donald J.A. in his dissenting reasons suggested that consultation before legislation could be seen as a replacement for traditional collective bargaining and could result in a finding that freedom of association was not breached if the consultation was a truly meaningful substitute for collective bargaining.[91] On further appeal, the Supreme Court of Canada, in brief reasons, allowed the appeal agreeing "substantially" with the dissenting reasons of Donald J.A.[92]

[181] According to Donald J.A., pre-legislative consultations can be a substitute for collective bargaining if the discussions give a union the opportunity to meaningfully influence the changes, by bargaining on terms of approximate equality, in a good faith consultation process.[93]

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[89] See *Health Services*, at paras 157, 179; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, at para. 124; *Gordon*, at paras. 106-13; *Dockyard Trades*, at para 57; *Manitoba Federation of Labour*, at para. 92.
[90] See *Health Services*, at para. 157.
[91] See *BC Teachers' Federation* (BCCA), at paras. 289-91.
[92] *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49, at para 1.
[93] See *BC Teachers' Federation* (BCCA), at paras. 287, 291.

[182] A good faith consultation is one in which: the employees have the right to make collective representations to the employer and have those representations considered in good faith;[94] the parties engage in meaningful dialogue where positions are explained, and the parties honestly strive to find a middle ground;[95] and where parties provide information necessary to enable the other to understand their position and respond to it.[96]

### ii. The Consultation Process Here

[183] The applicants challenge the validity of the consultations because it appears that the government was working on draft legislation while the consultations were ongoing. I do not find anything amiss in that. Governments and other large organizations will often have to work on several tracks simultaneously to provide timely responses to the challenges they face.

[184] That said, the consultations that Ontario conducted do not meet the test for consultations that would save the Act from being found constitutionally invalid. While the consultations may have been consistent with consultations that a government might conduct before passing ordinary course legislation, they were not a substitute for collective bargaining.

[185] The consultation here was not one that was designed to reach any agreement with any of the applicants. This was clear from the outset of the process. Past consultations on labour relations issues had taken a very different route. For example, when Ontario consulted the OSSTF on hiring practices in the past, it circulated a consultation paper that set out in some detail, the issues and sub issues that the government was considering, the status of those issues and the proposed changes. The consultation occurred over four months. Here, the consultation involved approximately 780,000 employees over a much broader sector of the public service. The consultations occurred over four weeks beginning in mid-April 2019 and were not preceded by the circulation of any consultation paper. Instead, Ontario circulated the following questions:

> 1. Elements of collective agreements could help or hinder our overall ability to achieve sustainable levels of compensation growth; and collective agreement provisions that work well in one sector may have unintended consequences in another. **Are there any aspects of the collective agreement(s) in your organization(s) that affect the ability to manage overall compensation costs?**

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[94] *Ibid*, at para. 286.
[95] *Ibid*, at para. 348.
[96] See *OPSEU v. Ontario*, 2016 ONSC 2197, at paras. 137-38.

> 2. Potential opportunities to manage compensation growth could take different forms, for example, growth-sharing or gains-sharing, as identified in the September 2018 line-by-line review of government spending. **Are there any tools to manage compensation costs that you believe the government should consider?**
>
> 3. While no decisions have been yet made, the government is considering legislated caps on allowable compensation increases that can be negotiated in collective bargaining or imposed in binding arbitration. We wish to engage with you in good faith consultations on this option and invite your feedback. **What are your thoughts on this approach?**
>
> 4. Many different approaches to managing compensation growth and overseeing collective bargaining are in place in other jurisdictions, including other Canadian provinces. **Are there any tools applied in other jurisdictions which you think would work in Ontario? If so, what is the proposal and how would it work?** (Emphasis in original)

[186] The questions were not capable of producing any agreement with any union. The only product of that consultation could be either a set of further consultations based on the preliminary reactions to these questions or legislation that the government would unilaterally impose. None of the internal government timelines contemplated further consultations.

[187] Internal government documents contemplated the introduction of legislation "if necessary" shortly after the end of the scheduled consultations. In my view, the words "if necessary" were added to provide political protection in the event the documents were producible in any subsequent constitutional challenge. Legislation was the only possible outcome because the questions were not designed to reach an agreement on anything.

[188] If the consultations were intended to result in any sort of agreement, one might have expected Ontario to set out a proposal. None was ever presented during the consultations even though the President of Treasury Board had directed staff to explore caps of 1% to 2% as early as February 2019.

[189] The manner in which the consultations were carried out could not lead to agreement on anything either. The consultations were not led by government officials from the Treasury Board Secretariat or any other relevant ministry with whom unions could bargain. Rather, they were led by an external lawyer hired by Ontario. The external lawyer held separate meetings with employer and employee groups. It is difficult to see how unions and

employers could be expected to agree on anything if they were not speaking with each other.

[190] The consultations consisted of the external counsel reading from a prepared script and providing nonresponsive answers to questions. By way of example, the most obvious response to question number three which solicited opinions about potential legislated caps was what sort of caps the government had in mind. If the government was considering caps of 10% when inflation was running at 2.4%, speedy agreement was likely possible. Understandably one of the first questions the applicants asked in their consultations was: "What is the Government's definition of modest, reasonable and sustainable compensation?"

[191] Instead of advising that the government was considering caps of between 1% and 2% as the Minister had directed in February 2019, the government's answer consisted of a series of numbers dealing with the current deficit, net debt and the growth of its debt to GDP ratio. No information about the range of proposed caps was provided. Nor did the government explain who would be included in any wage caps, the period of moderation or any other parameters that were important to Ontario. In other cases, the unions were directed to the 2019 budget, a 400-page document that nowhere mentions wage caps of 1%. Mr. Porter admitted on cross-examination that expecting unions to find that figure in the budget would be like asking parties to "find a needle in a haystack."[97]

[192] Mr. Porter agreed on cross-examination that the consultation process that preceded Bill 124 was not intended to replicate or replace collective bargaining.[98] Indeed it was deliberately set up to separate employers and employees and to create an environment separate from the collective bargaining process so that parties could put forward ideas to moderate compensation growth without prejudice to future bargaining positions.[99]

[193] The unsuitability of the consultations as a substitute for collective bargaining is perhaps best demonstrated by the involvement of the applicant Society of United Professionals. It represents professional engineers, scientists, economists, auditors and others employed by Ontario Power Generation Inc. ("OPG"), the Independent Electricity System Operator ("IESO") and the Ontario Energy Board ("OEB").

[194] The Society and four other bargaining agents were invited for a 60-minute consultation with Ontario's external counsel. That allowed for 12 minutes of consultation for each of the five bargaining agents. The Society explained to the external counsel how the OPG, the IESO and the OEB were self funding and did not contribute to the province's debt. External counsel could not explain how compensation in those organizations contributed to the provincial debt or deficit. The Society was then advised that electricity costs were of

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[97] Porter Cross, June 28, Q. 1960.
[98] See Cross-Examination of Jay Porter, held June 17, 2022, Q. 906 ("Porter Cross, June 17").
[99] *Ibid*, Q. 966.

concern to the government and the organizations were ultimately included within the ambit of the legislation. Mr. Porter admitted in cross-examination that electricity costs were not part of the consultation process.

[195] As Lederer J. characterized a similar process before the introduction of an earlier piece of wage restraint legislation in 2012, "[w]hat seems apparent with hindsight is that Ontario was attempting to manage the process to the end it desired."[100]

[196] In that earlier decision, Lederer J. also characterized the government's failure to provide savings target breakdowns by individual school board, as a fundamental flaw in the "consultation" process.[101] So it is here. The government's failure to provide any information about the sort of wage limits it was considering made any agreement on the point impossible unless one expected all public sector unions in Ontario to come to the consultations ready to volunteer, out of the blue, limitations on wage increases that were less than half of the rate of inflation at the time.

[197] Ontario notes that it invited the applicants to a second consultation after the Act was introduced to which none of the applicants responded. That somewhat overstates the "invitation." As reproduced in Ontario's materials, the invitation is a mass email from "TBS Consultations" announcing the legislation and inviting stakeholders "to provide feedback on this proposed approach via" a general email address. It was not an offer to meet and discuss issues with any of the applicants.

[198] In these circumstances, the consultations Ontario conducted may have been in line with the sort of consultations a government might conduct before passing legislation that does not infringe on *Charter* rights to collective bargaining, but they did not entail the exchange of information, explanation of positions or relatively equal bargaining power that is necessary to make consultations a substitute for collective bargaining.

## D. PREVIOUS EXPENDITURE RESTRAINT DECISIONS

[199] Ontario relies on a series of cases that have upheld wage restraint legislation in other contexts; principally *Meredith*, *Dockyard Trades*, *Gordon*, and *Manitoba Federation of Labour*. It submits that the Act is indistinguishable from the legislation that was upheld in those other cases.

[200] In *Meredith*, for example, the Supreme Court of Canada addressed the limitations on collective bargaining that the federal *Expenditure Restraint Act*,[102] ("ERA") imposed. The ERA was enacted in the wake of the international financial crisis of 2008. It limited salary

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[100] *OPSEU v. Ontario*, at para. 30.
[101] *Ibid*, at paras. 25, 35.
[102] S.C. 2009, c. 2, s. 393.

increases in the federal public sector to 1.5% for the years 2008 – 2010 inclusive. The Court held that this did not substantially interfere with collective bargaining.

[201] There are, however, significant distinguishing features between *Meredith* and other cases that upheld the ERA like *Dockyard Trades* and *Gordon*.

[202] First, *Meredith* and other ERA cases all noted that the wage cap it imposed "was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes."[103]

[203] By the time the ERA was enacted, the large majority of unionized federal employees had already reached collective bargaining agreements for the period the ERA covered that were consistent with the wage limits in the ERA. A minority of unions had not. These cases note that the legislation mirrored the results of free collective bargaining by the largest public service bargaining units.[104] In *Gordon,* for example, the Ontario Court of Appeal noted that it was difficult to imagine "that continuation of an unfettered bargaining process for the remaining minority would have produced significantly different outcomes, given that the settlement with the majority of the public service drove the determination of the wage increase caps."[105]

[204] The evidence before me is that the wage caps the Act imposes are less than the prevailing going rate in either the public or private sector in 2019.

[205] The ERA cases also note that the legislation permitted negotiation on nonmonetary clauses which have a pecuniary effect[106] such as working hours, vacations, leave, employment security, terms affecting work organization, staffing, assignments, and transfers.

[206] The evidence before me is that the Act monetizes many such benefits and includes them in the calculation of the 1% salary cap.

[207] Second, there was no evidence in the ERA cases that the salary cap was behind the rate of inflation and thereby deprived employees of the right to negotiate compensation increases to keep up with increases in the cost of living.

[208] Third, the ERA was introduced in the context of a world-wide financial crisis that led banks to fail, lending markets to freeze and forced governments around the world to provide massive injections of liquidity into the financial system and take substantial ownership

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[103] *Meredith*, at para. 28. See also *Syndicat canadien*, at paras. 50-51; *Gordon*, at paras. 126-131, 139; *Dockyard Trades*, at para. 93.
[104] See e.g., *Gordon* at para. 126.
[105] *Ibid*, at para. 128.
[106] See *Meredith*, at para. 29; *Syndicat canadien*, at para. 55; *Gordon*, at para 163.

interests in banks, insurance companies, automobile manufacturers and other businesses to prevent the world economy from collapsing. The ERA cases considered the financial crisis when determining whether the legislation substantially interfered with collective bargaining.[107] For example, in *Dockyard Trades*, the British Columbia Court of Appeal stated:

> In my view, the authorities indicate that the appropriate inquiry is a holistic, contextual, or blended one. The question of **substantial interference should be approached contextually, taking into account the nature of the matter subject to the interference, the effect of the interference, and the context or exigent circumstances in which the interference occurred**. If, on an assessment of all of those factors, it can be said that the interference was "substantial", then s. 2(d) is infringed.[108]

[209] The court revisited that theme at paras. 92 and 93 stating: "[i]n my view, the lengths and depth of the negotiations and consultations prior to the ERA's enactment was adequate, given the looming fiscal crisis… These findings are critical. Fiscal and economic context cannot be ignored."

[210] Ontario submits that any financial circumstances that led to the legislation should be considered in the s. 1 analysis and not when considering whether there was a breach of s. 2(d). While I generally agree, I can also understand why the British Columbia Court of Appeal took the 2008 financial crisis into account when determining whether there was a breach of s. 2(d). The fundamental question to ask when determining whether there was a breach of s. 2(d) is whether the legislation amounted to substantial interference with collective bargaining. One measure of substantial interference is to compare what the legislation provides with what was available in free collective bargaining. An international financial crisis that threatens the viability of banks, insurance companies and large-scale manufacturers across the world to the extent that governments were obliged to make huge equity injections into these businesses to keep them afloat has a bearing on what sort of salary increases would have been available through collective bargaining. In that sense, the financial circumstances that led to the legislation are also relevant to an infringement of s. 2(d).

[211] The Ontario Court of Appeal took a similar approach in *Gordon*, although the court also took the financial crisis into account in its s. 1 analysis. When assessing collective bargaining negotiations that occurred just before the ERA was passed, the court noted:

> Both sides were constrained by the economic crisis and the effect it would have on public opinion. How would a strike for higher wages

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[107] See *Dockyard Trades*, at paras. 83, 92; *Gordon*, at paras. 99-101, 123-24, 172, 176 and 184-91.
[108] *Dockyard Trades*, at para. 83 (emphasis added).

> be received publicly in a falling economy with increasing unemployment, especially given the job security public servants enjoy over their counterparts in the private sector?
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> …
>
> In short, the bargaining record, as carefully and extensively laid out by the application judge, shows sophisticated and experienced bargaining parties making the best of a bad situation and coming to reasonable settlements in the pre-ERA period. The bargaining units freely negotiated with eyes wide open to the global economic crisis and to their right of access to all the available options in collective bargaining.[109]

[212] I consider the financial situation of Ontario in the course of the s. 1 analysis, not the s. 2 (d) analysis. I simply note here that there was no financial crisis in Ontario when the Act was passed.

[213] Fourth, the ERA cases note that the government spent some time negotiating with unions before imposing legislative restraints. The negotiations were true collective bargaining negotiations aimed at reaching collective agreements. By way of example, in *Dockyard Trades*, the judge of first instance noted that the government negotiated as close to the maximum possible time given the financial crisis it faced; the government chose a "negotiate first, legislate second" approach; and that government negotiators made five different attempts to restart negotiations before passing legislation.[110]

[214] Ontario relies heavily on the decision of the Manitoba Court of Appeal in *Manitoba Federation of Labour.* That case dealt not with the ERA but with provincial wage restraint legislation that was introduced in 2017 and which capped wage increases over four years at 0%, 0%, .75% and 1%.

[215] Ontario points out that in *Manitoba Federation of Labour*, the court had before it similar evidence from Dr. Hebdon to the effect that the legislation at issue there fundamentally altered a union's ability to bargain because, once wage limits are pre-determined, the union loses its leverage to trade-off wages for other concessions. The trial judge accepted this evidence and concluded that the legislation substantially interfered with collective bargaining.

[216] The Court of Appeal reversed the trial judge's holding:

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[109] *Gordon*, at paras. 99, 101.
[110] See *Dockyard Trades*, at para. 92.

> The problem with the trial judge's conclusion is that it runs contrary to *Meredith* and the three appellate court decisions. The trial judge concluded that the "removal of monetary issues from the bargaining table" substantially interfered with the collective bargaining process. This conclusion is diametrically opposed to the jurisprudence which holds that legislation similar to the PSSA, which includes broad-based, time-limited wage restraint legislation, had not "substantially impaired the collective pursuit of the workplace goals."[111]

[217] Ontario asks me to apply the same reasoning here. Doing so would, in my view, ignore the Supreme Court of Canada and appellate jurisprudence to the effect that the decision in each case is contextual and fact-based.[112] As I understand those cases, it would be a legal error to conclude that there was no substantial interference in this case simply because some other cases involving different legislation and different factual contexts had found there to be no substantial interference. On the record before me, I am satisfied that the Act does substantially interfere with the process of collective bargaining.

[218] After the oral hearing of this matter concluded, Ontario advised me that the Supreme Court of Canada had refused to grant leave to appeal from the Manitoba Court of Appeal decision. I do not draw from that that the Supreme Court of Canada agreed with the Manitoba Court of Appeal in this respect. There are many considerations that factor into whether leave to appeal is granted. The Supreme Court of Canada has noted on many occasions that it is not a court of error correction. As a result, the fact that leave to appeal is refused cannot be taken as agreement with the Court of Appeal decision. In speaking about the principles relating to granting leave to appeal, Sopinka J. explained:

> The general principles are as follows. We are not a court of error and the fact that a court of appeal reached the wrong result is in itself insufficient. This is still the case if the court of appeal has misapplied or not followed a judgment of this Court. On the other hand, if a misinterpretation of one of our judgments becomes an epidemic in the courts below, then we may want to set the record straight.
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> …
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> Third, if the law is settled, we usually don't grant leave because a court of appeal has failed to follow it unless this becomes an epidemic. Then we might have to take another case in order to remind the courts below that their obligation is to follow the law.

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[111] *Manitoba Federation of Labour*, at para. 100.
[112] See *Health Services*, at para. 92; *Meredith*, at paras. 40-42; *Mounted Police*, at paras. 47, 93; *Dockyard Trades*, at para. 83.

> Another example where we may get into a matter shortly after we have decided it is where the courts below are misapplying or misinterpreting our decision and things have gotten out of control.
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> …
>
> Fourth, if we have dealt with the issue recently and further issues arise out of our judgment in the application of the matter that we have decided, we don't immediately rush in to decide all subsidiary issues. We like to see what the courts below are doing with our decision, how they are applying it.[113]

[219] As a result of the foregoing, I conclude that prior cases dealing with wage restraint legislation are relevant to consider in that they establish general principles to follow but the results in those cases do not predetermine the result in this case.

## III. Freedom of Speech

[220] Certain applicants also submit that the Act restrains freedom of speech protected under s. 2(b) of the *Charter*.

[221] In support of this submission, they note that the Supreme Court of Canada has long recognized the importance of freedom of expression to organized labour, where the freedom of employees to express themselves, including through strike activity, becomes an essential component of labour relations.[114]

[222] The applicants who raise the freedom of speech issue submit that the legislated 1% wage cap renders expression through strike action or interest arbitration futile.[115] They argue that the expressive force of a strike lies in the ability of workers to enlist public support in order to exert pressure on the employer in the event of a bargaining impasse.[116]

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[113] D. Lynn Watt *et al.*, *Supreme Court of Canada Practice* (Toronto: Thomson Reuters Canada, 2022), at Part 4—Supreme Court Rules, *Sopinka, The Supreme Court of Canada*, online: Westlaw Canada Texts and Annotations <nextcanada.westlaw.com/Document/Ib0202a022cfb4cede0440021280d79ee/View/FullText.html>. See also *Important information about seeking leave to appeal to the Supreme Court of Canada* (2022), at *3. What is the mandate of the Supreme Court of Canada?,* online: Supreme Court of Canada <scc-csc.ca/unrep-nonrep/app-dem/important-eng.aspx>.

[114] See *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 25 ("*KMart*"); *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, at paras. 25, 33-35; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, at paras. 29-33.

[115] See Affidavit of Scott Travers, sworn January 29, 2021, at para. 15.

[116] See *KMart*, at para. 25.

[223] Although the *Charter* guarantees of freedom of speech, it does not guarantee the effectiveness of the speech. As the Supreme Court of Canada noted in *Toronto (City) v. Ontario (Attorney General)*,

> In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression — for instance, instituting a two-day electoral campaign — may rise to the level of a substantial interference with freedom of expression; such an act may effectively preclude meaningful expression in the context of the election. That is simply not what happened here. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.[117]

[224] In my view, the Act does not restrain freedom of expression. Unions remain free to express whatever views they want about both the Act and the government that enacted it. They are free to communicate, protest and take whatever steps they believe would be effective to force the government to withdraw the legislation or have the government voted out of office. While the Act may make their speech less effective insofar as it occurs within the context of collective bargaining, it does not restrain the ability to speak, nor does it render less effective any political action the unions may wish to take.

[225] It strikes me that the constitutional right at issue is better analysed through the framework of freedom of association where the Supreme Court of Canada has made it clear that any government measure that substantially interferes with collective bargaining constitutes a violation of freedom of association. The expressive force of a strike to which the applicants refer is more closely related to the freedom of association and the ability to bargain collectively than it is to freedom of speech.

## IV. Section 15 Equality Argument

[226] The applicants submit that the Act also violates equality rights under s. 15 of the *Charter* because the Act disproportionately targets women and racialized women in particular.

[227] Section 15 of the *Charter* provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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[117] 2021 SCC 34, at para. 39.

[228] The applicants characterize this as an adverse impact case because the law is neutral on its face but has a stronger adverse impact on women and racialized women than on other groups.

[229] In *Health Services*, the Supreme Court of Canada found that a British Colombia statute breached s. 2(d) of the *Charter* by invalidating provisions of collective agreements, precluding meaningful collective bargaining on a number of specific issues and voiding any collective agreement inconsistent with it. The court, however, refused to find that the statute breached s. 15 of the *Charter* noting:

> **The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are.** Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.[118]

The applicants submit that the Supreme Court of Canada changed the approach applicable to adverse impact cases in *Fraser v. Canada (Attorney General)*,[119] in a way that overrules this aspect of *Health Services*. I do not read *Fraser* in the same way. In my view, *Fraser* applies the same analysis to the situation as *Health Services* did.

[230] In *Fraser,* the court set out the following test for infringement of equality rights under s. 15:

> (a) Does the law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground, including by having an adverse impact on members of a protected group?
>
> (b) If so, does it impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage, including historical disadvantage?[120]

[231] In my view, the applicants' s. 15 argument falls on the first branch of the test in *Fraser*. The Act does not draw a distinction, either on its face or in its impact, based on a protected ground. It draws a distinction based on the identity of one's employer. The Act does not affect women in the public sector any differently than it affects men in the public sector.

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[118] *Health Services*, at para. 165 (emphasis added).
[119] 2020 SCC 28, at para. 50.
[120] *Ibid*, at para. 27.

[232] The applicants say adverse impact arises because the public-sector is predominantly female. If that alone were enough for a s. 15 claim, one could never have any law or regulation about the public-sector without being discriminatory.

[233] As already noted, the Act affects over 780,000 employees. A group that large inevitably includes a broad range of employees who are male, female, straight, LGBTQ+, members of visible minorities, ethnic majorities, religious minorities, Indigenous and non-Indigenous persons. Public-sector employees work in job classes that are predominantly female, like nursing; predominantly racialized like Personal Service Workers; and predominantly male like OPP officers or engineers. The Act applies equally to all of them.

[234] The Act distinguishes between employers, not occupations. It applies to certain employers (that is to say those within the broader provincial public-sector) but not to others (such as municipalities and for-profit long-term care homes). There is no evidence that workplaces covered by the Act are more female-predominant or racialized than similar workplaces that are not covered by it, such as municipal employees or for-profit long-term care homes. There is no evidence about wages of men and women in sectors covered by the Act compared to those in similar sectors not covered by it.

[235] Moreover, the *Pay Equity Act*[121] applies throughout the public sector. It is intended to redress systemic gender discrimination[122] and is unaffected by the Act. The applicants submit that the *Pay Equity Act* is overly limited in its scope and does not protect against the inequities of which the applicants complain. The general adequacy or inadequacy of the *Pay Equity Act* is, however, beyond the scope of this application.

[236] This is not a case like *Fraser*,[123] *Griggs v. Duke Power Co.*[124] or *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*[125] which concerned adverse impact discrimination in situations in which virtually all employees who were adversely affected by a facially neutral law were members of a disadvantaged group. All men in the public service are affected by the Act in the same measure as all women are. Although the Act may impact lower wage earners more significantly than higher wage earners, I have not been taken to any cases that would apply section 15 to protect individuals based on their income level.

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[121] R.S.O. 1990, c. P.7.
[122] See *Ontario Nurses' Association v. Participating Nursing Homes*, 2021 ONCA 148, at paras. 1, 12; *Pay Equity Act*, s. 4(1).
[123] Where pension rules disadvantaged women who went on reduced hours for child-care reasons but did not disadvantage officers who were suspended for disciplinary reasons. Although the pension rules were facially neutral, almost all persons who reduced hours for child-care were women.
[124] 401 U.S. 424 (1971) (United States Supreme Court case regarding educational and standardized testing requirements that disproportionately disqualified African American job applicants), cited in *Fraser*, at paras. 32-34.
[125] [1999] 3 S.C.R. 3 (requirements for forest firefighters that disqualified most women job applicants, at para. 11).

[237] The applicants point out the Act carves out male-dominated occupations such as municipal firefighters. While that is the case, it also carves out female dominated occupations like municipal librarians or municipal nurses. Again, the basis of distinction is not the job but the employer.

[238] The applicants submit that looking for a basis of distinction reverts back to older law calling for the identification of a comparator group which has since been overruled in favour of the approach articulated in *Fraser*. On my reading of *Fraser* that submission goes too far. The test in *Fraser* speaks of drawing a distinction based on an enumerated or analogous ground.[126] The court stated that "[f]or over 30 years, the s. 15 inquiry has involved identifying the presence, persistence and pervasiveness of disadvantage, based on enumerated or analogous grounds."[127]

[239] *Fraser* continued to apply that principle by noting that the disadvantages of the policy at issue there were felt almost exclusively by women.

[240] The expert reports of both sides on the equality issue demonstrate that the workforce continues to be heavily gender segregated.

[241] The evidence on behalf of the applicants is that:

a. Ontario's labour market is segregated by sex such that women and men largely work in different industries and occupations doing different jobs in different workplaces. This pattern by which women predominate in health care, social service and education work has remained largely unchanged for decades.[128]

b. Sex segregation of the labour market is accompanied by systemic sex discrimination that devalues the skills, effort, responsibility and working conditions of women's work which results in lower pay relative to male-dominated work of similar value.[129]

c. Women's care work is even more intensely devalued and underpaid because it is associated with women's traditional unpaid work in the home and assumed to be what women do naturally rather than being skilled work (often referred to as the

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[126] See *Fraser*, at para. 27.
[127] *Ibid*, at para. 136.
[128] See Expert Report of Dr. Pat Armstrong, dated January 19, 2021, at paras. 7-8, 34-55 ("Armstrong Report"). See also Affidavit of Kaylie Tiessen, affirmed April 9, 2021, at paras. 41-42 ("Tiessen Affidavit").
[129] See Armstrong Report, at paras. 37-43. See also Exhibit A to Tiessen Affidavit, at pp. 26-28; Affidavit of Sarah Braganza, affirmed June 28, 2021, at paras. 45-46, 53-56.

"care penalty").[130]

d. Women's care work is done disproportionately by racialized women.[131]

e. While burdened by the care penalty, female-dominated work in the social services sector is also devalued by a second gendered dynamic: the "charitable sector penalty". Historically, churches and other organizations provided social services in the form of charity, mainly by women delivering services without pay. Though this work is now formalized in the broader public sector, norms rooted in the sector's charitable history continue to suppress women's pay.[132]

[242] That evidence was not seriously contested by the Crown. I accept that evidence. It demonstrates that, despite the efforts made over the past few decades, we still have far to go as a society to ensure true equality between genders and races. But it does not change the fact that the Act creates distinctions based on the employer, not occupation, gender or race.

[243] A number of applicants also asked me to find that s. 28 of the *Charter* amounted to a notwithstanding clause that supersedes any other notwithstanding provision in the *Charter*. Section 28 provides that "[n]otwithstanding anything else in the *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

[244] In light of the fact that I have dismissed the equality claim under s. 15, it is not necessary to address the interpretation of s. 28.

[245] On November 24, 2022, counsel for Ontario drew to my attention the case of *R. v. Sharma*[133] which addresses the analytical approach to take when addressing s. 15 of the *Charter*. I have reviewed that decision. It has no effect on the outcome of my analysis and in my view is substantially in line with the analysis set out above. I have therefore not asked for any submissions on *Sharma* nor has any party requested the opportunity to make submissions.

# IV Section 1 Analysis

[246] Ontario submits that, if there are any *Charter* violations, they are saved by s. 1 which provides that "[t]he *Charter* guarantees the rights and freedoms set out in it subject only to

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[130] See Armstrong Report, at paras. 6, 73-78. See also Exhibit A to Tiessen Affidavit, at pp. 50-54; Godick Affidavit, at paras. 20-46, 51-52.
[131] See Armstrong Report, at paras. 9, 56-63. See also Tiessen Affidavit, at paras. 31-34, 58-65, and Exhibit A; Atkins Affidavit, at paras. 27-30; Godick Affidavit, at para. 39.
[132] See Tiessen Affidavit, at paras. 43-49, 60.
[133] *R. v. Sharma*, 2022 SCC 39 (CanLII),

such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[247] The ultimate question under s. 1 is whether the *Charter* infringement can be demonstrably justified in a free and democratic society. That by necessity requires the court to balance the objective that the *Charter* infringement seeks to achieve against the degree of the infringement of the *Charter* right. The answer in any one case is highly context dependent. In one set of circumstances a certain degree of infringement may be quite acceptable. In another, the infringement may be entirely unacceptable.

[248] A government relying on s. 1 bears the onus of demonstrating its applicability. To do so, the government must demonstrate that:

A. The objective of the measure is pressing and substantial.

B. There is a rational connection between the object and measures taken to achieve it.

C. The measure taken minimally impairs the *Charter* right.

**D.** The benefits achieved by the measure outweigh the negative impact on *Charter* rights.[134]

[249] In assessing these four aspects of the s. 1 test, courts are required to show a degree of deference to the legislator in recognition of the different roles of the legislative and judicial branches of government.

[250] Ontario notes that the Act is motivated by a concern for the prudent management of the Province's public finances, optimal levels of taxation, the impact of compensation on the Province's debt and deficit, provincial workforce planning (including the desire to avoid involuntary layoffs), and the provision and protection of sustainable levels of public services.

[251] Ontario submits that this case falls at the high end of judicial deference. The issues at play are far removed from the institutional competence of the court. Judges cannot and should not determine optimal levels of taxation or spending through the litigation process. These are classic political issues on "which elections are won and lost."[135]

[252] As the Supreme Court of Canada cautioned in *Vriend v. Alberta*, "courts are not to second-guess legislatures and the executives; they are not to make value judgments on what

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[134] See *Frank v. Canada (Attorney General)*, 2019 SCC 1, at para. 38 ("*Frank* (SCC)").
[135] Peter W. Hogg and Wade K. Wright, *Constitutional Law of Canada*, loose-leaf, 5th ed. suppl. (Toronto: Thomson Reuters Canada Ltd., 2022), at para. 47:12.

they regard as the proper policy choice; this is for the other branches."[136] The role of courts "is to protect against incursions on fundamental values, not to second guess policy decisions" because legislatures must be given reasonable room to manoeuvre when they struggle with questions of social policy and conflicting social pressures.[137]

[253] Even greater deference is owed when dealing with complex fiscal and economic balancing.[138] The courts are also required to recognize the symbolic leadership role of government. As Dickson C.J. put it:

> Many government initiatives, especially in the economic sphere, necessarily involve a large inspirational or psychological component which must not be undervalued. The role of the judiciary in such situations lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the *Charter*.[139]

[254] At the same time, the section 1 requires governments to demonstrate that the limit on the right is reasonable and that it is *demonstrably* justified. The court undertakes both of those analyses in the context of a commitment to uphold rights and in the context of a free and democratic society.[140]

[255] With these principles mind I turn to the four elements of the s. 1 test.

## A. Pressing and Substantial Objective

[256] Ontario submits that the objective of the impugned law is to moderate the rate of growth of compensation increases for public sector employees so as to manage the Province's

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[136] [1998] 1 S.C.R. 493, at para. 136.
[137] *R. v. Chouhan*, 2021 SCC 26, at paras. 132-33.
[138] See *PSAC v. Canada*, [1987] 1 SCR 424, at paras. 29, 34 and 39-40. See also *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home et al. and two other applications* (1983), 44 O.R. (2d) 392 (Div. Ct.) (upholding provincial compensation restraints under s. 1), rev'd (1984) 48 O.R. (2d) 225 (C.A.), cited in *PSAC v. Canada* (with approval on this point, at paras. 41-43), *per* Dickson C.J. (dissenting in part); *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at paras. 67-73; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, at paras. 83-84 ("*N.A.P.E.*"); *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, at paras. 267, 279.
[139] *PSAC v. Canada*, at para. 36.
[140] *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at p. 135-136.

finances in a responsible manner and to protect the sustainability of public services.[141] Ontario submits that this is a pressing and substantial objective under s. 1 of the *Charter*.

### i. Defining the Objective

[257] Before turning to the pressing and substantial nature of the objective, I address the definition of the objective itself. It strikes me that Ontario's statement of its objective conflates the means of achieving an objective with the objective itself. The responsible management of Ontario's finances and the protection of sustainable public services is an objective which may be capable of meeting the pressing and substantial need test. The moderation of public-sector wages strikes me more as a means to achieve responsible financial management than as an objective in itself. To determine whether moderating wages amounts to a pressing and substantial need, one must understand why the wage increases are being moderated.

[258] This is more than academic parsing. The definition of the objective may have an effect on the remaining three branches of the test. By way of example, there would clearly be a rational connection between the Act's limitation of wage increases to 1% and the objective of moderating wages. If the means and the objective are one of the same, the means would always be rationally connected to the objective.

[259] As the Supreme Court of Canada has explained, the objective "must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective."[142] For purposes of the s. 1 analysis, I define the objective as the responsible management of Ontario's finances and the protection of sustainable public services.

### ii. Legal Principles

[260] There was considerable disagreement between the parties about the extent to which the court should inquire into the pressing and substantial nature of the objective that Ontario asserts. The differences appear to arise out of two contrasting lines of cases from the Supreme Court of Canada.

[261] Ontario describes the test as a low bar and points out that few *Charter* cases fail because of the government's inability to demonstrate a pressing and substantial objective. Ontario submits that refusing to find a substantial and pressing objective here would involve the court at the policy level in that the court would have to evaluate the importance of

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[141] See Bill 124, Preamble, s. 1.
[142] *KMart*, at para. 59.

government policy. Ontario says it need not show any urgency associated with the objective. It need only show a valid government purpose.

[262] Ontario relies on cases like *Harper v. Canada (Attorney General)*, where the Supreme Court of Canada said that the government need not prove a pressing and substantial objective but merely assert one.[143] If this is correct, and the mere assertion of an objective without any need to evaluate the objective or the context in which it arises, I would agree that the need to manage finances responsibly and sustain public services is a substantial and pressing objective.

[263] There are, however, a number of Supreme Court of Canada cases, both before and after *Harper*, which suggest that financial and budgetary considerations should be treated as suspect because governments are always subject to budgetary tensions. Treating something as suspect, implicitly requires evaluation.

[264] In *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, the Supreme Court noted:

> The first concern, maintaining the financial viability of the Accident Fund, may be dealt with swiftly. Budgetary considerations in and of themselves cannot normally be invoked as a free-standing pressing and substantial objective for the purposes of s. 1 of the *Charter*.[144]

[265] In *N.A.P.E.*, Binnie J. said:

> The result of all this, it seems to me, is that courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are always budgetary constraints and there are always other pressing government priorities.[145]

[266] In *Health Services*, the court affirmed that:

> To the extent that the objective of the law was to cut costs, that objective is suspect as a pressing and substantial objective under the authority in *N.A.P.E.* and *Martin,* indicating that "courts will continue to look with strong scepticism at attempts to justify

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[143] 2004 SCC 33, at paras. 25-26.
[144] [2003] 2 SCR 504, at para. 109, citing *Ref re Remuneration of Judges of the Prov. Court of P. E. I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, at para. 281; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 709.
[145] *N.A.P.E.*, at para. 72.

> infringements of *Charter* rights on the basis of budgetary constraints.[146]

[267] Most recently in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia,* the Supreme Court of Canada reaffirmed its view that budgetary objectives are generally not pressing and substantial stating:

> In my view, the courts below erred in ruling that "the fair and rational allocation of limited public funds" is a pressing and substantial objective in the case at bar. Public funds are limited by definition. Every government allocates its funds among its various programs on the basis of certain scales, and as fairly as possible. If merely adding the words "fair and rational" to the word "allocation" sufficed to transform the allocation of public funds into a pressing and substantial objective, it would be disconcertingly easy for any government to intrude on fundamental rights. I cannot accept such a result. The fair and rational allocation of limited public funds represents the daily business of government. The mission of a government is to manage a limited budget in order to address needs that are, for their part, unlimited. This is not a pressing and substantial objective that can justify an infringement of rights and freedoms. Treating this role as such an objective would lead society down a slippery slope and would risk watering down the scope of the *Charter*.[147]

[268] Returning for a moment to *Harper* and its statement that the government need not prove a pressing and substantial objective but only assert one, I note that *Harper* was a case dealing with spending limits on electoral advertising by third parties. It did not involve any budgetary considerations as a justification for breaching *Charter* rights. The Supreme Court of Canada cases cited above would appear to make it clear that when the government invokes budgetary restraint as a reason for infringing *Charter* rights, the court is called upon to engage in some sort of evaluation of the assertion.

[269] That said, there are a number of cases in which budgetary considerations have amounted to pressing and substantial objectives under section 1. Those case have, however, involved some sort of financial emergency like the international financial crisis of 2008 in *Meredith*, *Dockyard Trades* and *Gordon* or the "severe financial crisis" that Newfoundland suffered in *N.A.P.E.* In the latter case, federal transfer payments that constituted 45% of Newfoundland's revenues had been cut by $130 million, the provincial debt had been downgraded to B grade which resulted in much less of the debt market being available to Newfoundland and resulted in higher interest payments, the government had already closed 360 acute care hospital beds, frozen per capita student grants, made government

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[146] *Health Services*, at para. 147.
[147] 2020 SCC 13, at para. 153.

wide reductions in operating budgets, reduced or eliminated a range of programs, laid off 1,300 permanent and 350 part-time positions, eliminated 500 vacant positions and terminated Medicare coverage for a number of treatments.

[270] In *N.A.P.E.*, the court noted, at para. 64, that while budgetary considerations in and of themselves cannot normally be invoked as freestanding pressing and substantial objectives, at some point a financial crisis can attain dimensions where "elected governments must be accorded a significant scope to take remedial measures even if the measures taken have an adverse effect on a *Charter* right". Whether an economic situation is sufficiently serious to justify overriding a *Charter* right depends on the gravity of the situation at hand.[148] In *Gordon,* for example the Court of Appeal refers to the 2008 financial collapse as a "crisis" 50 times and reminds us that where the reason for the infringing measure is a "national emergency",[149] that context must be kept in mind *throughout* the *Charter* analysis.

[271] All these cases suggest some level of urgency. A level of urgency is also implicit in the pressing and substantial moniker the test as been given. The *Oxford Dictionary of English* defines "pressing" as "requiring quick or immediate action or attention."[150] It defines "substantial" as "of considerable importance, size or worth".[151]

[272] I do not think it advisable to try to define with even more adjectives what constitutes a pressing and substantial objective but say only as the Supreme Court of Canada did in *Conseil scolaire* that it requires more than the day-to-day business of government.

[273] The question then becomes whether the financial situation of Ontario in 2019 was sufficiently serious to justify infringing on the applicants' constitutionally protected right to collective bargaining.

## iii. Evidence of a Pressing and Substantial Objective

[274] Shortly after its election in June 2018, the Ontario government appointed an Independent Financial Commission of Inquiry which delivered its report on August 30, 2018. After implementing changes in accounting practices, the Commission changed the fiscal statement for 2017/18 from a surplus of $0.6 billion to a deficit of $3.7 billion and revised the projected deficit for 2018/19 from $6.7 billion to $15 billion. This prompted the need to control the growth of government expenditure and led to the Act.

[275] Ontario relies primarily on the expert's report of Dr. David Dodge in support of its submission that the financial situation of Ontario in 2019 justified overriding s. 2(d). Dr. Dodge's credentials are undoubted. He holds a PhD in economics and is a tenured professor

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[148] See *PSAC v. Canada*, at para. 30.
[149] See *Gordon*, at para. 198.
[150] Michael Proffitt, Philip Durkin & Edmund Weiner, eds, *Oxford English Dictionary* (London: Oxford University Press, 2022) sub verbo "pressing".
[151] *Ibid*, sub verbo "substantial".

of economics. He has held senior positions dealing with fiscal and macroeconomic policy. He acted as Governor of the Bank of Canada between 2001-2008, as federal Deputy Minister of Health between 1998-2001, and as federal Deputy Minister of Finance between 1992-1997. The Applicants did not cross-examine Dr. Dodge on his report.

[276] Dr. Dodge points to the following challenges in Ontario's fiscal situation in 2019: Its economic growth would be lower than the growth for government services. Without adjustments this would lead to continuing, growing deficits which may reduce the scope of available fiscal stimulus to respond to changes in the business cycle when needed. A higher debt to GDP ratio also results in higher borrowing costs and further limits the government's scope of fiscal intervention when needed. Unless controlled, the situation would at some point become unsustainable.

[277] In 2018-19 Ontario's net debt to GDP ratio was projected to be 40.7%. In Dr. Dodge's view it should be brought below 40% and remain there.

[278] Dr. Dodge also warns of the possibility of rising interest rates increasing Ontario's debt service cost to revenue ratio. The Supreme Court of Canada has recognized that governments can act in the present with a view to prevent future deterioration to justify infringing measures under s. 1.[152] In Dr. Dodge's view, the ratio of debt service costs to revenues "should be significantly less than 10%."[153] In 2019 that ratio was 8%. Ontario's projections had it rising to 9% in 2027. The most recent evidence before the court is that the debt cost to revenue ratio is 7.4% for the year 2020-21 with projections for subsequent years through to 2025 varying between 7.5% and 7.6%.

[279] Dr. Dodge's report also describes ensuring fiscal sustainability as a "herculean challenge for the Ontario government" and that "compensation restraint constituted a critical element of any fiscal consolidation strategy."[154]

### iv. The Limitations on the Evidence

[280] Dr. Dodge does not claim that Ontario faced a "severe fiscal crisis" like the one that justified the measures discussed in *N.A.P.E.*,[155] let alone an international economic crisis like the one that prompted the ERA in 2008/9.[156] Rather, he points to the potential for the cost of debt to rise at some future unspecified point.[157] That certainly calls for prudent management. Does it call for the breach of *Charter* rights? Dr. Dodge merely advocates

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[152] See *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 ("*Hutterian Brethren*").
[153] Affidavit of David A. Dodge, sworn August 12, 2021, at para. 61 ("Dodge Affidavit, August 12").
[154] *Ibid*, at para. 72.
[155] *N.A.P.E.*, at para. 59.
[156] See *Meredith,* at paras. 8-9.
[157] See Dodge Affidavit, August 12, at paras. 56-59.

for fiscal prudence. While fiscal prudence is a laudable and responsible objective for any government, it can as a result, be used to breach *Charter* rights at any time.

[281] While Dr. Dodge refers to Ontario's debt to GDP and debt cost to revenue ratios, he does not compare Ontario's ratios in this regard to those of other jurisdictions apart from a brief reference to Quebec and its weaker ratios without Quebec having suffered any apparent detriment.

[282] In assessing Ontario's position, I cannot not be blind to certain not uncommon political scenarios. It is not uncommon for a new government to disclose with surprise and disappointment that the fiscal situation left by the previous administration was far worse than imagined. This is usually accompanied by a new, more negative assessment of the fiscal situation. When actual results are disclosed in subsequent years, the deficits turn out to be smaller than originally forecast. A positive change which the government of the day attributes to its responsible fiscal management and not to overly negative assessments or projections.

[283] While I am not saying that this is what occurred here, the facts do disclose that shortly after the Act was introduced, the Ministry of Finance revealed that the deficit was in fact $7.4 billion, not $14.5 billion and the debt to GDP ratio was 40%. It appears that most of the difference had to do with the reversal of the way in which the Financial Commission of Inquiry had accounted for pension liabilities and assets. Dr. Dodge agreed that it would not be unreasonable for the government to reverse the accounting treatment of those assets and liabilities. Since 2019 government revenue has also been 5 to 6% higher than predicted in 2019. The Commission also spoke of the long term goal of restoring the Province's AAA credit rating. The rating had been reduced in in 2012.

[284] In addition, Ontario points to a report from EY which it commissioned in July 2018 to conduct a line-by-line review of government expenses. EY noted that although the government had full control over compensation with direct employees and significant control over compensation in consolidated sectors such as hospitals, school boards and colleges, it had "very little" control over negotiations in the remainder of the broader public sector. It noted that while the government could exercise direct control over the broader public sector, this would take time. I was not taken to any breakdown of the comparative size of sectors over which the government exercised full control or considerable control as opposed to those where it exercised less control. Nor was I the taken to any explanation of how much time it would take to exert greater control over the broader public sector and what risks that timeline posed for Ontario. The lack of that evidence is significant given that the Act appears to apply to control compensation and sectors that in no way affect government expenditure or debt.[158]

[158] See for example the discussion on energy sector employees in the section on rational connection below.

[285] The applicants point out that, at the same time as the Act was imposed, the government pursued a course of large tax cuts. According to the Financial Accountability Office of Ontario, an agency of the Government of Ontario mandated to provide independent financial advice and analysis about Ontario's finances, in 2019 the government announced tax cuts of $4.3 billion in 2019; $4.1 billion in 2020; $5.7 billion in 2021, $7 billion in 2022 and $3.8 billion in 2023.[159] In addition, it notes that there was a further $9.9 billion of unannounced cuts embedded into government projections.[160]

[286] Jay Porter estimates the cost savings achieved by the 1% pay cap at $400 million per year.

[287] The applicants further note that the government then eliminated $ 1billion per year in revenue from vehicle license plate stickers and, in 2022, refunded to drivers any monies they had paid for license plate stickers between March 1, 2020 and March 1, 2022.

[288] I hasten to add that I am not suggesting that the government has somehow acted improperly in imposing wage restraint at the same time as it as provided tax cuts or license plate sticker refunds. I recognize that governments may have to pursue policies that may seem inconsistent on the surface such as simultaneous budgetary restraint and economic stimulus. I am also mindful of the warning of the Court of Appeal in *Gordon* that judges ought not to see themselves as finance ministers.[161]

[289] Ontario has not, however, explained why it was necessary to infringe on constitutional rights to impose wage constraint at the same time as it was providing tax cuts or license plate sticker refunds that were more than 10 times larger than the savings obtained from wage restraint measures. The closest to an explanation in the record is a statement in Dr Dodge's report to the effect that certain "unannounced revenue-reducing measures **appear** to have been aimed primarily at increasing the North America-wide competitiveness of Ontario's business taxation to induce increased investment in Ontario."[162]

[290] Dr. Dodge adds that he has no precise definition of those revenue cutting measures and provides no evaluation of them.

[291] If tax competition with other jurisdictions is indeed the reason for tax cuts, the people whose *Charter* rights have been breached are entitled to a cogent explanation from the government about why it was necessary to breach their *Charter* rights to achieve tax competition. An assumption in an expert's report does not suffice. That cogent

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[159] See Affidavit of Sheila Block, sworn April 14, 2022 (Table 4, at para. 83, citing Financial Accountability Office of Ontario, *Economics and Budget Outlook: Assessing Ontario's Medium Term Budget Plan*, by Nicholas Rhodes *et al.* (Toronto: FAO, Fall 2018), at p. 16; Financial Accountability Office of Ontario, *Economics and Budget Outlook: Assessing Ontario's Medium Term Budget Plan*, by Jay Park *et al.* (Toronto: FAO, Fall 2019), at p. 12).
[160] *Ibid.*
[161] See *Gordon*, at para. 224.
[162] Dodge Affidavit, August 12, at para. 52 (emphasis added).

explanation should set out how Ontario's tax rates compare to what Ontario sees as its competitors, why the tax cuts are necessary, and what they aim to achieve.

[292] Those explanations are critical for four reasons. First, because courts conduct the s. 1 inquiry in the context of a commitment to uphold *Charter* rights.[163] Second, because s. 1 requires that any limitations on *Charter* rights be reasonable. That is to say it must be rationally explained, not merely asserted. Third, because s. 1 requires that any limitations on *Charter* rights be "demonstrably" justified. This requires governments to demonstrate why the infringement is necessary. *Charter* rights should not be violated simply because a government find it more convenient to pursue a particular policy by breaching *Charter* rights rather than complying with them. Fourth, the beneficiaries of *Charter* rights are often politically vulnerable or unpopular. There are segments of the public that are hostile to unions and feel that their power should be reduced. That could provide a political motivation to do just that. Without requiring governments to explain with some degree of cogency why *Charter* rights must be infringed, it is too easy for governments to breach the *Charter* rights of the vulnerable or the politically unpopular under the guise of fiscal prudence.

[293] The business of government ought ordinarily to be pursued within the confines of the *Charter*. Breaching a *Charter* right should require something more than a simple preference to proceed in a particular way for political convenience. It should require some level of explanation for why it is necessary to breach the *Charter* right. If governments act in a manner that is inconsistent with their explanation for why a *Charter* breach is needed, they should at least be required to explain the inconsistency. If no explanation is required, governments are free at any time to breach *Charter* rights on economic grounds. Requiring these explanations does not have judges acting as finance ministers. It has finance ministers acting in compliance with constitutional requirements. Judicial deference is owed to cogent explanations that justify *Charter* infringements. Deference is not owed to simple assertions.

[294] As noted earlier, in *Conseil scolaire* the Supreme Court of Canada rejected the "fair and rational allocation of limited government funds" as a pressing and substantial objective. Similarly, here, adding the word "responsible" to managing public finances or "sustainable" to delivering public services does not transform those tasks into pressing or substantial objectives under s. 1. Managing finances responsibly to ensure the sustainability of public services is the daily business of government. Here, as in *Conseil scolaire,* the mission of a government is to manage limited resources to address unlimited needs. Dr. Dodge describes this as a "herculean" challenge. That adjective changes nothing. Although that task of managing public resources and public expectations is inevitably extraordinarily challenging, it has been the core task of government since the advent of widespread social programs. As of 2019, Ontario had experienced and was continuing to experience a long period of growth after its emergence from the world

[163] *Oakes* at p. 135-136.

financial crisis. Although Ontario may have experienced deficits, the management of deficits is a perennial political issue in Canada.

[295] In addition to Dr. Dodge's evidence, Ontario has also filed reports from Kimberly Henderson and Robert Lee Downey. Both are former senior civil servants in British Columbia. Both say that wage restraint legislation is necessary in the public sector because collective bargaining is not as effective in the public sector as it is in the private sector. They say unions do not face the same pressure in the public sector because they know their employer will never be bankrupted by a strike. This they say, changes the balance of power. In addition, they say public sector unions are not willing to negotiate financial concessions for fear that other unions will manage to avoid the government's restraint agenda. Finally they say interest arbitration is undesirable because governments are reluctant to put their financial future into the hands of a third party.

[296] My difficulty with those opinions is that they seem to take issue with the concept of collective bargaining and interest arbitration more generally. I am bound by Supreme Court of Canada decisions that guarantee a constitutional right to collective bargaining and that require that abolishing the right to strike must, in effect, be replaced with interest arbitration. Moreover, the view that wage restraint cannot be negotiated in the public service contradicts the evidence of Ontario's collective bargaining expert in this proceeding.

[297] This brings me back to the point that although managing public resources in a way to sustain public services can amount to a pressing and substantial objective in appropriate circumstances, Ontario has not, on my view of the evidence, demonstrated that the economic conditions in 2019 were of a sufficiently critical nature to warrant infringing on the constitutionally protected right to collective bargaining.

[298] In the event I am incorrect on this assessment, I consider below the remaining branches of the s. 1 test.

## B. Rational Connection

[299] The second branch of the s. 1 analysis requires the government to demonstrate that there is a causal connection between the limit on the right and the intended objective.[164] The government need not do so with scientific proof. It is sufficient if "it is reasonable to suppose that" the impugned measure may further the objective, not that it will actually do so."[165] This aspect of the test has been described as "not particularly onerous."[166] The

[164] See *Frank* (SCC), at para. 59.
[165] *Hutterian Brethren*, at para. 48.
[166] *Mounted Police*, at para. 143.

rational connection step requires the measure not to be arbitrary, unfair or based on irrational considerations. As long as the challenged measure "can be said to further in a general way an important government aim" it will not be seen as irrational.[167]

[300] The hallmarks of rational connection in an impugned measure are "care of design" and a "lack of arbitrariness".[168]

[301] Compensation represents roughly half of the Province's expenditures.[169] Moderating the rate compensation increases is therefore logically related to the responsible management of the Province's finances and the protection of the sustainability of public services insofar as it concerns wages that Ontario pays for directly. The Act, however, goes well beyond wages for which Ontario pays directly.

### i. The Electricity Sector

[302] On the record before me, there is no rational connection between the government's objective and wages at OPG, the OEB or the IESO, to all of whom the Act applies.

[303] OPG is a for-profit corporation operated pursuant to the *Electricity Act, 1998*.[170] It is responsible for generating and selling electricity. OPG's revenue comes primarily from the sale of electricity. OPG's operations do not contribute to Ontario's debt. In 2019, OPG earned $1.143 billion. It is in no way a drag on provincial coffers.

[304] The OEB regulates the rates that OPG charges for most of the electricity it generates.

[305] Even if OPG were to earn increased profits as a result of savings on labour costs, that money would not necessarily make its way into provincial coffers. The OEB regulates the rate of return that OPG is permitted to earn. OPG is already earning above the permitted rate of return. It will be for the OEB to decide what is done with excess rates of return. This can include creating a variance account to hold excess funds that could then be used to credit customers with future rate adjustments.

[306] The OEB is a corporation without share capital that is continued under the *Ontario Energy Board Act, 1998*[171] and the *Electricity Act, 1998*. The OEB regulates and licenses natural gas and electricity utilities in Ontario and sets electricity rates. The OEB derives its revenues through licensing fees and penalty charges to licensees. It is not funded by the Province. The OEB's revenues exceeded its costs for the fiscal years 2016 to 2019. Lower

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[167] *Canada v. Taylor*, [1990] 3 S.C.R. 892, at para. 56.
[168] *Ibid*. See also *OPSEU v. Ontario*, at paras. 247-48.
[169] See Affidavit of Jay Porter, affirmed March 4, 2021, at para. 33.
[170] S.O. 1998, c. 15, Sch. A.
[171] S.O. 1998, c. 15, Sch. B.

compensation costs at the OEB do not lead to increased revenues in the Province's budget or decreases in the provincial debt.

[307] The IESO coordinates and integrates Ontario's electricity system. It monitors energy needs in real time, balances supply and demand and directs the flow of electricity across Ontario's transmission lines. It is not funded by the Province. It is funded by fees charged to customers for usage, smart metering, program revenues, and application fees. The OEB sets the rates that the IESO charges. Ontario does not intervene in the determination of rates. The IESO and intervenors provide information on employee costs during rate hearings; if the OEB concludes these costs are too high it will refuse the IESO's rate proposal. Lower compensation costs at the IESO do not lead to increased revenues in the Province's budget.

[308] Although Ontario had this information about OPG, the OEB and IESO as a result of the consultation process, it nevertheless included employees of all three organizations within the Act's scope and, in addition, amended s. 190 of the *Labour Relations Act*[172] to specifically include unionized employees of all three entities.

[309] Although at some point in the consultation process Ontario purported to take the position that it was concerned about electricity rates, the Act's preamble does not refer to any aspect of the electricity system as one of its purposes.[173] Mr. Porter, whose affidavit is cited in support of the concern about electricity rates, acknowledged on cross-examination that:

(i) The consultations with bargaining agents from the energy sector were not about electricity costs.[174]

(ii) A report prepared by Ernst & Young in 2018, which examined and made recommendations about government expenditures, and which laid the groundwork for the 2019 Budget, had nothing to say about the electricity sector.[175]

(iii) There was no government expenditure involved in OPG, the OEB or the IESO.[176]

[310] Neither Dr. Dodge nor any other government deponent speaks of electricity costs as being an issue.

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[172] See *Labour Relations Act*, s. 190.
[173] See Bill 124, Preamble, s. 1.
[174] See Cross-Examination of Jay Porter, held June 15, 2022, QQ. 43-45.
[175] See Porter Cross, June 17, Q. 1263.
[176] *Ibid*, Q. 1262.

[311] For purposes of a constitutional challenge, the object of the legislation is determined by the intent at the time the legislation was drafted and enacted.[177] The government is not permitted to shift the purpose of the legislation in response to litigation.[178] Any shift in the purpose of the Act to control electricity rates is therefore impermissible.

[312] Given that Ontario does not fund compensation of employees at OPG, the OEB or the IESO, there is no rational connection between their inclusion in the Act and the responsible management of Ontario's finances or the sustainability of its public services.

## ii. Carleton University Academic Staff Association

[313] The Carleton University Academic Staff Association ("CUASA") submits that there is no rational connection between Ontario's objective and salaries paid at Carleton University.

[314] Carleton was established under the *Carleton University Act, 1952* to operate as an autonomous not-for-profit corporation. Under that statute, Carleton has complete autonomy to set its own budget, acquire property, borrow, and invest funds it does not immediately need. Any budget surplus remains with Carleton and is not paid to the provincial government.

[315] Ontario generally provides funding that covers between 30-35% of Carleton's overall budget. Carleton obtains the remainder of its budget from tuition fees, donations, public-private partnerships, and grants from other sources. Across Ontario, the province provides funding for approximately 23% of university operating budgets.

[316] Government funding is provided pursuant to a Strategic Mandate Agreement ("SMA") that Ontario enters into with each university. The terms of the SMAs vary from one university to another. The SMA sets the maximum amount of funding Ontario will provide to Carleton per year. Whether Carleton receives all, or only part of, that funding depends on Carleton's ability to meet certain criteria that are negotiated between the government and the University, and which are set out in the SMA.

[317] Carleton's current SMA covers the period between 2020-2025. Under it, Carleton's ability to obtain funding depends on its ability to deliver university graduates with the skills required to meet Ontario's labour market. There is no mention of, and there are no metrics geared towards, the university's overall budget. The SMA does not allow Carleton to request additional funding from the government if it runs a deficit. Carleton does not run deficits. Carleton and CUASA have always negotiated collective agreements, including compensation, that fit within Carleton's operating budget.

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[177] See *Big M Drug Mart*, at para. 91.
[178] *Ibid*, at paras. 89-91. See also *Frank v. Canada (Attorney General)*, 2015 ONCA 536, at para. 166, *per* Laskin J.A. (dissenting), rev'd *Frank* (SCC).

[318] In the circumstances, it is difficult to discern a rational connection between the Act's objectives and salaries paid to CUASA members. Current funding to Carleton is locked in until 2025 pursuant to the existing SMA. I was not taken to any evidence to suggest that that the preceding SMA that governed in 2019 was materially different. Even potential indirect concerns such as the University increasing tuition fees to compensate for higher salaries would seem to be unfounded because Ontario says in its factum that it exercises control over tuition fees.

### iii. Long Term Care

[319] The applicants submit that there is no rational connection between the Act's objective of prudent fiscal management and salary limitations on long-term care workers because the government does not pay the salaries of long-term work care workers. Instead, the government pays care homes a fee per day per patient. The size of the fee may vary according to the level of care the patient needs based on the acuity category they fall into. The fee that a long-term care home receives per patient is the same for patients in care homes whose wages are covered by the Act as it is for care homes not covered by the Act.

[320] The government's responsibility for wages in the long-term care sector is therefore only indirect in the sense that increased wages could lead care homes to demand higher daily fees for each patient under their care. However, only 24% of Ontario's long-term care homes are covered by the Act. To the extent that uncontrolled higher wages in the remaining long-term care homes lead to demands for increases in the daily patient fee, the Act does nothing to limit those demands.

[321] This makes the rational connection between the objective of controlling government expenditure in the long-term care sector somewhat remote.

[322] On my view the evidence, there is a rational connection between Ontario's objective and the salaries of employees it pays directly. There is no rational connection between the objective and workers in the energy sector or the university sector. Any rational connection between the objective and the long-term care sector is at best remote.

## C. Minimal Impairment

[323] At the minimal impairment stage, the government must demonstrate that the measure at issue impairs the *Charter* right as little as reasonably possible to achieve the legislative objective.[179]

[324] The Supreme Court of Canada has explained that minimal impairment requires the measure to have been carefully tailored so that rights are impaired no more than necessary.[180] Courts must accord some leeway to the legislator and keep in mind that just because the parties or the court can think of a solution that impairs the right less than the measure in question does not mean that the government has failed to demonstrate minimal impairment.[181] If, however, the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.[182]

[325] At the same time, a less drastic measure that impairs the right more minimally need not satisfy the objective to exactly the same extent or degree as the impugned measure: "[i]n other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage."[183]

[326] In *Frank*, the Supreme Court of Canada found that a federal law that removed the right to vote from Canadian citizens after they had been living abroad for 5 years failed the minimum impairment test because the government could not demonstrate why the 5 year time limit was chosen and because the legislation was overinclusive on a number of fronts.[184]

[327] Here, Ontario has failed to explain why it could not have pursued voluntary wage restraint. In any collective bargaining negotiation with public sector employees, Ontario could have taken the position that it was not able to pay for more than a 1% wage increase.

[328] Ontario had achieved voluntary wage restraint in the past. Professor Riddell gave many examples throughout his report of negative wage settlements that had been voluntarily agreed to in the public sector. Professor Riddell agreed that it would be desirable to at least try to obtain voluntary restraints through collective bargaining.[185]

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[179] See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160 ("*RJR-MacDonald*").
[180] *Ibid*.
[181] See *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at para. 43 ("*JTI-Macdonald Corp*.").
[182] See *RJR-MacDonald*, at para. 160.
[183] *Hutterian Brethren*, at para. 55.
[184] See *Frank* (SCC), at paras. 67-68.
[185] See Riddell Cross, June 21, Q. 2272.

[329] In circumstances where Ontario was the direct employer, it would have been very easy for Ontario to take the position that nothing more than 1% was available. Even where Ontario was not the direct employer it had effective mechanisms to impose the same result.

[330] By way of example, teachers are not employed directly by Ontario but are employed by local school boards. Since 2014, collective bargaining in the education sector has been regulated by the *School Boards Collective Bargaining Act, 2014* ("SBCBA").[186] It mandates, collective bargaining on central and local levels. Central bargaining is mandated for all compensation issues. Central bargaining occurs between representatives of employees on the one hand, the designated employer representative of all school boards on the other *and* the Crown. The Crown is required to be at the table during any negotiations about compensation and must agree to any compensation provisions in any collective agreement. Jay Porter agreed that Ontario could have enforced compensation restraint at the bargaining table under this legislation by refusing to agree to any settlement that was out of line with its fiscal goals.

[331] Although taking the position that wage increases of no more than 1% were available might may have led to strikes, Ontario has not explained why it had to avoid those strikes by legislating a cap on wage increases. While I understand that it might be more convenient to avoid the stress and pressure of collective bargaining and potential strikes, that is not, without more, a reason for infringing a *Charter* right.

[332] Although Ontario is not at the bargaining table with respect to university salaries, it has not explained why the funding arrangements it has under its SMA with each Ontario university would not protect it against liability for wage increases. If there were a residual concern that wage increases could lead to demands for increased funding, Ontario has not explained why it could not have pursued other measures that would not have substantially interfered with collective bargaining such as freezing or limiting increases in university funding.

[333] This is an issue of particular relevance in the context of minimal impairment because of the governance regime that affects universities in Ontario. The Divisional Court set out the history of and the reason for that regime in *Canadian Federation of Students v. Ontario*.[187] In that case, the Divisional Court explained that after a series of scandals involving government interference in universities, the government of Ontario set up the Flavelle Commission to examine and report back on the appropriate governance structure for universities. The Flavelle Commission reported back in 1906. The thrust of its report was that there was widespread consensus across North America that the governance of universities should be separated from political power.[188] Its recommendations were largely adopted into Ontario law and have governed the relationship between the province and its

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[186] S.O. 2014, c. 5.
[187] 2019 ONSC 6658 ("*Canadian Federation of Students*").
[188] *Ibid*, at para. 38.

universities ever since.[189] The essential principles of that relationship are that each university is established by a separate statute[190] which gives the governing councils and senates of each university wide-ranging power over all aspects of university governance and operations.[191] There is no statutory authority to allow government interference in the affairs of a university.[192]

[334] The Act not only substantially interferes with collective bargaining but it materially interferes with the statutory autonomy of universities that has been a cornerstone of university governance for over 100 years. The absence of any explanation for this interference suggests a lack of care in the design of the Act.

[335] The lack of care of design in the Act is also evident in its inclusion of employees of OPG, IESO and the OEB. As noted earlier, Ontario has failed to explain how it contributes to the wages of those organizations directly or indirectly.

[336] Ontario nevertheless had a means of imposing wage restraint without interfering with collective bargaining even in the energy sector. As the shareholder of OPG, it could have insisted on wage increases of no more than 1% within the collective bargaining process. Mr. Porter agreed on cross-examination that Ontario could have done so.[193]

[337] Similarly, in the long-term care sector, Ontario has not explained why it could not freeze or limit any increases to the daily patient fee it pays to long-term care homes if that was in fact its concern. I appreciate that many of these alternative measures may have created political difficulties for a government. The fact that it may be more politically convenient to infringe on a *Charter* right than to refuse additional funding to long-term care homes or universities does not, however, justify the infringement. If political convenience were the test, it would be far too easy to infringe on *Charter* rights on a regular basis.

## D. Balancing Salutary and Deleterious Effects

[338] The fourth branch of the s. 1 analysis focuses on the effects of the measure. It requires the court to determine whether the infringement of the *Charter* right can be justified in a free and democratic society by weighing the benefits of the measure against its negative effects.[194] The real world always requires trade-offs and compromises. The question is

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[189] *Ibid*, at para. 44.
[190] Except for Queen's University which is governed by Royal Charter.
[191] See *Canadian Federation of Students*, at para. 43.
[192] *Ibid*, at para. 8.
[193] See Porter Cross, June 17, QQ. 1274-77.
[194] See *Frank* (SCC), at para. 76.

whether the trade-offs here were a proportionate or disproportionate choice. As the Supreme Court of Canada described it in *JTI-Macdonald Corp.*,

> The final question is whether there is proportionality between the effects of the measure that limits the right and the law's objective. This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?[195]

[339] It is in this fourth branch of the s.1 analysis that "most of the heavy conceptual lifting and balancing" is done.[196] Proportionality is what s. 1 is all about:

> It is only at this final stage that courts can transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society "in direct and explicit terms." In other words, this final step allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society. Although this examination entails difficult value judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision. Further, as mentioned, proceeding to this final stage permits appropriate deference to Parliament's choice of means, as well as its full legislative objective.[197]

[340] This balancing requires a fact based, contextual approach because the infringement of a *Charter* right may be justified in one context, but not in another.[198]

[341] As part of its proportionality argument, Ontario relies on Professor Riddell's comment that public-sector wages are higher than private-sector wages. He refers to this as the public-sector premium. Bringing public-sector wages in line with private-sector wages is, Ontario submits, a valuable and proportionate social goal. I am unable to accept that submission for three reasons.

[342] First, the data on which this assertion is based is fairly old as Professor Riddell acknowledges in his report. The assertion is based primarily on a study conducted in 1979 and secondarily on a paper published in 2000 which uses data collected between 1986 and

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[195] *JTI-Macdonald Corp.*, at para. 45.
[196] *Hutterian Brethren*, at para. 149.
[197] *R. v. K.R.J.*, 2016 SCC 31, at para. 79.
[198] See *RJR-MacDonald*, at para. 132*; Health Services*, at para. 139; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at para. 13.

1990. Professor Riddell acknowledges in his report that there is little recent evidence on the public-private earnings gap.

[343] Second, there are large sectors of the public service where the evidence discloses that there is no wage gap. Professor Riddell acknowledges, for example, that there is no public-sector wage premium in the educational sector where wages in both sectors have been relatively comparable for the last 25 years. The evidence before me also disclosed that public and private sector wages in nursing and long-term care have tracked each other for approximately 30 years. If anything, the Act may be leading to a premium in the private sector.

[344] Third, Professor Riddell acknowledged that at least part of any pay gap between the public and private sectors is attributable to unionization. Professor Riddell acknowledges that unionized employees generally earn more than comparable non-unionized employees. He also notes that the public-sector is substantially more unionized than the private sector. His figures indicate that 78% of the public-sector is unionized while only 16% of the private sector is.

[345] In this light, the desire to eliminate alleged differences between public and private sector wages is an attempt to reverse the benefits of collective bargaining. In effect, the government is using its desire to undo the benefits of the *Charter* right to collective bargaining as a justification to infringe on that very right.

[346] On the facts of this case, balancing the salutary and deleterious effects also raises some of the same issues that were discussed when considering the pressing and substantial objective aspect of the s. 1 test. A fact-based, contextual approach makes the alleged urgency of the government objective relevant. An infringement may well be justified if it arises in a true emergency that requires radical intervention to safeguard the public interest. The breach may not be justified if it arises in routine administration that the government of the day would prefer to pursue by infringing Charter rights instead of observing them.

[347] Here, the objective was to moderate compensation to manage government expenditure in a responsible way. This strikes me as a day-to-day government duty that does not call for the breach of *Charter* rights absent unusual circumstances. If responsible fiscal management justified limiting collective bargaining in an ordinary, unremarkable environment, it would mark the end of collective bargaining in the public sector.

[348] Whatever view I have on the proper balancing of advantages and disadvantages of the Act, has nothing to do with the advisability of the government's fiscal policies. I accept that fiscal prudence is essential. That, however, is not the question before me. The question before me is whether the circumstances surrounding the government's preferred fiscal policies warrant infringing on a *Charter* right. In my view, they do not.

[349] As already noted, here the benefit of the Act is to save approximately $400 million per year. As noted earlier, that same $400 million could be saved through collective bargaining

by refusing increases of more than 1%. Ontario has failed to explain why it could not take this approach.

[350] Had Ontario taken a hard-line approach in collective bargaining, the question of wage restraint would then have worked itself out in the collective bargaining process, perhaps involving a series of strikes to push for higher wage increases. Both unions and government would have to fight that issue out in the court of public opinion. The development of public opinion in this manner is a cornerstone of a free and democratic society. It puts the issue on the front page. The government has ample resources and communication tools at its disposal in any such contest. While there was no evidence before me on the point, I think it is fair to assume that the government's resources in this regard considerably exceed those of unions. The government is fully able to explain to the public why it is necessary for them to hold wages at 1%. Unions are then able to communicate to the public why they feel the government is contradicting itself by holding down wage increases to save $400 million while providing billions of dollars in tax cuts. That issue will then be for public opinion to decide. By removing wage increases of more than 1% from the bargaining table, the government took away from unions a key tool they have to pressure employers into paying higher wages.

[351] In legislating that issue off the table, the government has not only interfered with collective bargaining but has also hampered the development of public consensus on the issue. It is fair to say that the passage of Bill 124 was much lower on the public's radar than a public sector strike would be.

[352] In addition, if the government did not want to assume the risk of strikes, it has not explained why the tax cuts it imposed could not have been reduced by $400 million and thereby protected the *Charter* rights of 780,000 employees. Again, I hasten to add that I am not saying that the government cannot implement wage restraint and tax cuts in the full amount it desires. I say only that when balancing the salutary and deleterious effects of the Act, I see a serious violation of the applicants' *Charter* rights to save approximately $400 million per year. At the same time, the applicants point to tax cuts of over 10 times that amount. In the absence of any explanation from Ontario for that apparent inconsistency or the absence of an explanation for why the tax cuts could not have been a bit smaller and thereby maintain the applicants' *Charter* rights, the benefit of the Act does not appear to outweigh its detrimental effect.

[353] If governments are permitted to infringe on *Charter* rights in times of relative growth and prosperity, in the absence of any present or imminent fiscal urgency without explaining the need to breach *Charter* rights or the need to pursue inconsistent policies, it would be far too easy for governments to infringe on *Charter* rights merely by asserting the need for fiscal prudence.

[354] While it might be appropriate to infringe on a *Charter* right when faced with a serious fiscal challenge, it is not appropriate to do so as part of the day-to-day management of government affairs.

[355] Ontario responds that allowing the government leeway to do that is the essence of democracy. If the government made election promises to cut taxes, it should be permitted to do so. I fully agree. But an election promises to cut taxes does not necessarily give the government the right to breach *Charter* rights to achieve what appeared to be routine policy preferences rather than urgent societal needs.

# V. REMEDY

[356] All applicants have requested that I declare the Act to be unconstitutional and that I defer the specific remedy to a later hearing.

[357] Sections 32 and 34 of the Act purport to preclude any action against the Crown arising out of the Act or any repeal of any provisions of the act. Section 34 provides:

> Despite any other Act or law, no person is entitled to be compensated for any loss or damages, including loss of revenues, loss of profit or loss of expected earnings or denial or reduction of compensation that would otherwise have been payable to any person, arising from anything referred to in subs. 32 (1).[199]

[358] A right is only as meaningful as the remedy provided for a breach.[200] As the Supreme Court of Canada noted in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*,

> In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed.[201]

[359] Section 24(1) of the *Charter* expressly guarantees "[a]nyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied" the right to bring applications to seek "such remedy as the court considers appropriate and just in the circumstances". It is courts who are tasked with protecting *Charter* rights, determining whether legislative

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[199] Bill 124, s. 34.
[200] See *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, at para 25 ("*Doucet-Boudreau*").
[201] 2014 SCC 59, at para. 40 (citations omitted) ("*Trial Lawyers*").

action violates those rights, and crafting remedies to address any infringements.[202] Legislatures are not the ones to determine which *Charter* rights are enforceable through the courts, nor are they the ones to determine appropriate remedies for a *Charter* breach.[203]

[360] Although governments may insulate themselves from liability for policy decisions, complete Crown immunity is "intolerable" in a society governed by the rule of law.[204] Legislation that seeks to preclude individuals from challenging state action in court effectively treats the government as above the law.[205] Such legislation is inconsistent with Canada's constitutional structure.[206]

[361] To the extent that ss. 32 and 34 of the Act purport to preclude any remedy for the breach of *Charter* rights that ensued as a result of the Act, they too are constitutionally invalid. The precise scope of any remedy available to the applicants is something to be reserved to the remedy trial. Any limitations on those remedies should be based on principles and legal provisions apart from ss. 32 and 34 of the Act.

## Conclusion

[362] As a result of the foregoing, I have found the Act to be contrary to section 2(d) of the *Charter*, and not justified under s. 1 of the *Charter*.

[363] Given that the entire purpose of the act is to implement the 1% limitation on wage increases in the broader public sector, there is no purpose served in reviewing the Act section by section. While it may be possible that some sections, standing entirely in isolation from each other do not violate any *Charter* rights, those sections have no purpose apart from enforcing the overall wage limitation that the Act imposes. As a result, I declare the Act to be void and of no effect.

[364] All parties have requested that I defer the consideration of any remedy as a result of the Act having been in effect since June of 2019 to a further hearing. I remain seized of the matter to address the issue of remedy and any other ancillary issues arising from these reasons.

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[202] See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para 53; *Doucet-Boudreau*, at paras. 36-37; *Ontario (Attorney General) v. G*, 2020 SCC 38, at paras. 95-99.
[203] See *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27, at paras. 49-51 ("*Quebec Reference*"); *Doucet-Boudreau*, at paras. 45-51.
[204] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 76; *Francis v. Ontario*, 2021 ONCA 197, at para. 123, citing *Just v. British Columbia*, [1989] 2 S.C.R. 1228, at para. 16. See also *Francis v. Ontario*, at paras. 124-28.
[205] See *Trial Lawyers*, at para. 40; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at paras. 59-60.
[206] See *Quebec Reference*, at paras. 49-51; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at para. 45; *Trial Lawyers*, at para. 40; *Re Manitoba Language Rights*, at paras. 59-60.

[365] Finally, I would like to thank all counsel for their extraordinary effort in this matter. The written and oral submissions of all parties were of exemplary calibre as was the approach of counsel to each other and the court.

Koehnen J.

**Released:** November 29, 2022

**SCHEDULE 1**

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

Court File Nos. CV-20-00636524-0000

B E T W E E N :

ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION,
PAUL WAYLING and MELODIE GONDEK

Applicants

- and –

HIS MAJESTY THE KING IN RIGHT OF ONTARIO
AS REPRESENTED BY THE PRESIDENT OF THE TREASURY BOARD, THE
MINISTER OF EDUCATION, AND THE ATTORNEY GENERAL OF ONTARIO

Respondents

AND

Court File No.: CV-20-00636524-0000

THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO,
ASSOCIATION DES ENSEIGNANTES ET ENSEIGNANTS FRANCO-ONTARIENS, JADE
ALEXIS CLARKE, CHRISTINE GALVIN AND YVES DUROCHER

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO
AS REPRESENTED BY ATTORNEY GENERAL OF ONTARIO, THE PRESIDENT
OF THE TREASURY BOARD, AND THE MINISTER OF EDUCATION

Respondents

AND

Court File No. CV-20-00636529-0000

B E T W E E N:

ONTARIO NURSES' ASSOCIATION VICKI MCKENNA AND
BEVERLY MATHERS

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS
REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO, THE
PRESIDENT OF THE TREASURY BOARD, MINISTER OF HEALTH AND
MINISTER OF LONG-TERM CARE

Respondents

AND

Court File No.: CV-20-00637314-0000

B E T W E E N :

ONTARIO FEDERATION OF LABOUR, CANADIAN UNION OF PUBLIC EMPLOYEES,
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 CANADA, ONTARIO
CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS, ASSOCIATION OF
PROFESSORS OF THE UNIVERSITY OF OTTAWA, BRESCIA UNIVERSITY FACULTY
ASSOCIATION, BROCK UNIVERSITY FACULTY ASSOCIATION, FACULTY
ASSOCIATION OF THE UNIVERSITY OF WATERLOO, HURON UNIVERSITY
COLLEGE FACULTY ASSOCIATION, KING'S UNIVERSITY COLLEGE FACULTY

ASSOCIATION, LAKEHEAD UNIVERSITY FACULTY ASSOCIATION, LAURENTIAN UNIVERSITY FACULTY ASSOCIATION, MCMASTER UNIVERSITY ACADEMIC LIBRARIANS' ASSOCIATION, MCMASTER UNIVERSITY FACULTY ASSOCIATION, NIPISSING UNIVERSITY FACULTY ASSOCIATION, ONTARIO COLLEGE OF ART AND DESIGN FACULTY ASSOCIATION, QUEEN'S UNIVERSITY FACULTY ASSOCIATION, RENISON ASSOCIATION OF ACADEMIC STAFF, RYERSON FACULTY ASSOCIATION, ST. JEROME'S UNIVERSITY ACADEMIC STAFF ASSOCIATION, TRENT UNIVERSITY FACULTY ASSOCIATION, UNIVERSITY OF ONTARIO INSTITUTE OF TECHNOLOGY FACULTY ASSOCIATION, UNIVERSITY OF TORONTO FACULTY ASSOCIATION, UNIVERSITY OF WESTERN ONTARIO FACULTY ASSOCIATION, ~~WILFRED~~ WILFRID LAURIER UNIVERSITY FACULTY ASSOCIATION, WINDSOR UNIVERSITY FACULTY ASSOCIATION, YORK UNIVERSITY FACULTY ASSOCIATION, ASSOCIATION OF MANAGEMENT, ADMINISTRATIVE AND PROFESSIONAL CROWN EMPLOYEES OF ONTARIO, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, PUBLIC SERVICE ALLIANCE OF CANADA, SOCIETY OF UNITED PROFESSIONALS LOCAL 160 OF THE INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, AMALGAMATED TRANSIT UNION LOCAL 1587, CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 636, WORKERS UNITED CANADA COUNCIL, PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, UNITED FOOD AND COMMERCIAL WORKERS LOCAL 175, ASSOCIATION DES ENSEIGNANTES ET DES ENSEIGNANTS FRANCO-ONTARIENS UNITÉ 203 – CENTRE PSYCHOSOCIAL, ASSOCIATION DES ENSEIGNANTES ET DES ENSEIGNANTS FRANCO-ONTARIENS, UNITÉ 103 – PAPSP (PERSONNEL ADMINISTRATIF, PROFESSIONNEL ET DE SOUTIEN PÉDAGOGIQUE, EDUCATIONAL ASSISTANTS ASSOCIATION, HALTON DISTRICT EDUCATIONAL ASSISTANTS ASSOCIATION, DUFFERIN-PEEL EDUCATION RESOURCE WORKERS' ASSOCIATION, ASSOCIATION OF PROFESSIONAL STUDENT SERVICES PERSONNEL, UNITE HERE LOCAL 272, SERVICE EMPLOYEES' INTERNATIONAL UNION LOCAL 2, CANADIAN MEDIA GUILD, LOCAL 30213 OF THE NEWSPAPER GUILD/COMMUNICATIONS WORKERS OF AMERICA, RON BABIN, STEPHANIE BANGARTH, CARMEN BARNWELL, ROCKLYN BEST-PIERCE, PAMELA BONIFERRO, ANDREW BRAKE, NEIL BROOKS, NATASHA BROUILLETTE, DANIEL G. BROWN, COLLEEN BURKE, MITCHELL CHAMPAGNE, ~~JOHN CIRIELLO~~, FABRICE COLIN, CLAIRE COPP, WILLIAM CORNET, ALLYSON CULLEN, GAUTAM DAS, RYAN DEVITT, TIMOTHY EDNEY, MELISSA ELLIS, KIMBERLY ELLIS-HALE, PEDRAM KARIMIPOUR FARD, CARRIE GERDES, ALISON GRIGGS, MYRON GROOVER, ELKAFI HASSINI, ELIZABETH HANSON, JEAN-DANIEL JACOB, MELISSA JEAN, BETTY JONES, NADIA KERR, NATHAN KOZUSKANICH, SAHVER KUZUCUOGLU, MIN SOOK LEE, RICHARD LEHMAN, DAVID LENGYEL, KRISTINA LLEWELLYN, SUSAN LUCEK, ELIZABETH MACDOUGALL-SHACKLETON, TERRY MALEY, MEREDITH MARTIN, BRANDI MATTHIAS, STEPHANIE MCKNIGHT, LUCIE MÉNARD, DAVID MONOD, DAVID R. NEWHOUSE, KIMBERLY NUGENT, LISA PATTISON, LOUIS PELLETIER,

TOM POCRNICK, KEVIN PORTER, WANDA REID, PAULINE RICKARD, LOIS ROSS, LORNA ROURKE, ALLAN ROWE, ELLEN SIMMONS, COLLEEN DIETRICH SISSON, RYAN STUDINSKI, ALBERTO TONERO, ARI JOHAN VANGEEST, JOY WAKEFIELD, JUDY WATSON, MICHELLE WEBBER, DON WILSON, PETER ZIMMERMAN, and TEREZIA ZORIC, on their own behalf and on behalf of all other employees in bargaining units affected by this Application (the "OFL Coalition")

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO and THE PRESIDENT OF THE TREASURY BOARD

Respondents

Court File No. CV-20-00638156-0000

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION and WARREN ("SMOKEY") THOMAS, EDUARDO ALMEIDA, SANDRA CADEAU, DONNA MOSIER, ERIN CATE SMITH RICE, and HEIDI STEFFEN-PETRIE

Applicants

- and -

THE CROWN IN RIGHT OF ONTARIO as represented by the ATTORNEY GENERAL OF ONTARIO and THE PRESIDENT OF THE TREASURY BOARD

Respondent

AND

Court File No.: CV-20-00646385-0000

B E T W E E N:

UNIFOR, KELLY GODICK, SARAH BRAGANZA AND KATHLEEN ATKINS

Applicants

-and-

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO and THE PRESIDENT OF THE TREASURY BOARD

Respondent

AND

Court File No. CV-20-00653134-0000

B E T W E E N:

SOCIETY OF UNITED PROFESSIONALS, LOCAL 160 OF THE INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, JO-ANN KINNEAR, CINDY ROKS and ~~VELMA FRANCIS~~ JANET SAKAUYE

Applicants

and

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE ATTORNEY GENERAL OF ONTARIO and THE PRESIDENT OF THE TREASURY BOARD

Respondents

AND

Court File No. CV-20-00653130-0000

B E T W E E N:

POWER WORKERS' UNION (CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000), ANDREW CLUNIS and ROBERT BUSCH

Applicants

- and –

THE CROWN IN RIGHT OF ONTARIO as represented by the PRESIDENT OF THE TREASURY BOARD, and the ATTORNEY GENERAL OF ONTARIO

Respondent

AND



Court File no. CV-20-00084683-0000

B E T W E E N:

CARLETON UNIVERSITY ACADEMIC STAFF ASSOCIATION and ANGELO MINGARELLI, ROOT GORELICK, and GREG FRANKS on their own behalf, and on behalf of all of the members of the Carleton University Academic Staff Association

Applicants

- and -

THE CROWN IN RIGHT OF ONTARIO as represented by the President of the Treasury Board

Respondent

**CITATION:** Ontario English Catholic Teachers Assoc. v. His Majesty, 2022, ONSC 6658
**COURT FILE Nos.:** CV-20-00-636089-0000; CV-20-636421-0000; CV-20-00636524-0000; CV-20-00636529-0000; CV-20-00637314-0000; CV-20-00638156-0000; CV-20-00646385-0000; CV-20-0084683-0000; CV-20-00653134-0000; CV-20-00653130-0000;
**DATE:**



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION; ALEXANDRA BUSCH; AND KAREN EBANKS,

AND NINE OTHER APPLICATIONS IN THE MATTER OF THE PROTECTING A SUSTAINABLE PUBLIC SECTOR FOR FUTURE GENERATIONS ACT, 2019 LISTED IN SCHEDULE 1 HERETO

Applicants

**– and –**

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE PRESIDENT OF THE TREASURY BOARD, MINISTER OF HEALTH, MINISTER OF LONG-TERM CARE AND MINISTER OF EDUCATION, AND THE ATTORNEY GENERAL OF ONTARIO

Respondents

**REASONS FOR JUDGMENT**

Koehnen J.

**Released:** November 29, 2022

# TAB 11

# COURT OF APPEAL FOR ONTARIO

CITATION: Ontario English Catholic Teachers Association v. Ontario (Attorney General), 2024 ONCA 101
DATE: 20240212
DOCKET: COA-23-CV-0010

Doherty, Hourigan and Favreau JJ.A.

BETWEEN

Ontario English Catholic Teachers Association,
Karen Ebanks and Alexandra Busch

Applicants (Respondents)

and

His Majesty the King in Right of Ontario, as represented by the Attorney General of Ontario, the President of the Treasury Board, and the Minister of Education

Respondents (Appellants)

AND BETWEEN

Ontario Secondary School Teachers' Federation,
Paul Wayling and Melodie Gondek

Applicants (Respondents)

and

His Majesty the King in Right of Ontario, as represented by the President of the Treasury Board, the Minister of Education, and the Attorney General

Respondents (Appellants)

AND BETWEEN

The Elementary Teachers' Federation of Ontario,
Association des enseignantes et des enseignants
franco-ontariens, Jade Alexis Clarke,
Christine Galvin, and Yves Durocher

Applicants (Respondents)

and

His Majesty the King in Right of Ontario, as represented by the
Attorney General of Ontario, the President of the Treasury Board,
and the Minister of Education

Respondents (Appellants)

AND BETWEEN

Ontario Nurses' Association, Vicki McKenna
and Beverly Mathers

Applicants (Respondents)

and

His Majesty the King in Right of Ontario, as represented by the
Attorney General of Ontario, the President of the Treasury Board,
Minister of Health and Minister of Long-Term Care

Respondents (Appellants)

AND BETWEEN

Ontario Public Service Employees Union and
Warren (“Smokey”) Thomas, Eduardo Almeida,
Sandra Cadeau, Donna Mosier, Erin Cate Smith Rice,
and Heidi Steffen-Petrie

Applicants (Respondents)

and

The Crown in Right of Ontario, as Represented by
the Attorney General of Ontario and the
President of the Treasury Board

Respondents (Appellants)

AND BETWEEN

Ontario Federation of Labour, Canadian Union of Public Employees, Service Employees International Union Local 1 Canada, Ontario Confederation of University Faculty Associations, Association of Professors of the University of Ottawa, Brescia University Faculty Association, Brock University Faculty Association, Faculty Association of the University of Waterloo, Huron University College Faculty Association, King’s University College Faculty Association, Lakehead University, Laurentian University Faculty Association, McMaster University Academic Librarians’ Association, McMaster University Faculty Association, Nipissing University Faculty Association, Ontario College of Art and Design Faculty Association, Queen’s University Faculty Association, Renison Association of Academic Staff, Ryerson Faculty Association, St. Jerome’s University Academic Staff Association, Trent University Faculty Association, University of Ontario Institute of Technology Faculty Association, University of Toronto Faculty Association, University of Western Ontario Faculty Association, Wilfrid Laurier University Faculty Association, Windsor University Faculty Association, York University Faculty Association, Association of Management, Administrative and Professional Crown Employees of Ontario, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service

Workers International Union, Public Service Alliance of Canada, Society of United Professionals Local 160, Amalgamated Transit Union Local 1587, Canadian Office and Professional Employees Union, International Brotherhood of Electrical Workers Local 636, Workers United Canada Council, Professional Institute of the Public Service of Canada, United Food and Commercial Workers Local 175, Association des enseignantes et des enseignants franco-ontariens unité 203, Aefo unité 103, Educational Assistants Association, Halton District Education Assistants Association, Dufferin-Peel Education Resource Workers' Association, Association of Professional Student Services Personnel, Unite Here Local 272, Seiu Local 2, Canadian Media Guild, Local 30213 of the Newspaper Guild/Communications Workers of America, Ron Babin, Stephanie Bangarth, Carmen Barnwell, Rocklyn Best-Pierce, Pamela Boniferro, Andrew Brake, Neil Brooks, Natasha Brouillette, Daniel G. Brown, Colleen Burke, Mitchell Champagne, John Ciriello, Fabrice Colin, Claire Copp, William Cornet, Allyson Cullen, Gautam Das, Ryan Devitt, Timothy Edney, Melissa Ellis, Kimberly Ellis-Hale, Pedram Karimipour Fard, Carrie Gerdes, Alison Griggs, Myron Groover, Elkafi Hassini, Elizabeth Hanson, Jean-Daniel Jacob, Melissa Jean, Betty Jones, Nadia Kerr, Nathan Kozuskanich, Sahver Kuzucuoglu, Min Sook Lee, Richard Lehman, David Lengyel, Kristina Llewellyn, Susan Lucek, Elizabeth Macdougall-Shackleton, Terry Maley, Meredith Martin, Brandi Matthias, Stephanie Mcknight, Lucie Ménard, David Monod, David R. Newhouse, Kimberly Nugent, Lisa Pattison, Louis Pelletier, Tom Pocrnick, Kevin Porter, Wanda Reid, Pauline Rickard, Lois Ross, Lorna Rourke, Allan Rowe, Ellen Simmons, Colleen Dietrich Sisson, Ryan Studinski, Alberto Tonero, Ari Johan Vangeest, Joy Wakefield, Judy Watson, Michelle Webber, Don Wilson, Peter Zimmerman, and Terezia Zoric, on their own behalf and on behalf of all other employees in bargaining units affected by this Application

Applicants (Respondents)

and

His Majesty the King in Right of Ontario, as represented by
the Attorney General of Ontario
and the President of the Treasury Board

Respondents (Appellants)

AND BETWEEN

Unifor, Kelly Godick, Sarah Braganza, and Kathleen Atkins

Applicants (Respondents)

and

His Majesty the King in Right of Ontario, as represented by
the Attorney General of Ontario
and the President of the Treasury Board

Respondents (Appellants)

AND BETWEEN

Carleton University Academic Staff Association,
Angelo Mingarelli, Root Gorelick, and R. Gregory Franks,
on their own behalf, and on behalf of all the members of the
Carleton University Academic Staff Association

Applicants (Respondents)

and

The Crown in Right of Ontario, as represented by the President of the
Treasury Board

Respondents (Appellants)

AND BETWEEN

Society of United Professionals, Local 160 of the
International Federation of Professional and Technical Engineers,
Jo-Ann Kinnear, Cindy Roks, and Janet Sakauye

Applicants (Respondents)

and

His Majesty the King in Right of Ontario, as represented by
the Attorney General of Ontario
and the President of the Treasury Board

Respondents (Appellants)

AND BETWEEN

Power Workers' Union (Canadian Union of Public Employees, Local 1000),
Andrew Clunis and Robert Busch

Applicants (Respondents)

and

The Crown in Right of Ontario, as represented by the
President of the Treasury Board, and the Attorney General of Ontario

Respondents (Appellants)

Peter Griffin, Nina Bombier and Samantha Hale, for the appellants His Majesty the King in Right of Ontario *et al*.

Paul Cavalluzzo and Balraj Dosanjh, for the respondents Ontario English Catholic Teachers Association *et al.*

Susan Ursel, Karen Ensslen and Emily Home, for the respondents Ontario Secondary School Teachers' Federation *et al.*

Howard Goldblatt and Benjamin Piper, for the respondents Elementary Teachers' Federation of Ontario *et al.*

Janet Borowy and Danielle Bisnar, for the respondents Ontario Nurses' Association *et al.*

David R. Wright, Mae Jane Nam and Rebecca Jones, for the respondents Ontario Public Service Employees Union *et al.*

Steven Barrett and Melanie Anderson, for the respondents Ontario Federation of Labour *et al.*

Anthony Dale, Dijana Simonovic and Jenna Meguid, for the respondents Unifor *et al.*

Colleen Bauman, for the respondents Carleton University Academic Staff Association *et al*.

Michael Wright, Alex St. John and Nora Parker, for the respondents Society of United Professionals *et al.*

Andrew Lokan and Shyama Talukdar, for the respondents Power Workers' Union *et al.*

George Avraam and Ajanthana Anandarajah, for the intervener Canadian Association of Counsel to Employers

Tim Gleason and Adrienne Lei, for the intervener Canadian Civil Liberties Association

Christine Davies, Danielle Sandhu and Kat Owens, for the intervener Women's Legal Education and Action Fund Inc.

Heard: June 20-22, 2023

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated November 29, 2022, with reasons reported at 2022 ONSC 6658, 165 O.R. (3d) 1.

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**Favreau J.A.:**

## A. OVERVIEW

[1] In 2019, the Ontario legislature passed Bill 124, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, S.O. 2019, c. 12 ("Bill 124" or the "Act"), which imposed a 1% cap per year on increases to salary rates and compensation for three years for employees in the broader public sector.

[2] The respondents, which include organizations that represent employees in the broader public sector, brought applications challenging the Act on the basis that it violated their members' rights to freedom of expression (s. 2(b)), freedom of association (s. 2(d)) and equality (s. 15) under the *Canadian Charter of Rights and Freedoms*.

[3] The application judge granted the applications, finding that the Act violated the respondents' freedom of association and that this violation was not saved by s. 1 of the *Charter*. The application judge did not accept the arguments that the Act violated the respondents' s. 2(b) or s. 15 rights.

[4] His Majesty the King in Right of Ontario ("Ontario")[1] appeals on the basis that the application judge's decision is contrary to decisions of the Supreme Court, this court and other appellate courts that have found similar wage restraint

[1] Some of the applicants named different Crown respondents. However, for simplicity, I will refer to the appellants as Ontario in these reasons.

legislation to be constitutional. Ontario also argues that the application judge erred in his analysis of s. 2(d) by essentially turning the right to freedom of association, which the Supreme Court has said is a procedural right, into a substantive right. Ontario further contends that the application judge erred in his analysis and application of s. 1 of the *Charter* by failing to sufficiently defer to its policy choices in the face of a pressing need to address the deficit through control of public sector wages and compensation.



[5] I would dismiss the appeal with one exception. I agree with the application judge that the Act violates the s. 2(d) rights of broader public sector represented employees in Ontario and that it is not saved by s. 1. Taking into consideration the context in which Bill 124 was introduced and the restraints imposed by the Act, I am satisfied that the Act substantially interferes with the respondents' right to participate in good faith negotiation and consultation over their working conditions. The circumstances of this case are distinguishable from other cases where wage restraint legislation was deemed constitutional because, here, there was no meaningful bargaining or consultation before the Act was passed, the Act significantly restricts the scope and areas left open for negotiation in the collective bargaining process, there is no meaningful mechanism for collective agreements to be exempted from the Act, and public sector collective agreements to which the Act does not apply generally provide for higher annual wage increases than 1%. Further, I find that the Act is not saved by s. 1 of the *Charter* because it does not

minimally impair the respondents' right to freedom of association, and because the Act's deleterious effects outweigh its benefits.

[6] However, the application judge erred in declaring the entire Act unconstitutional. The Act applies to represented and non-represented employees in the broader public sector. Non-represented employees, given that they do not bargain collectively, do not benefit from the same protections as their represented counterparts under s. 2(d) of the *Charter*. Accordingly, the application judge's declaration was overly broad, and should be limited to a declaration that the Act is unconstitutional in so far as it applies to represented employees.

[7] I start with a review of the Act, the parties and their interests, and the application judge's decision. I then address the s. 2(d) and s. 1 analyses. It is in the context of these analyses that I provide a more detailed review of the evidence, where relevant.

## B. THE ACT AND THE SCOPE OF ITS APPLICATION

[8] Bill 124 was introduced in the Ontario legislature on June 5, 2019, and received royal assent on November 7, 2019.

[9] The Act imposes a three-year "moderation" period on compensation, including salary rates, for all employees in the broader public sector. For those three years, compensation increases are not to exceed 1% per year. The Act applies to represented and non-represented employees.

[10] In order to properly address the issues on appeal, it is helpful to review the scope and application of the Act in some detail.

**(1) Preamble, purpose and other preliminary matters**

[11] As indicated above, the short title of the Act is *Protecting a Sustainable Public Sector for Future Generations Act, 2019*. Its long title is "An Act to implement moderation measures in respect of compensation in Ontario's public sector".

[12] The preamble to the Act emphasizes the government's goal of reducing the deficit and balancing its budget, stating that "Ontario's accumulated debt is among the largest subnational debts in the world". The preamble also states that sustaining the province's finances is in the public interest and is needed to "maintain important public services", and that the "[g]overnment also seeks to protect front-line services and jobs of the people who deliver them." The preamble then addresses the role of public sector compensation in maintaining a sustainable public sector. In doing so, the preamble states that compensation represents a "substantial proportion" of government program expenses and that "the growth in compensation costs must be moderated to ensure the continued sustainability of public services for the future." The preamble further states that the measures imposed by the Act "would allow for modest, reasonable and sustainable compensation growth for public sector employees" and that, for represented employees, the measures "respect the collective bargaining process, encourage

responsible bargaining, and ensure that future bargained and arbitrated outcomes are consistent with the responsible management of expenditures and the sustainability of public services." The preamble concludes with a statement that the "[g]overnment believes that the public interest requires the adoption, on an exceptional and temporary basis, of the measures" in the Act.

[13] Besides the preamble, s. 1 states that the purpose of the Act is "to ensure that increases in public sector compensation reflect the fiscal situation of the Province, are consistent with the principles of responsible fiscal management and protect the sustainability of public services."

[14] Section 3 of the Act explicitly states that "the right to bargain collectively" is preserved, subject to the provisions of the Act. Section 4 preserves the right to strike lawfully.

**(2) Employees affected**

[15] Pursuant to s. 5(1), the Act applies to employers in the broader public sector, including to the Crown, Crown agencies, school boards, universities and colleges, hospitals, licensed not-for-profit long-term care homes, and children's aid societies. It also applies to not-for-profit organizations that received at least $1 million in funding from the government in 2018.

[16] Section 5(2) of the Act specifies categories of employers to which the Act does not apply. These include municipalities and for-profit organizations.

[17] Pursuant to s. 8, the Act applies to “bargaining organizations”, which include unions and other organizations that bargain collectively on behalf of the broader public sector employees affected by the Act. In addition, the Act applies to the non-represented employees in the broader public sector.

**(3) Scope of compensation affected and length of “moderation period”**

[18] The Act limits “salary rate” and “compensation” increases during the moderation period. Salary is a subset of compensation.

[19] The Act defines “salary rate”, at s. 2, as:

> [A] base rate of pay, whether expressed as a single rate of pay, including a rate of pay expressed on an hourly, weekly, bi-weekly, monthly, annual or some other periodic basis, or a range of rates of pay, or, if no such rate or range exists, any fixed or ascertainable amount of base pay.

[20] The Act defines “compensation” very broadly as meaning “anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments”: s. 2. As a practical matter, and as found by the application judge, it is understood that compensation includes matters such as pension contributions, vacation days, sick days, bereavement days, meal and travel allowances, and any other benefits to which a monetary value can be assigned.

[21] Sections 9 to 16 of the Act address the limits on increases to salary rates and compensation during the moderation period for represented employees covered by the Act.

[22] Pursuant to s. 10(1) of the Act, a collective agreement or arbitration award cannot provide for a salary rate increase of more than 1% per year during the three-year moderation period. This 1% cap applies to any position or class of positions.

[23] In addition, pursuant to s. 11(1) of the Act, increases in compensation, which, as noted above, include salary rates for all employees covered by a collective agreement, are limited to 1% per year during the three-year moderation period:

> During the applicable moderation period, no collective agreement or arbitration award may provide for any incremental increases to existing compensation entitlements or for new compensation entitlements that in total equal more than one per cent on average for all employees covered by the collective agreement for each 12-month period of the moderation period. [Emphasis added.]

[24] Therefore, in combination, s. 10(1) and 11(1) mean that no individual employee can receive a salary rate increase of more than 1% per year during the moderation period. In addition, the overall increase for all compensation, including salary rates, within the bargaining unit cannot exceed 1% per year overall. This means that employers can agree to an increase of compensation for some employees beyond 1% per year, so long as the increase does not apply to their

salary rate and so long as the overall compensation for all employees in the bargaining unit does not exceed 1% per year. In other words, an increase above 1% in compensation, other than the salary rate, for some employees would have to be offset against no increases or lesser increases for other employees.

[25] There are some exceptions to the limitations on compensation increases. For example, s. 10(2) of the Act provides for three exceptions to the 1% per year cap on salary rates, allowing for salary rate increases that recognize an employee's "length of time in employment", "assessment of performance", and "successful completion of a program or course of professional or technical education." Also, s. 11(3) of the Act provides that an employer's increase in the cost of providing a benefit that existed before the moderation period does not constitute an increase in compensation.

[26] In accordance with s. 9 of the Act, for represented employees, the moderation period begins at different times. For example, if a collective agreement was still in effect on June 5, 2019, the three-year moderation period starts on the day immediately following the end of the collective agreement. If the collective agreement had already expired on June 5, 2019, the moderation period starts running on the day immediately following the date on which the previous collective agreement had expired. The same principles generally apply to arbitration awards.

[27] Sections 17 to 23 of the Act set out the provisions that apply to non-represented employees. They are similar to those that apply to represented employees. However, pursuant to ss. 18 and 19, the cap imposed on salary rate and compensation increases is focused on individual employees or classes of employees and not on bargaining units. In addition, for non-represented employees, the start date of the moderation period is different than for represented employees. The moderation period starts on a date selected by the employer that is after June 5, 2019, but no later than January 1, 2022.

**(4) Enforcement, oversight and exemptions**

[28] The Act includes a number of measures designed to prohibit employers from avoiding compliance with the 1% limit on compensation increases during the moderation period. For example, s. 24 prohibits an employer from providing compensation before or after the moderation period to make up for compensation the employee did not receive during the moderation period.

[29] The Act also gives the government broad powers of enforcement. Section 25 of the Act gives the Management Board of Cabinet the power to obtain information from employers about collective bargaining or compensation to ensure compliance with the Act. Section 26 gives the Minister responsible for administration of the Act the sole discretionary power to make an order declaring that a collective agreement or arbitration award does not comply with the Act,

which then requires the parties to enter into a new collective agreement that is compliant with the Act.

[30] Finally, s. 27 of the Act provides that the Minister "may, by regulation, exempt a collective agreement from the application of [the] Act". However, the Act does not set out criteria or the basis on which the Minister may make such an exemption.



## C. THE RESPONDENTS

[31] There were ten groups of respondents on the appeal. While the respondent organizations[2] represent employees that fall within the scope of the Act, they are not all similarly situated. They work in different sectors, including education, health and energy. In addition, some of their members are directly employed by the province, whereas others are employed by other bodies that fall within the scope of the Act; therefore, in some cases, the collective bargaining takes place directly with the province and in other cases it takes place with an employer other than the province. Finally, some of the respondents' members work for employers that are fully funded by the province, partially funded by the province and, in some cases, not funded by the province at all.

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[2] Most of the groups of respondents also include named individuals who are members or representatives of the organizations. For the purpose of describing the respondent organizations' various interests in this section, it is not necessary to list these individuals or to identify their respective interests.

[32] In order to highlight these differences, it is helpful to provide a brief description of each organization:

a. Ontario English Catholic Teachers Association ("OECTA"): OECTA is the designated bargaining agent for teachers employed by the English-language Catholic district school boards in Ontario. While the members of OECTA are employed by their individual school boards, OECTA participates in a process of "central bargaining" with the Crown and school boards over significant issues, such as salary increases.

b. Ontario Secondary School Teachers' Federation/Fédération des enseignants-enseignantes des écoles secondaires de l'Ontario ("OSSTF"): OSSTF is the designated bargaining agent for secondary school teachers employed by the English-language public district school boards in Ontario. It also represents a variety of other education workers employed by both French and English school boards. While these OSSTF members are employees of their respective school boards, like OECTA, OSSTF participates in a process of "central bargaining" with the Crown and school boards over significant issues. In addition to its school board members, OSSTF also represents members who work for employers offering

transportation services to school boards and members who are non-teaching employees at some universities.[3]

c. Elementary Teachers' Federation of Ontario ("ETFO") and l'Association des enseignantes et des enseignants franco-ontariens ("AEFO"): ETFO is the designated agent to bargain on behalf of English-language elementary teachers in Ontario as well as certain other education workers, such as early childhood education workers and professional support personnel. AEFO is the designated bargaining agent for all public and Catholic French-language elementary and secondary school teachers in Ontario. While the members of ETFO and AEFO are employees of their respective school boards, ETFO and AEFO also participate in a process of "central bargaining" with the Crown and school boards.[4]

d. Ontario Nurses' Association ("ONA"): ONA represents registered nurses, nurse practitioners, registered practical nurses, personal support workers and other health care professionals across Ontario. ONA's members work



[3] Following the hearing of the appeal but before the release of this decision, counsel for OSSTF advised that their clients and Ontario had settled their claims in relation to this litigation for school board members and withdrew from further participation in those portions of the appeal solely concerning the school board employees. However, the parties agreed that the court could continue to rely on the parties' submissions for the purpose of deciding the appeal and confirmed that they did not seek to withdraw their participation in respect of the members who are not school board employees.

[4] Following the hearing of the appeal but before the release of this decision, counsel for ETFO advised that their clients and Ontario had settled their claims in relation to this litigation for its members and withdrew from further participation in those portions of the appeal concerning the ETFO applicants. However, the parties agreed that the court could continue to rely on the parties' submissions for the purpose of deciding the appeal.

in a variety of settings, including hospitals, long-term care homes and community health clinics.

e. Ontario Federation of Labour ("OFL"): OFL's application was brought on behalf of several organizations, including OFL, the Canadian Union of Public Employees ("CUPE"), the Association of Management, Administrative and Professional Crown Employees of Ontario ("AMAPCEO") and various university faculty associations. These organizations represent a broad variety of employees in different sectors, including hospitals, long-term care, social and community services, education, universities, transportation, the justice system and the Ontario Public Service.[5]

f. Ontario Public Service Employees Union ("OPSEU"): OPSEU represents a broad range of workers who work in the Ontario Public Service or who are employed by broader public sector employers. They include cleaning staff, personal support workers, college professors, office administrators, correctional officers and education assistants.[6]



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[5] Following the hearing of the appeal but before the release of this decision, counsel for Ontario advised that its client and CUPE had settled CUPE's claims in the OFL application for the school board employees and withdrew from further participation in those portions of the appeal solely concerning those employees. Counsel further advised that Ontario and AMAPCEO have settled AMAPCEO's claim and withdrew from further participation in those portions of the appeal concerning those employees. However, the parties agreed that the court could continue to rely on the parties' submissions for the purpose of deciding the appeal and confirmed that they did not seek to withdraw their participation in respect of other employees represented by CUPE as well as the employees represented by the other unions in the OFL application.

[6] Following the hearing of the appeal but before the release of this decision, counsel for OPSEU advised that their clients and Ontario had settled their claims in relation to this litigation for OPSEU members

g. Unifor: Unifor represents employees in the private and public sector. The public sector workers Unifor represents work in a variety of areas, including health care, social services and education.

h. Society of United Professionals, Local 160 of the International Federation of Professional and Technical Engineers ("Society" or "Society of United Professionals"): The Society represents employees in the energy sector who work for Ontario Power Generation ("OPG"), the Independent Electricity System Operator ("IESO") and the Ontario Energy Board ("OEB"). The Society's members include professionals, such as engineers, accountants, lawyers and managers. The Society bargains with OPG, IESO and OEB, which are self-funded and receive no funding from the province.

i. Power Workers' Union (Canadian Union of Public Employees, Local 1000) ("PWU"): PWU represents employees in the energy sector who work for OPG and IESO as well as other entities not subject to the Act. Its members work in clerical, technical and skilled trade positions. As with the Society, PWU bargains with OPG and IESO, which, again, are self-funded and receive no funding from the province.



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employed by the Crown in the Ontario Public Service Unified Bargaining Unit and withdrew from further participation in those portions of the appeal solely concerning the unified bargaining unit employees. However, the parties agreed that the court could continue to rely on the parties' submissions for the purpose of deciding the appeal and confirmed that they did not seek to withdraw their participation in respect of all other OPSEU members.

j. Carleton University Academic Staff Association: The Association represents faculty members, librarians and instructors employed by Carleton University. The members of the Association are employed by Carleton and their collective bargaining agreement is with Carleton. The province provides funding grants to Carleton, which covers 30 to 35% of its budget. However, the province does not directly fund the compensation paid to the Association's members.



## D. THE APPLICATION JUDGE'S DECISION

[33] The application judge rejected the respondents' position that the Act violated their right to freedom of expression or their equality rights. However, he found that the Act violated the right to freedom of association under s. 2(d) of the *Charter*, and that the Act was not saved by s. 1 of the *Charter*.

### (1) Application judge's finding that the Act violates s. 2(d) of the *Charter*

[34] In concluding that the Act violates the respondents' s. 2(d) rights, the application judge found that the Act substantially interferes with the respondents' ability to enter into good faith negotiation and consultation. In reaching this conclusion, the application judge considered the following ten factors:

a. The financial impact of the wage cap: The Act interferes with the process of collective bargaining because it places significant limits on the ability of

unions to negotiate higher wages or to use wages to negotiate other better work conditions.

b. The impact on trading salary against other issues: The Act inhibits the ability of unions to trade off wages for other issues.

c. The impact on staffing: The application judge accepted the respondents' evidence that there was a "serious long-term recruitment and retention crisis" in the health care sector. He found that the Act prevents unions from negotiating solutions to this crisis.

d. The impact on wage parity between public and private sector employees: On this factor, the application judge focused on the long-term care sector, which consists of private for-profit homes, private non-profit homes and municipal homes, whose employees have typically bargained together. The application judge held that "[f]ragmenting bargaining units into public and private sector units interferes with the unions' ability to choose who bargains together."

e. The impact on employee self-government: The application judge held that the Act interferes with the respondent organizations' ability to decide democratically how to prioritize their negotiating positions.

f. The impact on freely negotiated agreements: The government's power under the Act to decide whether a collective agreement will or will not be exempted from the Act interferes with freely negotiated agreements.

g. The impact on the right to strike: The application judge held that the Act renders the right to strike "financially meaningless" because the best the unions can achieve is a wage increase of 1% or an increase of benefits equal to 1% of wages, a benefit he found would be exhausted after 2.6 days of striking.

h. The impact on interest arbitration: The Act affects bargaining units subject to interest arbitration, because one of the principles of interest arbitration is the replication of negotiated agreements.

i. The impact on the relationship between unions and their members: The application judge relied, by way of example, on negative responses from ONA's members to their 1% wage increase as evidence that the Act will cause discord within unions.

j. The impact on the power balance between employer and employees: The application judge stated that the "shadow of the legislator" would loom over negotiations and disrupt the power balance between employees and employers achieved through meaningful collective bargaining.

[35] The application judge then considered whether the process of consultation prior to the introduction of Bill 124 amounted to a meaningful process of collective bargaining. He stated that the government did not have an obligation to consult with the respondents on its legislation. However, relying on prior jurisprudence, he stated that, in appropriate circumstances, meaningful consultation before the

passage of legislation can nevertheless take the place of collective bargaining. In this case, he found that there was no meaningful consultation.

[36] The application judge also reviewed prior decisions dealing with wage restraint legislation where no breach of s. 2(d) of the *Charter* was found. He distinguished those cases on the basis of the evidence in this case and differences between the Act and the legislation in those cases.



**(2) Application judge's finding that s. 1 of the *Charter* does not save the Act**

[37] The application judge found that the Act was not saved by s. 1 of the *Charter*.

[38] In his s. 1 analysis, the application judge started by rejecting Ontario's definition of the Act's pressing and substantial objective. Ontario had submitted that the Act's objective was fiscal responsibility and moderating the growth rate of public sector compensation. The application judge rejected this objective because the moderation of public service wages was the means by which the objective of fiscal responsibility was to be achieved. It was not an objective in and of itself. On this basis, the application judge redefined the objective as "the responsible management of Ontario's finances and the protection of sustainable public services."

[39] The application judge then found that Ontario did not establish that this was a pressing and substantial objective. In doing so, he considered case law from the

Supreme Court of Canada which suggests that budgetary considerations cannot be a freestanding pressing and substantial objective, except in the context of a financial crisis. The application judge found that, in this case, Ontario's evidence, including a report from its expert, Dr. David Dodge, did not establish that the province was in a financial crisis.

[40] Despite his finding that Ontario had not established a pressing and substantial objective, the application judge went on to consider the other aspects of the s. 1 *Charter* analysis.

[41] On the issue of a rational connection, the application judge found that, because compensation represents approximately one half of provincial government expenditures, moderating the rate of compensation increase is logically related to the responsible management of the province's finances and protecting the sustainability of public services. However, he found that the rational connection did not exist for two categories of broader public sector workers because the province was not responsible for paying wages in these sectors: 1) the employees in the electricity sector working for OPG, OEB and IESO, and 2) the Carleton University academic staff, and by extension academic staff at other universities. Further, and relatedly, he concluded that the rational connection for workers in the long-term care sector was "at best remote."

[42] On the issue of whether the Act minimally impairs the respondents' s. 2(d) *Charter* rights, the application judge found that Ontario failed to explain why the province could not pursue "voluntary wage restraint", as it had in the past, rather than imposing a wage cap through legislation. In addition, specifically with respect to the university sector, he found that the Act interferes with the governance of universities and that Ontario failed to provide an explanation for this interference.

[43] Finally, the application judge found that the salutary effects of the Act did not outweigh its deleterious effects. Amongst his reasons for this finding, he held that Ontario's argument that the province wanted to bring public sector wages in line with private sector wages was not supported by the evidence regarding the wage gap. He further found that the lack of "present or imminent fiscal urgency" weighed against the Act.

**(3) Remedy**

[44] Based on his conclusion that that the Act violated s. 2(d) and was not saved by s. 1 of the *Charter*, the application judge declared the entire Act void and of no effect. In doing so, he stated that there was no purpose in going through the Act section by section.

[45] In addition, the application judge deferred the issue of any further remedies to a later hearing.

## E. ISSUES ON APPEAL

[46] Ontario raises the following issues on appeal:

a. The application judge erred in treating s. 2(d) as a substantive right to a specific outcome rather than as a right to a fair collective bargaining process;
b. The application judge erred in failing to follow existing case law dealing with the constitutional validity of wage restraint legislation;
c. The application judge erred in his s. 1 *Charter* analysis; and
d. Even if the Act is invalid as it relates to represented employees in the broader public sector, the application judge erred in declaring the Act void and of no effect vis-à-vis employees who are not represented by a bargaining organization and who do not bargain collectively.

## F. THE STANDARD OF REVIEW

[47] The constitutional validity of the Act is a question of law to be decided on a standard of correctness. However, this court owes deference to the application judge's findings of fact, including findings based on social and legislative evidence. As the Supreme Court held in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 49, a judge's factual findings, including findings on social and legislative facts, are entitled to deference on appeal:

> When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is

> charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case. [Emphasis added.]

See also *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 109.

[48] This is especially important in a case such as this one where, as discussed in the next section of these reasons, the Supreme Court has expressly stated that the issue of whether legislation substantially interferes with s. 2(d) rights, and specifically collective bargaining rights, is a "contextual and fact-specific" inquiry: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 92.

[49] As held by Donald J.A., in dissent, in *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184, 71 B.C.L.R. (5th) 223, at para. 326, rev'd 2016 SCC 49, [2016] 2 S.C.R. 407 (substantially for the dissenting reasons of Donald J.A.), factual findings underlying a trial judge's conclusion that a government substantially interfered with freedom of association are subject to the palpable and overriding error standard.

[50] Similarly, in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2021 MBCA 85, 463 D.L.R. (4th) 509, at para. 46, leave to appeal refused, [2021] S.C.C.A. No. 437, the Court of Appeal of Manitoba described the applicable standard of review in deciding on whether wage restraint legislation contravenes s. 2(d) of the *Charter* as follows:

> Whether legislation is constitutional is a quintessential question of law. Therefore, the applicable standard of review is correctness. However, to the extent that the section 2(d) inquiry is premised on an assessment of relevant facts, any relevant factual finding will be owed deference and will be reviewed on the palpable and overriding error standard (see *Consolidated Fastfrate* at para 26). The appellate court will then take a last look at the accepted relevant factual foundation and decide the ultimate issue (whether the legislation is constitutional) on the correctness standard.

[51] Accordingly, the questions of whether the Act violates s. 2(d) of the *Charter* and, if so, whether it is saved by s. 1 of the *Charter* are to be reviewed on a standard of correctness. This inquiry includes consideration of what factors are relevant to deciding these issues. However, the trial judge's findings of fact relevant to this assessment are to be reviewed on the palpable and overriding error standard of review.

## G. DOES THE ACT INFRINGE S. 2(D) OF THE *CHARTER*?

[52] In this section, I start with a review of the general principles that apply to s. 2(d) of the *Charter*, followed by a review of other appellate decisions dealing

with wage restraint legislation. I then address whether the Act violates s. 2(d) of the *Charter*.

### (1) General principles regarding protection of collective bargaining under s. 2(d) of the *Charter*

[53] Section 2(d) of the *Charter* provides that everyone has the freedom of association, which is a fundamental freedom.

[54] In a series of decisions, starting in 2007 with *Health Services*, the Supreme Court has recognized that, in the labour context, s. 2(d) of the *Charter* protects the right to collective bargaining.

[55] In *Health Services*, the Supreme Court established that the s. 2(d) right to freedom of association protects collective bargaining, which the court described as "the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining": at para. 87. The court stated that recognizing the right to engage in collective bargaining is consistent with *Charter* values because it affirms the "values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*": *Health Services*, at para. 86.

[56] The Supreme Court reaffirmed that s. 2(d) of the *Charter* protects the right to engage in collective bargaining in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and again in a 2015 trilogy of decisions: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R.

3, *Meredith. v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125, and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245. In *Mounted Police*, at para. 5, the court emphasized that the purpose of s. 2(d) is to protect "a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests." In *Saskatchewan Federation*, the Supreme Court also confirmed that the right to strike forms part of collective bargaining rights protected by s. 2(d): at para. 75.

[57] In these cases, the Supreme Court has consistently stated that s. 2(d) does not guarantee specific outcomes, but rather protects the right to a collective bargaining process: *Health Services*, at paras. 89, 91; *Fraser*, at para. 45; and *Mounted Police*, at para. 67. Similarly, the court has stated that s. 2(d) does not protect a specific model of labour relations or bargaining method, but rather the right is to a general process of collective bargaining: *Health Services*, at para. 91; *Fraser*, at para. 42; and *Mounted Police*, at para. 93.

[58] Further, the Supreme Court has emphasized that s. 2(d) "does not protect all aspects of the associational activity of collective bargaining"; rather, it only protects against "substantial interference" with associational activity: *Health Services*, at para. 90. As described in *Health Services*, to constitute substantial interference with the right to collective bargaining, "the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue

the common goals of negotiating workplace conditions and terms of employment with their employer": at para. 92. Similarly, in *Mounted Police*, the court stated that a "process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is … inconsistent with the guarantee of freedom of association enshrined in s. 2(*d*)": at para. 71.

[59] In *Health Services*, at para. 93, the court established that there are two parts to the "substantial interference" inquiry:

a. First, the court must assess "the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert."
b. Second, the court must assess "the manner in which the measure impacts on the collective right to good faith negotiation and consultation."

[60] In *Health Services*, the court further emphasized that "[b]oth inquiries are necessary": at para. 94. There will be no violation if the matter impacted does not substantially affect the process of collective bargaining. Similarly, even if the matter at issue substantially touches on collective bargaining, it will not violate s. 2(d) of the *Charter* if it preserves a "process of consultation and good faith negotiation": at para. 94.

[61] In *Fraser* and the 2015 trilogy, the Supreme Court did not specifically refer to or apply the two-part substantial interference inquiry. However, in *Meredith*, at

para. 24, the court explicitly stated that the test to determine whether state action "substantially impair[s] … employees' collective pursuit of workplace goals" is "[t]he test … set out in *Health Services*." In addition, in *Gordon v. Canada (Attorney General)*, 2016 ONCA 625, 404 D.L.R. (4th) 590, at para. 47, leave to appeal refused, [2016] S.C.C.A. No. 444 (*Professional Institute of the Public Service of Canada*), and [2016] S.C.C.A. No. 445 (*Gordon*), upon reviewing the Supreme Court decisions that followed *Health Services*, this court confirmed that the two-part inquiry still applies.

[62] Before moving on to a review of the wage restraint legislation cases, it is helpful to describe each of the two inquiries further.

[63] With respect to the first part of the inquiry, namely the importance of the matter to the process of collective bargaining, "the essential question is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of unions to pursue common goals collectively…. The more important the matter, the more likely that there is substantial interference": *Health Services*, at para. 95.

[64] In *Gordon*, at para. 53, this court explained that "while protection is not afforded to the 'fruits' of bargaining, but only to the process by which they are to be negotiated, employer actions unilaterally undermining the ability of unions to bargain about significant matters are constitutionally suspect." The court further

explained, at paras. 53 and 54, that legislation affecting certain matters and employer actions which restrict those matters are by their nature “constitutionally suspect”. The matters of concern include salary, hours of work, job security and seniority, equitable and humane working conditions, and health and safety protections: *Gordon*, at para. 53. The employer actions that are “constitutionally suspect” for the purpose of s. 2(d) of the *Charter* include taking important matters off the table or restricting the matters that may be discussed, imposing “arbitrary outcomes”, unilaterally nullifying negotiated terms, removing the right to strike, and imposing limits on future bargaining: *Gordon*, at para. 54.

[65] With respect to the second part of the inquiry, as described above, the court must inquire into the impact of the measure on the collective right to good faith negotiation and consultation. In assessing the impact of a measure, the Supreme Court has emphasized that the duty to bargain in good faith requires the parties to engage in meaningful dialogue and to be willing to explain their positions: *Health Services*, at para. 101. However, the duty to bargain in good faith does not impose an obligation to reach an agreement or to accept any contractual provision: *Health Services*, at para. 103. Similarly, it does not require the parties to bargain indefinitely or preclude the parties from engaging in hard bargaining: *Health Services*, at paras. 102-3.

[66] Further, the circumstances under which an impugned law was adopted can be relevant to assessing the impact of the law on the process of good faith

negotiations. For example, a law that is adopted after a period of meaningful negotiation and consultation is less likely to be seen as interfering with the process of collective bargaining: see *Health Services*, at para. 92; *Association of Justice Counsel v. Canada (Attorney General)*, 2012 ONCA 530, 117 O.R. (3d) 532, at para. 41, leave to appeal refused, [2012] S.C.C.A. No. 430; and *British Columbia Teachers' Federation*, at para. 82, *per* Bauman C.J.B.C. and Harris J.A., and at paras. 287-91, *per* Donald J.A. (dissenting). However, "[s]ituations of exigency and urgency" may be relevant and "[d]ifferent situations may demand different processes and timelines": *Health Services*, at para. 107.



[67] In *Health Services*, at para. 109, the Supreme Court summarized the two-part inquiry by emphasizing that both the matter at issue and the effect on good faith collective bargaining must be substantial. The court also emphasized that this is a contextual and fact-specific inquiry:

> In summary, s. 2(*d*) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(*d*). Conversely, less central matters may be changed more summarily, without violating s. 2(*d*). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(*d*) be breached. [Emphasis added.]

**(2) Previous wage restraint decisions**

[68] The Supreme Court, this court and other appellate courts in Canada have had the opportunity to consider the constitutional validity of other wage restraint legislation: *Meredith*; *Gordon*; *Canada (Procureur général) c. Syndicat canadien de la function publique section 675*, 2016 QCCA 163, leave to appeal refused, [2016] S.C.C.A. No. 117; *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2016 BCCA 156, 84 B.C.L.R. (5th) 341; and *Manitoba Federation*. In addition, the decision in *Reference re Bill 148, An Act Respecting the Sustainability of Public Services*, 2022 NSCA 39, 471 D.L.R. (4th) 547, is also relevant because, while the court declined to decide the issue on a reference, it nevertheless addressed some of the applicable principles in such cases.

[69] In all the decisions referred to above where the courts considered the constitutional validity of wage restraint legislation, the courts found that the legislation did not substantially interfere with the right to collective bargaining protected by s. 2(d) of the *Charter*. Ontario relies on these decisions in support of its position that the Act at issue in this case does not contravene s. 2(d). Ontario argues that the legislation in those cases is similar or more restrictive than the Act and that the application judge erred in failing to follow those decisions.

[70] I disagree with Ontario's proposed approach to the other wage restraint legislation decisions. The issue of whether the Act infringes the respondents' s. 2(d) rights does not simply require a review and comparison of the provisions in the Act and the other wage restraint legislation. Rather, in accordance with the direction of the Supreme Court in *Health Services* and the 2015 trilogy, this determination requires a contextual and factual analysis of the circumstances and context in which the Act was passed and its impact on collective bargaining. While the decisions at issue found that other wage restraint legislation did not infringe s. 2(d), none of these decisions suggests that wage restraint legislation is compliant with s. 2(d) *per se* if it has specified characteristics. Rather, the courts look at the circumstances under which the legislation was passed, the content of the legislation and the impact of the legislation on collective bargaining in the particular circumstances of the case to determine whether the legislation constitutes a substantial interference.

[71] Therefore, in order to assess the relevance of the prior appellate wage restraint legislation decisions, it is helpful to review those decisions in some detail to distill the relevant factors that led to each respective court's determination that the legislation in the corresponding case did not infringe the s. 2(d) rights of the represented employees in those cases. Below, I start with a review of the four decisions that dealt with challenges to the federal *Expenditure Restraint Act*, S.C.

2009, c. 2, s. 393 ("*ERA*"), followed by review of the *Manitoba Federation* decision, which dealt with wage restraint legislation enacted by the Manitoba government.



**(a) Decisions challenging the *Expenditure Restraint Act***

[72] The decisions in *Meredith*, *Gordon*, *Dockyard* and *Procureur général* all dealt with challenges to the *ERA*. The legislation was enacted in response to the 2008 worldwide financial crisis. The *ERA* applied to over 400,000 unionized and non-unionized employees who worked for the federal Crown and approximately 48,000 employees who worked for federal Crown corporations. The *ERA* limited wage increases by specified percentages over a five-year period as follows: a) 2.5% for the 2006-2007 fiscal year, b) 2.3% for the 2007-2008 fiscal year, c) 1.5% for the 2008-2009 fiscal year, d) 1.5% for the 2009-2010 fiscal year, and e) 1.5% for the 2010-2011 fiscal year. The legislation was enacted after multiple collective agreements had already been negotiated. In some cases, where collective agreements that were subject to the *ERA* had already been negotiated, the legislation had the effect of rolling back negotiated wage increases.

[73] In *Meredith*, the parties challenging the *ERA* were members of the Royal Canadian Mounted Police ("RCMP"). In *Mounted Police*, which was decided at the same time as *Meredith*, the Supreme Court had found that the existing labour relations regime imposed by legislation for RCMP officers infringed s. 2(d) of the *Charter*. It was in that context that the Supreme Court reviewed the general

principles from *Health Services* and *Fraser* applicable to determining whether legislation substantially interferes with collective bargaining rights. In *Meredith*, despite having found that the labour relations regime for RCMP officers violated s. 2(d) of *Charter*, the court nevertheless considered the constitutional validity of the *ERA* as it applied to RCMP officers.



[74] The majority of the court held that the *ERA* did not violate the affected employees' s. 2(d) rights. In reaching this conclusion, the court did not engage in a detailed analysis of the circumstances under which wage restraint legislation may or may not constitute a violation of s. 2(d). Rather, in its reasoning at paras. 28-29, the court focused on the circumstances of the case, including that the relevant wage increases were similar to wage increases achieved by other employees who engaged in the collective bargaining process in the public sector and that the affected RCMP employees were nevertheless able to negotiate other improvements to their compensation:

> [T]he level at which *ERA* capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes. The process followed to impose the wage restraints thus did not disregard the substance of the former procedure. And the *ERA* did not preclude consultation on other compensation-related issues, either in the past or the future.
>
> Furthermore, the *ERA* did not prevent the consultation process from moving forward. Most significantly in the

> case of RCMP members, s. 62 permitted the negotiation of additional allowances as part of "transformation[al] initiatives" within the RCMP. The record indicates that RCMP members were able to obtain significant benefits as a result of subsequent proposals brought forward through the existing Pay Council process. Service pay was increased from 1% to 1.5% for every five years of service – representing a 50% increase – and extended for the first time to certain civilian members. A new and more generous policy for stand-by pay was also approved. Actual outcomes are not determinative of a s. 2(*d*) analysis, but, in this case, the evidence of outcomes supports a conclusion that the enactment of the *ERA* had a minor impact on the appellants' associational activity. [Emphasis added.]

[75] In *Gordon*, two unions representing employees in the federal public service challenged the *ERA* on the basis that it infringed their collective bargaining rights under s. 2(d) of the *Charter*. The evidence on the application was that most of the bargaining units represented by the unions had reached collective bargaining agreements with the federal government before the *ERA* was enacted. Many did not challenge the legislation. Furthermore, the evidence was that, as had been found in *Meredith*, the wage caps in the *ERA*, for the most part, were equivalent or higher than negotiated wage increases.

[76] In the circumstances, this court found that the *ERA* did not breach the union members' s. 2(d) rights. In reaching that conclusion, the court accepted that the first part of the "substantial interference" inquiry was met because "[b]argaining over wages is ordinarily a significant matter in free collective bargaining" and because the evidence in that case showed that wages were an important issue for

most bargaining units: at para. 122. However, the court was not satisfied that the *ERA* amounted to a substantial interference with good faith negotiation and consultation. In reaching this conclusion, the court relied on the evidence that the caps on wage increases in the *ERA* were equivalent or higher than those in most collective agreements reached around that time. The court reasoned, at paras. 127-28, that:

> The *ERA*'s imposition of the wage increase caps therefore was consistent with the results of free collective bargaining that were the most favourable to the unions, having been negotiated by the largest union.
>
> From a process perspective, it is difficult to imagine that continuation of an unfettered bargaining process for the remaining minority of units would have produced significantly different outcomes, given that the settlement with the majority of the public service drove the determination of the wage increase caps.

[77] The court recognized that, as held in *Meredith*, outcomes are not determinative, but they can support a conclusion that the *ERA* had a minor impact on the unions' associational activities: *Meredith*, at para. 29; *Gordon*, at para. 130. The court concluded that "viewing the matter in context, union members were not discouraged from the collective pursuit of common goals as a result of the upper limits placed on wage increases for the restraint period": *Gordon*, at para. 131.

[78] Ultimately, at para. 176, this court concluded that the *ERA* did not infringe the appellant unions' s. 2(d) rights on the following basis:

> The Government engaged in permissible hard bargaining during a period of economic crisis and government austerity. And by enacting the *ERA*, the Government capped wage increases for a limited period. The *ERA* did not completely prohibit any wage increases, the cap was in place for a limited period of time, and the limit imposed was in line with the wage increases obtained through free collective bargaining. Moreover, the appellant unions were able to make progress on matters of interest to some of the bargaining units they represented. They were still able to participate in a process of consultation and good faith negotiations. As such, neither the *ERA* nor the Government's conduct before or after the enactment of *ERA* limited the appellants' s. 2(d) rights.

[79] In *Procureur général*, the Court of Appeal of Québec dealt with a challenge to the *ERA* brought on behalf of two groups of employees of the Société Radio-Canada in the province of Québec and Moncton. Prior to the passage of the *ERA*, one of the bargaining units had negotiated wage increases of 3.5% as of October 1, 2007, followed by four annual increases beginning in December 2007 of 3%, 2.5%, 2.5% and 2.5%. The other bargaining unit had negotiated annual wage increases of 2.6% in 2007, 2.5% in 2008 and 2.5% in 2009. In that case, the evidence was that, at the time the *ERA* was tabled, the unions representing the affected employees did not realize that the wage caps in the *ERA* would apply to their collective agreements.

[80] In that context, the Court of Appeal of Québec, at para. 43, held that there was no question that the issue of wage increases was a matter of central importance to workers involved in collective bargaining: "[t]hese issues are central

to the exercise of this freedom in a workplace and are ordinarily one of the crucial points of discussion during collective bargaining" [translation].

[81] Despite finding that there was interference, the court found on the second branch of the *Health Services* analysis that the *ERA* did not substantially interfere with the collective bargaining process because it preserved a process of consultation and good faith negotiation: at para. 59. In reaching this conclusion, the court relied on the following contextual factors and characteristics of the *ERA*:

a. The *ERA* did not freeze or reduce salaries, but rather restricted the scope for wage increases for what the court described as a non-negligible period of time: at para. 48.
b. As the Supreme Court found in *Meredith*, and as subsequently found in *Gordon*, the wage increase caps in the *ERA* were comparable to wage increases that had been freely negotiated within the federal public sector: at paras. 50-51.
c. Once the wage restraint measures concluded, the parties would be free to negotiate agreements that mitigated the lost increases over time: at para. 52.
d. Section 8 of the *ERA* permitted the reopening of already negotiated collective agreements to enhance non-monetary aspects of the collective agreements, such as hours or work, vacation, leaves, employment security, staffing assignments and transfers. This provision was consistent with

*Meredith* in allowing for consultation on other compensation-related issues: at paras. 53-56.

[82] The court concluded, at para. 100, that the *ERA* did not substantially interfere with freedom of association because the legislation did not deprive the employees and associations representing them of the possibility of having meaningful collective negotiations on workplace matters, the right to actual collective bargaining processes, or the ability to engage in collective bargaining.

[83] Finally, in *Dockyard*, before the introduction of the *ERA*, a bargaining agent for the members of its constituent trade unions had obtained a 5.2% wage increase through arbitration as of October 2006, as well as wage increases within the limits of the *ERA* from 2006 to 2009. The effect of the *ERA* was to nullify the 5.2% wage increase. The court found that the rollback did not substantially interfere with the process of collective bargaining for a number of reasons, including the lengthy negotiations and the warning, before pressing ahead with the arbitration, that there may be a rollback.

[84] There are four common threads between the decisions dealing with the constitutional validity of the *ERA*: 1) the measures were imposed in the context of the 2008 global economic crisis; 2) multiple bargaining units had reached agreements about wage increases similar to those that were legislated before the *ERA* was enacted; 3) the legislation was imposed after a relatively long period of

negotiation; and, 4) in some cases, following the enactment of the *ERA*, bargaining units were nevertheless able to reopen their collective agreements to negotiate for wage increases (*Meredith*) or other matters of interest, including matters related to compensation (*Procureur général*).

[85] The Supreme Court denied leave to appeal on *Gordon*, *Procureur général* and *Dockyard*.

**(b) Manitoba wage restraint legislation decision**

[86] The only other appellate decision in Canada raised by the parties deciding the constitutional validity of wage restraint legislation is the decision of the Court of Appeal of Manitoba in *Manitoba Federation*. Ontario relies heavily on this decision as the basis for its position that the application judge erred in finding that the Act infringes the respondents' s. 2(d) rights. Specifically, Ontario argues that the Act and the legislation at issue in *Manitoba Federation* are very similar and, in fact, that the Manitoba legislation imposed more draconian caps on wage increases in comparison to the Act.

[87] *Manitoba Federation* involved a challenge to *The Public Services Sustainability Act*, S.M. 2017, c. 24 (the "*PSSA*"). The *PSSA* was passed in 2017. It imposed wage caps of 0%, 0%, 0.75% and 1% over a four-year period. The *PSSA* applied to represented and non-represented employees in Manitoba's public service, which covered nearly 20% of the province's workforce.

[88] The trial judge had found that the *PSSA* infringed the s. 2(d) rights of the represented employees who were subject to the legislation, and that it was not saved by s. 1 of the *Charter*.

[89] The Court of Appeal of Manitoba allowed the appeal on this issue, finding that the *PSSA* did not infringe the s. 2(d) rights of represented employees affected by the statute. The court found that the trial judge made several errors in her analysis.

[90] First, while the court noted that the government of Manitoba had not engaged in any pre-legislation consultation before enacting the *PSSA*, it was an error for the trial judge to find that this consideration was relevant because the government had no obligation to consult with the unions before passing legislation: at para. 81. (I will have more to say below about how the court dealt with this issue.)

[91] Second, the court found that the trial judge had improperly compared private sector wages to public sector wages in determining that the results achieved through collective bargaining were higher than the wage increases in the *PSSA*: at paras. 84-85. The court held that, when comparing the *PSSA* wage increase caps to other public sector negotiated collective agreements to which the *PSSA* did not apply, the wage increases were comparable to those in the *PSSA*: at para. 86.

[92] Having found that the trial judge erred in her s. 2(d) analysis, the court conducted its own fresh analysis. In doing so, the court considered a number of factors. First, the court found that the relevant provisions of the *PSSA* are functionally equivalent to those in the *ERA*, which were found to be constitutional. Second, the court found that, despite the passage of the *PSSA*, bargaining units were able to negotiate over various workplace conditions other than wages. Third, the court noted that, unlike the *ERA*, the *PSSA* included a clause permitting exemption from the statute. In making this finding, the court pointed out that s. 7(4) of the *PSSA* gave the Manitoba government the ability to grant an exemption from the *PSSA*, and that the unions could strike for the purpose of pressuring the government into granting an exemption: at para. 123.

[93] The court accepted, as conceded by Manitoba, that "taking wages off the bargaining table" met the first inquiry in the test established by *Health Services*: at para. 128. However, the court found that the second branch was not met because, based on the factors referred to above, the *PSSA* preserves a process of consultation and good faith negotiation. In reaching this conclusion, at para. 128, the court stated that "the case law establishes that that type of legislative interference does not amount to 'substantial interference' when it is broad-based and for a limited period of time."

[94] As with the decisions that considered the *ERA*, the Supreme Court denied leave to appeal from the *Manitoba Federation* decision.

### (c) General principles that arise from prior wage restraint legislation decisions

[95] As mentioned above, one of the arguments made by Ontario is that the application judge erred in failing to follow previous appellate wage restraint legislation decisions. In making this argument, Ontario points to the similarities between the legislation in these other cases and the Act, especially the Manitoba legislation.

[96] However, this argument fails to have regard to the fact-specific and contextual analysis mandated by the Supreme Court in deciding whether legislation substantially interferes with the right to collective bargaining.

[97] One of the challenges in understanding the wage restraint cases is that there is an inherent tension between the protection of a right to a *process* of collective bargaining but not of the right to a specific *outcome*. By imposing specific limitations on compensation increases, wage restraint legislation places limitations on the potential outcomes of collective bargaining, which on its own is not a violation of s. 2(d). However, imposing limits on potential outcomes, such as wages, does interfere with good faith negotiation and consultation because it limits the potential areas and scope for negotiation and consultation. As held by the Court of Appeal of Québec in *Procureur général*, at para. 97, the question becomes

one of degree and intensity, and the degree to which legislation imposing a wage cap interferes with the ability of organizations to bargain collectively.

[98] Based on my review of the case law above, there is no formula for assessing whether the degree of interference reaches the level of substantial interference. Rather, the courts have looked at a set of factors to assess the degree of interference, and whether the measures imposed nevertheless leave room for a meaningful process of good faith negotiation and consultation.

[99] These indicia include consideration of the circumstances and process leading to the passage of the legislation. Significant collective bargaining prior to the passage of the legislation or meaningful consultation on the legislation diminish the finding of interference, because such processes mean that there was negotiation or consultation before the imposition of the wage restraint measure, and that not much more could have been gained through further negotiation or consultation. On this issue, with respect, I do not agree with the Court of Appeal of Manitoba's finding that it was an error for the trial judge to consider the fact that the Manitoba government did not consult with the unions before passing the *PSSA*. Negotiation of collective agreements and consultation on legislation are different. However, as acknowledged in the decisions dealing with the constitutionality of the *ERA*, they can both play a role in determining whether legislation limiting the areas of negotiation violate s. 2(d). Good faith collective bargaining prior to the enactment of legislation can form the basis for a finding that there has been no substantial

interference with the process of collective bargaining. Similarly, while consultation on legislation is not required, meaningful consultation can also serve as evidence that there has not been significant interference with the collective bargaining process.

[100] Another indication that wage cap legislation does not substantially interfere with the process of good faith negotiation and consultation is where the legislation leaves room for meaningful negotiation and consultation on issues other than wages. This is because, in such circumstances, the legislation still allows workers to come together in an effort to achieve workplace goals.

[101] Similarly, where the wage restraint legislation allows for a process of exemption, over which organizations can negotiate or even strike, there is an attenuated interference with the ability to negotiate and bargain in good faith.

[102] Finally, where the terms of the wage restraint legislation replicate the terms of collective bargaining agreements freely negotiated in the public sector, this serves as an indication that there has not been substantial interference because it suggests that a free process of collective bargaining would not have led to a better outcome if the unions had participated or continued to participate in negotiations.

[103] Before turning to an analysis of the Act and the circumstances under which it was enacted, I pause to comment on two additional factors the Court of Appeal of Manitoba suggested are also relevant.

[104] First, as mentioned above, the court stated, at para. 128 and elsewhere, that one relevant consideration is whether the legislation is “broad[ ]based”, applying to represented and non-represented employees. With respect, this cannot be a relevant consideration. The s. 2(d) analysis requires consideration of whether legislation substantially interferes with the process of collective bargaining. The fact that legislation may also apply to non-represented employees does not assist in this inquiry. The issue is not whether the legislation targets represented employees, but rather the impact the legislation has on represented employees’ collective bargaining rights.

[105] Second, in *Manitoba Federation*, the Court of Appeal of Manitoba also suggested that other wage restraint legislation cases had established that time-limited wage restraint legislation does not substantially interfere with the process of collective bargaining. Again, I do not agree with this characterization of the other decisions. The focus of the *ERA* decisions was on whether, despite the legislated wage cap, a process remained for the unionized employees to come together and engage in good faith negotiation and consultation over working conditions. The fact that a measure is not permanent may be relevant to assessing whether it constitutes a substantial interference. However, it is still appropriate to measure the degree of interference within the relevant collective bargaining period. It is hard to imagine that legislation that halted all collective bargaining, even for a period of one year, would sustain s. 2(d) scrutiny. In other words, time limits may be relevant

but they should not be overemphasized when looking at the impact of the legislation on collective bargaining in the context and circumstances of a particular case. In this respect, I agree with the comment made by the Nova Scotia Court of Appeal in *Reference re Bill 148*, at para. 49:

> In my view, *Manitoba Federation* does not add any new principles to the jurisprudence with respect to s. 2(d) of the *Charter*. The Attorney General relies heavily on this decision because of the similarities between the legislation under consideration and the *PSSA*. He argues it stands for the proposition time limited wage restraint legislation is always constitutional. If the suggestion is this conclusion can be reached without the need to consider the surrounding context, this runs contrary to the clear advice of the Supreme Court of Canada in *Health Services, Meredith* and *British Columbia Teachers' Federation*. I would not adopt such an interpretation of *Manitoba Federation*. [Emphasis added.]

[106] Ultimately, while I take issue with the Court of Appeal of Manitoba's treatment of pre-legislation consultation, the application of legislation to represented and non-represented employees and the time-limited nature of the legislation, I note that this does not detract from the fact that the *PSSA* has several of the characteristics I referred to above as indicia of constitutionality. Notably, the court found that the *PSSA* left room to negotiate matters of importance, including an exemption clause that maintained a right to strike over wages, and it replicated wage increases in other public sector collective agreements.

[107] As reviewed below, in contrast with the *ERA* and *PSSA* decisions, the circumstances leading up to the passage of the Act and the terms of the Act,

including a comparison of those terms to other public sector negotiated agreements, all support a finding that the Act substantially interfered with the ability of the respondents to enter into good faith negotiation and consultation with their employers. I now turn to a review of these indicia as they apply to the circumstances leading up to the passage of the Act and the provisions of the Act itself.



**(3) Application of s. 2(d) jurisprudence to this case**

[108] As set out above, the Supreme Court has established a two-part process for determining if a law substantially interferes with the right to collective bargaining. First, the court must assess the importance of the matter to the process of collective bargaining. Second, the court looks at the manner and extent to which the measure impacts on the collective right to good faith bargaining and consultation.

[109] In this case, as uncontested by Ontario, and consistent with the prior wage restraint legislation decisions, there is no doubt that wages and compensation are matters of central importance to collective bargaining. Besides the fact that this has been recognized as a self-evident proposition in other cases, the respondents all put forward evidence supporting a finding that wages and compensation were central to their collective bargaining goals and interests.

[110] Therefore, the key issue in this case, as in the other wage restraint legislation decisions, is the second part of the *Health Services* analysis, namely whether the Act preserves a meaningful "process of consultation and good faith negotiation": *Health Services*, at para. 94.

[111] Before turning to my analysis on this issue, I want to deal briefly with the application judge's s. 2(d) analysis. As discussed above in the section addressing the standard of review, this court does not owe deference to the application judge's finding that the Act violates s. 2(d). This includes the ten factors he considered as part of his determination that the Act did not preserve a process of consultation and good faith negotiation that are relevant to the inquiry.

[112] Based on my review of the case law above and the indicia of potential substantial interference they identify, the application judge may have considered some factors that were not necessary or germane to the inquiry. For example, I am not persuaded that the application judge's reliance on evidence from ONA that some of its members expressed a lack of confidence in their association rises to the level of supporting a finding that the Act substantially eroded a process of good faith negotiation and consultation; there will likely always be some union members who are dissatisfied with their association's inability to influence government policy or with the terms of a negotiated collective agreement.

[113] However, given the standard of review, I do no need to consider each of the ten factors the application judge relied on in any detail. For this exercise, the primary relevance of those factors is that they include some findings of fact that are relevant to the analysis below. As indicated above, this court owes deference to those findings of fact.

[114] I now turn to a review of the indicia of interference identified above as they apply in this case.

**(a) The government did not engage in a significant process of collective bargaining or consultation before passing the Act**

[115] As reviewed above, when wage restraint legislation comes after a significant period of collective bargaining or after meaningful consultation with collective bargaining organizations over the terms of the legislation, the impact of the legislation on collective bargaining is attenuated. In this case, the evidence does not support a finding of significant collective bargaining or meaningful consultation over the Act.

**(i) The status of collective bargaining at the time of Bill 124's introduction**

[116] With respect to collective bargaining prior to the passage of the Act, the Act applies to over 2,500 bargaining units, so it is not possible to assess the state of collective bargaining with each of those bargaining units at the time Bill 124 was

introduced. However, at least two factors make clear that, unlike the *ERA*, the Act was not introduced after a period of significant collective bargaining with the respondents. In other words, in this case, unlike in *Gordon*, the evidence does not support a finding that little more could be achieved with further collective bargaining: see *Gordon*, at paras. 100-1, 128.

[117] First, as reviewed above, the 1% cap on wage and compensation increases was to come into effect as collective agreements came to an end starting on June 5, 2019. This means that, in many cases, if not most cases, no collective bargaining would have started before the Act was enacted.

[118] Second, there is evidence that the Act was introduced in anticipation of the beginning of collective bargaining in the education sector. As the application judge observed, Jay Porter, the Director of the Broader Public Sector Labour Relations Initiatives Branch at the Treasury Board Secretariat and Ontario's chief affiant in this proceeding, conceded that the commencement of education sector bargaining was a key consideration with respect to the timing of the Act. This consideration is supported by the course of events leading up to the introduction of Bill 124. With collective bargaining set to take place in 2019 for many working in the education sector, the government announced it was launching a consultation process on compensation growth with public sector bargaining agents and employers in April 2019. Many of the bargaining agents representing teachers and other education workers served notices to bargain in the weeks before Bill 124's

introduction and passage. For example, OECTA served its notice to bargain on May 21, 2019, just 15 days before the government introduced Bill 124. Similarly, OSSTF served its notice to bargain on April 29, 2019, the earliest possible date under the legislation governing collective bargaining in the education sector. Notably, the president of OSSTF testified before a legislative committee that he learned of Bill 124's introduction on June 5, 2019, while sitting at the bargaining table.



[119] Again, the government was not precluded from introducing Bill 124 before the beginning of collective bargaining in the education sector and other sectors. However, this timing makes clear that it was not introduced after a period of meaningful bargaining and negotiation, which could have attenuated the impact of the Act on the respondents' collective bargaining rights.

**(ii) Consultation on Bill 124**

[120] Similarly, there is no requirement for governments to consult unions and their members before passing wage restraint legislation or any other legislation that may affect work conditions. Consultation on legislation is not the same as collective bargaining. However, where there is meaningful consultation on legislation, this can reduce the impact of the unilateral imposition of legislation on the collective bargaining process. In this case, as found by the application judge,

there was no meaningful consultation with the respondents before the passage of the Act.

[121] As identified by the application judge, the government engaged in consultations over a four-week period beginning in April 2019 before introducing Bill 124, but this did not amount to meaningful consultation with the respondents. The application judge noted in particular the following:

a. The government circulated no consultation paper to the respondents before the consultations, but instead provided them with a series of questions about managing compensation costs and legislated compensation caps. The questions did not set out any proposed caps, even though the President of the Treasury Board had directed staff to explore caps of 1% to 2% as early as February 2019. Internal government timelines and documents did not provide for further consultations following receipt of answers to the questions, but instead contemplated the introduction of legislation, if necessary, soon after the end of the scheduled consultations.
b. The consultations were led by an external lawyer hired by the government, not government officials from the Treasury Board Secretariat or any other relevant ministry with whom the unions could bargain. During the consultations, counsel read from a prepared script and provided non-responsive answers to questions. For example, when asked about the sort of wage caps in the government's contemplation, counsel did not provide

information about the range of proposed caps but instead directed unions to the 2019 budget and a series of broad-based financial figures.

c. Mr. Porter, Ontario's chief affiant in the proceedings, conceded in cross-examination that the consultation process was not intended to replicate or replace collective bargaining. This was evident in the consultations that occurred. For example, the Society of United Professionals was invited along with four other bargaining agents to a 60-minute consultation, allowing each of the five bargaining agents 12 minutes of consultation. During that consultation, counsel could not explain how compensation at OPG, IESO and OEB (which are self-funded) contributed to the province's debt.

d. The consultations took a very different route from past consultations on labour relations issues. For example, the government previously engaged in a four-month consultation with OSSTF on hiring practices. As part of those consultations, it provided a detailed consultation paper setting out the issues and sub-issues the government was considering, the status of those issues and the proposed changes. Here, in contrast, the consultations were not preceded by any consultation paper and the duration of the consultations was shorter, even though they concerned a much broader sector of the public sector.

[122] Shortly after these limited consultations occurred, Bill 124 was introduced on June 5, 2019. On June 6, 2019, government officials sent a mass email to

stakeholders announcing the legislation and inviting them “to provide feedback on this proposed approach” to a generic email address. As the application judge observed, however, the email was not an offer to meet and discuss issues with any of the respondents.

[123] Again, there is no requirement that the government consult with the respondents over its intended legislation. However, a process of meaningful consultation could have significantly attenuated the impact of the Act on collective bargaining given that it could have served as a substitute for negotiation. Here, there was no such process.

**(b) The Act removes the ability to negotiate over significant matters**

[124] One of the issues considered by the courts in the other wage cap legislation cases was that, despite the limit imposed on wage increases, the unions were still able to negotiate over other substantial matters. For example, in *Meredith*, a provision in the legislation that applied to compensation for RCMP officers permitted for negotiation of additional allowances. The court found that this resulted in “significant” benefits following the passage of the *ERA*: at para. 29. Similarly, in *Procureur général*, the Court of Appeal of Québec found that the bargaining units at issue could still bargain over matters such as hours or work, vacation, leaves, assignments and transfers: at para. 55.

[125] In this case, the broad definition of “compensation” in the Act significantly limits the areas that remain available for negotiation. As reviewed above, the cap does not just apply to salaries; it also applies to any kind of benefit or compensation that can be monetized, such as sick days, vacation days and other benefits. The *ERA* and Manitoba’s *PSSA* did not impose such broad limitations on the areas affected by the caps in those statutes.



[126] The impact of the broad limitations in this case is twofold. First, it significantly limits the scope for negotiations over all areas of compensation. Second, it impedes the respondent organizations from using wages and other compensation as a bargaining chip to achieve gains in other areas. The application judge made findings of fact that support both concerns.

[127] On the first point, the application judge noted the significant limits on areas of negotiation and gave the following example:

> Moreover, the ability to negotiate “nonmonetary” issues is somewhat overstated given that even nonmonetary issues may be quantified for purposes of the Act. By way of example, a union that negotiated an additional vacation day for employees would be told that a one-day benefit amounts to .38% of annual compensation. The additional vacation day would therefore swallow a good part of the 1% pay increase the Act permits.

[128] On the second point, the application judge also provided examples of the impact on collective bargaining in other areas of interest to the respondents:

> A large number of the applicants' affiants have sworn affidavits attesting to the way in which the Act limited collective bargaining. By way of example, the applicant OFL filed 23 affidavits from union members. Ontario cross-examined eight of those but not on their evidence about their collective bargaining experience under the Act.
>
> By way of further example, in 2019 – 2020, the [ONA] had identified two collective bargaining priorities as being the adjustment of full-time and part-time staffing ratios in line with longstanding expert recommendations and changes to language surrounding job security. The representative employer group, the Ontario Hospital Association declined to accommodate those wishes taking the position that with only 1% available, nothing could be negotiated or traded.
>
> The Act also limited Unifor's ability to bargain terms to address long-term staffing, recruitment and retention issues in not-for-profit long-term care homes that were subject to the Act. The government's own 2020 *Long-Term Care Staffing Study* found that "staffing in the long-term care sector is in crisis and needs to be urgently addressed." It identified as "priority areas for action" increasing staffing, improving workload and working conditions for Personal Service Workers (PSWs), increasing wages, improving benefits, and maximizing opportunities for full-time hours. The Act prevents Unifor from bargaining about these issues even as understaffing was exacerbated during the Covid 19 pandemic. [Footnotes omitted.]

[129] Removing wages and compensation as an item from negotiation is not an impediment to good faith negotiation and consultation *per se* if there is room left for meaningful bargaining on other matters. This is because s. 2(d) of the *Charter* does not guarantee a specific outcome, but only a right to a meaningful process. However, in this case, the scope of the items removed from negotiations and the

impact of removing those items on the ability to bargain over other items did evidently interfere with the respondents' ability to participate in good faith negotiation and consultation.

**(c) The Act does not provide a meaningful process for exemption**

[130] One of the other considerations in some of the other wage restraint legislation is the availability of a process for seeking exemptions from the wage increase cap. For example, as mentioned above, in *Meredith*, at paras. 29 and 42, the Supreme Court relied on the RCMP members' ability to seek compensation above the caps imposed by the *ERA* based on a statutory provision that allowed them to do so. In *Manitoba Federation*, at para. 123, the Court of Appeal of Manitoba pointed to a provision in its legislation that allowed the unions in years three and four of the wage restraint timeframe to negotiate savings and increase employee compensation. In addition, the *PSSA* gave the Treasury Board the ability to exempt "any person or class of persons" from the statute's application: *PSSA*, s. 7(4). Further, the court reasoned that a union could exercise its right to strike for the purpose of seeking an exemption under that provision.

[131] In this case, Ontario relies on the exemption in s. 27 of the Act in support of its position that the Act does not substantially interfere with the process of collective bargaining. In taking this position, Ontario suggests that the respondents could strike for the purpose of seeking an exemption.

[132] I do not accept this argument.

[133] Unlike in *Manitoba Federation*, in this case there is significant evidence that supports a finding that the possibility of an exemption is illusory rather than a meaningful avenue of negotiation. While s. 27 provides for exemptions, the Minister has only granted one exemption despite multiple requests. Notably, the majority of such requests have gone unanswered. At the time of the hearing before the application judge, he made the following findings on the use of the exemption:

> There has been one exemption granted under the Act. The evidence does not disclose the details of that exemption aside from a one-page letter granting it. All other exemptions have been rejected even when they were joint submissions from employer and union and even when the employer required the exemption to discourage staff from leaving for better paying positions in the private sector.
>
> The exemption process has also entailed lengthy delays. Unifor notes that it has filed a request for an exemption that has remained unanswered after two years.

[134] Further, there is no evidence of a process or any criteria used by the Minister to consider such requests.

[135] Therefore, while in theory s. 27 suggests that the respondents may have an avenue for seeking an exemption from the application of the Act, there is in fact no evidence that this is a meaningful channel for negotiation or collective bargaining.

[136] In so far as Ontario suggests that the respondents could engage in a strike to obtain an exemption, this position is not supported by the reality of how lawful

strikes take place in Ontario. First, for many of the employees affected by the Act, their employer is not the provincial government. In those cases, a strike would not place meaningful pressure on the government to grant an exemption. Second, the right to strike in Ontario arises after the parties engage in a series of required steps, and, once those steps are completed, the union and its members can only strike over matters which the employer can compromise. As such, I accept the respondents' position that Ontario is suggesting that they could engage in strikes that are unlawful. Third, many of the bargaining units represented by the respondents are essential workers who do not have a right to strike; instead, they are subject to binding arbitration. In the circumstances, there is simply no basis for Ontario's blunt assertion that the respondents could strike for the purpose of being exempted from the Act.

[137] While the ability to obtain or negotiate an exemption from wage restraint legislation can be relevant to assessing the degree of interference of such legislation with the process of collective bargaining, the hypothetical possibility of an exemption is of no moment in this case. Accordingly, s. 27 of the Act does not attenuate the interference of the Act with the respondents' ability to engage in good faith negotiation and consultation because it does not offer a meaningful avenue for negotiation and consultation.

**(d) The Act does not match other collective agreements negotiated in the public sector in the same time period**

[138] As mentioned above, one of the considerations in all wage restraint legislation decisions is whether the restrictions imposed by the legislation are similar to terms freely negotiated in other public sector agreements during the relevant timeframe.

[139] In *Meredith*, at para. 28, the Supreme Court found that the level at which the *ERA* capped wage increases for members of the RCMP was consistent with the rates reached in collective agreements negotiated in the core and broader public sector. In *Gordon*, at para. 127, this court similarly found that the "*ERA*'s imposition of the wage increase caps was consistent with the results of free collective bargaining that were the most favourable to the unions." As reviewed above, the courts made similar findings in *Procureur général* and *Manitoba Federation*.

[140] As noted in these previous cases, this factor is not determinative, but it can serve as an indication that the wage restraint legislation did not impede the ability to engage in good faith negotiation and consultation. If the outcome achieved by other public sector organizations is consistent with or lower than the wage cap imposed by legislation, this is an indication that the wage cap had a minimal impact on the collective bargaining process because it is unlikely that a better outcome could have been achieved through collective bargaining.

[141] In this case, the application judge made a finding of fact regarding other freely negotiated collective agreements in the public sector before and after the passage of the Act:

> When Bill 124 was introduced, collective bargaining negotiations in the broader public sector resulted in overall salary increases of approximately 1.6%. After the Act was introduced, public[-]sector wages that were not affected by the Act resulted in wage increases well above 1%.
>
> By way of example, the York Regional Police Association, which was excluded from the Act as a municipal police force, negotiated an annual wage increase of 2.12% over a five-year term after its collective agreement expired on December 31, 2019. Other freely negotiated wage settlements fell in a range of 1.37%-2.26% for 2019, 0.93% to 2.21% for 2020, and between 1.5% to 4% for 2021. [Footnote omitted.]

[142] The application judge also rejected the comparators proposed by Ontario on the basis that this small subsection of collective agreements providing for wage increases of 1% or lower represented only 1.05% of public sector collective agreements and were therefore not representative of what was generally available in collective bargaining.

[143] Notably, in this case, as reviewed above, the 1% cap in the Act does not only apply to wages, but also to all forms of compensation that can be quantified in monetary values such as sick days and vacation days. Accordingly, while the application judge found that collective bargaining negotiations in the broader public sector at the time Bill 124 was introduced resulted in overall salary increases of

approximately 1.6%, the 1.6% figure does not account for all forms of compensation increases. Presumably, taking account of the monetary value of other changes in compensation negotiated in comparable collective agreements would lead to a bigger difference between the 1% cap imposed by the Act and results achieved in other negotiated collective agreements.

[144] Again, this factor is not determinative. However, unlike in previous wage restraint legislation decisions, the difference between the 1% cap in the Act and the terms of negotiated agreements does not support a finding that the Act had little impact on the respondents' ability to come together and negotiate with their employers in pursuit of their collective interests.

**(4) Conclusion on s. 2(d) interference**

[145] I agree with the application judge's conclusion that the Act substantially interferes with the respondents' collective bargaining rights. First, it affects a matter of central importance to collective bargaining, namely wages. Second, the circumstances leading up to the passage of Bill 124 and the characteristics of the Act substantially impact the respondents' ability to participate in good faith collective bargaining and consultation. The Act did not come after a significant or meaningful process of collective bargaining. While this could have been attenuated by meaningful consultation over Bill 124 itself, no meaningful consultation took place. Further, the broad definition of compensation significantly limits the areas

of potential negotiation left on the table for collective bargaining. Moreover, the Act does not provide a meaningful avenue for negotiating or seeking potential exemptions from the 1% cap in appropriate circumstances. Finally, the 1% cap on salary and compensation increases does not replicate collective agreements reached in other public sector bargaining. In combination, these factors persuade me that the Act substantially interferes with the respondents' ability to participate in good faith negotiation and consultation with their employers.



## H. IS THE ACT SAVED BY S. 1 OF THE *CHARTER*?

[146] Section 1 of the *Charter* provides that the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[147] Once a law has been found to violate a *Charter* right, the government bears the onus of establishing that the law is a reasonable limit on that right. This must be shown on a balance of probabilities: *Health Services*, at paras. 138-39.

[148] The test in *R. v. Oakes*, [1986] 1 S.C.R. 103, applies to deciding whether a law is saved by s. 1 of the *Charter*. The government must first establish that the impugned law pursues a pressing and substantial objective. Next, the government must establish that the objective of the law is proportional to the means chosen to achieve the objective. This aspect of the test has three components. First, there must be a rational connection between the pressing and substantial objective and

the means chosen to achieve the objective. Second, the law must be minimally impairing. Third, the salutary effects of the law must be proportional to its deleterious effects. Further, "the *Oakes* test must be applied flexibly, having regard to the factual and social context of each case": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 132.

[149] In *Health Services*, at para. 108, the Supreme Court explained that, in the context of a law infringing the right to collective bargaining under s. 2(d) of the *Charter*:

> [Section 1] may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis.

[150] As discussed below, I find that the Act is not saved by s. 1 of the *Charter*. I accept that Ontario has established that the Act has a pressing and substantial objective. However, while I find that the objective is generally rationally connected to the Act, I do not find that the objective is rationally connected in its application to workers in the electricity sector, namely the members of the Society of United Professionals and PWU, or to the members of the Carleton University Academic Staff Association and academic staff at other universities. In addition, I am not persuaded that the Act minimally impairs the respondents' collective bargaining rights or that its salutary effects are proportional to its deleterious effects. I address each of these issues below.

[151] Before doing so, however, I note that, in *Meredith*, the Supreme Court did not conduct a s. 1 analysis. In contrast, in *Gordon* and *Procureur général*, despite the courts' findings that the legislation in those cases did not violate s. 2(d), the courts nevertheless conducted s. 1 analyses, finding in each case that, even if the *ERA* did violate s. 2(d), it would have been saved by s. 1 of the *Charter*. Accordingly, in addressing each of the parts of the s. 1 analysis, I will address and distinguish those cases as appropriate.



**(1) Pressing and substantial objective**

[152] The application judge did not accept that Ontario established a pressing and substantial objective for two primary reasons. First, he did not accept that Ontario put forward a workable definition of a pressing and substantial objective. On that basis, he redefined the objective. Second, he found that Ontario had not established that the province was in a financial crisis such that Ontario's objective was pressing and substantial.

[153] In my view, having regard to the jurisprudence in this area and the evidence, the application judge failed to give sufficient deference to the government's ability to pursue its priorities in financial and budgeting matters. I start with a discussion of the definition of the objective, followed by a discussion of whether Ontario established that the objective is pressing and substantial.

### (a) Definition of objective

[154] At the hearing below, as described by the application judge, Ontario submitted that the objective of the Act was "to moderate the rate of growth of compensation increases for public sector employees so as to manage the Province's finances in a responsible manner and to protect the sustainability of public services." The application judge found that this objective "conflate[d]" the means of achieving the objective with the objective itself. He explained that:

> The responsible management of Ontario's finances and the protection of sustainable public services is an objective which may be capable of meeting the pressing and substantial need test. The moderation of public-sector wages strikes me more as a means to achieve responsible financial management than as an objective in itself. To determine whether moderating wages amounts to a pressing and substantial need, one must understand why the wage increases are being moderated.

[155] On this basis, the application judge redefined the objective as "the responsible management of Ontario's finances and the protection of sustainable public services."

[156] Before this court, Ontario again submitted that the objective of the Act was "to moderate the rate of growth of compensation increases for public sector employees so as to manage the Province's finances in a responsible manner and to protect the sustainability of public services." During argument, Ontario submitted that the responsible management of the province's finances and sustainability of

public services is the Act's main objective, and that the moderation of the rate of growth of compensation increases for public sector employees is its sub-objective. Ontario submits that the application judge erred in redefining the objective.

[157] I agree with the application judge. His redefinition of the Act's objective was consistent with the case law and with the preamble to the Act.

[158] The Supreme Court has explained that the objective of a law must not be stated in too general terms because, otherwise, "it will provide no meaningful check on the means employed to achieve it: almost any challenged provision will likely be rationally connected to a very broadly stated purpose": *R. v. Moriarity*, 2015 SCC 55, [2015] S.C.R. 485, at para. 28; see also *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 46. On the other hand, an articulation that is too narrow "may merely reiterate the means chosen to achieve it": *Frank*, at para. 46. On this basis, the Supreme Court has stated that a law's purpose should be "both precise and succinct" and distinguished from the means chosen to implement it: *Moriarity*, at para. 29; see also *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 23.

[159] In this case, I agree with the application judge's articulation of the objective as the responsible management of the province's finances and the protection of sustainable public services. The moderation of public service wages is a means to that end; it is not a valid objective on its own.

[160] This is evident from the wording of the preamble of the Act and the Act's purpose, which emphasize that its goals are responsible fiscal management and sustainability of public services, and that the means to achieving this goal is the moderation of public sector employee wages. For the purpose of highlighting this point, portions of the preamble are reproduced below, with emphasis on the stated goals of fiscal responsibility and preservation of public sector services:

> The Government is committed to restoring the Province's fiscal health by putting Ontario on a path to balance the budget in a responsible manner. As outlined in the Government's 2019 Budget, the Government inherited a very substantial deficit. Ontario's accumulated debt is among the largest subnational debts in the world, and the Province's net debt to Gross Domestic Product ratio exceeds 40 per cent. Interest on debt payments is the fourth largest line item in the 2019 Budget after health care, education and social services.
>
> Restoring sustainability to the Province's finances is in the public interest and is needed to maintain important public services that matter to the people of Ontario. The Government seeks to ensure the sustainability of public services by restoring fiscal balance and lowering Ontario's debt burden as a percentage of Gross Domestic Product. The Government also seeks to protect front-line services and the jobs of the people who deliver them.
>
> A substantial proportion of government program expenses is applied to public sector compensation, whether paid directly by the Province to Ontario Public Service employees or provided indirectly to employees in the Broader Public Sector. Given the fiscal challenge the Province is facing, the growth in compensation costs must be moderated to ensure the continued sustainability of public services for the future.
>
> This Act contains fiscally responsible measures to address compensation in the Ontario Public Service and for specified Broader Public Sector employers. These measures would allow for modest, reasonable and sustainable compensation growth for public sector employees. For public sector employees who collectively bargain,

> these measures respect the collective bargaining process, encourage responsible bargaining, and ensure that future bargained and arbitrated outcomes are consistent with the responsible management of expenditures and the sustainability of public services. [Emphasis added.]

[161] Similarly, s. 1 of the Act states that its purpose is "to ensure that increases in public sector compensation reflect the fiscal situation of the Province, are consistent with the principles of responsible fiscal management and protect the sustainability of public services" (emphasis added).

[162] As structured and worded, the preamble and purpose of the Act emphasize that its objective is to address the province's fiscal situation and to sustain public services, and that the means to those ends is the moderation of public service wages.

[163] Before concluding on this issue, it is worth reviewing the objectives of the *ERA*. In *Gordon*, at para. 192, and *Procureur général*, at para. 67, the courts described the three objectives of the *ERA* as follows:

- Display leadership through diligent management of public funds in periods of economic difficulty;
- Ensure management of costs associated with public sector compensation that is predictable and that sustainably contributes to the solidity of the government's financial position; and
- Reduce undue upward pressure on private sector salaries.

[164] Notably, unlike Ontario's proposed sub-objective in this case, these stated objectives are not the reduction or moderation of public sector wages *per se*, but are rather focused on the management of public funds in a time of crisis and establishing leadership vis-à-vis private sector wages.

[165] In oral argument, Ontario relied on the decision in *Health Services* to argue that it is appropriate to have a main objective with sub-objectives. Ontario submitted that, in this case, fiscal responsibility and the maintenance of public services is the main objective, while moderation of public sector wages is the sub-objective. There is no doubt, in accordance with *Health Services*, that it may be appropriate to have a main objective and sub-objectives. However, in this case, unlike in *Health Services*, Ontario's proposed sub-objective of moderating public sector wages is the means of achieving the main objective and not a sub-objective.

[166] Accordingly, I agree with the application judge's re-characterization of the objective of the Act as the responsible management of the province's finances and the protection of sustainable public services.

**(b) The objective is pressing and substantial**

[167] While I agree with the application judge's characterization of the Act's objective, I do not agree with his finding that Ontario did not establish that the objective as restated was pressing and substantial. In my view, the application

judge's decision shows insufficient deference to the legislature's ability to identify policy priorities, especially on fiscal and labour matters.



**(i) General principles**

[168] As a general principle, Ontario must establish that the Act's objective is "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 352. This ensures that "objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection": *Oakes*, at p. 138.

[169] As this court stated in *Gordon*, "[t]his stage … is not usually an evidentiary contest. Rather, 'the proper question at this stage of the analysis is whether the Attorney General has asserted a pressing and substantial objective' and a 'theoretical objective asserted as pressing and substantial is sufficient for purposes of the s. 1 justification analysis'": at para. 196 (emphasis in original), citing *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at paras. 25-26. The court also noted, at para. 199, that "[m]ost s. 1 *Charter* cases move quickly past the first stage of determining whether a government's objectives were pressing and substantial."

[170] In *Gordon*, at para. 224, this court further emphasized the deference courts owe governments in setting their policy objectives, specifically in the context of labour legislation:

> Courts conducting full-scale *Oakes* assessments in relation to labour legislation are obliged to delve deeply into government fiscal policy and its determination in highly sensitive areas. Judicial probing will lead inevitably into real tensions about the respective roles of Parliament and the judiciary in governing Canada, since s. 1 of the *Charter* places courts in the role of final arbiter of constitutional rights. Courts have recognized, through a series of limiting principles, that judicial deference to government policy determinations is prudent as a matter of institutional capacity and the constitutional legitimacy of judicial review. In general terms, judges ought not to see themselves as finance ministers.



[171] The court went on to list the limiting principles as: 1) the separation of powers between legislatures, the courts and the executive; 2) the recognition of the respective institutional capacities of each branch; and 3) the core competencies of each branch, including the government's core competency in determining economic policy, budgeting decisions, the proper distribution of resources in society, labour relations regulation and how best to respond to situations of crisis. Regarding these core competencies, the court observed, at para. 234, that "most importantly, it is a core function of government to provide leadership in times of crisis, when something must be done to protect the common good." Further, when complex policy issues are at stake, the court should refrain from second-guessing, in hindsight, the legislatures' policy decisions: *Gordon*, at para. 293.

[172] Despite the direction to defer to legislatures' policy decisions, especially in matters involving decisions related to their core competencies, this court in *Gordon* nevertheless noted that "deference never amounts to submission, since that would

abrogate the court's constitutional responsibility…. 'The role of the judiciary in such situations lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the *Charter*'": at para. 236, citing *PSAC v. Canada*, [1987] 1 S.C.R. 424, at p. 442, *per* Dickson C.J. (dissenting in part).

[173] In addition, as discussed more fully below, the Supreme Court has consistently stated that concerns over managing a limited budget cannot normally serve as a free-standing pressing and substantial objective and that attempts to justify *Charter* right infringements based on budgetary constraints will be approached with strong skepticism: *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 109; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at para. 72; *Health Services*, at para. 147; and *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, at para. 153.

**(ii) The application judge's decision**

[174] The application judge started his analysis of this issue by reviewing s. 1 decisions that involved the invocation of budgetary concerns as the basis for a pressing and substantial government objective. He noted the line of cases referred to above in which courts have stated that budgetary concerns should be treated

as “suspect”. He further noted that cases in which budgetary concerns were accepted as pressing and substantial objectives involved situations of financial emergency, including the 2008 financial crisis leading to the *ERA*, and the substantial cut in transfer payments which caused a downgrade in Newfoundland’s debt and higher interest payments in *N.A.P.E.* Based on this review of the jurisprudence, the application judge concluded that for an objective based on budgetary considerations to be pressing and substantial, there must be “some level of urgency”, which, consistent with *Conseil scolaire*, he described as requiring something “more than the day-to-day business of government.”

[175] On this basis, the application judge went on to review the evidence available in this case and determined that the Act was not passed in the context of a crisis or an emergency. In doing so, he reviewed the evidence Ontario relied on in support of the Act’s objective.

[176] First, he noted that, after the 2018 election, the Ontario government appointed an Independent Financial Commission of Inquiry. The Commission delivered a report in August 2018 that stated a deficit of $3.7 billion for 2017-2018 and projected a deficit of $15 billion for 2018-2019.

[177] Second, Ontario relied on the expert evidence of Dr. David Dodge, a professor of economics, which the application judge summarized as follows:

> Dr. Dodge points to the following challenges in Ontario’s fiscal situation in 2019: Its economic growth would be

> lower than the growth for government services. Without adjustments this would lead to continuing, growing deficits which may reduce the scope of available fiscal stimulus to respond to changes in the business cycle when needed. A higher debt to GDP ratio also results in higher borrowing costs and further limits the government's scope of fiscal intervention when needed. Unless controlled, the situation would at some point become unsustainable.
>
> In 2018-19 Ontario's net debt to GDP ratio was projected to be 40.7%. In Dr. Dodge's view it should be brought below 40% and remain there.
>
> Dr. Dodge also warns of the possibility of rising interest rates increasing Ontario's debt service cost to revenue ratio. The Supreme Court of Canada has recognized that governments can act in the present with a view to prevent future deterioration to justify infringing measures under s. 1. In Dr. Dodge's view, the ratio of debt service costs to revenues "should be significantly less than 10%." In 2019 that ratio was 8%. Ontario's projections had it rising to 9% in 2027. The most recent evidence before the court is that the debt cost to revenue ratio is 7.4% for the year 2020-21 with projections for subsequent years through to 2025 varying between 7.5% and 7.6%.
>
> Dr. Dodge's report also describes ensuring fiscal sustainability as a "herculean challenge for the Ontario government" and that "compensation restraint constituted a critical element of any fiscal consolidation strategy." [Footnotes omitted.]

[178] The application judge went on to note that Ontario did not claim that the province faced a severe financial crisis. Rather, Dr. Dodge's evidence was that the cost of debt would potentially rise "at some future unspecified point." The application judge stated that this called for prudent fiscal management, but it did not justify a *Charter* breach.

[179] In this context, the application judge noted various other government policies which he found belied any sense of urgency or crisis. For example, he noted that, in 2019, the government introduced tax cuts that had the effect of reducing revenues in an amount far beyond the savings to be achieved by the Act. As a further example, in 2022, the government eliminated revenue from license plate stickers, which again reduced revenue by an amount that far exceeded the savings to be achieved by the Act.

[180] Ultimately, the application judge concluded as follows:

> This brings me back to the point that although managing public resources in a way to sustain public services can amount to a pressing and substantial objective in appropriate circumstances, Ontario has not, on my view of the evidence, demonstrated that the economic conditions in 2019 were of a sufficiently critical nature to warrant infringing on the constitutionally protected right to collective bargaining.

**(iii) The Act's objective is pressing and substantial**

[181] In my view, the application judge erred in his approach to the analysis of whether Ontario had posited a pressing and substantial objective because he failed to give sufficient deference to the legislature's policy objectives. This is not a case in which the government's only rationale for the policy was a desire to better manage its finances. Rather, based on various information about its deficit and economic forecasts, the government concluded that any interest rate increase could lead to financial difficulties and therefore sought to proactively avert a

potential fiscal crisis. Indeed, as Dr. Dodge explained, the province was facing a growing gap between its spending and revenues, resulting in increasing debt and debt service charges. Borrowing to finance the ongoing deficit threatened the province's fiscal sustainability by reducing the scope of traditional fiscal stimulus to respond to changes in the business cycle, increasing the risk premium on the province's debt, and forcing the province to spend more of its revenue on the interest costs of the debt. Managing these fiscal and budgetary concerns is one of government's core responsibilities. As held in *Gordon*, the court should defer to these types of policy objectives.

[182] While I appreciate that the Supreme Court has warned that courts should treat fiscal rationales as constitutionally suspect, these are ultimately matters of degree. Fiscal prudence on its own may be constitutionally suspect. However, where fiscal prudence arises from the government's determination that it faces a real potential for fiscal crisis, the court should not engage in an overly technical analysis of the economic evidence and should refrain from analyzing subsequent savings or spending policies to assess the credibility of the government's stated objective. Governments are entitled to set policy objectives and one of their core areas of policy-making is fiscal and budgetary. If the government can state a pressing and substantial objective that is rooted in its evidence, the court should defer to that policy choice. As held in *Gordon*, at para. 242, "the court should generally accept Parliament's objectives at face value, unless there is an attack on

the good faith of the assertion of those objectives or on their patent irrationality". This does not mean that the other branches of the *Oakes* test will be met, but governments should be granted a generous margin for determining when and how to address and avoid a potential fiscal crisis.

[183] Accordingly, contrary to the application judge's finding, I accept that Ontario has put forward a pressing and substantial objective in support of the Act.

[184] However, this does not end the inquiry. I now turn to the proportionality assessment, starting with the rational connection analysis.

**(2) Rational connection**

[185] I agree with the application judge that the Act is, for the most part, rationally connected to the government's objectives. However, as found by the application judge, I see no rational connection between the Act's objectives and its application to workers in the electricity sector or the university sector.

**(i) General principles**

[186] On this branch of the *Oakes* test, the question is whether the impugned measure is rationally connected to the pressing and substantial objective: *Health Services*, at para. 148; *Mounted Police*, at para. 143. It is sufficient for the government to show that it is reasonable to suppose that the measure may further the objective – not that it will actually do so: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48. Nevertheless, the measure

must not be arbitrary, unfair or based on irrational considerations: *Canada v. Taylor*, [1990] 3 S.C.R. 892, at p. 921.

[187] The evidentiary burden at this stage is "not particularly onerous": *Health Services*, at para. 148, citing *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228, *per* Iacobucci J. (dissenting). Direct proof of a causal relationship between the measure and the objective is not required: *Thomson Newspapers Co.*, at para. 39.

**(ii) The application judge's decision**

[188] The application judge accepted that, for those wages that the government pays directly, there is a rational connection between the Act's objective and moderating compensation increases:

> Compensation represents roughly half of the Province's expenditures. Moderating the rate [of] compensation increases is therefore logically related to the responsible management of the Province's finances and the protection of the sustainability of public services insofar as it concerns wages that Ontario pays for directly. [Footnote omitted.]

[189] However, the application judge did not accept that there was a rational connection in the context of the electricity sector and the Carleton University Academic Staff Association. He also held that any rational connection in the long-term care sector was "at best remote."

[190] With respect to the electricity sector, the application judge found that OPG, OEB and IESO are self-funded, and that they do not receive any funds from the Ontario government to pay employee salaries. In addition, he found that, while some of the profits generated from electricity may be redirected to the province's consolidated revenue fund, this redirection is not automatic; extra profits may be used to credit consumers with future rate adjustments. The application judge also rejected an argument by Ontario that moderating wage increases for employees in the electricity sector would lower or moderate the cost of electricity because this does not fall within the stated purposes of the Act. The application judge ultimately concluded that "[g]iven that Ontario does not fund compensation of employees at OPG, the OEB or the IESO, there is no rational connection between their inclusion in the Act and the responsible management of Ontario's finances or the sustainability of its public services."

[191] With respect to the Carleton University Academic Staff Association, the application judge found no rational connection based on his finding that, while the province provides some funding to Carleton University, moderating the wages of the Association's members would have no impact on the amount the province is obligated to provide to the University. The application judge found that the province generally provides funding that covers 30 to 35% of the University's budget. The rest of its funding comes from tuition fees, donations, grants and other sources. As described by the application judge, the province provides funding to the University

pursuant to a Strategic Mandate Agreement ("SMA"), which sets the maximum amount of funding the province will provide the University each year (the province has similar SMAs with other universities in Ontario). The specific funding the province provides to the University depends on various metrics, which do not include the salaries the University negotiates with the Association's members. Under the circumstances, including the fact that funding for the University was "locked in" under the current SMA until 2025, the application judge concluded that it is difficult to find a rational connection between the Act's objectives and the salaries paid to the Association's members.

[192] With respect to the long-term care sector, the application judge found that any rational connection between the Act's objective and moderating compensation for workers in long-term care homes was at best remote because long-term care workers are not paid directly by the province. The application judge explained that long-term care homes receive a fee per patient based on the level of care each patient requires. Accordingly, the province would only bear indirect responsibility for any increased wages if those increases led long-term care homes to demand higher daily fees for patients under their care. Further, the application judge noted that only 24% of the province's long-term care homes are covered by the Act. If higher wages in the remaining 76% of long-term care homes led to demands for increases in the daily patient fee, the Act would do nothing to limit those demands.

### (iii) The Act is rationally connected to its objective, except in the energy sector and the university sector

[193] I agree with the application judge that, generally, the objective of the Act is rationally connected to wage moderation. As a matter of logic and common sense, moderating compensation increases will help achieve the government's goals of responsible management of its finances and the protection of sustainable public services.

[194] I also agree with the application judge that this logic does not apply to the electricity sector. Given that OPG, OEB and IESO are self-funded, imposing a cap on compensation that can be paid to their employees cannot logically lead to a decrease in the province's expenses. While Ontario speculates that moderating wage increases would allow OPG to generate more profits that could lead to an increase in the province's revenue from electricity, this is, at best, remote and speculative given that OPG is already earning above the permitted rate of return and no revenue flows from OEB and IESO to the province. More importantly, the goals of the Act are not to increase the province's revenues but to manage its spending and maintain public services.

[195] Similarly, I agree with the application judge that there is no rational connection between the Act's objectives and imposing caps on compensation for members of the Carleton University Academic Staff Association or, by extension,

academic staff at other universities. As the application judge explained, there is no direct relationship between the funding the province provides to Carleton University (and other universities) and the compensation it pays to its employees. The province has agreed to pay a fixed amount to the University until 2025. The University receives multiple sources of funding, and can negotiate over compensation increases without any impact on the amount the province is obligated to pay under the SMA.

[196] I do not agree with the application judge's finding with respect to the long-term care sector. As the application judge correctly noted, the province does not pay long-term care workers directly, but rather provides long-term care homes a daily fee for each patient based on the level of care that patient requires. The fact that the province does not pay long-term care workers directly, however, is not determinative. The application judge found that increased wages for long-term care workers could lead homes to demand higher daily fees for the patients under their care. While the relationship is somewhat tenuous, based on this finding, I accept that there is a rational connection between the Act's objective and moderating compensation increases in the long-term care sector.

[197] Accordingly, with the exception of members of the unions representing employees discussed above who work in the electricity and university sectors, I am satisfied that the measures in the Act are rationally connected to its objectives.

### (3) Minimal impairment

[198] I agree with the application judge that the Act did not minimally impair the respondents' right to collective bargaining under s. 2(d) of the *Charter*.

### (i) General principles

[199] In *Carter*, at para. 102, the Supreme Court explained this stage of the *Oakes* analysis as follows:

> At this stage of the analysis, the question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*, at para. 53). The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" (*ibid.*, at para. 55). The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's object.

[200] In *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, the Supreme Court emphasized that "the law must be carefully tailored so that rights are impaired no more than necessary": at para. 58, citing *RJR-MacDonald Inc.*, at para. 134. While the court accords deference to the legislature's choices, deference does not insulate the government from having to demonstrate that an impugned measure is minimally impairing and justified under s. 1: *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at paras. 62-64. At the same time, however, legislators are not held to a level of perfection; the court should not

find a law minimally impairing because it can "conceive of an alternative which might better tailor the objective to infringement": *Libman*, at para. 58; see also *Martin*, at para. 112.

**(ii) The application judge's decision**

[201] The application judge found that Ontario did not demonstrate that the Act was minimally impairing because it "failed to explain why it could not have pursued voluntary wage restraint. In any collective bargaining negotiation with public sector employees, Ontario could have taken the position that it was not able to pay more than a 1% wage increase."

[202] In reaching this conclusion, the application judge noted the evidence of Professor Christopher Riddell, an expert put forward by Ontario, who "gave many examples throughout his report of negative wage settlements that had been voluntarily agreed to in the public sector." Professor Riddell identified groups of workers who agreed to 0% wage increases at various points in time. For example, nurses in the hospital sector agreed to wage freezes in 2011 and 2012, and secondary school teachers agreed to a wage freeze in 2014.

[203] The application judge observed that the province could have taken this approach with its direct employees and that it could have also used various tools to control wage increases in the broader public sector through other means of influencing collective bargaining. For example, while the province does not employ

teachers, it nevertheless participates in central bargaining with the teachers' unions over wages and other compensation matters. As another example, in the long-term care sector, the province could control its expenditures by freezing the daily patient fees it pays.

[204] Finally, the application judge stated that Ontario had not demonstrated why the Act was minimally impairing with respect to the electricity sector and university sector because, as discussed in the rational connection section, there was no evidence that a 1% cap on compensation increases would have any impact on government expenditures in those sectors.

**(iii) The Act is not minimally impairing**

[205] I agree with the application judge that the Act is not minimally impairing essentially for the reasons he provided.

[206] Ontario provided no evidence that the province could not achieve the same goals through collective bargaining with the employees under its direct employment and by capping the funding it provides to broader public sector employers thereby limiting the money those employers would have available for collective bargaining with their employees.

[207] As discussed above, the province had not tried to negotiate collective agreements with the respondents in which it put forward the position that it would not agree to increases in compensation above 1% per year. There was no

evidence that further negotiation would be futile. As noted by the application judge and as discussed above, there were several examples in the record of agreements in prior years where wage increases were capped at 0%, not even allowing for increases that accounted for inflation. In addition, while I accept that Ontario's objective is pressing and substantial, there is no evidence of urgency or of an imminent need to impose a cap on compensation increases, such that there was no time to achieve the desired cost savings through negotiations.

[208] As also discussed above, the right to collective bargaining protected by s. 2(d) is not a right to an outcome but a right to a process of collective bargaining. In my view, Ontario has failed to explain why, in this case, the right to such a process should be infringed without first attempting to engage in a process of good faith bargaining.

[209] Ultimately, the only potential rationale for obviating the process of collective bargaining is expediency. However, in the absence of any evidence showing a need for expediency, imposing broad-based legislation of this nature is not minimally impairing.

[210] Ontario argues that at the minimal impairment stage of the analysis, the court is only permitted to look at whether different legislative provisions could have been implemented that would be less impairing and that it was improper for the application judge to consider voluntary wage restraint as an alternative because

this was not a legislative alternative. I reject this argument. Ontario has provided no authority for this position. More importantly, in the context of a s. 2(d) analysis, it is logically relevant to consider whether the government's goals can be achieved without impeding the process of collective bargaining through legislation.

[211] Even if one were to accept Ontario's argument that the only appropriate comparator on a minimal impairment analysis must be legislative, Ontario has failed to demonstrate that the Act is minimally impairing of the respondents' collective bargain rights. Notably, as discussed above, the government's failure to implement a meaningful process that would allow for exemptions demonstrates that the Act is not minimally impairing. I accept that a meaningful exemption process could provide evidence that legislation is carefully tailored to meet its objective by providing a mechanism to alleviate against a law's potential disproportionate impact in a particular case. In this case, however, for the reasons discussed above, there is no evidence that the exemption process in s. 27 of the Act has provided such a mechanism. Ontario has not advanced evidence to establish that, as implemented, the exemption process affords a meaningful channel for negotiation and collective bargaining.

[212] Accordingly, I find that Ontario has not demonstrated that the Act is minimally impairing.

### (4) Proportionality

[213] Having found that the Act is not minimally impairing, it is technically not necessary to consider whether its salutary effects are proportional to its detrimental effects: *Carter*, at para. 122.

[214] Nevertheless, dealing with this issue briefly, I note that many of the same considerations that lead me to conclude that the Act is not minimally impairing lead to the conclusion that its detrimental effects outweigh its salutary effects.

### (i) General principles

[215] This last branch of the s. 1 analysis asks whether there is proportionality between the overall effects of the *Charter*-infringing measure and the legislative objective: *Hutterian Brethren*, at paras. 72-73. The court must turn its mind to the effects of the measure to determine, on a normative basis, whether the infringement of the right in question can be justified in a free and democratic society: *Frank*, at para. 76. This requires a balancing between the measure's salutary and deleterious effects: *Hutterian Brethren*, at para. 100. In *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 79, the Supreme Court explained the court's task in the following terms:

> It is only at this final stage that courts can transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society "in direct and explicit terms"…. In other words, this final step allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free

> and democratic society. Although this examination entails difficult value judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision. Further, as mentioned, proceeding to this final stage permits appropriate deference to Parliament's choice of means, as well as its full legislative objective.

**(ii) The application judge's decision**

[216] The application judge was not satisfied that the Act's infringement on collective bargaining rights was justified. His conclusion on this issue rested heavily on his finding, which I have not accepted, that Ontario did not put forward a pressing and substantial objective.

[217] First, he rejected Ontario's argument, which drew on evidence from Professor Riddell, that bringing public sector wages in line with private sector wages was a valuable and proportionate social goal, reasoning that the argument was premised on dated evidence, ignored large sectors of the public service where there is no wage gap, and overlooked Professor Riddell's acknowledgment that any gap was attributable at least in part to unionization. In the application judge's view, any attempt to eliminate an alleged wage gap was therefore an attempt to reverse the benefits of collective bargaining.

[218] Second, the application judge observed that some of the same issues that appeared in his pressing and substantial objective analysis were relevant to balancing the Act's salutary and deleterious effects. Drawing on the stated objective of the Act, he reasoned that it was a "day-to-day government duty" to

moderate compensation to responsibly manage government expenditures and that such a duty only warrants a breach of *Charter* rights in unusual circumstances.

[219] Third, the application judge opined that the question of wage restraint could have been resolved as part of the collective bargaining process. Instead, the government took a "key tool" away from unions and, in doing so, not only interfered with collective bargaining but also "hampered the development of public consensus on the issue."

[220] Finally, the application judge stated that even if the government wanted to avoid the risk of strikes, it did not explain why the tax cuts it implemented could not have been smaller to maintain the respondents' *Charter* rights.

**(iii) The Act's salutary effects are not proportional to its deleterious effects**

[221] I agree with the application judge that the Act's salutary effects are not proportional to its deleterious effects, although I arrive at this conclusion through somewhat different reasoning.

[222] The government is responsible for ensuring responsible fiscal management and the delivery of public services to Ontarians. These are core government functions. Ontario put forward some evidence that it would be most prudent to manage potential financial challenges by decreasing the province's debt load and reducing its spending. Public sector wages are a significant proportion of

government spending. The Act would no doubt assist the government in reaching these goals.

[223] However, I cannot accept that the circumstances surrounding the government's decision to enact the legislation justify its infringement of the *Charter*. Ontario has not been able to explain why wage restraint could not have been achieved through good faith bargaining. While I accept that Ontario has stated a pressing and substantial objective, in the proportionality analysis, the degree to which the objective is pressing becomes relevant: *Oakes*, at p. 140. In the absence of evidence establishing a need to proceed with expediency, it is difficult to see how the Act's benefits outweigh its substantial impact on the respondents' collective bargaining rights.

[224] Ontario's argument that s. 2(d) of the *Charter* is meant to protect the process of collective bargaining and not specific outcomes becomes relevant again. There is no dispute that the government can seek to keep compensation increases to 1% per year or less. The issue becomes the process through which the government arrived at this outcome. In the absence of any evidence for the need for expediency or that the same goal cannot be achieved through collective bargaining, it is hard to understand on what basis the Act's salutary effects outweigh its deleterious effects.

[225] In contrast, because of the Act, organized public sector workers, many of whom are women, racialized and/or low-income earners, have lost the ability to negotiate for better compensation or even better work conditions that do not have a monetary value. Considering these impacts against the Act's purported benefits leads me to conclude that, on balance, the Act's infringement cannot be justified. By imposing a cap on all compensation increases with no workable mechanism for seeking exemptions, the deleterious effects of the Act outweigh its salutary effects.

### (5) Conclusion on s. 1 of the *Charter*

[226] Accordingly, in my view, the Act is not saved by s. 1 of the *Charter*. While I accept that the Act pursues a pressing and substantial objective and that the means it uses are generally rationally connected to its goals, it is not minimally impairing and its salutary effects are outweighed by its detrimental effects.

## I. REMEDY

[227] Having found that the Act violates s. 2(d) of the *Charter* and that it is not saved by s. 1, the application judge struck the whole statute. This was an error.

[228] The Act applies to represented and non-represented employees. The rights protected by s. 2(d) of the *Charter* do not apply in the same way to non-represented employees and accordingly the Act is only unconstitutional in so far as it applies to the represented employees covered by the Act.

[229] At the hearing of the appeal, one of the respondents' counsel suggested that the application judge's order should stand because non-represented employees may wish to organize for the purpose of bargaining collectively in the future. This may well be the case. However, as long as they remain non-represented, the Act is not unconstitutional in so far as it applies to non-represented employees.

## J. CONCLUSION AND DISPOSITION

[230] Accordingly, I would grant the appeal, but only to the extent of varying the disposition to declare that the Act is invalid in so far as it applies to represented employees.

[231] If the parties are unable to agree on costs, they are to make submissions in writing. The respondents, as the more successful parties, are to make submissions not exceeding 3 pages, exclusive of their bills of costs, to be submitted to the court within 14 days of the release of this judgment. Ontario is to make responding submissions not exceeding 15 pages, exclusive of its bill of costs, within 14 days thereafter.

[232] In accordance with the orders granting leave to intervene to the interveners, no costs are awarded to or against the interveners.

"L. Favreau J.A."
"I agree. Doherty J.A."

**Hourigan J.A. (dissenting):**

## A. INTRODUCTION

[233] On occasion, courts must engage with principles that lie at the heart of our judicial system. This is such a case. The principle put in play by the reasons of my colleagues and the application judge is the separation of powers between the legislature and the courts. As will be discussed, when judges second guess a government's policy decisions in the course of their *Charter of Rights and Freedoms* analysis, they are touching the third rail of judicial reasoning. Such conduct imperils the legitimacy of constitutional judicial review.

[234] The analysis of the application judge and my colleagues on the issue of whether s. 2(d) of the *Charter* has been violated demonstrates an incautious approach about wading into matters that have always been within the exclusive remit of the legislative branch. In addition, my colleagues offer unconvincing grounds to distinguish a series of binding authorities from the Supreme Court, effectively avoiding what is settled precedent.

[235] I conclude that there has been no violation of s. 2(d), as Bill 124, the *Protecting a Sustainable Public Sector for Future Generations Act*, 2019, S.O. 2019, c. 12 ("Bill 124" or the "Act"), has not substantially interfered with associational rights guaranteed under that section.

[236] In his s. 1 analysis, the application judge eschewed the law at every stage of the *Oakes* test, offered his own gratuitous views on policy making, and declined

to meaningfully engage with the evidence, creating a nearly impossible burden for Ontario (or the "Province") to meet. That analysis is built on legal errors and palpable and overriding factual errors and must be set aside. My colleagues have not endorsed the application judge's reasoning in its entirety. Still, they have repeated many of the same errors in law in their rational connection, minimal impairment, and proportionality analyses.



[237] I conclude, in the alternative, that if Bill 124 breached s. 2(d), it is a reasonable limit prescribed by law and is demonstrably justified in a free and democratic society.

[238] In these reasons, I will first briefly review the separation of powers between the judiciary and the legislature and then consider jurisprudence regarding s. 2(d) and collective bargaining. Next, I will consider, in the alternative, the issue of whether Bill 124 is justified under s. 1 of the *Charter* and whether the application judge erred in striking the law down in its entirety. In my view, the appeals should be allowed, the order of the application judge set aside, the applications dismissed, and Ontario should be awarded its costs of the applications below and in this court.

## B. ANALYSIS

### (1) Separation of Powers

[239] The *Charter* is the supreme law of the land and for it to be effective courts must engage in rigorous constitutional review of government actions. However,

courts must be careful not to exercise their review power in a manner that second guesses policy decisions because doing so undermines the separation of powers between the legislature and the judiciary. The fundamental importance of the separation of the judiciary and legislatures has been described as “a characteristic feature of democracies”: *Director of Public Prosecutions of Jamaica v. Mollison*, [2003] UKPC 6; [2003] 2 A.C. 411, and *R. (Anderson) v. Secretary of State for the Home Department* [2002] 3 WLR 1800, at 1821-1822, paragraph 50.

[240] As recognized by the Supreme Court in *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at para. 104, “[O]ur system works best when constitutional actors respect the role and mandate of other constitutional actors.” There are certain areas that the courts have recognized as purely political and immune from judicial interference. For example, courts have found that allocating public resources is a political decision: *Anderson v. Alberta*, 2022 SCC 6, at para. 22; *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3 (“*CLA*”). This makes sense because courts do not understand competing demands for the government’s limited resources. Courts are instead necessarily focused on individual cases and do not appreciate how overturning a resource allocation decision impacts other competing funding priorities.

[241] Closely related to the issue of the allocation of resources is the area of core policy decisions. Such decisions involve “weighing competing economic, social, and political factors and conducting contextualized analyses of information. These

decisions are not based only on objective considerations but require value judgments — reasonable people can and do legitimately disagree": *Nelson (City) v. Marchi*, 2021 SCC 41, at para. 44. Courts have recognized that they are institutionally incapable of making core policy decisions because they are "ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation … courts possess neither the expertise nor the resources to undertake public administration": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 120, *per* LeBel and Deschamps JJ. (dissenting) (see also para. 34 of the majority reasons, *per* Iacobucci and Arbour JJ.).

[242] Courts are public policy amateurs who lack the expertise, experience, and resources to understand where a policy fits in the bigger picture. Thus, it is not the role of judges to second guess the policy choices made by governments because this is a role they are wholly unqualified to undertake. As Justices Moldaver and Brown stated in *R. v. Chouhan*, 2021 SCC 26, 459 D.L.R. (4th) 193, at para. 84:

> The role of the courts in the *Charter* analysis "is to protect against incursions on fundamental values, not to second guess policy decisions", because when "struggling with questions of social policy and attempting to deal with conflicting (social) pressures, 'a legislature must be given reasonable room to manoeuvre'" [Citations omitted.]

[243] Developing the type of economic policies at issue in Bill 124 is the essence of what governments do in terms of macroeconomic management. These issues

inherently involve policy choices; a government has to choose what it considers to be the best course of action for the management of the economy among many options. Governments must be granted the freedom to make and implement policy, and courts must not misuse their power of judicial review to second guess a government's policy choices.

[244] This is not just a matter of expertise; the separation of the legislative and judicial branches respects the accountability that underlies a democratic system of government. Fundamentally, courts are not accountable to the people for their policy choices, while elected representatives are accountable at the ballot box. For example, in the case of Bill 124, the government campaigned on a platform of fiscal restraint, and the legislation was consistent with its policy platform. When courts impermissibly interfere with government policy making, their actions undermine our democratic form of government. They arrogate to themselves authority that belongs to democratically elected representatives and undermine the legitimacy of constitutional judicial review.

**(2) Section 2(d)**

**(i) Association Rights and Collective Bargaining**

[245] The text of s. 2(d) places no limits on the freedom of association. This contrasts, for example, with the right in s. 8 to be secure from unreasonable search and seizure. There are no such qualifiers in the text of s. 2(d). However, courts

have, in the context of the field of collective bargaining, added definitional qualifiers that clearly limit the scope of this right. These limitations were succinctly summarized by Chief Justice Chartier in *Manitoba Federation of Labour et al. v. The Government of Manitoba*, 2021 MBCA 85, 463 D.L.R. (4th) 509, at paras. 22-23:

> Section 2(d) guarantees "freedom of association." It is often referred to as an "associational right" (see, for example, *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 90, 97, 112, 128-29; and, more recently, *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at paras 62, 131, 147). In the workplace context, the s. 2(d) right that is guaranteed is the right of employees "to associate in a process of collective action" (*Health Services* at para 19) in order "to engage in a meaningful process of collective bargaining" (*Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 1 (*SFL*)).
>
> The Supreme Court of Canada describes s. 2(d) as "a limited right" (*Health Services* at para 91) in that it is restricted in the three following ways:
>
> > a) <u>It is a procedural right</u>: It guarantees the right to a process, not a certain substantive or economic outcome. This includes a right to a fair and meaningful process of collective bargaining, which incorporates a) the right of employees "to join together to pursue workplace goals"; b) the right "to make collective representations to the employer, and to have those representations considered in good faith"; and c) "a means of recourse should the employer not bargain in good faith" (*SFL* at paras 1, 29).

> b) It is general in nature: The associational right does not protect "all aspects of 'collective bargaining'" (*Health Services* at para 19). It guarantees the right to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method (see *Mounted Police* at para 67).
>
> c) It is limited to "substantial interference": The associational right does not protect against all interference with the procedural right to bargain collectively, only against "substantial interference" with the associational activity (*Health Services* at para 90). [Emphasis in original.]

[246] It is important to emphasize that the right to collective bargaining provides protection only against *substantial interference* in the collective bargaining process, as the Supreme Court explained in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at paras. 92-94, as follows:

> To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every

> case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.
>
> Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation.

[247] Based on the foregoing, the jurisprudence is relatively straightforward. In contrast to, for example, freedom of expression rights, where virtually any violation requires a s. 1 analysis, s. 2(d) rights in the labour relation field are qualified. They are only engaged where there has been substantial interference. Thus, the notion of substantiality serves as a gatekeeper in determining whether a s. 2(d) right may have been impaired, and consequently, whether a s. 1 analysis is required. That qualified right is qualified further as s. 2(d) does not protect a particular result. Instead, it is restricted to the protection of a fair collective bargaining *process*.

[248] The Supreme Court's case law provides guidance regarding the onus the respondents were obliged to meet in establishing a breach of their s. 2(d) rights. The test of substantial interference has remained consistent since *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, through *Health Services, and Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and into the 2015 labour trilogy of *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125; and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245. To establish a breach of s. 2(d) of the *Charter*, the respondents had to prove on a balance of probabilities that Bill 124 "substantially interferes with a meaningful process of collective bargaining": *Mounted Police*, paras. 72-74.

[249] To be clear, s. 2(d) "does not protect all aspects of the associational activity of collective bargaining" and "the interference with collective bargaining must compromise the essential integrity of the process of collective bargaining protected by s. 2(d)": *Health Services*, at paras. 90, 92. It also does not protect against all interferences with collective bargaining or collective agreements: *Fraser*, at para. 76. Instead, the jurisprudence requires substantial interference with the process of collective bargaining to ensure that the contents of collective agreements and the right to an outcome in bargaining do not "take on a sort of immutable constitutional status through the effect of s. 2(*d*)": *Canada (Procureur*

*général) c. Syndicat canadien de la fonction publique, section locale 675*, 2016 QCCA 163, at paras. 30-31.

[250] There is no debate in the cases at bar that compensation is of central importance to collective bargaining. The real issue is the manner in which Bill 124 impacts the collective right to good faith negotiation and consultation.



**(ii) Distinguishing Factors**

[251] The precedents from the Supreme Court are clear in their application of these principles. The Court has never found that temporary wage restraint legislation violates s. 2(d) of the *Charter*. In distinguishing other wage restraint legislation cases, namely those that dealt with the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 ("*ERA*"), my colleagues find that:

> [t]here are four common threads between the decisions dealing with the constitutional validity of the *ERA*: (1) the measures were imposed in the context of the 2008 global economic crisis; (2) multiple bargaining units had reached agreements about wage increases similar to those that were legislated before the *ERA* was enacted; (3) the legislation was imposed after a relatively long period of negotiation; and, (4) in some cases, following the enactment of the *ERA*, bargaining units were nevertheless able to reopen their collective agreements to negotiate for wage increases (*Meredith*) or other matters of interest, including matters related to compensation (*Procureur général*).

Implicit in this statement is the notion that unless these factors are present, Bill 124 violates s. 2(d). Each of these factors is reviewed below.

### (a) Economic Crisis

[252] Regarding the first factor, the affidavits from Dr. Dodge, former Governor of the Bank of Canada, make clear that action had to be taken to protect the sustainability of public services and the government's fiscal health. As in the situation in *Health Services*, the Province's determination to come to grips with spiralling costs was fuelled by the laudable desire to preserve and protect quality public services: *Health Services*, at para. 134.

[253] My colleagues ignore that evidence and rely on the severity of the economic crisis in 2008 as a factor that distinguishes Bill 124 from the *ERA*. On what basis do they differentiate the severity of the economic challenges? There is no analysis undertaken to explain the distinction between the two situations. This factor is nothing short of an invitation to courts to second-guess policy choices made by a democratically elected government without engaging in an analysis of the challenges facing the Province at the time of the enactment of Bill 124. As discussed, this is a function that courts do not have the institutional capacity to undertake.

### (b) Bargaining Outcomes

[254] The second distinguishing factor my colleagues relied on raises the question of the extent to which bargaining outcomes can be considered in a breach analysis. Given that the Supreme Court has made clear that the associational right under

s. 2(d) does not protect outcomes, one might be tempted to find that outcomes are irrelevant. Indeed, that is Ontario's position. It submits that the economic outcomes dictated by Bill 124 do not matter because there is a clear separation between process and outcomes, and only the former counts in determining whether there has been substantial interference.

[255] Despite the above, the Supreme Court's analysis in *Meredith* left open the door for considering outcomes in determining whether a breach of s. 2(d) has had a substantial impact. Similarly, in the leading Ontario case on wage restraint legislation, *Gordon v. Canada (Attorney General)*, 2016 ONCA 625, 404 D.L.R. (4th) 590, at para. 55, citing *Meredith*, at para. 29, this court relied on comparative bargaining outcomes to determine that the legislation did not breach s. 2(d): "Actual outcomes are not determinative of a s. 2(*d*) analysis, but, in this case, the evidence of outcomes supports a conclusion that the enactment of the *ERA* had a minor impact on the appellants' associational activity".

[256] My colleagues conclude that because compensation increases capped at 1.0 percent under Bill 124 are less than the average 1.6 percent increases in compensation obtained through collective bargaining at the time of the introduction of Bill 124, this is an important factor in finding a breach of s. 2(d).

[257] I disagree with that analysis. The cases relied on by my colleagues in support of this submission – *Meredith* and *Gordon* – were examples where the

courts found that other collective bargaining results were comparable to what was provided for in the *ERA* and therefore did not breach s. 2(d). There is no case where other collective bargaining results were used to ground a finding of a breach of s. 2(d). This is a problematic precedent.

[258] While comparable wage settlements may be a factor pointing to the absence of a breach of s. 2(d), I do not accept that the obverse is true. If it were otherwise, and we accepted my colleagues' expansion of the law, then we would be left in the unsatisfactory position where the Supreme Court has instructed that outcomes are not protected under s. 2(d), yet they become a *de facto* minimum in deciding whether there has been a s. 2(d) violation. Thus, if the wage cap imposed by legislation is lower than what was being negotiated in other comparable collective agreements at the time of the passage of the wage restraint legislation, then the legislation will likely violate s. 2(d).

[259] The Supreme Court's injunction that bargaining results are not protected under the s. 2(d) umbrella appropriately recognized the separation of powers between the legislature and the judiciary. If courts do not abide by that direction, they impermissibly enter into the arena of government spending policy by imposing a minimum result as a condition of constitutionality. In so doing, they also largely remove the opportunity for governments to use wage restraint legislation in the public sector to achieve meaningful savings. Put simply, if governments are obliged to pay the going rate, what is the point in wage restraint legislation?

[260] The fact that the application judge found that the wage cap under Bill 124 was marginally less than what was negotiated under other pre-legislation agreements is of no moment. My colleagues' expansion of the law and reliance on this factor makes bargaining results an integral part of the test for constitutional validity. That is inconsistent with the Supreme Court's jurisprudence.



**(c) Pre-legislation Negotiations and Consultation**

[261] Reliance on this factor is in keeping with the approach taken by my colleagues' reasons. They state that:

> [s]ignificant collective bargaining prior to the passage of the legislation or meaningful consultation on the legislation diminish the finding of interference, because such processes mean that there was negotiation or consultation before the imposition of the wage restraint measure, and that not much more could have been gained through further negotiation or consultation.

Indeed, they even reference the fact that Ontario used external lawyers rather than internal lawyers to lead its consultations. This approach is problematic for several reasons.

[262] First, it is worth reiterating, as my colleagues concede, that governments have no obligation to engage in collective bargaining or meaningful consultation before the introduction of legislation. As stated by the Supreme Court in *Health Services*, at para. 157:

> Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be

> useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.

[263] This emphasis at the breach stage of the analysis on what the government did or did not do when it had no legal obligation to do anything has the effect of transferring the onus to the government to justify its conduct rather than leaving it with the applicant to establish that there has been a breach.

[264] Second, it is unfair to say on the one hand that a government has no such obligation but, on the other hand, conclude that there will be adverse consequences if a government does not consult or bargain before passing legislation. This is an indirect way of imposing an obligation on a government while maintaining that there is no obligation.

[265] Third, it is inaccurate to suggest that only if the government negotiates or consults will it know "that not much more could have been gained through further negotiation or consultation." Negotiations, particularly in the early stages, often reveal nothing about the parties' real bottom line. In any event, in this instance, did the Ontario government really need to consult and bargain to figure out that the unions were not going to agree to a one percent cap? The fact that the unions

have launched a legal challenge to Bill 124 demonstrates that negotiation would have achieved nothing.

[266] Fourth, governments have always been permitted to control the timing of the release of information about planned legislation before it is introduced in the legislature. Many political and strategic reasons may go into the timing of the release of information to the public or stakeholders regarding what the government intends to do. That is a discretion that courts have no business interfering with. However, once a bill is introduced in the legislature, it has a structure in place to conduct public hearings and provide other methods for giving input on legislation. As noted by the Supreme Court, the "constitutionally mandated process in ss. 17 and 91 of the *Constitution Act, 1867*, ensures that the legislation is made in public forums that provide opportunities for substantial examination and debate": *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, 455 D.L.R. (4th) 1, at para. 291, *per* Côté J. (dissenting in part, but not on this point).

[267] That process of consultation was exactly what happened in this case. After Bill 124 was introduced, the government invited feedback from stakeholders (including bargaining agents) over the spring and summer of 2019. The result was that prior to its enactment, six amendments to Bill 124 were moved and adopted, which were informed by comments received during the consultation process after the introduction of the legislation.

[268] Fifth, many of the union respondents represent workers whom the Province does not directly employ. For those employees, who exactly do my colleagues envision the Province should have negotiated with?

[269] Sixth, why is consultation and negotiation important in the analysis? If a government consults widely and introduces draconian legislation, does that pass constitutional muster? Of course not. No court would be satisfied with the explanation, “Rights to bargain and associate have been stripped bare, but we told them we were going to do this.” Nor should legislation that minimally impacts collective bargaining rights be found to constitute substantial interference because the government failed to consult or negotiate.

[270] Seventh, at para. 66 of my colleagues’ reasons, they state as follows: “Further, the circumstances under which an impugned law was adopted can be relevant to assessing the impact of the law on the process of good faith negotiations. For example, a law that is adopted after a period of meaningful negotiation and consultation is less likely to be seen as interfering with the process of collective bargaining: see *Health Services*, at para. 92.”

[271] This is not an accurate paraphrase of para. 92 of *Health Services*. As set forth above, what the Supreme Court actually said in para. 92 is: “Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of

collective bargaining." My colleagues' recasting of the statement is unfair, especially since there is no suggestion in the context of Bill 124 that the government acted in bad faith or unilaterally nullified negotiated terms.

[272] When courts make implicit threats that certain procedural and political steps should be taken by governments – even though it is common ground that they have no legal obligation to do so – or their legislation risks being found to be unconstitutional, they overstep their bounds and undermine the separation of powers. Further, once these obligatory non-obligations are imposed, they invite courts to engage even more deeply with the minutiae of government decision making, further violating the separation of powers. It is this approach that causes courts to comment on whether internal or external lawyers are used in a consultation process, a matter that is none of the court's concern. If we have reached this level of judicial scrutiny, one wonders if the line separating the legislature from the judiciary has been obliterated.

**(d) Renegotiated Agreements**

[273] My colleagues point to *Meredith* as an example of a situation where the parties had the ability to reopen their collective agreements to negotiate for wage increases. Once again, this observation focuses on bargaining outcomes. Regardless, it is unpersuasive given that the *ERA* was used in *Meredith* to roll back previously agreed wage increases. That type of retroactive restriction is not

permitted under Bill 124 and arguably has a much more significant impact on associational rights, as the government was given the power to nullify an agreement reached by a collective bargaining process.

[274] There should be no requirement that the parties be able to reopen their agreement later to address compensation as a condition of constitutionality. Such a requirement defeats the purpose of wage restraint legislation. If a government moves to save money and halt the pace of compensation growth in the public sector, there is little point in doing so if those achievements can be retroactively wiped out when the wage restraint period ends. It is not the place of the courts to impose such a dubious policy choice.

**(e) Summary Regarding Distinguishing Factors**

[275] In summary, the distinguishing factors relied on by my colleagues are unpersuasive. There is nothing in the factors that they cite to distinguish Bill 124 from the *ERA* jurisprudence and the case law under the *Public Services Sustainability Act*, S.M. 2017, c. 24 ("*PSSA*").

**(iii) Compensation and Other Gains**

[276] My colleagues also rely on the alleged broad definition of compensation in Bill 124. That term is defined under s. 2 of Bill 124. The *PSSA* and *ERA* do not have a definition for "compensation" but define "additional remuneration." Significantly, additional remuneration is also restricted in the federal and Manitoba

legislation. As will be noted in the chart below, the legislation is largely consistent in casting a broad net regarding compensation increases:

| Bill 124 | *PSSA* | *ERA* |
|---|---|---|
| **Interpretation**<br>**2** In this Act,<br>…<br>"compensation" means anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments. | **Definitions**<br>**2** The following definitions apply in this Part.<br><br>**"additional"** means an allowance, bonus, premium or benefit of any kind to be paid or provided to an employee. | **Definitions**<br>**2** The following definitions apply in this Act.<br><br>***additional remuneration*** means any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments. |

[277] Given these similarities in the legislation, I do not agree with my colleague's statement in para. 125 that "[t]he *ERA* and Manitoba's *PSSA* did not impose such broad limitations on the areas affected by the caps in those statutes."

[278] In addition, a singular focus on compensation ignores the fact that after the passage of Bill 124, the union respondents were able to engage in collective bargaining and achieve significant gains.

[279] Ontario produced communications from the unions to their members wherein they confirmed that bargaining agents continued to have access to a meaningful process used to achieve gains and resist concessions sought by employers since the passage of Bill 124. For example, the Ontario English Catholic

Teachers' Association ("OECTA") provided an update to its membership and reported that it was able to push back against the concessions and obtain a "fair agreement." This agreement included significant non-monetary issues, such as a reduction in the proposed secondary class size averages and the new Supports for Student Fund. The union reported to its members:

> The solidarity and resolve shown by Catholic teachers over the past year has been remarkable. The Association endeavoured to keep members informed through almost 70 Provincial Bargaining Updates, regular updates to the Members' Area at catholicteachers.ca, and a series of local rallies leading up to the strike vote in November. Members responded by delivering a resounding strike vote, with 97.1 percent voting in favour of taking strike action if necessary, and then by enthusiastically engaging in OECTA's first-ever province-wide strike action, including extensive administrative job sanctions and four one-day full withdrawals of service. These actions, combined with the Association's efforts at the bargaining table, helped to slowly move the government toward a fair agreement.

[280] The Ontario Secondary School Teachers' Federation ("OSSTF") and the Elementary Teachers' Federation of Ontario ("ETFO") issued similar updates about successful bargaining results.

[281] Another example is in the healthcare sector. SEIU Healthcare provided an update about bargaining with an employer subject to Bill 124, which provided access to health benefits:

> For the first time in history, through the SEIU Benefit Trust Fund, these members have drug coverage, dental care, vision care, and so much more. Although these

> benefits are only for full-time Circle of Care staff, this is a step in the right direction for all our members in the HCC sector.
>
> "We are thrilled that through the hard work of the bargaining committee and their union representative Murray Cooke, we were able to obtain a health benefits plan for full-time members," said Tyler Downey, SEIU Healthcare's Secretary-Treasurer. "This victory is just one small step in the right direction for the home and community care sector."
>
> …
>
> On top of benefits, the new contract also included the creation of a Labour-Management Committee, more union steward rights, improved compensation language, and more access to float days. This collective agreement is proof that when members step up and into situations where their voices cannot be ignored, we can win together and create meaningful change in your workplaces.

[282] Similarly, the Ontario Nurses' Association ("ONA") advised its membership that it could identify their interests, advocate for those interests in bargaining and arbitration, and improve monetary and non-monetary matters. The Canadian Union of Public Employees ("CUPE") also issued an update after concluding an agreement at Unity Health Toronto in which a member of the bargaining committee noted they were "thankful that a fruitful bargaining process resulted in a freely negotiated agreement" and had achieved "substantial gains."

[283] In a video update after concluding a tentative agreement, a bargaining committee member for CUPE 3902, which represents academic and contract faculty at the University of Toronto, stated that they "came together and thought

about the impact of Bill 124…. And so early on we were thinking about how to ensure we get the -- we could get the most we could absolutely get under those provisions of the legislation. And the Committee did that." The bargaining committee highlighted examples of its achievements, including: (i) denying all the concessions sought by the employer; (ii) improved hiring criteria; (iii) better workload protections; (iv) 70 hours of guaranteed work for PhD students whose funding had run out, which would cover the cost of tuition and allow access to health benefits; and (v) paid pregnancy/parental leave.

[284] According to information provided by the Ontario Public Service Employees Union ("OPSEU") to its membership, it was able to work within Bill 124 to obtain significant benefits for them and resist concessions sought by the government and other public sector employers. For example, it advised part-time college support workers that the bargaining team was proud to recommend ratification of a tentative agreement negotiated on their behalf, which included increased job security. It also advised its membership:

> The employer had a long list of cuts and concessions they wanted us to accept, but I'm proud to say that the team held firm against each and every one of them.
>
> …
>
> The theme going into this round was 'bargaining for better,' and I'm proud to say that's exactly what we were able to do.
>
> …

> We are recommending our members vote in favour of this deal because it will mean better for students, better for workers, and better for the economic recovery of the province.

[285] OPSEU also negotiated a deal with the Ontario Public Service, which included increases to paramedical benefits, a healthcare spending account, seniority calculations for fixed-term employees, job security language, and equity-related gains.

[286] A good example of the ability of union members to bargain collectively is with respect to employees at the LCBO. OPSEU reported to its LCBO membership that it was the right time to focus on non-monetary issues given Bill 124, observing, "That's where your team negotiates better schedules and work-life balance, increased job security, stronger protection from privatization, strengthened health and safety rules, and workplaces that are equitable and fair for all." After a tentative agreement was reached, OPSEU issued a further bargaining update noting that despite many challenges, the union "squeezed every possible penny out of what's allowed under Bill 124. And there are no losses to you. Not a single one. No losses on job security. No losses on privatization. No losses on scheduling."

[287] The application judge briefly referred to these union communications but gave them short shrift, finding that they were not evidence of a meaningful bargaining process because the unions were legally obligated to "sell" any collective agreement they negotiated in order to promote ratification. In fact, the

bargaining unit representatives confirmed in their testimony that they provided accurate updates under a responsibility they took seriously. My colleagues have not referenced these communications.

[288] The respondent unions downplay these successful bargaining results, suggesting they made the best of a bad situation on behalf of their members. However, that does not change the fact that they were able to use collective bargaining to obtain improvements for their membership.

[289] My point in referencing these bargaining results and the unions' communications to their members is not to establish that Bill 124 did not impact collective bargaining. Obviously, there was an impact on increases in compensation. However, it is evident that within the Bill 124 framework, unions were able to negotiate gains that they identified as significant for their members. This is the essence of collective bargaining and demonstrates that Bill 124 did not result in substantial interference with associational rights under s. 2(d).

**(iv) Impact on the Right to Strike**

[290] The reasons of the application judge raise the question of the impact of Bill 124 on the right to strike. Before considering this issue, it is important to recognize that many bargaining units are considered essential workers who do not have a right to strike. Consequently, these comments are restricted to respondents who have this right.

[291] In 2015, the Supreme Court in *Saskatchewan Federation of Labour* overruled its own jurisprudence and found that the right to strike was constitutionally protected by s. 2(d) of the *Charter*. However, there was no suggestion in that case or any other jurisprudence from the Supreme Court that the content of associational rights, including the new right to strike, included a right to a particular result. To the contrary, as discussed above, s. 2(d) rights are procedural in nature.

[292] To determine the impact of Bill 124 on the right to strike, it is instructive to first look at the wording of the legislation. It expressly provides in s. 4 that "Nothing in this Act affects the right to engage in a lawful strike or lockout." Despite that clear wording, the application judge found that Bill 124 indirectly limits the right to strike because it imposes restrictions on compensation increases, making it difficult for unions to obtain strike votes for non-monetary issues. This conclusion ignored the evidence that many bargaining units held successful strike votes during the application of Bill 124.

[293] There was ample evidence in the record of bargaining units engaging in strikes or holding strike votes and using those actions to secure gains in bargaining after the passage of Bill 124. These include strikes by OSSTF, AEFO, and ETFO members. In their updates to their members, both OECTA and OSSTF highlighted their job actions and organizing as a factor that helped them push back against concessions sought by the government in central bargaining.

[294] Similarly, the Ontario Institute of Technology Faculty Association ("UOITFA") engaged in a two-week strike, which resulted in a settlement. A union report following the settlement noted that it made "big gains on the faculty association's workload, equity, and benefits priorities. This represented a hard-fought and well-deserved victory for the UOITFA." The report emphasized that the settlement followed months of actions by UOITFA, including the two-week strike.

[295] This evidence demonstrates that strikes or strike votes were available to unions and were used by several of them to obtain workplace gains. In failing to appreciate the legal significance of the evidence of many bargaining units exercising their right to strike under Bill 124 and the preservation of the collective bargaining process that resulted, the motion judge made plain that, in his mind, the right to strike includes a right to achieve specific economic results. Put another way, the application judge ignored that the most crucial element of the process that allows union members to effectively act collectively remained available to them because members were limited in what they could achieve financially.

[296] That approach marks a substantial increase in the scope of the right to strike, one that is inconsistent with the Supreme Court's jurisprudence on the issue. According to the application judge, a process is only worthwhile if it creates a desired financial result. Therefore, any interference with achieving a particular financial result constitutes a breach of s. 2(d). Thus, the right to a process

transforms into the right to a result, and the scope of the right to strike is expanded to achieve a particular financial result.

**(v) Summary Regarding s. 2(d)**

[297] The question before the court is not whether Bill 124 affects collective bargaining; it is whether it constitutes a substantial interference with the right to collective bargaining. Only if this has occurred does the burden of justification under s. 1 arise.

[298] My colleagues' finding of a breach of s. 2(d) is premised on several irrelevant factors. They admit that there is no obligation on the government to consult or negotiate before introducing wage restraint legislation but rely heavily on these factors to support their finding of a breach. Comparable collective bargaining results, which have never been relied on to support a finding of breach, also play a central part in their breach analysis. Further, my colleagues ignore the evidence of the collective bargaining and strike activity that actually took place and rely instead on their views of the economic conditions extant at the time of the introduction of Bill 124.

[299] This approach undermines the separation of powers because it flips the onus on the issue of whether there has been a breach and allows the court to require the Province to establish the constitutionality of its legislation. In so doing, my colleagues are content to ignore the evidence of the collective bargaining that

was actually occurring under Bill 124 and premise their breach finding on irrelevant factors or the failure of the government to meet obligations that are unknown at law.

[300] An evidence-based analysis of the impact of Bill 124 demonstrates that it does not constitute substantial interference with the associational right to bargain collectively. Under Bill 124, compensation increases were temporarily capped, but the record demonstrates that unions were able to secure other important gains for their members through collective bargaining. Further, the right to strike was preserved and utilized to achieve gains.

[301] Based on the foregoing, it is evident that, in keeping with the dicta from *Saskatchewan Federation of Labour*, workers were able to join together to pursue workplace goals, had the right to make collective representations to the employer and to have those representations considered in good faith, and had a means of recourse should the employer not bargain in good faith. There was no breach of s. 2(d).

**(3) Section 1 Analysis**

**(i) Background**

[302] In the alternative, if Bill 124 breached s. 2(d), it is a reasonable limit prescribed by law and is demonstrably justified in a free and democratic society.

[303] I agree with my colleagues' conclusion that Ontario has advanced a pressing and substantial objective in support of the Act. I disagree with their findings regarding rational connection, minimal impairment, and proportionality.

[304] As will become apparent, it is essential to review all aspects of the application judge's s. 1 analysis in detail. I do this because my colleagues are quick to adopt his factual findings in support of their analysis. They rely on *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 49, which holds that absent a palpable and overriding error, an appellate court should not interfere with the factual findings in a s. 1 analysis. Why this high standard is appropriate, given that most s. 1 cases are based on a written record, is not self-evident. Nonetheless, in this case, it is important to carefully scrutinize the application judge's factual findings because his analysis is filled with personal opinions and value judgments in the place of evidentiary-based factual findings.

[305] It is helpful to first review the background to the enactment of Bill 124 to place the legislation and the s. 1 analysis in their proper context. It is uncontested that the government of Ontario enacted the legislation in response to what it perceived to be a pressing economic issue. My colleagues find that the legislation's objective was the responsible management of the Province's finances and protecting sustainable public services. I am prepared to accept that characterization for the purposes of my analysis. It follows that, to achieve its objective, the legislation had to moderate the growth of compensation expenses in

the broader public service funded by the Province and those entities who, although not funded by the government, contribute to provincial revenue. There is no evidence that the government introduced the legislation in bad faith. Instead, Bill 124 was enacted in what the government perceived to be the Province's best interests.



**(ii) *Oakes* Test**

[306] On a s. 1 analysis, the party seeking to uphold the limit must establish two components on a balance of probabilities. First, the objectives of the provision are pressing and substantial to justify curtailing a *Charter* right. This is a threshold requirement, analyzed without consideration of the scope of the infringement, the means employed, or the effects of the measure. Second, the objective furthered must be proportionate. In this context, proportionality has three components: "(a) rational connection to the objective; (b) minimal impairment of the right; and (c) proportionality between the effects of the measure (including a balancing of its salutary and deleterious effects) and the stated legislative objective": *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 38; *R. v. Oakes*, [1986] 1 S.C.R. 103, at paras. 67-70.

[307] The interaction of these components and subcomponents in a s. 1 analysis is summarized by Peter W. Hogg and Wade K. Wright in *Constitutional Law of*

*Canada*, 5th ed., vol. 2 (Toronto: Thomson Reuters Canada Ltd., 2023) (loose-leaf release 1, 7/2023), at §38:12, as follows:

> Only in a rare case will a court reject the legislative judgment that the objective of the law is sufficiently important to justify limiting a Charter right (first step). It is also a rare case where a court will find that the law is not rationally connected to the objective of the law (second step). And the inquiry into disproportionate effect (fourth step) has rarely, if ever, played an independent role in the s. 1 justification analysis, in the sense of changing the outcome of a case. The heart of the inquiry, therefore, is the question whether the law has impaired the Charter right no more than is necessary to accomplish the objective (third step)…. [N]early all the s. 1 cases have turned on the answer to this inquiry.



[308] As will be discussed, the application judge erred in law at each stage of his *Oakes* analysis. His reasons display a misunderstanding of the role of courts in reviewing government policy choices on resource distribution and the regulation of labour relations, which are areas of core government competency.

**(a) Pressing and Substantial Objective**

[309] As noted by this court in *Gordon*, in the context of *Oakes* assessments in relation to labour legislation, courts have recognized certain limiting principles that underlie judicial deference to government policy choices. Such principles are "prudent as a matter of institutional capacity and the constitutional legitimacy of judicial review": *Gordon*, at para. 224. These limiting principles include the following:

- The separation of powers, which, as described above, recognizes that the legislative branch makes policy choices, and the executive implements and administers them with the assistance of a professional public service. The legislative branch alone holds the purse strings of government: *Gordon*, at para. 225; *CLA*, at para. 28.
- The recognition of each branch's respective institutional capacities includes an understanding that each branch will be prevented from fulfilling its mandate if it is unduly interfered with by the other: *Gordon*, at para. 226; *CLA*, at para. 29.
- The recognition that courts should accept and defer to the government's core competencies, which include "the determination of economic policy, budgeting decisions, the proper distribution of resources in society, labour relations regulation, and how best to respond to situations of crisis": *Gordon*, at para. 227.

[310] The application judge erred in law in his analysis of the first stage of *Oakes*. He referenced the warning from this court in *Gordon* that judges conducting a s. 1 analysis in the context of labour law must resist the temptation to act as finance ministers, effectively imposing their policy choices as part of their *Charter* analysis: see *Gordon*, at para. 224. Despite this recognition, the application judge did just that. He ignored the limitations on his powers of review found in the jurisprudence. Particularly concerning aspects of this analysis include the following.

[311] At paras. 282 to 283, the application judge finds that he cannot ignore the fact that new governments “disclose with surprise and disappointment that the fiscal situation left by the previous administration was far worse than imagined.” It appears to be implicit in his reference to this “not uncommon political scenario” that the current government is misrepresenting the Province’s financial position. However, he hastens to add, “I am not saying that this is what occurred here,” but then goes on to point out that the government reduced its calculation of the deficit after Bill 124 was introduced.

[312] One would have thought that if the application judge were seeking to conduct an evidence-based assessment of the first stage of the *Oakes* test, there would not be a gratuitous reference to something he said did not happen. The inclusion of this discussion is troubling. It suggests that the application judge has misconstrued his judicial role. Further, the inference I draw from the application judge’s reference to this non-event was that he intended to cast aspersions on the Province’s motivations without explicitly saying so. This troubling approach colours the entirety of his s. 1 analysis.

[313] Similarly, at paras. 285 to 292, the application judge provides his views on the wisdom of government policies cutting taxes and providing licence plate sticker refunds. He compares the cost of these programs to the savings from the compensation caps and suggests that it was within the power of the government to refrain from implementing such programs. The application judge then states that

"the people whose *Charter* rights have been breached are entitled to a cogent explanation from the government about why it was necessary to breach their *Charter* rights to achieve tax competition."

[314] It was an error of law to require the government to justify selected expenditures to determine whether money spent on other programs could have been better invested in increased compensation in the analysis of whether there is a pressing and substantial objective. Courts overstep their institutional role when they require governments to account to them in such a granular fashion. Further, the application judge's analysis also has an inherent value judgment. Tellingly, he does not require the government to justify investments in areas like healthcare, transportation, cultural programs, or education. Instead, the focus is on items like tax cuts, which apparently must be justified.

[315] The application judge also erred in his treatment of Dr. Dodge's evidence. At para. 294, he finds that:

> Dr. Dodge describes this as a "herculean" challenge. That adjective changes nothing. Although that task of managing public resources and public expectations is inevitably extraordinarily challenging, it has been the core task of government since the advent of widespread social programs. As of 2019, Ontario had experienced and was continuing to experience a long period of growth after its emergence from the world financial crisis. Although Ontario may have experienced deficits, the management of deficits is a perennial political issue in Canada.

[316] According to the application judge, at para. 293 of his reasons, “Judicial deference is owed to cogent explanations that justify *Charter* infringements. Deference was not owed to simple assertions.” The same standard applies to judges’ reasons under s. 1. If there is a basis for rejecting Dr. Dodge’s evidence, the application judge is obliged to explain it in clear terms. It is insufficient to simply assert that he, the application judge, believes – based on no evidence – that the economy is strong. I note that this conclusion conflicts with the evidence of Dr. Dodge who testified that “[g]rowth in Ontario never came back to its longer-term pre-recession average.”

[317] Further, the application judge mischaracterizes and devalues Dr. Dodge’s evidence by his finding that he “merely advocates for fiscal prudence.” That is plainly incorrect. Dr. Dodge’s affidavit, which was not the subject of cross-examination, includes his conclusion that “the effort to contain unit costs, including through temporary wage restraint as set out in Bill 124, is critical to ongoing fiscal sustainability, even more so than I assessed it to be in 2019.” Again, the application judge was obliged to engage with that evidence. Mischaracterizing expert evidence and relying on that mischaracterization to dismiss it falls short of what is required of a judge in a s. 1 analysis.

[318] In summary, I agree with Ontario’s submission that the application judge erred in applying too stringent a standard at this stage of the *Oakes* test; he wrongly ignored the good faith assertions of the government and cast aspersions

on their motivation while denying that he was doing so. He also went beyond the record to substitute his own opinion for the views of the elected government and financial experts.



**(b) Rational Connection**

[319] The jurisprudence under the rational connection stage of the *Oakes* test holds that the evidentiary burden here "is not particularly onerous": *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228 (*per* Iacobucci J., dissenting in part); *Health Services*, at para. 148; and *Mounted Police*, at para. 143. Indeed, Hogg and Wright, at §38.18, suggest that "the requirement of a rational connection has very little work to do."

[320] All that is necessary is that the government establish a "causal connection between the infringement and the benefit sought on the basis of reason or logic": *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 99, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153. As long as the challenged limit "can be said to further in a general way an important government aim," it will pass the rational connection branch of the analysis": *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at pp. 925-26. Further, where the legislation at issue has more than one goal, any of them can be relied upon to meet the s. 1 test: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at paras. 44-45.

[321] Regarding the nature of the evidence to be adduced on this issue, a rational connection can be established on "a civil standard, through reason, logic or simply common sense": *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 53, citing *RJR-MacDonald*, at para. 184. The government need only demonstrate a reasonable prospect that the limiting measure will further the objective to some extent, not that it will certainly do so: *Hutterian Brethren*, at para. 48.

[322] In the cases at bar, the application judge held that moderating compensation rate increases is logically related to the responsible management of Ontario's finances and the protection of the sustainability of public services insofar as it concerns wages that Ontario pays for directly. However, he found that there is no rational connection between the government's objective and workers in the energy sector or the university sector, and that any rational connection between the objective and the long-term care sector is remote at best.

[323] My colleagues reject the application judge's conclusion on the long-term care sector. However, they agree with his conclusion regarding the energy sector and post-secondary education sectors.

[324] The application judge and my colleagues erred in law in their rational connection analysis with respect to these sectors by demanding too stringent a level of proof, which required the government to establish an empirical connection and direct causal relationship. They fail to consider the indirect ways that wage

control in these entities would benefit the responsible fiscal management of the Province. The government has an interest in reducing wage growth in entities that are provincially funded (e.g., the university) or wholly provincially owned (e.g., the electricity sector).

[325] Ontario need not directly pay the wages of employees for it to benefit from a compensation limitation because a cap would place their employers in a more sustainable financial position. It must be remembered that when public sector institutions face financial pressures, they look to the government for funding because it serves as a fiscal backstop. Thus, to the extent their fiscal situation is improved, it furthers the objective of the Act, as found by my colleagues, which is to address the Province's fiscal situation to sustain public services.

[326] My colleagues conclude that concerning the energy sector, a cap on compensation is of no benefit to the Province because no revenues flow from the Ontario Energy Board and the Independent Electricity System Operator to it. This conclusion reflects their restrictive approach to rational connection, which is at odds with the Supreme Court's jurisprudence. It is evident that a wage limitation would further the ability of these entities to maintain a sustainable financial position.

[327] A wage restriction affecting Ontario Power Generation ("OPG") also supports Ontario's aim of maintaining a sustainable financial position. Ontario is

the sole shareholder of OPG. In 2018, OPG had a net income of approximately $1.12 billion. A wage restriction would contribute to a larger dividend for Ontario in its position as sole shareholder, thereby contributing directly to the Province's fiscal health.

[328] In addition, it makes no difference that Ontario is not, as in the case of the university sector, the sole source of funding. Bill 124 is rationally connected insofar as the provincial government is a significant source of funding for universities. This point was considered in *Syndicat canadien de la fonction publique, section locale 675,* 2014 QCCA 1068. In that case, the Court of Appeal of Quebec accepted that it was rational for Parliament to limit salary growth at the Canadian Broadcasting Corporation even though the federal government is only one source of its funding.

[329] Further, my colleagues' reliance on a funding agreement for Carleton University that extends to 2025 is misplaced. Funding requests of the provincial government represented approximately 29 percent of universities' operating revenue in 2019-20 and tuition fees are partly government funded through student financial supports. It is unrealistic to think that when that agreement expires, Carleton will not seek increased funding, either direct or indirect, from the Province to cover compensation increases made during the life of the agreement. Again, it is worth emphasizing that Ontario serves as the ultimate financial back stop for public services in the province.

### (c) Minimally Impairing

[330] The Supreme Court in *Carter*, at para. 102, describes the minimal impairment step of the s. 1 analysis, as follows:

> [T]he question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*, at para. 53). The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" (*ibid*. at para. 55). The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's object.

[331] At this stage of the analysis, the court must afford the legislature some leeway to create a law that falls within a range of reasonable alternatives to respond to a policy problem: *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 58, citing *RJR-MacDonald*, at p. 342. Courts should not interfere on the basis that they can conceive of less restrictive alternative measures: *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 112. The appellants submit – and I agree – that the application judge failed to adopt this deferential approach and erred in concluding that voluntary wage restraint – or hard bargaining – was the alternative that should have been pursued.

[332] It was an error to conclude that voluntary wage restraint would be a better alternative to a legislative measure. This conclusion reflects a misunderstanding

of the scheme and scope of Bill 124. The legislation extends beyond the government's bargaining role and includes situations where the government is not the employer or not at the bargaining table. Thus, hard bargaining is not an available alternative in all sectors covered by the legislation and does not fit within the range of reasonable alternatives to meet the government's purpose.

[333] Compounding this error was the application judge's and my colleagues' focus on hard bargaining, which prevented them from analyzing whether Bill 124 falls within a range of reasonable alternatives to respond to a policy problem. They avoided that analysis and failed to consider compelling reasons supporting the government's submission that it met the minimal impairment test.

[334] For example, the terms of Bill 124 are not as restrictive as in other temporary wage control legislation. There is no rolling back of wage gains in existing collective agreements or arbitration awards as in the *ERA*. Further, unlike Bill 124, which provides for a one percent wage increase per year, the *PSSA* moderation period included two years with zero percent increases. The moderation period in Bill 124 is also one year shorter than the *PSSA* and two years shorter than the *ERA* moderation period.

[335] The government also adduced persuasive evidence in the form of affidavits from Dr. Dodge indicating that Ontario's fiscal situation was unsustainable and that temporary wage restraint was imperative to gain control of the Province's finances

and protect the delivery of public services. In addressing this challenge, the government made the political decision, as it was entitled to do, that it would not raise taxes or cut critical front-line services and that it would avoid involuntary job cuts.

[336] The record reveals that the government considered and attempted various options for limiting public spending growth associated with salaries, but they were found to be insufficient. For example, in November 2018, it established a requirement for government approval of employer bargaining mandates and tentative collective agreements reached by all public service entities as defined by the *Management Board of Cabinet Act*, R.S.O. 1990, C. M.1. However, that proved insufficient to meet the government's fiscal goals. The government also considered options for greater oversight over bargaining in the broader public service, but those options were not sufficient to curtail compensation costs in the immediate to medium term as they need time to be developed and successfully implemented.

[337] In these circumstances, it was open to the government to choose a legislative solution that was both effective and did not result in such measures as involuntary layoffs and mandatory unpaid days off. The avoidance of these outcomes should be considered in determining whether the legislation was minimally impairing. After all, a laid off employee has very limited associational rights.

[338] Finally, it is unpersuasive that the unions can point to agreements in 2012 that provided for zero percent wage increases. As my colleagues point out, the 2008 economic crisis had a devastating impact on the economy. It is difficult to accept that in 2018, the unions would be prepared to accept such a contract. The fact that they have commenced this litigation objecting to a cap of one percent strongly suggests that the notion that they would have accepted zero percent increases is fanciful.



**(d) Balancing Step**

[339] In undertaking the balancing step, a court measures the proportionality between the measure's effects (including a balance of its salutary and deleterious effects) and the stated legislative objective. The crux of the issue is whether the limit on the right is proportionate in effect to the public benefit of the measure: *Hutterian Brethren*, at para. 73-78. This analysis leads to a series of essential questions identified by the Supreme Court in *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 45: "What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?"

[340] The application judge's analysis on this issue suffers from some of the same defects found earlier in his s. 1 analysis. In particular, he chose to downplay the

evidence of Dr. Dodge and recast Ontario's fiscal situation to fit his conclusion. He described the challenge facing the government as moderating "compensation to manage government expenditure in a responsible way. This strikes me as a day-to-day government duty that does not call for the breach of *Charter* rights absent unusual circumstances." The application judge also stated that the case involved collective bargaining in an "ordinary, unremarkable environment."



[341] Implicit in this finding is that the application judge disagrees with the government's assessment of its fiscal situation. If Dr. Dodge was wrong in his evidence and Ontario's fiscal situation was business as usual, then the application judge was obliged to explain where he got it wrong. Sweeping statements about times of relative growth and prosperity are no substitute for rigorous analysis. Nor is it satisfactory to point out that the fiscal situation was arguably worse in other cases. The application judge was obliged to engage with the evidence before him, not to discount it in favour of his own assessment of the economic conditions in Ontario, which was untethered to the evidence in the record.

[342] In support of this analysis, the application judge returns to the value-laden false dichotomy he created between tax cuts and fiscal restraint:

> In addition, if the government did not want to assume the risk of strikes, it has not explained why the tax cuts it imposed could not have been reduced by $400 million and thereby protected the *Charter* rights of 780,000 employees. Again, I hasten to add that I am not saying that the government cannot implement wage restraint

> and tax cuts in the full amount it desires. I say only that when balancing the salutary and deleterious effects of the Act, I see a serious violation of the applicants' *Charter* rights to save approximately $400 million per year. At the same time, the applicants point to tax cuts of over 10 times that amount. In the absence of any explanation from Ontario for that apparent inconsistency or the absence of an explanation for why the tax cuts could not have been a bit smaller and thereby maintain the applicants' *Charter* rights, the benefit of the Act does not appear to outweigh its detrimental effect.



[343] Left out of the application judge's balancing analysis is any consideration of the impact of ever-increasing compensation costs on front-line services and debt servicing obligations. That omission illustrates the fundamental problem with his reasoning. Properly balancing the salutary and deleterious effects of a piece of legislation requires a consideration of the positive impacts of the law. That is the essence of balancing. The application judge declined to consider the positive impacts of Bill 124.

[344] Further, the application judge's insistence that there has to be an immediate and severe economic crisis to justify a temporary breach of *Charter* rights is unduly restrictive. There can be no doubt that Dr. Dodge's evidence made clear that the rate of spending on compensation was unsustainable. In light of this fact, the government should be permitted to temporarily reduce the unit costs of providing public services in preference to cutting services. According to the application judge's analysis, it would be permissible for the government to temporarily reduce wage costs when the economy was on the brink of collapse, but it would be

unconstitutional for the government to act proactively to prevent the inevitable. If a government sees an economic cliff on the horizon, courts should not require it to wait till the last moment to act.

[345] My colleagues distance themselves from the application judge's balancing analysis. They conclude that the government could have achieved the same results via collective bargaining. That is an unrealistic and unworkable proposition for the reasons set forth above.

[346] Finally, in their brief discussion of the balancing of the salutary and deleterious effects, my colleagues offer this statement: "In contrast, because of the Act, organized public sector workers, many of whom are women, racialized and/or low-income earners, have lost the ability to negotiate." There are many issues to unpack in this comment. However, I will restrict myself to reminding my colleagues that "women, racialized and/or low-income earners" pay taxes in this Province, and they too have an interest in ensuring the responsible management of the Province's finances and the protection of sustainable public services.

**(e) Conclusion Regarding s. 1**

[347] In summary, the application judge and my colleagues erred in their approach to their s. 1 analysis as follows:

- On the issue of pressing and substantial objective, the application judge erred in applying too stringent a standard and went beyond the record to

substitute his own opinion for the views of the elected government and financial experts.

- Regarding the rational connection issue, the application judge erred in finding that there was no rational connection regarding the energy and university sectors and only a remote connection to the long-term care sector. My colleagues made the same errors regarding the energy and university sectors. Both the application judge and my colleagues failed to consider indirect ways that wage control in these entities would benefit the responsible fiscal management of the Province and ignored the fact that the government had an interest in reducing wage growth in entities that are provincially funded or owned.
- In their minimal impairment review, the application judge and my colleagues failed to consider whether the legislature created a law that falls within a range of reasonable alternatives to respond to the policy problem. Instead, their analysis focused exclusively on his erroneous conclusion that voluntary wage restraint or hard bargaining was a viable and better alternative to further the government's policy objectives.
- Finally, at the balancing stage, the application judge chose to ignore the expert evidence and recast Ontario's fiscal situation to fit his s. 1 analysis. Further, my colleagues' analysis of the balancing stage is based on a misunderstanding of the operation of Bill 124.

[348] A proper s. 1 analysis would have found ample evidence to support the government's submission that the control of compensation costs was a pressing and substantial objective. The government also established a rational connection when considering the indirect ways that wage control in the energy and university sectors benefitted Ontario's fiscal position. Regarding minimal impairment, the record made clear that the government tried other measures to fulfil its objectives and that it created a law that was not as intrusive as similar laws in Canada or other policy options. Therefore, the government established that Bill 124 was within a range of reasonable alternatives to respond to Ontario's pressing and substantial fiscal problem. Finally, at the balancing stage, it is evident that the Act's salutary effects of protecting Ontario's financial health and preserving the sustainability of public services far outweigh any deleterious effects.

[349] Based on the preceding, I would find, in the alternative, that if Bill 124 breached s. 2(d), it is a reasonable limit prescribed by law and is demonstrably justified in a free and democratic society.

**(4) Reading Down**

[350] I agree with my colleagues that the application judge erred when he declined to consider the pertinent sections of Bill 124 and simply invalidated the whole Act. The idea that non-unionized workers have associational rights under s. 2(d) is unknown at law.

**(5) Disposition**

[351] For the foregoing reasons, I would allow the appeals, set aside the order of the application judge, dismiss the applications, and award the Province its costs below and in this court.

Released: February 12, 2024 “D.D.”

“C.W. Hourigan J.A.”

# TAB 12

A-225H

IN THE MATTER OF AN ARBITRATION

K. Swan. S
29/76.

- BETWEEN -

THE BRITISH COLUMBIA RAILWAY COMPANY

- AND -

THE GENERAL TRUCK DRIVERS AND HELPERS UNION, LOCAL NO. 31 AND TEAMSTERS UNION 213

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- BETWEEN -

THE BRITISH COLUMBIA RAILWAY COMPANY

- AND -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, CARIBOU LODGE 221, LILLOOET LODGE 215 AND SUMMIT LODGE 252

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- BETWEEN -

THE BRITISH COLUMBIA RAILWAY COMPANY

- AND -

THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 115

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A-225

BOARD OF ARBITRATION

| | |
|---|---|
| O.B. SHIME, Q.C. | CHAIRMAN |
| A.L. McGREGOR | EMPLOYER NOMINEE |
| J. BROWN | UNIONS' NOMINEE |

APPEARANCES

| | |
|---|---|
| T. TEICHMAN | REPRESENTATIVE, and others for the Employer |
| E.D. ZIMMERMAN | REPRESENTATIVE, and others for the General Truck Drivers and Helpers Union, Local No. 31 and Teamsters Union 213 |
| A.L. CAMPBELL | COUNSEL, and others for Brotherhood of Maintenance of Way Employees, Caribou Lodge 221, Lillooet Lodge 215 and Summit Lodge 252 |
| J.L. WHITTAKER | REPRESENTATIVE for the International Union of Operating Engineers, Local No. 115 |

Hearings in this matter were held in Vancouver, British Columbia, on April 28 and April 29, 1976.

## PREAMBLE

The Pacific Great Eastern Railway Company was incorporated by an act of the Provincial Legislature in 1912. In 1918, the Government of the Province of British Columbia acquired the company and since that day has operated the railway.

On April 1, 1972, the Pacific Great Eastern Railway Company became the British Columbia Railway Company and currently is an integral part of the national railway net work and encompasses 3,060 miles of line rail road.

There are approximately 2,350 employees of the railway who are represented by a number of different unions and this matter concerns three of those unions.

In the spring and summer of 1975, bargaining commenced between the railway and the unions who are parties to this dispute. Matters were not resolved and on January 21, 1975, the Teamsters began picketing at various points on the railway and then escalated its strike activity.

The parties were unable to resolve their differences and voluntarily entered into an agreement to refer all

matters in dispute to arbitration. Accordingly, this board of arbitration was convened to hear evidence and arguments and the following constitutes the award of the board.

AWARD

On March 26, 1976, an agreement was reached by the parties to this matter wherein they agreed that all outstanding matters in dispute should be resolved by a three-man arbitration Board. As a result of that agreement this Board was constituted and held hearings in Vancouver, B.C., on April 28 and April 29, 1976.

At the outset of the hearings the Board pointed out to the parties that notwithstanding that they had made provision for a "binding award" no provision had been made which considered the possibility that each member of the arbitration Board might make a separate award; if that did occur, an issue might arise as to which award would be the binding award. Accordingly, all the parties agreed that if there was a majority award, it would be the binding decision of the arbitration board and if there was no majority, the decision of the chairman would be the binding award.

The parties in their submissions implied that the industrial relations condition on the British Columbia Railway was chaotic and unstable and where it was not implicit in the submissions it became not only a reasonable

but also an obvious inference to be readily drawn from the submissions. The main source of the difficulty appears to be the fragmentation of employees into multiple bargaining units represented by separate unions with the inherent problem of each bargaining representative vying with the other to demonstrate its prowess in the collective bargaining arena.

The parties themselves in recognition of the difficulties - and the detriment to the employees who have undoubtedly suffered considerable losses arising from the frequent closing of the Railway and to the public who have been plagued by the absence of a needed and valuable service, have wisely agreed that the matter of the formation of Council of Unions be submitted to the Labour Relations Board in accordance with the British Columbia Labour Code. Hopefully, this mature step towards a co-operative effort will assist in bringing a measure of industrial peace to the Railway.

It is my view that if the concept of a Council of Unions achieves success it is of primary importance that the parties undertake an evaluation of all the jobs in the Railway so as to create a semblance of order and to develop a reasonable basis for comparison among

jobs within the railway. Needless to say, each of the partie where it was convenient, attempted to justify its position to this Board by suggesting comparisons that could validly be made between jobs in the Railway and other jobs. In all case the jobs submitted for comparison were highly selective - eac party choosing the best comparison and at times ignoring othe valid comparisons, with the result that it soon became obviou that the arbitration was an extension of the bargaining proce where each party nurtured its own best position. Accordingly when it came time to assess the positions of the parties we found the totality of the submissions bereft of any completel rational basis for assessing the various claims that were mad For example, one of the unions urged us to consider any internal comparisons between the jobs in the Railways and not to consider any external comparisons. Another of the unions took the completely opposite tack. In addition, the Railway was not blameless in its presentations - it too sough to find valid comparisons based on expediency.

While it is our view that a job evaluation system appears necess to establish a successful collective bargaining relationship, since we were not asked to implement such a system by any of the parties, we make no award in that regard, but only a recommendation.

After considering the submissions of the parties and

the totality of the situation, it is apparent that some criteria are required to assist the parties in their bargaining. Thus, I have attempted to establish some criteria as a basis for future bargaining. It is not intended that these criteria be the final word on how the parties should govern their affairs; but rather, it is hoped that the parties and other arbitration boards, if arbitration is agreed to by the parties, shall more finely hone the criteria which I propose and either augment them or discard them where it suits their purpose.

It is important to note that interest arbitration, unlike some other forms of adjudication, is in many respects an economic event. Thus, submissions to a board of arbitrati should present as facts, carefully analysed economic data. While there are some who believe that economic data have a certainity that will ultimately lead to a solution, it is obvious that economic facts may prove to be as elusive as ordinary facts and as difficult to assess. Often economic facts may point to opposite conclusions and, therefore, th should be carefully marshalled.

It is my view that interest arbitration should not be a sleight of hand process. The institution of arbitration

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1. Since the hearing in this matter, the Government has introduced legislation requiring arbitration on the Railway.

interest disputes requires some attempt by the board of arbitration to rationalize its position to the parties. While reasons may be difficult they are necessary to enable the parties to understand the basis for decision.

Before elaborating on the criteria, it is useful to enumerate them in summary form.

1. Public Sector Employees should not be required to subsidize the community by accepting substandard wages and working conditions.
2. Cost of living.
3. Productivity
4. Comparisons (a) internal
   (b) (i) external - in the same industry
   (ii) external - not in the same industry, but similar work

I now turn to the individual criteria:

1. PUBLIC SECTOR EMPLOYEES SHOULD NOT BE REQUIRED TO SUBSIDIZE THE COMMUNITY BY ACCEPTING SUBSTANDARD WAGES AND WORKING CONDITIONS

With the introduction of collective bargaining into the public sector there has also been some attempt to import into public sector bargaining many of the concepts that historically have been a part of private sector bargaining without making all the necessary distinctions between the public sector and the private sector. In the

private sector, consideration was often given to an employer's profit and loss statement and many early cases concerning bad faith bargaining dealt with a union's right to have access to the financial records of the companies. In the public sector, however, the employer, as the government, is required to provide services to the community it is elected to represent and these services cannot be evaluated on a balance sheet or profit and loss statement in the same manner as a private sector company. Indeed many services, to name a few - the distribution of pension and welfare cheques, the providing of hospital or firefighting services, the supervision of health and sanitation - can neither be considered nor assessed in the same manner as a private business. Also, there are many public sector activities that operate at a loss, but are considered necessary for the vital operation and well-being of the community. In the instant case, the operation of a railway is an example of an industry which is necessary to the community - to the servicing and opening of remote areas, but which traditionally has operated at a loss with the full knowledge and acquiescence of the community which considers the service as vital to its well-being.

The operation of the industry at a loss does not justify employees receiving substandard wages. On balance, the total community which requires the service should shoulder the financial loss and not expect the employees of the industry to bear an unfair burden by accepting wages and working conditions which are substandard; that is not to say that the public sector employer ought to be the best employer in the community - it need not. Rather, it should be a good employer and also be seen as a fair employer.

Related to this concept of a good and fair employer is the notion of ability to pay which has often been mooted as one of the criteria in public sector bargaining.

Once it is accepted that the public sector employer does not operate with a view to a profit and once accepted that it may also operate at a loss, it becomes clear that it may not have the necessary resources required to pay the employees. It must gain this financial support through the taxing power whether directly or indirectly. In almost all cases the financial means are available through taxation, and more to the point, quite often the differences between the union and the employer are such that if taxes were increased the financial burden could be readily borne by each member of the community

bearing his or her proportionate share of the cost. Thus, each member of the community should bear his or her share of the required public service without the necessity of the employees bearing the unfair burdern of substandard wages or working conditions.

This position should not be considered as suggesting that the source of funds from the community is inexhaustible or that there are not political realities to be considered prior to the taxing power being exercised. But, that does not detract from the reality that the public or quasi public sector employer is not subject to the same market place conditions or assumptions that affect the private sector employer.[1]

In sum, I determine that on balance, if the community needs and demands the public service, then the members of the community must bear the necessary cost to provide fair and equitable wages and not expect the employees to subsidize the service by accepting substandard wages. If economies are required to cushion the taxes then they may have to be implemented by curtailing portions of the service rather than wages and working conditions.

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1. Some caution should be exercised in using arbitraion cases in the United States because some of the principles adopted by the National War Labor Board and the National Wage Stabilization Board who were involved in regulating and arbitrating private industry disputes were imported into the public sector.

## 2. COST OF LIVING

The Cost of Living has become a significant factor in our economy and must be weighed in the arbitration process. The importance of this criterion cannot be denied - particularly in the current economy and it has generally been regarded by arbitrators to be of significance in assessing claims made in the arbitration process.

Arguments that decisions granting increases considering cost of living will have an impact on the economy and drive the cost of living indicies even higher should bear little weight in the arbitration process. There is no proof that arbitration awards are capable of aggravating a rising cost of living and there is sufficient evidence that the necessity to readjust wages is a result of, rather than the cause of increased living costs. Thus most arbitrators have given consideration to this factor as a response to the economy and have adopted the position that a particular arbitration involving a limited number of employees

is not the place to regulate the national or provincial economy. The arbitration process as an institution is not equipped to be a regulator of the economy. That function is properly the role of Parliament or the Legislature adopting necessary fiscal or monetary policies.

It is important, however, to consider the cost of living standard as a maintenance standard. It is intended to maintain the position of the employees relative to the balance of the economy. In many respects it keeps jobs at a stationary level rather than advancing them. To put it simply, a position valued at $10,000.00 in an economy where the cost of living is increasing by 10 per cent annually should be valued at $11,000.00 in the subsequent year.

I have used the terminology valuing a position rather than speaking of the particular wage or salary because there is an expectation that the actual wage or salary should rise in a parallel manner to the cost of living index without consideration of other benefits. But that should not be the case. A consideration of the cost of living standard must take into consideration

not only wages, but benefits from all sources, including increments and improvements in working conditions and fringe benefits. An increase in employer contributions to a medical plan would free other financial resources in the hands of the employee to combat inflation. Moreover, gains in working conditions such as reductions in hours of work are a cost to the employer and a benefit to the employee and are matters that must be evaluated when considering cost of living. It is true that a reduction in hours does not immediately translate into a tangible financial amount which the employee can use to combat inflation - but it is a cost to the employer and a benefit to the employee and merely because no immediate funds come into the hands of the employee is no reason to disregard that item as without value when considering cost of living.

Another issue that also arises when considering cost of living is the base year for comparison. Unions will often chart a comparison between their wages and the cost of living indicies going back for a number of years. Very often, when these comparisons are made, other valid improvements in fringe benefits and working conditions are not considered - only wages. But these other matters must

be considered. Also, one must assume that where settlements were voluntarily reached, the parties considered their positions relative to the rest of the economy at that time and accepted the terms and conditions. Whether these past settlements were achieved because of satisfaction by the parties with the bargain after consideration of the total economy, or whether these past settlements were arrived at because of an assessment or testing of the relative economic strengths of the employers or the unions matters little. There should be a presumption against going back too far in history when comparing the wages of the employees to the cost of living index. This is particularly so in the case of public sector employees who have considered fringe benefits such as pensions, job security and working conditions of primary importance and preferred these benefits rather than accept what they considered to be the risks and disadvantages of the private sector, with the result that their wage demands were modified.

In accepting the cost of living as a factor or standard, I take no position on cost of living clauses or payments - that may be a more particular function of

the term of the agreement. Long-term agreements may require some built in protection for those whose predictions prove inaccurate; whereas, short-term agreements where the relative economic position of the employees to the economy in general may be soon re-evaluated and tested may not require similar protective clauses.

## 3. PRODUCTIVITY

The criticism most often levelled at using the cost of living as a standard is that it merely maintains the position of the employee relative to the remainder of the economy. However, this criticism is obviated if productivity is considered as a factor along with cost of living. This factor enables the employees to share in the economic advances of the community.

A problem arises in public sector situations which are essentially of a service nature because it is not feasible to assess productivity; or to put it another way, when productivity cannot be quantified and documented with respect to a particular group of employees, they should not be precluded from consideration for productivity increases. Merely because no scientific or empirical evaluation can be made as to the productivity of a group of employees does not mean that they should not share in the productivity of the general community. For this type of situation, statistics are available which demonstrate the increases in the Gross National Product and public and quasi-public sector employees should not be denied the benefits of such productivity advances.

Specific mention should be made of the automatic increase or increment system which is often present in public employment. It is my view, that such increases, if not considered as part of the total wage package for cost of living purposes, should be so considered when assessing productivity. In the obvious situation where an employer hires an individual to perform a specific function, it is usual that in addition to granting that person an increase after a fixed period which reflects an increase in the cost of living, consideration is also given to the improvement in skill, ability and efficiency derived through experience which are factors related to productivity. However, where there are large number of employees, it is difficult to make individual assessments of improvements in productivity. Moreover, such attempts at evaluating large number of employees, apart from the difficulties in controlling the assessment procedures leads to friction among employees whose self-evaluation when compared to other employees doing the same work may not agree with the employers' assessment. Faced with that type of situation, public service and quasi-public service employees, as well as large employees in private industry have implemented an increment or automatic increase system which has the advantage of not creating distinctions between employees doing the same

work, but has the disadvantage of not rewarding employees who are more efficient and thus most productive. To remedy this latter situation merit systems have been attempted in some cases.

Merely because increments or increases are automatic does not mean that they should not be considered as either a part of the cost of living or as a consideration for productivity purposes. They are a cost to the employer and represent additional funds in the hands of the employee. But most important, they are a substitute for the individual increase which contemplates productivity and, accordingly, they cannot be disregarded; they must be considered under the criteria of either "cost of living" or "productivity".

4. COMPARISONS - (a) Internal

Often, one finds that the public service employer and the union - or if there is no union, the employees - have traditionally considered certain positions of equal value and have negotiated on that basis. Also, there are 'bench mark' positions which form the basis for negotiations and the premises from which the balance of the rates are structured. Where there is more than one bargaining unit, parties have often attempted to maintain an association between different jobs and classifications in order to give some semblance of order to the system. Thus, for example, in hospital bargaining, the parties will maintain differentials between nurses and registered nursing assistants or nurses and orderlies and then between registered nursing assistants and technicians and so on down the line. That is not to say that this is a perfect system and that the parties themselves do not vary or amend the relative positions and differentials within the bargaining unit and between bargaining units. However, the net effect of creating a structured employment situation with different jobs and positions considered as bearing some relationship one to the other is that any form of adjudication on one segment of the work force has

a "ripple effect" on other segments. Thus, some caution must be taken to prevent an undue distortion of the pattern or structure which the parties by themselves have constructed. One of the perils of interest arbitration is that while the arbitrator may be called upon to adjudicate in a dispute affecting one group of employees his decision will ripple through the system and create effects which extend far beyond the particular dispute.

On the other hand the resolution of other disputes within the employer's household will in turn have an impact on any particular adjudication. One need not be tyrannized by the ripple effect but responsible consideration must be given to the effects and impact of any decision which may extend beyond the borders of a particular case.

Also as a practical matter where one employee is doing work which compares in skill and ability to the work of another employee it will create considerable dissatisfaction and create disruption if those equivalent posistions do not receive equivalent compensation.

In the long run it serves the best interest of all parties to have a system of job evaluation where comparisons may be made and challenged through a grievance

procedure or other procedure rather than attempt to negotiate these matters, because negotiations constitute an arena where job disputes may be resolved in unscientific trade offs which may have undesirable long-term effects on the total job structure.

In conclusion, I am of the view that internal differentials and internal comparisons must be considered as a factor in interest disputes.

4. COMPARISONS - External - (b) (i) in the same industry

This comparison is necessary to make certain that employees are not caught by the internal relationships and differentials that have been structured within a particular employer's household but that persons doing the same jobs receive similar rates. Thus, a secretary working for a provincial government agency may be compared to secretaries working in other provincial government agencies within the same province. As well, he or she may be compared to secretaries doing the same work in other government agencies such as Federal agencies operating within the same geographic area. Finally, such work may be compared with the work in governmental agencies in other provinces. Similarly, teachers, nurses, economists or inspectors may be considered alongside other persons holding similar positions. The weight to be attached to these comparisons will vary depending on the nature of the particular public agency, the geographic area and the competition differentials in those areas and the distinctions to be made in the actual work performed. Care should be taken to compare equal jobs and consideration must be given to differences in working conditions and fringe benefits and appropriate adjustments should be made where required.

In this case, it is valid to compare jobs in the British Columbia Railway with the same jobs on other railways;

by the same token, care must be taken to compare the similarities as well as the differences and to make allowances for the economic situation in British Columbia as compared to the economic situation of employees employed by the Canadian National or Canadian Pacific Railways - negotiations on the national railways must make allowances for the varying economic conditions that obtain across Canada in the various provinces. This is a factor which must be considered when comparing the same positions in the different railways.

The external comparison to the same jobs in the industry ensures that the same relationship is maintained among employees who work in the industry and who may be considered to be doing work in similar conditions and thus similar considerations must prevail. Not only can comparisons be more readily made between jobs in the same industry, but there is some virtue in maintaining a competitive position between employers. The inability to compete because of a particular wage structure may result in a diminution of jobs and may cause serious repercussions.

4. COMPARISONS - (b) (ii) external - not in the same industry, but similar work

One of the difficulties inherent in comparing jobs in the same industry is that there is a circular or a self-perpetuating effect. For example, in the health industry, if all hospitals are paying their employees a specific percentage of a fringe benefit, such as fifty percent disability insurance or they are all granting the same number of statutory holidays, how is the pattern broken, particularly where the industry is paying a lesser rate than that which prevails in other sectors of the economy? If all or most hospitals grant 9 statutory holidays, then each hospital as it negotiates will point to other hospitals suggesting that the basic pattern is set and that nothing in excess of the pattern is warranted. This may be inequitable, all other things being equal, if employees in other public institutions or in private industry are receiving more than 9 statutory holidays. It is, therefore, appropriate to look beyond a particular industry or public sector situation to ascertain the patterns set in similar occupations or in large private sector businesses to prevent the process from becoming internalized.

Arbitration of interest disputes in the public sector

is a substitute for free collective bargaining and some attention must be paid to what might have evolved had the parties had the opportunity to engage in that process. If the parties know this in advance it may encourage them to resolve their own differences, and at the very least the free collective bargaining situations provide some objective basis for assessing a particular dispute.

In this case, for example, there are truck drivers who perform the same or similar work to other truck drivers within the railways and also in other private sector situations. Just as dissatisfaction may be bred by unequal rates paid for the same work in an employer's household, so too will dissatisfaction arise if vastly unequal rates are paid for the same work either in the same industry or in other industries. Therefore, these other rates and fringe benefits and working conditions must be compared to prevailing external employment situations as a test against which the public service rates may be measured.

Quite often there are no comparable jobs or positions in the private sector. A fireman is an example of the type of public sector occupation which has no counterpart in the private sector. In these situations

as well as assessing the internal relationships that have evolved between the parties, some objective assistance may be gained from economic indicies published by various government agencies.[1]

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1. The Federal Department of Labour publishes a report concerning the percentage increases that have resulted from negotiated collective agreements where 500 or more persons are employed. Since these are relatively large employment situations, some reference may be made to this type of statistic. This particular index should be hesitatingly used as a form of litmus test comparison only and the reason for that is because percentage increases are calculated on the base rates only and not on the average rate and data concerning other matters such as fringe benefits or changes in working conditions is not reported. Any use of this particular index must, therefore, be on a limited basis only. However, absent a valid basis for comparison, it does provide some limited assistance.

CONCLUSION

In conclusion, I am of the view that the above criteria may be used in whole or in part in interest disputes and that varying weight may be given to each of the criteria as the individual situation demands. The criteria should enable a form of adjudication based on a more scientific analysis and should also permit the parties to properly prepare for the interest arbitration.

I now turn to the particular disputes. While I have set forth the criteria which are useful, needless to say, the parties did not have my views in advance and accordingly relied solely on comparisons both internal and external to justify their positions. I have,therefor not utilized all the criteria in arriving at my decision.

MATTERS OF GENERAL RELEVANCE TO THE PARTICULAR DISPUTES

An evaluation of the particular disputes must be assessed against the background of certain events which, as the submissions revealed, had considerable impact on the parties and were part of the social and economic dynamics affecting the current disputes.

First, Mr. D.L. Larson was appointed as an Industrial Inquiry Commissioner pursuant to Section 122 of the Labour Code of British Columbia with respect to a dispute between the Railway and the "Shopcraft unions" and submitted his report to the parties on January 3, 1975. Before Mr. Larson, the unions urged that their rates be compared to other tradesmen in industry in British Columbia; whereas the Railway argued that the wages must be comparable to wages in other railways in North America as wage rates in excess of those paid in other railways would put the B.C. Railway at a competitive disadvantage. Mr. Larson concluded that the B.C. Railway should be prepared to pay its employees "rates of pay which are at least approximatel consonnant with industry generally within the Province", and he also concluded, as did the Honourable Emmett Hall, Q.C. D.C.L. D. Med. in another railway dispute that the employees should not be required to subsidize the railways which are an instrument of national policy and that

the community as a whole must absorb any such deficit. Mr. Larson then recommended an increase of $1.25 with certain exceptions as well as a COLA clause and that the term of the contract be for nine months, to expire July 31, 1975.

An agreement was subsequently entered into between the Railway and the Shopcraft unions and, as I understand it, the agreement was based on the recommendations of the Industrial Inquiry Commissioner. Subsequently, a further agreement was voluntarily entered into between the Railway and the Shopcraft unions which provided a further increase of $2.00 plus shift differentials. That agreement is to terminate on July 31, 1977.

The second item of major importance to the negotiations between the parties preceding this dispute was a cost of living increase of 26¢ per hour which was introduced by the Railway by agreement with some of the unions and not others. The unions claim that they are entitled to the continuation of that increase into the terms of the existing agreement.

The third significant event that occurred was the appointment of Mr. Justice Munroe as an Industrial Inquiry

Commissioner on January 23, 1976. On February 5, 1976, Mr. Justice Munroe recommended an increase of $1.90 per hour and a cost of living increase which might yield 26¢ per hour provided that the cost of living reached a certain point. Subsequently, the employees rejected the report of Mr. Justice Munroe and after further bargaining and a strike, the parties eventually agreed to refer this matter to arbitration.

These events have unwittingly contributed to the basic disagreements that exist between the parties. Thus, the Teamsters urge that employees in the bargaining unit represented by them receive rates comparable to other Teamsters' contracts in British Columbia. The IUOE claims that its members should receive rates comparable to the construction industry, while the Brotherhood of Maintenace and Way Employees stresses the internal comparison between the employees it represents and the Shopcraft employees. The Railway,on the other hand, urges rates comparable to other railways and has indicated that it is prepared to accept the Munroe Report The Railway seeks to isolate The Shopcraft Settlement as being peculiar to its own set of facts and as a reflection of the economic events that prevailed at the time of the settlement which it asserts differ from the prevailing economic situation.

The unions also request a maintenace of the 26¢ per hour cost of living increase asserting it as a right whereas the Railway adopts the position that the 26¢ is provided in the Munroe Report in one form or another - either as an inclusion in the $1.90 awarded or alternatively, as a renewal of the cost of living provision which "may" take effect during the life of the agreement. Needless to say, the perception as to how and when the 26¢ is to be incorporated into the agreement has affected the atmosphere in the Railway and aggravated the dispute.

The differences between the parties are incapable of complete resolution by this arbitration. Hopefully, the parties themselves will attempt some resolution of their differences in the Council of Trade Unions which is contemplated. This arbitration must be concerned only with bringing the parties to a plateau from ~~the~~ which they can responsibly move on and adjust their own affairs.

I now turn to the specific disputes.

I

DISPUTE BETWEEN THE BRITISH COLUMBIA RAILWAY COMPANY AND THE GENERAL TRUCK DRIVERS AND HELPERS' UNION, LOCAL No. 31 AND TEAMSTERS LOCAL UNION 213

The items in dispute between these parties are as follows :

1. General Holidays
2. Annual Vacations
3. Deduction of Dues
4. Picket Lines
5. Coverage - retroactivity
6. Wages and Classifications
7. Sick Leave

During the hearings the parties reached an agreement with respect to item 5 "Coverage - retroactivity" and accordingly it is our determination that the agreement between the parties with respect to this item be incorporated into a collective agreement.

1. GENERAL HOLIDAYS

The union agrees generally with the position of the Railway which is contained in Rule 40 of the Railway's proposed agreement. The union objects to Rule 40(c) which requires an employee to work for 12 shifts during 30 calendar days immediately preceeding the general holiday in order to qualify for holiday pay. The union requests that all employees who have been on the payroll for 30 calendar days shall be entitled to the paid holidays and further that employees absent from work by reason of accident or illness not in excess of six months shall be paid.

Holiday pay is generally considered to be a part of the wage package and not unilaterally bestowed by the employer. As such, there are some who consider the holiday to be earned by work performed since the last holiday. Thus a provision such as Rule 40 is not unusual - it requires the holiday to be earned by a minimum of 12 shifts worked in the period preceeding the holiday. I am not persuaded that the union position should prevail nor does the evidence submitted by the union suggest that on balance a change is warranted.

Also, the request that an employee be paid even though absent due to accident or illness detracts from the concept of the holiday as a benefit earned through working. Employees who are absent or ill have not earned the benefit in the classical sense of having worked for it. Moreover, any benefits they receive should be covered under Workmen's Compensation or sickness and disability benefits and granting to them holiday pay in addition would be a duplication of benefits.

Award

The union's request is, therefore, denied.

2. ANNUAL VACATIONS

The union's main objection to the Railway's position, in this case, is that an employee must qualify twice before receiving an annual vacation. In the first instance an employee must work so many years and hours to receive respectively 10, 15 20, 25 and 30 working days. This type of a provision is common. However, the Railway then requires that the employees must requalify by working a fixed number of cumulative compensated service days to requalify. For example, an employee who has worked for 19 years and 4750 days is entitled to 25 working days' vacation each year with pay. However, in subsequent years, such employee is

> ".....allowed one (1) working day's vacation with pay for each ten (10) days' annual cumulative compensated service, or major position thereof, during the preceding calendar year; with a maximum of twenty-five (25) working days until qualifying for further vacation.....".

The union's submission in this case has some justificati There appears to be no theoretical reason for requiring long service employees to requalify yearly in order to receive a vacation. Their vacation period is earned through years of lengthy service and to deprive them of their vacation entitlement in any individual year

because they have not met a quota of days of compensated service is to ignore their previous service. On the other hand, if the clause is intended to prevent duplication or pyramiding of benefits, there is some warrant for retaining that concept. While there is evidence that this system forms part of other internal agreements, e.g., the shopcraft agreement, there is also evidence that this system of granting paid vacations does not exist outside the railways.

On balance, I would have been of the view that the union's submissions should be given greater weight than the Railway and a change introduced in order that this collective agreement be brought into line with other collective agreements, but for the following. It appears that prior to this dispute a number of unions in the Railway, with the exception of the Printers, negotiated in concert for a welfare package and were able to arrive at a joint agreement. This demonstrates a strong internal community of interest and relationship with respect to the general welfare package and I am loath to disturb this internal relationship. Also, after considering the nature of those negotiations, I am of the view that greater weight must be given to internal comparisons when considering the welfare package, particularly

where the union participated in the settlement. Accordingly, I am not prepared to grant the union's request.

Award

The union's request to amend the annual vacation provision is denied.

3. DEDUCTION OF DUES

It is the Railway's practice to deduct union dues. There is no requirement for what is traditionally a union shop in which all employees are required to become members of a union after a fixed period of employment. The union, on the other hand, seeks not only a union shop, but a preferential hiring hall provision.

Based on internal comparisons to other unions in the Railway, there is some justification for maintaining the Railway's position. However, the external data is so overwhelming that certainly some change is warranted from the mere forwarding of dues position suggested by the Railway. Moreover, it is implicit, in the recognition of a union shop, that an employer has accepted the union as a participant in regulating the relations between the employees and their employer and this is a positive factor in any Industrial Relations setting.

Had the union represented these employees for some peri I would have had no hesitation in granting a full union shop. However, the Teamsters union has in recent years

replaced another union as the bargaining representative. On that basis, it is my view that it has to earn the right to a union shop and that some time should be given to the employees who are in the bargaining unit and who have experienced another representative to finally determine that they wish to be representated by this union.

Accordingly, it is my view that Rule 90 should be amended and a maintenance of membership clause be established. That type of clause will require all new employees to become union members and it will preserve or maintain the membership in the union of all current employees who are members. Where non-members who are currently employees choose to join the union their membership shall be maintained in the union.

Needless to say, in establishing a maintenance of membership clause, I am not prepared to give the union a preferential hiring hall provision for additional employees because the relationship has not sufficiently matured and because the act of hiring or the choosing of new employees is a matter which should not be lightly removed from the employer who should be entitled to free access to the market place in selecting persons for employment in its organization. I am not prepared to restrict this free access by the employer.

Award

(a) Each employee who, on the date of this agreement, was a member of the union in good standing and each employee who becomes a member after that dat shall,as a condition of employment, maintain his or her membership in the union.

(b) All employees in the bargaining unit, hired after the date of the signing of this agreement, shall be required within 15 days of the date of their employment, as a condition of employment, to sign written authorizations, authorizing the company to deduct from the last pay due each calendar month an amount equivalent to the regular union dues and initiation fees uniformly levied against the members of the union and remit the same to the union not later than 15 days after the deduction of said amounts from the employees.

(c) The company agrees during the life time of the agreement to deduct such sum as is authorized by the employee from the last pay due each calendar month, and to remit the same to the union not later than 15 days after the deduction of said amount from the employee. The union will give a receipt to the company.

(d) The company shall furnish to the union a list of new employees taken into employment by the company, showing the location of the employment within 10 days of their being hired.

(e) The company shall, when remitting such dues, identify the employees from whose pay such deductions have been made

(f) Notwithstanding anything contained in this article, the company shall not be required to discharge any employee to whom membership in the union has been denied or terminated on some ground other than the refusal of such employee to tender the initiation fee and dues uniformly required in order to acquire or maintain membership in the union, unless the company agrees that the grounds upon which the union refused or terminated such employee's membership are valid, or in the alternative, unless the matter is referred to arbitration in the manner hereinafter prescribed by this agreement, and a board of arbitration decides that the grounds upon which the union refused or terminated the membership of such employee were sufficient to justify his discharge by the company.

(g) The union shall make available to the company application cards to the union and authorization cards for dues and initiation fee deductions which the company shall have the various branch or depot managers give to new employees to be filled out and then return same to the union office in Vancouver within a reasonable time.

Rule 90 shall be amended so as to be consistent with the foregoing award.

4. PICKET LINES - Rule 95

The Railway, in order to demonstrate that it has fulfilled its obligations as a common carrier, desires some record that it has attempted to fulfil its obligations and requests that a clause be inserted that requires an employee who refuses to cross a picket line to sign a letter. The union is reluctant to have employees expose themselves in this manner because they fear legal repercussions against the employees. The Railway submits a clause which does not require employees to cross a legally constituted picket line and has proposed such a clause.

These positions were not fully developed at the hearing and absent any evidence or submissions that demonstrates that the Railway is incapable of establishing its attempt to fulfil its obligation by other evidence, there seems to be no compelling reason to have the employee sign a document without the benefit of a hearing or investigation or without the benefit of a union representative. The Railway's position may be demonstrated by the evidence of a dispatcher or by bills of lading or by the employee being properly called as a witness at a hearing.

In the result, I accept that part of the Railway's proposal concerning the relationship between discipline and crossing picket lines only.

Award

Rule 95 shall provide that "an employee will not be disciplined for refusal to cross a legally constituted picket line, but will not receive pay if he refused to cross a picket line established at the railway property".

## 6. WAGES AND CLASSIFICATIONS

In view of the recommendations concerning job evaluation, I am not prepared to grant the union's request for reclassifying employees. Hopefully, any inequities that may exist in that area will be remedied by a properly instituted job evaluation scheme.

The current proposal by the Railway is $1.90 and a 26¢ COLA which may or may not be triggered. The union demand is $2.55.

It is my view that the COLA payment established in the previous agreement should be incorporated into the current rates commencing August 1, 1975. That payment will, therefore, continue throughout the life of the agreement. The payment is not to continue as a distinct and separate amount beyond the life of the current agreement unless negotiated or awarded. Future rates are to be negotiated as economic circumstances warrant. This award will ensure the employees that the COLA payment granted in the previous agreement will continue in the current agreement whereas the current COLA formula is merely speculative and there is no certainty that the cost

of living will reach a point where the 26¢ will be triggered.

In addition, I am of the opinion that the shopcraft settlement cannot be ignored following so closely on the heels of a previous increase which undoubtedly had taken into account the cost of living. Accordingly, I have given great weight to that settlement because it was voluntarily reached. Also the locomotive engineers received an increase of $2.20 which included a 26¢ COLA and accordingly some weight must be given to that settlement. Having also considered the outside rates, I am of the view that some weight be given to them and that some movement be made to provide a comparable rate consistent with also maintaining the internal differentials. Hopefully, a job evaluation scheme will put the jobs into a more realistic internal structure and may also allow for comparisons to outside rates.

The Railway, in addition to relying on the Report of Mr. Justice Munroe, also relied on comparisons with the C.N. & C.P. Railways and more particularly the rates contained in a Conciliation Board Report. As yet, those rates have not been agreed upon and thus must be considered as speculative when it comes to assess

the Railway's position.

Since the hearing, the unions' leadership in the nation railways has rejected the Conciliation Board and since there is no finality to that situation, the submissions by the Railway in this case, cannot be given full weight

Accordingly,I am of the view that a total increase of $2.1 is warranted. This amount will assist in maintaining the differentials that had previously existed, and will be an initial step toward establishing relatively comparable rates to those existing in private industry when it is justified. Since the 26¢ is to be incorporat the commencement of the agreement, there is no basis for paying it twice and the 26¢ is to be in lieu of the cost of living formula offered by the Railway and recommended by Mr.Justice Munroe. My award is therefor as follows:

Award

There is to be added to all wage rates the following:

| August 1,'75 | February 1,'76 | August 1,'76 | February 1,'77 |
|---|---|---|---|
| 26¢ plus a further 90¢ for a total of $1.16 | 35¢ | 50¢ | 15¢ |

7. SICK LEAVE

The union has proposed a sick leave bank which accumulates at the rate of 1/2 day per month to a maximum of 30 days. There has been a general tendency to eliminate sick leave banks because they tend to create problems. The employees who have not used the sick leave feel that there is some obligation on the employer to give them credit for that leave upon termination of their employment. Also, where there is no payment some employees feel that they should use the time. While most employees are honest in not taking undue advantage of a sick bank there are some who abuse it.

However, there is some justification for protecting employees who are ill. The current trend is to protect them through insurance plans which provide sickness and accident as well as long term disability benefits. These plans provide a more equitable form of coverage in that all employees are protected against sickness or accident regardless of length of service. The extent of coverage, of course, depends on the plan.

One of the impediments to instituting appropriate

insurance coverage is often the sick bank because unions often insist on some form of final reconciliation of the credits contained in the sick bank. Accordingly, some caution must be exercised in instituting such an arrangement.

In this case, apart from the reasons indicated, there is not sufficient comparative data, either internal or external, which would warrant establishing such a scheme. Moreover, the union has not shown any incidents where employees have suffered inequities which would be avoided by the establishment of a sick bank. Further, sick leave should be part of the general welfare package and should have been negotiated when the welfare package was negotiated. Since it did not form a part of the general welfare package, negotiated by the union, I do not think that the Teamsters can now claim this benefit independently of the other unions. Sick leave should be deferred to be dealt with jointly. Accordingly, I am not prepared to grant this request.

Award

The request for sick leave improvements is denied.

II

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 115

At the outset of the hearing the Board was advised that the following items remained in dispute:

1. Wage rates and classifications
2. Grievance procedure
3. Probationary employees
4. Vacation pay entitlements
5. General Holidays
6. Hours of work

During the course of the hearings the parties were able to reach agreement on items 2, 4, and 5 leaving items 1, 3 and 6 to be resolved.

GENERAL BACKGROUND

The employees with whom we are concerned are employed by the railway on the Dease Lake Construction Project which is a new extension of the railway that is currently being constructed. Initially, this union applied for certification for all employees doing similar work in the B.C. railway which included employees who were not working on the Dease Lake Construction Project. The union ultimately received

a certificate covering only those employees engaged on the Dease Lake Construction Project. This is reflected in the collective agreement between the parties. The effect of the certification and the collective agreement is that upon completion of the Dease Lake Construction project the bargaining rights of the union will expire or lapse.

That factor is significant because it is in issue between the parties whether the employees should be treated as regular employees of the Railway or whether they should be considered on the same basis as construction workers. The railway urges that these employees should be treated the same way as non-unionized employees performing the same work for the Railway whereas the union submits that these employees are working on a specific construction project and should be treated as construction workers.

After considering the representations of the parties, the nature of the work performed and the recognition clause i the collective agreement, I am compelled to conclude that the employees in the bargaining unit bear a greater

similarity to an ordinary construction unit than to an operating unit. Not only is the limitation on the bargaining rights significant but the nature and extent of their work and the geographic location tend to indicate that these employees are construction workers. Had the working conditions affecting these employees been so similar in nature to others whom the Railway says are performing the same work, it would follow that the community of interest between those two groups would have warranted one bargaining unit. Since the Labour Relations Board did not find one bargaining unit to encompass all these employees, it must have been of the opinion that there were sufficient differences between the two groups to subdivide the employees into potentially separate bargaining units.

I am also of the view that given the temporary nature of the bargaining unit and the work performed, the considerations surrounding these employees may be isolated, in the sense, that they may be treated as separate and independent without undue concern as to how an award affecting their interests will affect other bargaining units and other employees. There are not strong ties or inveterate relationships between this group and others to worry about the ripple effect

within the Railway's own employees. It is true that there are some non-unionized employees who may be affected, but there are sufficient distinctions which can be made between these two groups of employees which would mitigate against the impact of any award. Accordingly, in this case, it is my view that external comparisons should be given greater weight than any internal comparisons and that external comparisons should be made to those doing similar work either for other public employers or those in the construction industry. It is also my view that this award should reflect a bringing of these employees to a position that is within reach of these external comparisons so that in time they will be brought to comparative rates.

1. PROBATIONARY EMPLOYEES

The union requests a change in the probation period from 45 to 30 days, as well as certain other modifications. I am of the view that there is not sufficient data before the Board to satisfy us that a change is warranted in this area or that difficulties have arisen which require rectification.

Award

The union's request is denied.

2. HOURS OF WORK

The union seeks a reduction from a 40 hour week to a 37 1/2 hour week in keeping with the accepted hours of work throughout the construction industry. Since it is our view that these employees are primarily construction workers, we are of the view that their hours should be consistent with the hours in the construction industry.

Award

The hours of work are to be changed from eight (8) hours per day and forty (40) hours per week to seven and one half (7 1/2) hours per day and thirty-seven and one-half hours per week (37 1/2) hours per week. This shall not be implemented until June 15, 1976.

3. WAGES AND RECLASSIFICATION

The union's evidence demonstrates that there is a wide discrepancy between the rates it receives and the rates received in the construction industry. Bearing in mind that this group of employees may be considered separate and independent from other employees of the Railway and that it is not bound to the internal structure as the other employees, greater weight may be given to external comparisons.

The rates paid to comparable classifications in an agreement between the Office & Technical Employees' Union Local 378 and Columbia Hydro Constructors and Peace Power Constructors are as follows :

| | May 1,1975 | Nov. 1,1975 |
|---|---|---|
| Rodmen | $ 7.55 | $ 7.86 |
| Chainmen | $ 7.91 | $ 8.23 |
| Junior Instrumentmen | $ 8.40 | $ 8.72 |
| Instrumentmen (Journeymen) | $ 9.34 | $ 9.67 |
| Senior Instrumentmen | $10.05 | $10.39 |

Rates paid to similar classifications in an agreement betwe

Ralph M. Parsons Co. Ltd. and IUOE, Local 115 are as follows :

| | May 1,1975 | Nov. 1, 1975 |
|---|---|---|
| Senior Instrumentmen | $ 9.04 | $ 9.26 |
| Junior Instrumentmen or Levelmen | $ 8.44 | $ 8.66 |

Having regard to these agreements, the rates requested by the union in this dispute are not out of line and accordingly some effort should be made to gradually bring the rates within the range of the prevailing rates. However, it should also be borne in mind that we have amended the hours of work and allowance should be made for this as a cost to the employer and a benefit to the employees.

Award

| CLASSIFICATIONS | Aug.1'75 | Aug.1'76 |
|---|---|---|
| Instrumentmen | | |
| Probation - 1st 45 days | $6.90 | $7.70 |
| Balance of 1st year | $7.08 | $7.88 |
| 2nd year | $7.26 | $8.06 |
| 3rd year and after | $7.70 | $8.50 |
| Levelmen | | |
| Probation - 1st 45 days | $5.98 | $6.78 |
| Balance of 1st year | $6.25 | $7.05 |
| 2nd year and after | $6.50 | $7.30 |
| Rodmen | | |
| Probation - 1st 45 days | $5.45 | $6.25 |
| Balance of 1st year | $5.71 | $6.51 |
| 2nd year and thereafter | $5.84 | $6.64 |

| CLASSIFICATIONS | Aug.1'75 | Aug.1'76 |
|---|---|---|
| Chainmen | | |
| Probation - 1st 45 days | $ 5.12 | $ 5.92 |
| Balance of 1st year | $ 5.35 | $ 6.15 |
| 2nd year and thereafter | $ 5.56 | $ 6.36 |

III

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
LODGES 215, 221 and 252

The only item in dispute between the parties is wages. The union requests a total increase of $2.76 and a cost of living allowance. The Railway is prepared to abide by the Munroe report.

The union submits that there should be similar rates of pay for similar classifications of work and seeks to compare some of its employees with the shopcraft group. It claims that equality of rates must be within the British Columbia Railway and not - "comparisons and parity with the two major railways". However, the submissions do not specifically detail how the Board is to arrive at the sum of $2.76 requested. The union stresses comparison to the shopcraft unions, but seeks a greater amount. In the absence of detailed economic support for the union's position its request cannot be supported.

However, there is some merit that it maintain a position relative to the shopcraft union and to the other unions who are party to this arbitration

and accordingly some weight must be given to its submission for parity. However, the union has not justified its request with sufficient economic data and its full request must be denied. The award is as follows :

Award

There is to be added to all wage rates the following:

| August 1,'75 | February 1,'76 | August 1,'76 | February 1,'7 |
|---|---|---|---|
| 26¢ plus a further 90¢ for a total of $1.16 | 35¢ | 50¢ | 15¢ |

In the event that the parties have any difficulty with respect to the implementation of this award, we will remain seised of all matters.

I wish to express my indebtedness to the members of the board for their assistance and to the parties for their courtesy and the care in which they took in their submissions.

DATED AT TORONTO this 1st day of June 1976.

CHAIRMAN

"I CONCUR - A.L. McGREGOR"
EMPLOYER NOMINEE

"I CONCUR - JOHN BROWN"
UNIONS' NOMINEE

# TAB 13

**IN THE MATTER OF A COMPENSATION REOPENER**

**BETWEEN:**

**The Participating Hospitals**

**(Represented by the Ontario Hospital Association)**

**and**

**OPSEU**



**Before:** William Kaplan, Chair
Brett Christen, OHA Nominee
Joe Herbert, Union Nominee

**Appearances**

**For the OHA:** Craig Rix
Hicks Morley
Barristers & Solicitors

**For OPSEU:** Steven Barrett
Colleen Bauman
Goldblatt Partners
Barristers & Solicitors

The matters in dispute proceeded to a mediation in Toronto on February 18 & 19, 2023 and to a hearing held by Zoom on May 29, 2023. The Board met in Executive Session on June 1, 2023.

## Introduction

On July 7, 2022, the Board issued its award settling the terms of a collective agreement between the parties with a term of April 1, 2022, to March 31, 2025. The jurisdiction of the Board was constrained by the *Protecting a Sustainable Public Service for Future Generations Act, 2019* (Bill 124*).* Accordingly, and as was normative in cases of this kind, the Board included in its award a reopener provision.



## Reopener

We remain seized with respect to a reopener on monetary proposals in the event that OPSEU is granted an exemption, or Bill 124 is declared unconstitutional by a court of competent jurisdiction, or the Bill is otherwise amended or repealed.

After Bill 124 was declared unconstitutional on November 29, 2023, the reopener provision was invoked and issues arising out of it proceeded to a mediation in Toronto on February 18 & 19, 2023, and then to a hearing held by Zoom on May 29, 2023. The Board met in Executive Session on June 1, 2023.

## Statutory Criteria

T*he Hospitals Labour Dispute Arbitration Act* (*HLDAA*) governs these proceedings and sets out the specific criteria to be considered:

> 9 (1.1) In making a decision or award, the board of arbitration shall take into consideration all factors it considers relevant, including the following criteria:
>
> 1. The employer's ability to pay in light of its fiscal situation.
> 2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
> 3. The economic situation in Ontario and in the municipality where the hospital is located.

4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
5. The employer's ability to attract and retain qualified employees.



**General Background and Union and Participating Hospitals Reopener Proposals**

OPSEU (union) represents more than 12,000 paramedical employees at 49 Participating Hospitals working in more than 200 different classifications. The most populous group – representing just over 40% of the bargaining unit – are the Registered Technologists (RTs) – who are integral to almost all hospital health care. For example, approximately 85% of all diagnoses are dependent on a laboratory result, one provided by an RT. RTs and others are subject to applicable college regulation.

The union proposed the following adjustments:

1. General wage increases of an additional 6% in each year of the collective agreement.
2. A one-time adjustment of 7.9% to the top rate for all job classifications. Or, in the alternative, all RTs moved from RT Wage Grid to RT Plus Grid.
3. Effective April 1, 2022, a one-time lump sum payment of $8400 pro-rated for part-time employees ($3400 pandemic pay and $5000 retention bonus).
4. Amendment to call back provision to provide two times hourly rate for call backs.
5. Increases to evening, night and weekend shift premiums.
6. Increase vacation to five weeks after eleven years and seven weeks after twenty-five (with corresponding changes to part-time).
7. Increase vision care and add option to use coverage for laser surgery.
8. Increase Health Care Spending Account.

The Participating Hospitals proposed the following adjustments:

1. Effective April 1, 2022, an additional .75%.
2. Effective April 1, 2023, an additional 2%.
3. Effective April 1, 2024, an additional 2%.

**Union Submissions**

**Overview**

In the union's view, its general wage increase request squarely aligned with economic, social and political realities and was needed to address three main *HLDAA* criteria: recruitment and retention, the economy; namely, the unprecedented and continuing erosion of wages brought about by persistent high inflation, and comparability between RTs and RNs. Meaningful adjustments were necessary to restore the historic relationship between the two and that meant parity at the top of the wage grid. The growing and unjustified wage gap between union members and RNs represented by ONA required immediate attention; on wages to be sure, but also premiums and other benefits.

In brief, it was the union's submission that the application of the three identified statutory criteria, together with the normative ones – above all replication of free collective bargaining – justified each of the union's proposals. Moreover, the union observed, this reopener provided an opportunity to recognize the extraordinary efforts of union members who worked tirelessly throughout the pandemic to ensure that vital health care services were provided to the people of the province. Recognition of the union members' service and sacrifice was made even more critical because during the pandemic – even though they attended at their hospitals throughout

and made themselves available as required – they were deprived not only of the pandemic pay provided to other hospital workers, but also the retention pay provided to nurses. One of the union's proposals was directed at redressing this, something the union described as a manifest injustice.

In the union's view, the wage offer of the Participating Hospitals did not even come close to addressing key *HLDAA* and other criteria. Recent public sector settlements – PSAC and the federal government/CRA and OPG and the PWU (approved by Ontario's Treasury Board) – made this crystal clear. These freely bargained settlements providing for 4.75% in 2022 and 3.5% in 2023 (plus signing bonuses and in the case of the PWU other significant compensation improvements) established the baseline for replicating free collective bargaining (as did the negotiated outcome between Ontario's school boards and CUPE in November 2022, as did emerging bargaining trends in the broader public sector, as did negotiated private sector settlements, as did health care settlements in other provinces).

In the union's submission, replicating free collective bargaining meant adopting these outcomes: along with other sought after economic adjustments. The reason for this was obvious: When rampant inflation, the recruitment and retention situation, and the long overdue correction of the comparability disparity were added to the mix, the case for substantial general wage and other compensation increases beyond these bargained outcomes, together with other enhancements, became even more compelling. The Participating Hospitals' proposal – even including the 1% in each year already awarded – amounted to a huge decline in real wages. And it was a result that

would never be agreed to and, thus, it could not be the outcome of an arbitrated interest award which must replicate free collective bargaining.

Numerous other reasons supported the union asks: no application of any of the criteria, statutory or otherwise, could rationally lead to the numbers proposed by the Participating Hospitals because the evidence established that since the 1990s – albeit with some variation – union wage increases had by and large tracked or exceeded CPI. Paradoxically, when inflation tracked at 2% or less, the Participating Hospitals argued that wages should keep pace with inflation, not exceed it. Now that that argument no longer served its interests with the union asking for a general wage increase that mitigated against inflation, the Participating Hospitals were adopting the opposite argument; that inflation should not be considered or applied, a convenient but inconsistent approach with one predictable result: it would leave union members even further behind.

**Why ONA was no longer an Appropriate Comparator for General Wage Increases**

There was no doubt about it, the union submitted, that the longstanding key comparator for general wage increases for the union and its members in central hospital bargaining has been ONA. Since 1991, general wage increases, almost without exception, have moved lockstep with those obtained by ONA. However, the current situation was complicated by the two ONA reopener awards, along with what only could be described as a major change in circumstances.

There first of these was *ONA & Participating Hospitals*, (unreported award of Stout dated April 1, 2023) – the Stout Reopener – and the second was *ONA & Participating Hospitals*, (unreported award of Gedalof dated April 25, 2023) – the Gedalof Reopener. It was impossible, the union

argued, to conclude that the Stout Reopener for 2021 considered the impact of inflation by holding ONA to its earlier bargaining proposal and arriving at only a total 2% increase (1% added to the 1% initially awarded) when inflation in Ontario in 2021 was 3.5%. The Gedalof Reopener for 2022-2023 (which covers the first year of this reopener) awarded an additional 2% general wage increase for a total of 3% and collapsed the grid adding an additional 1.75% for nurses between 8 and 25 years. From a costing perspective, this worked out to an approximately 0.9% increase for the bargaining unit as a whole, leading to the conclusion that the total compensation value of the Gedalof Reopener was 3.9%. However, the union argued that notwithstanding historical comparability, the Gedalof Reopener (like the Stout Reopener), should not be followed.

The reason for this submission was that in the Gedalof Reopener ONA only requested a 3% general wage increase (together with other improvements). But circumstances had materially changed, and there was no basis, therefore, to follow this ONA outcome even though doing so would have been previously anticipated by the parties. The awarded 3% did not come close to addressing inflation or recruitment and retention and fell far short of rectifying the parity gap that had arisen between RN and RT wages. As well, the Gedalof Reopener was decided without the benefit of access to relevant free collective bargaining outcomes: namely, the one agreed to by OPG and the PWU with the sanctioned approval of Ontario's Treasury Board and the PSAC settlements covering 155,000 core federal government employees and those employed by the CRA (in both cases reached following relatively lengthy strikes).

The authorities established, the union submitted, the absolute necessity of taking these freely bargained settlements into account, and the key cases on point were discussed in the union's brief and at the hearing and the point made that it would indeed be an astonishing result if employees working at home during the darkest days of the pandemic received freely bargained wage increases far in excess of union members who regularly attended at their hospital workplaces to ensure that vital health care services were delivered to the people of Ontario. Accordingly, while ONA has been a key comparator for general wage increases in the past, there was a strong legal and factual basis to depart from that relationship given the inadequacy of the ONA reopener outcomes and the manifest change in circumstances including the persistence of inflation and ongoing recruitment and retention challenges (discussed below).



**Specific Application of the Criteria**

**The Economy**

The economic situation in Ontario was one of the *HLDAA* criteria, and the application of this criterion, in the union's view, led to the inescapable conclusion that its compensation proposals should be granted. The Ontario economy was on a very strong footing with both revenue growth and budget surpluses. Transfer payments from Ottawa – earmarked for health care – were up. Notably, the Financial Accountability Office (FAO), an Ontario government-appointed body that provides independent analysis of the province's finances, trends in the provincial economy, and related matters, concluded in its *Winter 2023 Economic & Budget Outlook* that "Ontario's economy rebounded rapidly from the pandemic...." Similar upbeat predictions were reflected in the Ontario government's March 2023 budget. Other positive economic indicators included record strong job growth and decreasing unemployment. On the other hand, inflation was

unrelenting and had led to real hardship to union members whose wages had been substantially eroded with inflationary increases now thoroughly baked in even if, for the sake of argument, it was accepted that the inflation rate had begun to modestly decelerate.

Indeed, the union argued, the impact of inflation was dramatic: the pandemic and post-pandemic period had been marked by high and persistent inflation beginning in the spring-summer of 2021, continuing until today and projected to continue well into the future. In 2021, inflation in Ontario averaged 3.5%; the next year it reached 6.8%. In 2023, inflation may have begun to slightly abate, but was still sitting above 3% with no one credibly forecasting a return to historic numbers in the near or medium term. If all went well, inflation might return to earlier norms in 2024, but it was impossible to predict with any accuracy for obvious reasons. In the meantime, the cost of living had become unaffordable; real wages had taken a huge hit. The economy was a *HLDAA* criterion and, properly applied, meant that above-inflation general wage increase were required to offset the erosion in spending power – a conclusion that was reinforced by an examination – reviewed in the union's brief and at the hearing – of the arbitral authorities where leading arbitrators had done just that when inflation last reached historic proportions.

**Hospital Funding and Level of Services**

Funding for hospital health care, the union noted, was increasing; the March 2023 Ontario budget was categorical in projecting an increase in spending from $74.9 billion in 2022-23 to $87.6 billion in 2025-26. Part of this growth was earmarked to "support health human resources to optimize the existing workforce and recruit and retain health care providers." Many hundreds of millions of dollars – enumerated in the union brief – had been allocated specifically for the

Participating Hospitals. Consistent with government policy – as set out in the budget – there was money to recruit and retain. In an era of emergency room closures, surgical waiting lists and hospital hallway health care, it was inconceivable that services, already stretched to the limit, could be further reduced.

The fact of the matter was that increased compensation to recruit and retain indispensable health care workers was required to prevent further reductions in services; it was definitely not something that could lead to fewer services in a world where hospitals were crying out for more employees. Various examples were provided illustrating this point. Critical health care services like emergency rooms and surgeries were being curtailed because of a lack of staff, not money to pay salaries. Positions were posted; the problem was that no one was applying to fill them. In any event, however, it was long established, and well established, that public sector employees do not subsidize the public with substandard wages and, as importantly, that government funding decisions cannot determine independent interest arbitration where a statutory regime has been instituted in substitution of the right to strike (or lockout).

**Recruitment and Retention**

Overall, the union observed, hospital health care was facing a most serious and severe recruitment and retention crisis: there were not enough RTs to provide required levels of service. According to the FAO, "other health care worker" vacancies, meaning mainly employees represented by the union, had more than doubled between 2018 and 2021 to 4770. Recruitment and retention problems were considerable and serious across the broad swath of health care, but the situation faced by the RTs was emblematic and especially problematic.

The RT classification included the Medical Laboratory Technicians (MLTs) – the largest group – followed by the Medical Radiation Technologists (MRTs) and then the Respiratory Technologists and the Biomedical Technologists. The MLTs – there were approximately 6100 of them – performed the laboratory tests that diagnose disease, and during the pandemic their workload considerably expanded with multiple millions of PCR tests completed. Yet, at the same time, survey results indicated that instead of increasing in numbers, MLT ranks were on the decline with further reductions expected as the cohort aged and became eligible for retirement, and this did not include voluntary departures for other reasons such as burnout brought about by the pandemic's excessive and onerous workload.

Notably, the number of MLTs registered with their College was declining at the same time as demand was increasing, especially in rural areas and at remote laboratories. Simply stated: demand far exceeded supply, a chronic situation that was expected to continue. Unfortunately, seven MLT programs were permanently closed in the 1990s under the completely misguided and ultimately erroneous assumption that technology and instrumentation upgrades would reduce the need for MLTs. Currently, there were not enough MLTs to train students during clinical placements, a vicious circle to be sure, leading for example, in March 2022, to a backlog of many millions of diagnostic tests. Members of the Participating Hospitals were doing what they could to fill vacancies; for example, in December 2022, Kingston Health Sciences Centre began offering a $3000 referral bonus for RNs, RPNs and MLTs (together with other inducements). At the other end of the province, the Lady Dunne Health Centre in Wawa introduced a $20,000 retention incentive for full-time MLTs. Private clinics were regularly headhunting hospital

MLTs. (The union set out a long list of other Participating Hospitals offering various inducements to recruit staff.)

Only a handful of the Participating Hospitals responded to the Board's production order, but when the data was examined from those that did, the picture of a true recruitment and retention crisis was glaring, and chilling. Between 2019-2020 and 2021-2022, MLT vacancies increased by nearly 25%. The situation with the MRTs was even worse. Between 2019-2020 and 2021-2022, MRT vacancies increased by nearly 48%. There was the burnout leading to voluntary departures, but there was also a current lack of supply, anticipated to deteriorate further.

Here too, members of the Participating Hospitals were again taking matters into their own hands; London Health Sciences Centre (LHSC), for example, had begun paying employees to attend school to become MRTs: they receive their wages and all their education-related expenses while in class and on clinical placement. (LHSC offered similar inducements to encourage employees to become certified as Anesthesia Assistants and Cardiovascular Perfusionists.)

The situation with MLTs and MRTs was acute, but it was a problem that presented in virtually all the paramedical classifications represented by the union. Overall turnover had increased from 6.11% in 2017 to 8.95% in 2023. The overall vacancy rate had doubled from 3.69% in 2017 to 7.69% in 2023. Likewise, the resignation rate went from 3.53% in 2017 to 6.37% in 2023. As a result, jobs were not being filled. A representative sampling – compiled by the union – of recent job vacancies at LHSC, St. Joseph's Healthcare Hamilton and Joseph Brant Hospital illustrated the extent of the problem. As of January 2023, for example, LHSC had 90 vacant positions that

fell within the union's bargaining unit, and the average length of a job posting was 115 days. Some positions – Certified EEG Technician, MRT, MLT, Pharmacy Technician and Registered Respiratory Therapist – cannot be consistently filled. St. Joseph's Healthcare had 136 vacancies in union bargaining unit positions with postings taking an average of 141 days to fill. The same story could be told about Joseph Brant Hospital including one particular posting that remained unfilled for years.

These shortages had tangible implications for the delivery of health care. Without staff to perform procedures, surgical backlogs, for example, increased. In January 2023, the Ontario government introduced its plan to address this situation and it included allowing private clinics to conduct MRI and CT scanning. However, there was a rub: to operate, these clinics would require hiring regulated professionals working in the Participating Hospitals and when recruited the ensuing vacancies would make the delivery of health care in those very same hospitals even more challenging. The inevitable outcome would be a drain on the talent pool from the public system. The union's concern was shared by the President of the OHA: "We certainly aren't interested in seeing members of the hospital teams being poached by other employers." The union referred to evidence indicating the enhanced pay being offered to its members in targeted classifications to switch to (non-hospital) employers; and it was not confined to higher pay as scheduling flexibility was also on offer. Wage increases, the union argued, were necessary not just to recruit but also to retain.

At the end of the day, the union argued that the evidence was unassailable that the lack of real wage growth has compounded recruitment and retention issues. Only meaningful compensation

increases would stop the exodus of employees leaving for various reasons including excessive and unmanageable workloads, exhaustion, burnout and better employment opportunities in private laboratories.



**The Union Proposals in More Detail**

**General Wage Increases and Re-establishment of RT/RN Parity**

In addition to the 1% previously awarded in each of the three years of the collective agreement, the union sought a further 6% of new money in each year. These additional amounts – 18% over and above the 3% initially awarded – were necessary to address the historic and continuing erosion of wages due to inflation, the recruitment and retention crisis and re-establishment of RT/RN parity.

In addition to a general wage increase that mitigated against inflation, re-establishing RT/RN wage parity was also on the top of the list of union priorities. This parity was lost in 1991 and further eroded since. Accordingly, a one-time adjustment of 7.9% was required for all classifications. As a result of the Gedalof Reopener, the disparity in wages at the top of the grids had grown to 13.86%. The parties agreed that ONA was the comparator for rates, and in the result, the time was long overdue for this unjustified disparity to be addressed (even though the requested 7.9% adjustment would not fully accomplish this task). In the alternative, the union proposed that all RTs be moved from the RT wage grid to the RT plus wage grid, which provides a higher wage rate at the 8$^{th}$ year for specified health care professionals (a proposal which would reduce the ONA comparability gap and one with meaningful antecedents in the Gedalof Reopener and its collapse of the 25-year rate with the self-evident objective of encouraging

retention of the most senior employees). Notably, the regulated health care professionals were the ones with the most alarming recruitment and retention challenges.



**Pandemic Pay and Retention Bonus**

Unlike nurses and other health care professionals, the vast majority of union members who attended faithfully to their jobs in the Participating Hospitals throughout the pandemic were ineligible for pandemic pay as well as the $5000 retention bonus offered to nurses. Awarding appropriate compensation was one means of recognizing the efforts of union members during the dark days of the pandemic. This reopener was also the opportunity to rectify this inequity caused by Ontario government's exclusion of its members though awarding one-time payments of $3400 (pandemic pay) and $5000 (retention bonus), with part-time employees receiving pro-rated amounts.

Remarkably, the union observed, the Participating Hospitals agreed that an unfairness had occurred. In its 2022 brief – leading to the initial award – the OHA stated: "regrettably most of the employees covered by the OPSEU central agreement were excluded by the government from their pandemic pay initiative." Exclusion from the $5000 retention bonus paid to hospital nurses was equally unfair. Simply put, the benchmark classifications populated by very many of the union's members were – just like the RNs – integral to delivering hospital health care during the pandemic and they should receive both pandemic and retention pay. Union members worked countless hours of overtime: the MLTs, for example, ensured that 23 million COVID-19 tests were completed. Other classifications, such as the Occupational Therapists, worked side by side with the RNs providing direct patient care but, inexplicably, were excluded from eligibility for

pandemic pay. Ontario was one of the few provinces that did not include therapeutic, diagnostic and rehabilitative workers in their pandemic pay programs. This wrong, the union argued, had to be set right.

**Other Union Proposals**

Other union proposals included increasing call-back to double time regular pay – something that was awarded in the case of ONA and CUPE/SEIU. There was no principled reason, in the union's submission, why its members, called back in the middle of the night to perform vital life-saving procedures, should be treated any differently than any other similarly situated health care professionals. The union's argument was straightforward: no matter what task was being performed during the call-back, an employee has been called back to work at irregular hours at significant disruption to their personal life. All employees – regardless of bargaining unit – should be compensated in exactly the same way.

The union also sought increases to shift and weekend premiums – again to restore historic parity with ONA, but only to the rates in effect as of April 1, 2022. The argument here was exactly the same as that with call-back: the disruption to the employee was the same and there was no principled basis to apply differing compensation depending on whether the employee was an RN or a RT. The union further sought increases to vacation after eleven, twenty and twenty-five years, It was appropriate, the union argued, given recent trends, to award these enhancements which would reward the longest-serving employees of the Participating Hospitals and add a further recruitment and retention incentive. The same could be and was said about the requested improvement to vision care and the proposed increase to the Health Care Spending Account.

**Submissions of the Participating Hospitals**

**Overview**

In the submission of the Participating Hospitals, appropriate application of the statutory and normative criteria was critical and properly applied supported its offered economic increases; namely, an additional .75% in the first year and 2% in both the second and third year. Inflation, while relevant, could not and should not be determinative especially in these circumstances where there was no compelling history of general wage increases always matching/exceeding existing inflation rates. The overall total compensation cost of the increases sought by the union were unfunded and unaffordable. The union's economic demands far exceeded any negotiated settlement or award in any comparable sector. To be sure there were some staffing issues, but it was on a much smaller scale in this bargaining unit than, for example, ONA, and also had to be seen in a much broader context of human resource challenges in all sectors across the country. Furthermore, attention needed to be paid to the fact that the reopener jurisdiction was limited and effectively precluded the Participating Hospitals from advancing amendments it urgently required to modernize the collective agreement so that it could make best use of employee complement in responding to operational needs with the objective of serving the public.

**The Economic Context**

The Participating Hospitals cited with approval Arbitrator's Hayes observations in *Homewood Health Centre & UFCW* (unreported award dated June 1, 2022) and its conclusion that "the harsh reality is that no-one can expect to be fully immunized from the negative impacts of extraordinary inflation. This award does not come close," (at para. 31, an approach that has been adopted, also with approval, in other cases cited by the Participating Hospitals). While this award

was not governing, the Participating Hospitals urged that it be closely followed. Inflation may be a factor in determining the appropriateness of a wage outcome, but there was no reason to conclude that wage increases must match or exceed the rate of inflation and no demonstrable history of them ever having done so. In fact, when virtually all recent settlements and awards were carefully considered, it was obvious that Arbitrator Hayes' admonition had been followed with increases not reflective of current or past inflation.

There was another important factor that needed to be borne in mind: the Participating Hospitals relied on the government to provide funding. Unfortunately, as the province emerged from the pandemic it faced an uncertain economic future. At best, there would be slow economic growth; at worst, a recession could take place during the collective agreement term. Various economic indicators such as bond yield curves, real GDP growth, and net debt to GDP ratio, – referred to in the Participating Hospitals' brief, and discussed at the hearing – were canvassed to illustrate these points. Indeed, just weeks before the hearing, two major American banks collapsed; an ill wind with future repercussions that remained to be seen.

Potentially making matters even worse was the state of the province's finances. Both the existing provincial debt, and the rising interest rates that came with it, and deficit spending, again more debt and more interest, were reaching new highs seriously impacting the ability of the funder – the government – to provide the money needed to maintain existing operations much less afford the increases being sought by the union. There was no reason to believe that hospital funding would follow any award. To be sure, funding had been announced for various hospital health care initiatives – but, by and large, these were investments directed at increasing capacity and

providing services, not to pay for unjustified and unaffordable increases arising out of Bill 124 reopeners.

**Recruitment and Retention**

The Participating Hospitals did not dispute that there was currently a health human resources challenge in Ontario. It was also generally agreed that there was a significant increase in the number of vacancies across all hospital employee groups. According to OHA data, paramedical vacancies rose from 3.69% on March 31, 2017 to 7.69% on March 1, 2023 – a much lower vacancy rate than any other hospital bargaining unit, by a substantial degree: 3.51% lower than the overall hospital rate, and 7.77% lower than the RN rate. Turnover and retirements were decreasing – the paramedical group had the lowest rate by far – suggesting that vacancy numbers were most likely attributable to the growth in capacity – as outlined in the Participating Hospitals' brief and discussed at the hearing. Voluntary separations, however, had grown from 3.53% in 2016/2017 to 6.37% in 2022/2023 (and 3.41% lower than the total hospital rate and 3.56% lower than the RN rate). At the same time, the number of positions across the system was increasing: headcount was 10,655 in 2016 and 12,536 in 2022. Unlike the situation with RNs, there was virtually no agency use and minimal use of temporary incentives (and when offered were seasonal or otherwise time limited). Some of the Participating Hospitals were undoubtedly responding to local labour market conditions, but the evidence here, it was pointed out, was limited and anecdotal.

Nevertheless, the Participating Hospitals and Ministry of Health were aware that across-the-board province-wide human resource initiatives were necessary to bolster the number of

paramedical employees. Both the *Rehabilitation Incentive Grant Program* and the *Learn and Stay Grant* – both of which were described in the brief, were the kinds of programs that were currently under way to ensure a steady supply of RTs for the short, medium and long term. *Practical Solution* outlined the need for a multi-faceted multi-stakeholder approach to tackle ongoing RT (and other health professionals) needs. Specific proposals under current consideration included exploration of alternate and expedited approaches to entry for physiotherapists, innovative education and training opportunities and institution of an exemption under the *Controlled Acts Regulation* to allow respiratory therapists to perform diagnostic ultrasounds without a medical directive. Overall, it was anticipated that the implementation of well-crafted strategic initiatives would begin to address the recruitment and retention issues (which in any event paled in comparison to other hospital classifications, most particularly the RNs). To be sure, there was no reason to believe that the massive increases to compensation proposed by the union would successfully address the limited human resource issues.

**Participating Hospitals Proposals**

In the outlined circumstances – where inflation did not direct wages – and where the recruitment and retention issues were not of the same significance and magnitude of other classifications, and where solutions to them were currently underway, the Participating Hospitals argued that its proposed general wage increases of an additional .75% in year one, and 2% more in each of year two and three, were the appropriate outcome. The union's requested general wage increase numbers were unprecedented; even more so, when those numbers were added to all the other asks and considered from a total compensation perspective. They were unaffordable and unfunded.

Obviously, neither the Stout nor Gedalof Reopeners addressed inflation in the manner sought by the union, but the Participating Hospitals emphasized and again endorsed Arbitrator's Haye's observations and findings that the "harsh reality is that no one can expect to be fully immunized from the negative impacts of extraordinary inflation." This conclusion was made even more clear when a year-over-year comparison was made of the general wage increases and inflation rates. The bottom line was that general wage increases – the ATBs – have never necessarily mirrored inflation and any assertion to the contrary was without persuasive evidentiary foundation. In addition, hospital funding was not tied to inflation, and that meant the Participating Hospitals had to live within their means, and those means precluded paying for inflation-driven wage results. A much better comparison, the Participating Hospitals argued, was between funding and ATBs.

It was also legally and factually significant, the Participating Hospital's observed, that the union could not point to any settlement or award of 23.707% in the first year, and 5.808% in the second which is what the union was seeking. The Stout and Gedalof Reopeners, the Participating Hospitals argued, set the maximum that could be achieved by the union case and both reopener awards, one way or the other (i.e., either directly or indirectly) took inflation into account. Consideration of health care awards more generally – for example in long term care – reinforced this conclusion, making clear that the range of settlement was around 3%. There was, in any event, a historic bargaining pattern of this union following ONA outcomes (and there was no persuasive reason to break that decades-long relationship). On the other hand, while there was once parity between RTs and RNs, that ceased to be true decades ago, and so there was no basis, and certainly no demonstrated need, to re-establish it now. It was material that interest arbitrators have, ever since the parity relationship was broken in the early 1990s, repeatedly declined union

invitations to restore it. There was no basis to conclude that replicating free collective bargaining could – in the historical context – lead to the granting of this union request.

Finally, the Participating Hospitals took issue with all the other union demands. They were not justified on a demonstrated need basis, on an application of the statutory or normative criteria basis, or on a funded basis. They were actually unaffordable. The same was true about the union request for pandemic pay and a retention bonus. Both these programs were established by the government on its own initiative. The government determined how much and who was eligible. The government provided the additional monies. The Participating Hospitals had no money to extend either program to non-eligible employees and they were actually prohibited from doing so under program terms. The Participating Hospitals had no money to pay for either of these programs which, in any event, had to be considered in a total compensation framework.

**Discussion**

It is now well established that reopener awards must consider all relevant information including negotiated and awarded outcomes from all sectors, not just traditional comparators: the very best evidence, in other words. It is also now generally agreed that there are no cut-off dates following which relevant evidence is to be ignored. We have followed this approach. In the result, we have paid careful attention to the settlement between OPG and PWU – one very recently reached with Treasury Board approval – and the virtually identical also recently reached settlement between PSAC and the Government of Canada/CRA. Replicating free collective bargaining – what these parties would have likely done had they been able to strike or lockout – is the most important of the normative interest arbitration criteria. Notably, both PSAC settlements were agreed upon

following lengthy strikes. Also carefully considered were the *HLDAA* criteria, which are not prioritized, leaving it open to a Board of Interest Arbitration to determine which ones, and to what extent, are the most applicable in any proceeding. In this case, the impact of inflation on real wages and recruitment and retention have figured prominently in our analysis.

Obviously, there is a historic relationship between ONA general wage increases and the ones awarded to the union. For years this was dispositive (except in one case where an interest arbitration board was persuaded that the union should get less because of changed economic circumstances). We cannot, however, conclude that this is an appropriate case to follow the ONA reopener for 2022. We decline to follow this award because it does not in our opinion adequately address inflation, past or present, when inflation has seriously eroded spending power.

Inflation was 6.8% in 2022 and no one is seriously suggesting it will dip below 3% in 2023. If all goes well – and some of the economic projections turn out to be correct – it may begin to reach historical numbers by 2024, or it may not. We need to address this in our award. Inflation – before and during the term of this agreement – has been persistent and its results are now entrenched. While there is some evidence that inflation has begun to decelerate, not even the most optimistic economists are predicting a return to historic norms any time soon, and certainly not during the term of this collective agreement. Even if inflation begins to fall, the increases to the cost of living – and therefore the real erosion of spending power – will not change: they are now baked into prices. No one suggests that de-inflation is on the horizon.

A year-over-year comparison of ATBs with inflation indicates that in many years, the ATB was higher, in some it was lower. But in no year were the reported inflation results approaching the scale of at least the first two years of this reopener. That is worth bearing in mind. Also attracting attention is the fact that the wage increases proposed by the Participating Hospitals would do nothing more than embed into wages previous, current and future real wage cuts resulting from inflation. That would not be the proper application of any of the *HLDDA* criteria and cannot be the outcome of this award (and it is unlikely to be the outcome of free collective bargaining). The point must also be made that the Gedalof Reopener – the only one that is really applicable to this proceeding – was issued before the arbitrator had the advantage of broader information about free collective bargaining settlements.

In arriving at appropriate compensation, we have also borne in mind the limited scope of a Bill 124 reopener, one in which the Participating Hospitals were not able to advance any of their non-monetary proposals. This would normally result in some adjustment to otherwise persuasive free collective bargaining comparators. However, we have not reduced any amounts because there are recruitment and retention issues – that is established in the evidence – albeit not on the scale of those affecting other hospital workers most particularly RNs and RPNs.

Recruitment and retention issues are complicated, requiring a comprehensive and sophisticated approach, but there is no question that compensation is a key driver in attracting and retaining health care employees, a conclusion that is reflected in individual hospital initiatives (discussed above) and government programs. As *Practical Solutions* makes clear, insufficient staffing is one of the reasons explaining the turnover and resignation rates, and consequentially impacting the

delivery of key hospital services reflected in emergency room closures, long surgical waitlists and hallway health care. Unless recruitment and retention is addressed, services will be reduced not because there is no additional money to pay for posted positions but because of an absence of health care workers to perform key functions. Hundreds of unfilled postings – discussed above – proves this point.

We are not persuaded to award a RT-RN parity relationship, and we note that previous arbitrators have declined to do so on the repeated occasions when this issue has been raised. There is, however, a basis to increase the maximum RT and above rates (and doing so is fully in accord with the approach taken in the Gedalof Reopener). And providing the adjustment to those grids at the RT and above levels is also in keeping with and adopts the approach of the August 29, 2003 award of Arbitrator Bendel between these Parties.

The government made a public policy decision to offer pandemic pay to most unionized hospital workers and retention bonuses to nurses, but neither to the members of the union. The RN retention bonus was clearly initiated in response to more than 9000 vacancies system wide. However, on a comparability basis – one of the *HLDAA* criteria – it is impossible to understand the basis for excluding union members from the time-limited modest pandemic pay. The background facts are straightforward.

On April 25, 2020, the Ontario government announced a program of support for the "Heroes" of the pandemic. Between April 24 and August 13, 2020, eligible employees received pandemic pay. In our view, a pandemic payment is justified on a comparability basis. We note that this

payment was received for the period April to August 2020 and it is now the summer of 2023. Accordingly, we have attempted to create an equitable payment model which ensures that there are no implementation difficulties for individual hospitals.

We have also increased shift and weekend premiums, as requested by the union, bringing them closer to current ONA entitlements.

One final observation is in order. In the recent *ONA and Participating Hospitals* award, under the heading **Overall Approach**, the principle of replication relied upon at interest arbitrations was given effect. It requires consideration of the trade-offs that are made in free collective bargaining to reach a settlement; to achieve an outcome that is balanced and fair to both parties. Nothing in this award, which deals with a reopener process which by the reservation of jurisdiction is limited to compensation (as did the recent *OCHU/SEIU & Participating Hospitals* award), should be taken as in any way diminishing the **Overall Approach** taken in the *ONA and Participating Hospitals* award.

**Award**

**Grid**

Effective September 1, 2023, increase maximum rate on RT and above grids by 1.75%.

**General Wage Increase**

After hearing the submissions of the parties, we direct that the collective agreement be amended to provide for the following increases in addition to the 1% initially awarded:

April 1, 2022: 3.75%

April 1, 2023: 2.5%

April 1, 2024: 2.0%

**Pandemic Pay**

A one-time lump sum payment to all full-time, part-time and casual employees in the bargaining unit as of August 13, 2020, and who did not receive pandemic pay under the government program, as follows: $1,750 full-time, $1,250 part-time, and $750 casual. Payments to be made within sixty days less deductions required by law.

**Call-Back**

Effective date of award, union proposal awarded.

**Shift and Weekend Premium**

Effective date of award, union proposal awarded ($2.25 evening, $2.88 night, and $3.04 weekend)

**Vision**

Union proposal awarded effective April 1, 2024.

**Health Care Spending Account**

Union proposal awarded effective April 1, 2024.

**Conclusion**

At the request of the parties, we remain seized with respect to the implementation of our award including, if necessary, to address any issues that may arise should the government's Bill 124 appeal prove successful.

DATED at Toronto this 3rd day of August 2023.

*"William Kaplan"*

William Kaplan, Chair

I dissent. Dissent attached.

Brett Christen, OHA Nominee

I dissent. Dissent attached.

Joe Herbert, OPSEU Nominee

DISSENT OF OHA NOMINEE

I respectfully dissent from the Award of the Chair dated August 3, 2023 (the "Award") and the reasoning and analysis that led to the items awarded therein.

The Award is a supplemental award to an award dated July 7, 2022 (the "Initial Award") and addresses compensation issues not addressed in the Initial Award which was issued when the *Protecting Sustainable Public Sector for Future Generations Act*, 2019 ("Bill 124") was in effect. The Initial Award contained a typical reopener clause which allowed for monetary issues to be re-visited in the event that Bill 124 was determined to be unconstitutional. After the Initial Award was issued, the Ontario Superior Court declared Bill 124 to be unconstitutional and of no force or effect.

The Award addresses the additional compensation to be awarded under the reopener provision. It must be emphasized that, like other situations involving reopeners, there was no opportunity for the hospitals to negotiate any trade offs against the monetary gains sought by the Unions.

The Award covers the period April 1, 2022 to March 31, 2025. That is, for purposes of analyzing comparable settlements and awards, the Award covers three years: 2022, 2023, and 2024. The prior collective agreement was for three years (2019, 2020, and 2021) and was the result of a voluntary settlement between the parties. That voluntary settlement provided for general wage increases of 1.75% in each year of the agreement. No other changes to wages or benefits were agreed.

In my respectful view, the Chair's Award is excessive and does not follow recognized principles of interest arbitration or the *HLDAA* criteria, exceeds the Chair's jurisdiction, and the reasoning

giving rise to the items awarded is contradictory, deeply flawed, and wholly unpersuasive. The Award does not represent a considered application of replication and other principles of interest arbitration as they have traditionally been applied in the hospital sector.



**The Union's Arguments**

The various arguments of the Union in support of its many requests for increased entitlements are summarized by the Chair in the Award (at pp. 4 – 16; the long list of Union proposals advanced at arbitration are at p.3).

It was the Union's position that Registered Technologists (RTs) in the Union's bargaining unit should have wage parity with Registered Nurses (RNs) in the ONA bargaining unit. The Union also argued that ONA was an appropriate comparator for call back pay, and shift and weekend premiums. It was also the Union's position that its members should receive the same retention bonus provided to nurses and the same pandemic pay received by nurses (and other hospital employees) under government programs. The Union also relied upon a 1.75% increase to the ONA Central Grid's 8 year rate awarded in the recent ONA Central reopener arbitration to argue for increased RT wage rates. Despite these positions, it was also the Union's position that ONA was not an appropriate comparator for the general wage increases it sought. I found the Union's argument to be inconsistent and unpersuasive.

In asserting that ONA was not the appropriate comparator for general wage increases, the Union argued that the first central reopener award for ONA covering and 2020 and 2021 by Arbitrator Stout (the "Stout Reopener") and the second central reopener for ONA covering 2022 by Arbitrator Gedlof (the "Gedalof Reopener") should not be followed.

The Stout Reopener dealt with two years, neither of which were years covered by the Award. The purported relevance of the Stout Reopener to the issues under consideration is therefore somewhat difficult to understand. In any event, in the second year of his award (2021), Arbitrator Stout awarded ONA a 2% ATB increase. 2022 was the third year of OPSEU's voluntary settlement. As noted, in that settlement OPSEU agreed to a 1.75% general wage increase for 2022. It now criticizes Arbitrator Stout's award of 2% to ONA for 2022 as inadequate.

The Union's argument is that Arbitrator Stout: (i) failed to properly consider the rate of inflation in 2022 and (ii) that he was unable to award more than 2% since that was ONA's proposed wage increase for that year. The first argument ignores the fact that the Stout Reopener awarded non-wage compensation that the Union, in my view, should not have been awarded (as described in my dissent to that award) and also fails to address the fact that the total general wage increase over the two-year period covered by the award amounted to 3.75% which wasn't that different from inflation over that same period.

The Union's second argument is equally perplexing. In addition to ONA's proposed general wage increase, ONA pressed for increases across the RN wage grid, which Arbitrator Stout declined to award. It would have been a simple matter (however unjustified) to award increased compensation in the form of grid adjustments had Arbitrator Stout in fact felt constrained by the wage increase proposed. However, Arbitrator Stout rejected all of the grid adjustments sought by ONA.

The Union's argument with respect to the Gedalof Reopener, which does actually address a year covered by this award (2022), is that it shouldn't be given weight because Arbitrator Gedalof was constrained by ONA's request for a 3% general wage increase for 2022 and due to the fact that additional bargained wage settlements made after the release of his April 25, 2023 award, weren't

available to be considered by him. In the Gedalof Reopener, as was the case in the Stout Reopener, ONA sought wholesale changes to the RN wage grid in addition to its proposed general wage increase. Arbitrator Gedalof was fully aware that the rate of inflation for 2022 was 6.8% and that nurse staffing was the most severe recruitment and retention issue faced by hospitals. Arbitrator Gedalof awarded a 1.75% increase to the 8 year step of the grid (which impacted approximately half of the bargaining unit) to address the anomalous 25 year rate as well as recruitment and retention, in addition to a 3% general wage increase and other items.



The Union's arguments in respect of the Gedalof Reopener amount to nothing more than conjecture and should have been given no weight. This is particularly the case since Arbitrator Gedalof expressly addressed the question of whether it was appropriate to award greater compensation increases to the Union and expressly determined that the recognized interest arbitration principle of total compensation principle did not allow him to do so (at para. 59):

> 59. In our view, with these changes, we have exhausted the total compensation available in this single year. Any further compression of the grid, changes to the complex landscape of highly differential NP grids across the different hospitals, introduction of other forms of retention bonus or benefit improvements must be addressed by the parties in future rounds of bargaining.

The Union also argued strongly that government funding decisions relating to health care (which the Participating Hospitals had argued were a better predictor than was inflation of general wage increases awarded at interest arbitration) were not relevant to the determination of a general wage increase at interest arbitration (p.10). The Union simultaneously noted that health care transfer payments from the federal government were increasing (p.9), that provincial funding of hospitals including for recruitment and retention was also projected to increase (pp.9-10), and that the

government had a budget surplus (p. 8). I found the Union's argument to be inconsistent and unpersuasive.

The Union also argued that the recruitment and retention data supplied by it and the OHA fully supported the Union's position including the cost of its proposed increases, totaling a 23.707% increase to total compensation in year 1. In fact, the data, while showing some recruitment and retention issues in this bargaining unit, did not come anywhere close to the recruitment and retention issues established by ONA in its recent central interest arbitration awards. Further, the Union's reliance on examples of staffing shortages impacting the hospitals' ability to provide services related largely to staffing shortages in other bargaining units.

**The Award**

The items awarded by the Chair in this reopener process are found at pages 27-28 and must be read in conjunction with the Initial Award (which awarded wages and non-wage compensation of 1% in each of the three years being determined by this reopener award). The general wage increase awarded for 2022, 2023, and 2024 are, respectively, 4.75%, 3.5%, and 3.0%. Pandemic pay is also awarded and, in 2023, the maximum rate on RT and above grids is increased by 1.75%. In addition to these increases, call back pay, shift and weekend premiums, vision, and the heath care spending account are increased. The awarded items are excessive. In particular, pandemic pay and the adjustment to the maximum rate of the RT and above grids are, in my view, unjustified and inexplicable on the basis of recognized principles of interest arbitration.

The Chair's analysis in support of the Award is found at pages 22 to 26. I will deal with the numerous flaws in the Chair's reasoning and analysis that led to the profligate award in summary form.

**Relevant hospital Comparators**

I disagree with the Chair's statement that it is now "well established" (p.22) that reopener awards must consider negotiated and awarded outcomes from all sectors. Although this is this Chair's view, the proposition is stated too broadly and it remains to be seen whether it will be embraced by other Arbitrators in future and/or in different circumstances. If the statement is intended to imply that settlements and awards from other sectors should be given precedence over traditional hospital sector comparisons, then this view represents a fundamental departure from the long-standing accepted approach in this sector and is an approach that will lead to unpredictability of outcome, increased litigation costs, even fewer voluntary settlements, and the imposition of "whipsawing" awards on the hospitals.

**Inflation**

I also strongly disagree with the Chair's comments regarding inflation at pages 22 – 23. The rapid rise in the rate of inflation in Canada in 2021 and 2022 was the result of many unprecedented factors including the unexpected onset of a world-wide pandemic, the infusion of massive stimulus payments into the economy by the federal government in response, the collapse of the supply chain and the corresponding rapid outstripping of supply by demand, and the invasion of Ukraine. In the three years preceding the award (2019, 2020, 2021) inflation was 1.9%, 0.7%, and 3.4%. In the first year of the award (2022) inflation was 6.8%. In the second year of the award (2023), the rate of inflation has fallen from 5.9% in January to 2.8% in June. While there was undeniably a spike in inflation in the months immediately following the onset of the pandemic, there is considerable room for debate about whether inflation over the years preceding and covered by the Award has been, or will be, persistent or how it will compare to historical norms.

The events giving rise to the inflation spike are very different from those giving rise to previous periods of excess inflation and have been met with aggressive responses from centrals banks including through the introduction of rapid and unprecedented interest rate increases. In all of these circumstances, it is exceedingly difficult to anticipate future inflation or how much past inflation is "baked into" prices. For example, price increases resulting from commodity inflation are generally not permanent, as evidenced by the decline in oil/gas and food prices from 2022 highs. Immediately prior to the onset of the pandemic, inflation in Canada was low, several industrialized countries were in a deflationary environment and some of these had introduced negative interest rates. Given all of this, and with respect, I find the Chair's comments on inflation to be somewhat unbalanced.

**Gedalof Reopener**

I also, for the reasons set above, strongly disagree with the Chair's attempt to distinguish the Gedalof Reopener as a means of minimizing the general wage increase for 2022 awarded to ONA, the traditional comparator for OPSEU.

**Increase to maximum rate of RT Grid and above**

The award of a 1.75% increase to the maximum rate of the RT grid and above grids is not warranted by the evidence and is not supported by either the Gedlof Reopener or the 2003 Bendel Award referenced by the Chair. The 1.75% increase to the 8 year rate in the Gedalof Reopener was stated to be a response to the failure of the 25 year rate (imposed upon the parties at interest arbitration years earlier) to address recruitment and retention issues. Although there was no evidence supporting the need for this particular change before the Gedalof panel, there was detailed evidence before Arbitrator Gedalof regarding significant recruitment and retention issues in the ONA

bargaining unit generally, which is not present here. In short, the Union's evidence of retention and recruitment issues was not in any way comparable to that advanced in other central arbitrations. Notably, there was no compelling evidence of a particular issue with the retention of employees on the RT Grid or above grids at or above the maximum grid rate. The Bendel Award was based upon evidence of recruitment and retention issues in existence in 2003 and is not of any relevance to the issues before this board.



**Pandemic Pay**

As noted by the Chair, the Ontario Government's decision to provide pandemic pay in 2020 to certain hospital employee groups but not others was an exercise of public policy. It is not the function of this Board to second guess and effectively override public policy decisions and the Board is, in my view, without jurisdiction to do so.

I would also note that some members of the bargaining unit, such as Respiratory Therapists, and many employees who were reassigned to other roles, did receive pandemic pay under the government's program.

The pandemic pay program was not awarded at interest arbitration nor freely negotiated and is not therefore supported by the replication principle. The Chair's reliance on the *HLDAA* criterion of comparability is unconvincing since that criterion is in respect of "terms and conditions of employment". The pandemic pay program was a government entitlement for qualifying employees that was fully funded by the government (and not from hospital funding allocations). It was not a hospital initiative and did not form part of the terms and conditions of employment of bargaining unit employees. It is also of note that interest arbitrators have not factored in pandemic pay or

retention bonuses received by other employee groups in determining the awarded compensation for years in which those payments were received.

Although I strongly disagree with the award of pandemic pay, I agree with the method of payment that the Chair has determined is appropriate, which avoids numerous issues with implementation at this time.

**The Reopener Process**

In the award the Chair makes some final observations about the overall approach taken in the *ONA and Participating Hospitals* award. That award – not a reopener – attempted to achieve a balance by taking into account proposals from both the Participating Hospitals and ONA. That is the way interest arbitration is supposed to work: historically, interest arbitration has been completely unbalanced with meritorious management proposals being given, at best, short shrift. This needs to change.

Dated August 3, 2023

*"Brett Christen"*

Brett Christen
Nominee of the Participating Hospitals

**DISSENT OF UNION NOMINEE**

In a Dissent to *Participating Hospitals and CUPE/OCHU and SEIU*, I commented on the history of arbitration awards that have protected employees from the losses in real income occasioned by inflation. I won't repeat those comments other than to acknowledge that they are just as applicable here.

There are issues unique to this relationship that will require serious attention in bargaining. In particular, I am concerned that wage increases that have been awarded will be insufficient to deal with certain recruitment and retention issues. Just as importantly, there are also issues of internal equity which need to be addressed.

One expects unionized workforces to enjoy compensation greater than the bare market minimum necessary to attract new employees and retain current ones. Yet for some of the occupations covered by this collective agreement that is not necessarily the case. That points to a systemic failure.

A good example of the convergence of recruitment and retention problems, and issues of internal equity in the hospital sector, is provided by the Perfusionist classification. These specialists operate sophisticated equipment during heart surgeries to maintain heart functions. One qualifies by taking a two-year M. Sc. Programme at Michener, for which the prerequisites are stern – physics, chemistry, maths and anatomy. Alternative admission however is available to Registered Nurses with a degree, and to Respiratory Therapists with a Diploma.

OPSEU officials have pointed to the loss of Perfusionists to hospitals not covered by this agreement paying much greater salaries. Heart surgeries are cancelled as a result. https://www.thespec.com/news/hamilton-region/hamilton-health-sciences-loses-more-than-a-quarter-of-key-cardiac-surgery-staff/article_17dcef46-7cec-553e-9cc6-f8307da1e88c.html?

It goes without saying that in order to attract RN's, who are much more numerous than Respiratory Therapists, to undertake a two-year Masters program to become a Perfusionist, there must be some significant income differential. The recent necessary increases to RN salaries resulting from the ONA award, issued after the hearing in this matter, have instead reduced the gap between Perfusionists and RN's. While I agree with the Chair's decision here to provide an adjustment to RT and above classifications, the 1.75% awarded will in many cases not be enough to deal with recruitment issues, and will certainly not deal with internal equity issues.

Dated July 29, 2023.
Joe Herbert
Nominee of Ontario Public Service Employees' Union

# TAB 14

**In the Matter of an Interest Arbitration**

**BETWEEN:**

**THE UNIVERSITY OF TORONTO**

**(the "University")**

**AND**

**THE UNIVERSITY OF TORONTO FACULTY ASSOCIATION**

**(the "Association")**



**BEFORE:** Eli A. Gedalof, Sole Arbitrator

**APPEARANCES**

See Schedule "2"

**AWARD**

**INTRODUCTION AND BACKGROUND**

1. This is an interest arbitration convened pursuant to Article 6 of the Memorandum of Agreement between the University and the Association (the "MOA"). Article 6 of the MOA provides for the negotiation of salary, benefits and workload for faculty and librarians represented by the Association. Where the parties are unable to reach an agreement on these issues, Article 6 provides for interest arbitration before a Dispute Resolution Panel.

2. By Memorandum of Settlement dated January 25, 2022 (the "MOS"), the parties agreed to enter into a three-year agreement commencing July 1, 2020 and ending June 30, 2023. They also agreed to certain monetary terms for the first two years of that agreement, while referring salary, benefit and workload matters in the third year to interest arbitration. They further agreed that I would sit as sole arbitrator in place of the Dispute Resolution Panel, and that this award would be treated as a unanimous report for the purposes of paragraph 22 of Article 6 of the MOA.

3. When this proceeding commenced, the three-year term of the agreement was subject to the *Protecting a Sustainable Public Sector for Future Generations* for each year. At that time, the Association, along with other bargaining agents, had brought a constitutional challenge to Bill 124 that had not yet been determined. In that context, the parties, in their MOS, agreed to annual salary increases of 1%, and to benefit improvements equal to the residual of 1% of total compensation in the first two years of the agreement. With respect to the third year (July 1, 2022 to June 30, 2023), this matter has proceeded in five steps.

4. First, on September 15, 2022, I issued an interim Award, ordering a 1% across the board salary increase, together with an increase to the minimum per course stipend, effective July 1, 2022. The interim Award was without prejudice to either party's position with respect to the constitutionality of Bill 124 and the ongoing litigation in that regard.

5. Second, the parties filed written briefs and made oral argument over two days with respect to both workload and benefit issues for the third year of the agreement.

6. Third, the parties then entered into a Memorandum of Settlement with respect to benefit improvements in the third year, having regard to the Bill 124 1% envelope.

7. Fourth, having settled the benefit issues, workload issues from the second step remained to be decided. Before I issued a final Award on those issues, however, the Court released its decision in *Ontario English Catholic Teachers Association v. His Mastery,* 2022, ONSC 6658 ("*OECTA*"), finding that Bill 124 was unconstitutional, void and of no effect. The parties then engaged in mediated discussions in an effort to settle the outstanding monetary issues but were not able to reach an agreement.

8. Fifth, when the parties were not able to settle the outstanding monetary issues, they filed additional briefs and materials and on May 23, 2023, presented further oral argument with respect to those monetary issues. The parties subsequently filed further materials providing additional information and updates related to comparator data.

9. This award therefore determines the outstanding salary and workload issues for the third year of the parties' agreement.

**OVERVIEW OF ISSUES AND PROPOSALS**

10. There is no dispute, in the absence of Bill 124, that I retain jurisdiction to award salary increases beyond the 1% increase arising from my interim award. The Association proposes an across the board ("ATB") increases of 12.75% percent, in addition to the 1% previously awarded, together with lump sum payments to compensate for lost salary in years 1 and 2. The University proposes an additional 1.75% ATB increase. The Association also proposes that PTR breakpoints and increments increase by an additional 9.3% retroactive to July 1, 2022. The University opposes any increase to PTR.

11. The gulf between the parties' positions can be attributed, to a significant degree, to a dispute concerning the scope of my jurisdiction, and the import of the agreements reached in the MOS.

12. From the Association's perspective, the agreements reached in the MOS were all without prejudice to its challenge to Bill 124. Those agreements were not voluntary settlements in any meaningful sense. Now that Bill 124 has been struck down, this award should restore the Association to the position that it would have been in but for the imposition of unconstitutional constraints. For the Association, this means that while my jurisdiction may be limited to year 3 of the agreement, within that year I ought to award substantial across the board increases, lump sums, and improvements to PTR. Those increases should address the losses suffered by members in the first two years of the agreement, having regard to agreements that have been freely bargained and, of paramount importance, correcting for substantial inflation over the term of the agreement.

13. From the University's perspective, all terms of the agreement for the first two years, in addition to PTR in year 3, were fully, finally and voluntarily resolved. In the University's submission, all that remains to be determined on the monetary front is the appropriate across the board increase for the third year. Further, according to the University, the increases should be determined by looking primarily to what comparable U15 universities have negotiated for that specific year. In the University's submission, the parties chose to settle the first two years of the agreement, and there is no basis for awarding any additional amounts attributable for those years.

14. Before addressing the merits of the parties' monetary proposals, therefore, it is necessary to look closely at both the MOA and the MOS to determine the scope of my jurisdiction.

15. The workload issues in dispute are long-standing points of contention between the parties. They include several Association proposals directed toward

addressing what it describes as "crushing workloads that are inequitably distributed within units and disproportionately borne by equity-seeking groups". These include proposals related to providing technical and pedagogical support to faculty, several proposals directed at creating transparent and consistent standards for assignment of workload, and proposals placing limitations on the assignment of teaching to Teaching Stream faculty. The University maintains that the Association's proposals would constitute unwarranted breakthroughs in the absence of any demonstrated need and would interfere with the collegial assignment of work at the unit level.

16. These workload issues, although not precisely the same proposals, were also raised in the prior round of interest arbitration in *The University of Toronto and The University of Toronto Faculty* Association, unreported, June 29, 2020 (Kaplan) (the "*Kaplan Award*"). From the University's perspective, the *Kaplan Award* bears careful examination. For the same reasons as articulated in that award, the University maintains that, at most, I ought to award very modest and incremental changes to the workload language. In contrast, the Association maintains that the *Kaplan Award* misapprehended the workload issues raised by the Association, and the kind of modest and incremental change awarded in that decision would be wholly inadequate to address the demonstrated need for real and substantial workload protections.

17. The Association also proposes to incorporate into the MOA a provision to maintain salaries and benefits and workload during bargaining and throughout the interest arbitration process, i.e., a "freeze" proposal. The University objects to this proposal on both jurisdictional and substantive grounds.

18. In this award I will therefore address the following issues:

1. The scope of my jurisdiction under the MOA and the MOS, and identification of which proposals are properly before me;

2. Salary proposals;

3. Workload proposals;

4. Freeze proposal;

5. The ongoing significance of Bill 124.

**JURISDICTION**

The Parties' Agreements

19. My jurisdiction arises primarily from Article 6 of the MOA. Sitting in place of the Dispute Resolution Panel, and in accordance with Article 6(19), my jurisdiction:

> …shall encompass only those unresolved matters relating to salaries, benefits and workload that have been referred to [me] by the parties…[taking] into account the direct or indirect cost or savings of any change or modification of any salary or benefit agreed to by the parties…"

20. There are two related elements of this provision that underlie the dispute before me. First, there is a dispute over which matters remain "unresolved". Second, there is a dispute concerning whether certain of the proposals the Association now pursues were "referred to me by the parties".

21. In assessing what has and has not been resolved by the parties and what matters have been referred to me by the parties, it is necessary to carefully consider the terms of the January 25, 2022 MOS arising from the parties' mediation with mediator Burkett. The MOS is attached as Schedule "1" to this award. Of note, the MOS:

- Includes a "whereas" clause acknowledging the Bill 124 restrictions in place at the time and the Association's outstanding constitutional challenge, and provides that "any agreement in this Memorandum of Settlement with respect to salary rates and compensation is without prejudice to that ongoing constitutional challenge";

- Provides for a three-year term, with 1% across the board increases in each of the first two years and a corresponding increase to the per course stipend rate upon ratification;

- Provides for time limited increases to the existing Health Care Spending Account, and for ongoing expansion to and improvements to paramedical and dental benefits, attributable to years one and two of the Agreement;

- Incorporates the parties' August 2021 agreement for the payment of PTR, and provides for an additional July 1, 2022 PTR payment for the July 1, 2021 to June 30, 2022 assessment period as addressed further below;

- Refers salary, benefits and workload matters for the third year of the Agreement to interest arbitration "as set out in schedules A and B attached hereto"; and,

- In respect of year 3, but not years 1 or 2, specifies that the agreement is without prejudice to whether the DRP, following the issuance of an award for salary, could "remain seized or retain any jurisdiction in the event that thereafter Bill 124 is found to be unconstitutional or should Bill 124 be otherwise modified or repealed with retroactive effect."

- Includes a Schedule A with Association Proposals and a Schedule B with University Proposals while providing that "[a]ll other proposals are withdrawn by both parties". Schedule A includes a clause stating that "UTFA's proposals are without prejudice to its position on the constitutionality of Bill 124".

- Includes, in Schedule A, the Association's salary proposal for a 1% ATB increase effective July 1, 2022 with the following proviso:

  > If Bill 124 is found to be unlawful, UTFA proposes an ATB increase that is fair and reasonable in light of the unparalleled professional expectations faced by U of T faculty and librarians, trends in recent settlements in higher education, and broader economic considerations.

*The University's Argument*

22. The University distinguishes the references to the Association's agreements and proposals as "without prejudice" to its position on the constitutionality of Bill 124—references found in a whereas clause and in the Association's proposals—from the kind of broad Bill 124 re-opener provisions that had become common in other parties' collective agreements and interest arbitration awards under Bill 124. To say that the Association's agreements and proposals are "without prejudice", the University argues, means no more than that they cannot be relied upon to undermine the Association's constitutional challenge. But in the University's submission, the agreements reached between the parties throughout the process leading up to this arbitration are, nonetheless, just that: agreements. And having entered into a binding resolution on terms for years 1 and 2, without bargaining a Bill 124 re-opener for those years—a practice that was widespread and well-known at the time—the University argues that the Association cannot now seek to obtain additional compensation attributable to those years. Rather, the parties' agreement permits the Association to pursue specific proposals for a specific period of time. With respect to compensation the University argues that

the proposal must be limited to across the board increases for year 3, i.e., for the period July 1, 2022-June 30, 2023.

23. Neither, argues the University, is there any equitable or policy basis for setting aside the parties' agreements on compensation. The MOS is not a one-sided "contract of adhesion" or in any way contrary to public policy, as discussed in *Heller v. Uber Technologies Inc.*, 2020 SCC 16 ("*Heller*"). In the University's submission, the parties were fully apprised of all the relevant circumstances, including the possibility that Bill 124 might be struck down, and chose to voluntarily negotiate a settlement that limited the Association's recourse to pursuing an additional ATB increase effective July 1, 2022. That limited right was preserved in my September 15, 2022 interim award, and that is what the Association is entitled to pursue here.

24. Further, in the University's submission, the parties' agreements must be considered in light Article 6(19) of the MOA and section 5(a) of the MOS; the arbitrator's jurisdiction is limited to "those unresolved matters…that have been referred by the parties" and those unresolved matters have been enumerated by the parties in Schedules "A" and "B". Read together with the terms of the MOS, the University submits that all compensation for Years 1 and 2, including retroactivity, in addition to PTR for year 3, are matters that have been resolved and which cannot therefore be referred to arbitration. The parties similarly restricted outstanding benefit issues to Year 3, "for the period July 1, 2022 to June 30, 2023".

25. The Association's only salary proposal, as set out in Schedule "A", is for a "fair and reasonable" ATB increase in year 3 in the event that Bill 124 is found to be unlawful. The University acknowledges that the Association's current proposal for ATB increases is therefore a matter that is in dispute and properly before me. But in contrast to this salary proposal, Schedule "A" includes no proposal to revisit PTR for the assessment period July 1, 2021 to June 30, 2022. Neither does it include any proposal for stipends, lump sum payments or any other form of compensation attributable to the Years 1 and 2 of the agreement. In the University's submission, the absence of any such proposals is entirely consistent with the fact that the parties fully and finally resolved those issues. It is also, argues the University, consistent with my interim award, which ordered a salary increase, but left open the prospect of further ATB increase in accordance with the Association's outstanding proposal in the event Bill 124 was struck down.

*The Association's Argument*

26. The Association describes the University's objections as "jurisdictional sand in the eyes". The Association acknowledges that my jurisdiction is limited to awarding monetary increases for the third year of the three-year agreement. But it maintains that all its proposals fall squarely within that time frame. There is a distinction, it asserts, between making an award for improved terms during the first two years of the agreement—which it acknowledges I cannot do—and making an award during the third year of the agreement that also compensates for the inadequate compensatory improvements provided in those first two years. The University's jurisdictional objections conflate this distinction, the Association argues, hence the "jurisdictional sand".

27. There is nothing in the terms of the MOS, the Association argues, that either expressly or implicitly suggests that an Arbitrator cannot consider the losses suffered by the Association's members in Years 1 and 2 in determining the appropriate compensation increases for year 3. Further, while Schedule "A" to the MOS may not explicitly refer to lump sum payments, the Association maintains that the University's characterization of the arbitrator's jurisdiction is unduly narrow; as compensation for lost ATB increases in years 1 and 2, the Association maintains that the lump sum payments it seeks are reasonably captured by its proposal. With respect to stipends, the Association notes that its proposal specifically included a clarity note that its "proposal to increase ATB by 1% is intended to include per course stipend rates".

28. Further, argues the Association, it is important to consider the reasons that Justice Koehnen overturned Bill 124 in *OECTA*, emphasising the importance of collective bargaining[1] and the extent to which Bill 124 infringed the Association's rights under s.2(d) of the *Charter.* In this context, argues the Association, it becomes apparent that I must exercise my jurisdiction in year three of the parties' agreement, to address the artificially and unlawfully deflated terms in years one and two.

29. The Association also takes its argument concerning the significance of the parties prior agreements a step further. It argues that as Bill 124 has now been struck down, "any terms related to salary and compensation that were constraining by Bill 124 should no longer be treated as binding". This includes, it asserts, the 1% increases in years 1 and 2, and the 1% increases to PTR in Years 1, 2 and 3. According to the Association, when the parties recognized in the MOS

[1] See also *Health Services and Support—Facilities Subsector Bargaining Association v British Columbia,* 2007 SCC 27 and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC.

that "any agreement in this Memorandum of Settlement with respect to salary rates and compensation is without prejudice to that ongoing constitutional challenge", it was understood by both parties that the Association's agreements were conditional on the legal status of the legislation.

30. The provisional nature of the 1% increases is further reflected, the Association argues, in its prior proposals and submissions, and in my September 15, 2022 Interim Award, which awards 1% ATB increases, "without prejudice to either party's position with respect to the constitutionality of Bill 124 and the ongoing litigation in that regard…". In these circumstances, the Association maintains that it is both within my jurisdiction and appropriate to reopen the terms of the agreement.

31. In the further alternative, the Association argues that enforcement of the 2022 MOS is contrary to public policy, and that it should be set aside on this basis. The principle of public policy, as distinct from the principle of unconscionability, as a basis for voiding a contract, focusses on the content of the contract, and whether it conflicts with valued principles in a democratic society. The Association argues that to hold it to the terms of the MOS, which it would never have made but for the imposition of unconstitutional legislation, would allow that unconstitutional legislation to continue to interfere with the rights of the Association's members.

32. In support of its public policy argument, the Association relies upon *Heller* at paras 108-09, citing *In Re Estate of Charles Miller, Deceased*, [1983] S.C.R. 1 and *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4. The public policy doctrine is fundamental to contract law, it emphasises, and while exceptions to the enforceability of contracts may be narrow, the Association argues that they ought at least to "protect individuals from the enforcement of contractual provisions that are in violation of the *Charter*." The Association also relies upon *Canada Trust Co. v. Ontario (Human Rights Commission)*, (1990), 69 D.L.R. (4th) 321 (OCA)("*Canada Trust*") at para 39 for the proposition that a party should not be bound to the terms of contract that were dictated by unconstitutional legislation.

Analysis and Decision

*Is the MOS Binding and Enforceable: The Association's Public Policy Argument*

33. The University's jurisdictional objections, while founded on the terms of the MOA, are also premised on the binding nature of the MOS and the agreements between the parties that are set out therein. Thus, while the Association's public

policy argument is not its primary argument, it is nonetheless a threshold issue and an appropriate place to start.

34. The Association's argument is, in essence, that: i) it would never have agreed to the terms of the MOS but for the imposition of Bill 124; ii) Bill 124 has now been determined to be unconstitutional and to have fundamentally undermined the constitutional rights of the Association's members; and, iii) it would therefore offend public policy to enforce the MOS, since this would be tantamount to endorsing unconstitutional legislation and enshrining it in the parties' agreement.

35. The University, for its part, acknowledges that freedom of contract is not absolute, but cautions that exceptions should be carefully and narrowly construed. In this case, the Association had all the necessary information and knew exactly what it was doing when it entered into the MOS. Had it not wished to agree to the terms of the MOS, it could have elected to instead bring all its issues to interest arbitration, where it could have pursued a Bill 124 reopener. Many other parties to interest arbitration, it emphasises, did exactly that. Instead, fully informed, it made a choice to enter in the MOS, and that choice was "proportionate in the context of the parties' relationship" (as discussed by Justice Brown in *Uber*). The Association may now regret that choice, but that is not a basis for invalidating the parties' agreement.

36. In deciding this issue, I accept, as the Association argues, that it is important not to conflate "unconscionability" as a basis for invaliding a contract with the "public policy" argument that it is making. The majority decision in *Heller* is based on the former, while Justice Brown's concurring reasons are based on the latter.

37. The key passage from *Heller* upon which the Association relies, found in Justice Brown's concurring reasons, reads as follows (at paras 106):

> But while privileging freedom of contract, the common law has never treated it as absolute. Quite simply, there are certain promises to which contracting parties cannot bind themselves. As this Court has stated:
>
> ... there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates. [Emphasis added]

38. The question this articulation of the public policy principle raises, though, is whether the terms of the MOS are a form of promise "to which contracting parties cannot bind themselves". In answering this question, it bears emphasising that the facts in the instant case are very different from the facts in *Heller*, or any of the other cases cited by the Association.

39. In *Heller,* the terms of an arbitration clause, unilaterally imposed on a low-wage gig-economy worker with minimal transparency, were so onerous that they effectively denied him any access to justice. In the instant case, the University and the Association are both highly sophisticated and well-resourced parties. They jointly negotiated a dispute resolution mechanism (the MOA) for determining certain terms and conditions of employment for the Association's members, and they are both fully capable of participating in that dispute resolution process.

40. It is true that by virtue of Bill 124, if the Association wanted to attain any wage increases for its members at all, it had no choice but to accept the 1% increases the University was prepared to offer. By the same token, the University had no choice but to limit its offer to 1%. The Court has found that that constraint violated the Association's members' constitutional rights, and the Court will determine how that breach ought to be remedied.

41. But in the matter before me, the parties did have a choice to make, which was how they wished to address the potential striking down of Bill 124 in the context of their MOA. And the choice they made was to settle the monetary improvements for the first two years, leave open the ability to negotiate additional ATB increases in the third year, and to refer only compensation issues for that third year to me for arbitration. The parties' intention is manifest throughout the MOS and in schedule A. Indeed, they specifically turned their minds to the jurisdiction of the DRP in the event that Bill 124 was struck down at paragraph 5(i), but only with respect to amounts ordered in Year 3. They could have agreed otherwise, and absent agreement they could have pursued, under the MOA, a different mechanism for addressing the potential striking down of Bill 124. Instead, they entered into the MOS. In this context, there is simply nothing in the MOS that is even remotely analogous to Mr. Heller's circumstances.

42. In *Canada Trust*, the court refused to give effect to certain terms of a charitable trust that were blatantly racist and discriminatory. The Association argues that just as the specifically offensive content of the trust was unenforceable, so too should its agreement to limit compensation increases to 1% in the first two years of a three-year agreement, because those 1% increases are the product of unconstitutional constraints on bargaining. But that is not for me to decide; the parties did not choose to refer that issue to me for arbitration.

A remedy for the breach of the Association's *Charter* rights *vis a vis* compensation in years 1 and 2 is simply not before me. And there is nothing inherently offensive in the parties' choice to limit my jurisdiction that is akin to the circumstances in *Canada Trust.*

43. I therefore find that the MOS, insofar as they give rise to my jurisdiction, are binding and enforceable.

*Is the Association's Proposal for Increased Stipends Properly Before Me?*

44. The University's objection to the Association's proposal to increase stipends is easily disposed of.

45. The clarity note to the Association's Year 3 ATB proposal, found at paragraph 4A of Schedule "A" to the MOS, makes crystal clear that the Association's Bill 124 compliant proposal for 1% ATB increases was intended to include increases to stipends. That very same proposal, which encompassed increases to the stipends, was subject to a caveat that the Association would propose an ATB increase that is "fair and reasonable" if Bill 124 is found to be unlawful.

46. Reading the Association's ATB proposal in its entirety, as a coherent whole, as one should in accordance with the principles of contract interpretation, it is clear that the intent of the caveat was to permit the Association to revisit its ATB proposal in the event that Bill 124 was struck down. That proposal included increased stipends. The Association's proposal to further increase the per course stipends is therefore squarely and properly before me as a matter in dispute between the parties.

*Is the Association's proposal for an additional PTR increase in year 3 properly before me?*

47. It is equally clear that the parties have resolved the issue of PTR to be paid in year 3. The Association's PTR proposal is therefore not properly before me. To be clear, I accept that the Association's PTR proposal is for additional payments in year 3 of the agreement and one which would therefore fall within the temporal scope of my jurisdiction. But in accordance with paragraph 19 of the MOA between the parties, my jurisdiction "shall encompass only those unresolved matters relating to salaries, benefits and workload that have been referred to [me] by the parties."

48. The parties' agreement on payment of PTR in year 3 is set out at paragraph 4 of the MOS and reads as follows:

> 4 JULY 1, 2022 PTR FOR THE JULY 1, 2021 TO JUNE 30, 2022 ASSESSMENT PERIOD
>
> (a) It has been the University's consistent position that issues related to July 1 PTR are subject to negotiations and/or the dispute resolution process for salary, benefits and workload under Article 6 of the MOA for the relevant July 1 to June 30 period such that it is the University's position that issues related to July 1, 2022 PTR are subject to the dispute resolution process for salary, benefits and workload for the Year 3 period July 1, 2022 to June 30, 2023.
>
> (b) Notwithstanding paragraph 4(a) above the parties have from time to time, as they are entitled to do, agreed to PTR issues for the relevant July 1 prior to reaching an agreement or the conclusion of a dispute resolution process regarding salary, benefits and workload for the relevant July 1 to June 30 period on a without prejudice or precedent basis to the University's position set out in paragraph 4(a) above.
>
> (c) In the context of paragraphs 4(a) and (b) above, the parties agree that PTR for the 2021-2022 assessment period shall be paid on July 1, 2022, with the PTR breakpoints and increments moving by the 1% amount of the ATB percentage wage increase agreed to for the period July 1, 2021 to June 30, 2022. PTR funds shall be allocated utilizing the model in place prior to the 2015 Memorandum of Settlement (i.e. using the same model as was used for the July 1, 2020 PTR payment). The PTR assessment process for PTR to be paid on July 1, 2022 for the July 1, 2021 to June 30, 2022 assessment period is subject to any mutually agreed modifications to the process for determining PTR awards and assessments for that assessment period as may arise as a result of the provisions of paragraph 2.10 of the COVID LOU that; "[i]f the University's operations continue to be limited or impacted by COVID protocols that prohibit or limit indoor gatherings beyond December 31, 2021, the parties shall meet to discuss whether and on what terms there should be any modifications to the process for determining PTR scores and awards for the 2021-22 assessment period." [emphasis added]

49. In the emphasised text above, the parties agreed to when PTR for the 2021-22 assessment period "shall be paid", and they agreed to increase breakpoints and increments by 1%. It is simply not possible to read this section of the MOS as doing anything but resolving the PTR issue for 2021-22 assessment period, i.e., the PTR that is to be paid out in year three.

50. Further, under paragraph 5 the parties agreed to terms concerning the interest arbitration for salary, benefit and workload for the period July 1, 2022 to June 30, 2023. In paragraph 5(a), the parties agree to refer those issues "as set out in Schedules A and B attached hereto…". UTFA's proposals for the one year period July 1, 2022 to June 30, 2023 were "attached hereto as Schedule A". Consistent with the parties' intention to have settled the PTR to be paid in Year

3, and in stark contrast to the Association's proposal concerning ATB increases, Schedule A does not contain any proposals with respect to PTR.

51. PTR is therefore neither an unresolved matter nor a matter that has been referred to me, and I have no jurisdiction to award the Association's PTR proposal.

*Is the Association's proposal for lump sums properly before me?*

52. Unlike PTR, the parties have not explicitly settled the issue of lump sums in year 3. There is simply no mention of lump sums, as a proposal or otherwise, anywhere to be found in the MOS.

53. From the University's perspective, the absence of a proposal on lump sums in Schedule "A" is a complete answer and precludes awarding lump sum payments. I do not agree that the issue is so clear cut. Parties to interest arbitration make specific proposals, but except in the context of final offer selection or some similar arbitration regime, interest arbitrators can, and frequently do, craft provisions in their awards that deviate from the parties' proposals. Awarded provisions replicate the agreement the parties would likely have reached, not necessarily their positions coming into interest arbitration. As the Association argued, lump sums and ATB increases are often integrated components of a monetary award. I would not, therefore, foreclose the possibility that in appropriate circumstances an arbitrator might properly award lump sum payments in conjunction with ATB increases, even absent a specific proposal from either party.

54. But the Association's proposal is for lump sum payments as compensation for what its members lost in years 1 and 2 of the agreement, because of Bill 124. As described above, in their MOS the parties drew a line between compensation for the first two years, which they settled, and compensation for year three, which they referred to arbitration. In this context, had the parties intended that additional compensation attributable to years 1 and 2 of the agreement constitute an unresolved matter to be referred to arbitration, it would have been incumbent on them to include such a proposal in Schedule "A". The absence of such a proposal, in combination with the settlement of compensation for years 1

and 2, leads me to conclude that it is not an unresolved matter that has been referred to me for arbitration.

55. To be clear, my conclusion that the parties settled compensation issues for years 1 and 2 does not mean that I ought not to consider what the parties agreed to for those years in determining how to properly decide those matters in dispute that are properly before me. Article 6(19) of the MOA is telling in this regard, and reads:

> 19. The jurisdiction of the Dispute Resolution Panel shall encompass only those unresolved matters relating to salaries, benefits and workload that have been referred to it by the parties. The Dispute Resolution Panel shall, however, take into account the direct or indirect cost or saving of any change or modification of any salary or benefit agreed to by the parties in making its recommendation for terms of settlement.
> [emphasis added]

The 1% increases agreed to in years one and two are not strictly "cost savings" in the sense that they represent increases, as opposed to decreases, in cost. But they clearly represent substantial cost savings in comparison to normative outcomes that are not constrained by Bill 124. It is trite that in collective bargaining parties will always consider the  of costs of total compensation over the term of the agreement as a whole, as reflected in Article 6(19). To fail to account for the sub-normative costs to the University in years one and two of the agreement in fashioning a wage increase for year three would subvert the principle of replication that guides this arbitration.

56. I will further address this issue, and the University's argument that "catch up" for years 1 and 2 of the agreement is beyond my jurisdiction, below.

**SALARY PROPOSALS—ATB INCREASE FOR YEAR 3**

*Association Proposal and Argument*

57. The Association proposes an ATB increase of 12.75%, including an increase to per course stipends and overload payments, in addition to the 1% already awarded, for a total ATB increase of 13.75%, in year three, retroactive to July 1, 2022.

58. Of the considerations relied upon by the Association in support of its proposal, inflation is primary. After 20 years of low and stable inflation, the 3-year period covered by the parties' agreement has been marked by a rapid increase in inflation. During the period July 1, 2020-21 (Year 1), the CPI

increased by 3.7%. During the period July 1, 2021-22 (Year 2), the CPI rose a further 7.6%. At the time the parties presented their argument, the Association submitted that based on conservative estimates from the Bank of Canada for the period July 1, 2022-23 (Year 3), expected inflation was expected to be at approximately 4% (although it now appears that that estimate was high).[2]

59. Further, the Association argues, the impact of inflation on residents of the GTA has been particularly acute. Housing prices in the GTA have reached unprecedented heights, while interest rates are rapidly rising. As a ratio of price to salary, the Association asserts, a professor at McGill or Dalhousie could buy approximately twice as much housing as a professor at the University of Toronto.

60. During the same period, and to the limited extent that the Association acknowledges that the University's financial position is relevant, the Association cites the University's audited financial reports as demonstrating the University's healthy financial circumstances; enrolment has increased, net income and budgetary surpluses have grown, and the University is realizing ongoing savings from the absorption of its pension plan into the University Pension Plan. The Association also emphasises that the University's strong financial position is attributable in no small part to the workload demands placed on faculty.

61. The Association argues that its proposal for an additional 12.75% increase in year 3 is necessary to ensure that its member's salaries are not eroded by inflation[3]. Further, the Association argues that this is not a typical case of "catch up", where salaries have gradually lagged over an extended period of time, as in *Burkett*, where there may be reason to make up those losses more gradually. In this case, we are addressing erosion of wages within the term of a single agreement. In this context, the Association argues that there is no reason to delay the necessary correction to wages.

62. The Association also emphasises that while inflation is not the only relevant factor in establishing wage increases, it becomes increasingly important in times of high and rapidly rising inflation. In support of this argument the Association relies on *Ontario Hospital Association v ONA,* unreported, April 1, 2023 (Stout), *65 Participating Hospitals and CUPE, Re,* 1981 CarswellOnt 3551 (Weiler), *Participating Nursing Homes v Service Employees' International Union Local 1,*

[2] References to CPI are for Canada and all items, as presented in the parties' materials.

[3] I note that the Association's proposal tracks the CPI increases as compounded over the three years.

*Canada,* 2022 CanLII 90597 (ON LA)(Stout) and *Homewood Health Centre Inc. v United Food and Commercial Workers, Local 75*, 2022 CanLII 49154.

63. The Association acknowledges that in *University of Toronto and University of Toronto Faculty Association,* unreported, October 5, 2010 (Teplitsky)(the "*Teplitsky 2010 Award*") the arbitrator applied a "retrospective" approach to considering inflation, basing ATB increases on inflation from the prior year, as

opposed to the "prospective" approach that underlies the Association's proposal. In the Association's submission, however, that is because the parties do not typically know what inflation will be for each year of the agreement. In this case, though, we do know the prospective numbers, and in the Association's submission there is no reason they ought not to be followed.

64. Nonetheless, the Association emphasises that the greatest inflationary increases were in Year 2, and those increases must be accounted for on either approach. And on either approach, it maintains that the University's proposal falls woefully short. In support of its prospective approach, the Association relies on *OPG and The Society,* 2023 CanLII 37956 (ON LA) (Kaplan)(the "*OPG Kaplan Award*") and *Participating Hospitals v Ontario Nurses Association,* 2023 CanLII 33967 (ON LA) (Gedalof) (the "*ONA Second Reopener*") for the proposition that arbitrators ought to look to information that is available at the time of the decision and ought not to take an artificial "time machine" approach.

65. Looking to its relevant comparators, the Association begins from the long-held premise, recognized over almost 40 years of interest arbitration between these parties, that salaries for faculty at the University must be "top of market". As the leading academic institution in Canada, professional expectations on faculty and librarians exceed those of any other university in Canada, and salaries must reflect these expectations. In support of this proposition, the Association relies on *the Burkett 1982 Award*, *University of Toronto v. University of Toronto Faculty Association (Salary and Benefits Grievance)*, 2006 CanLII 93321 (ON LA)(Winkler)(the "*Winkler 2006 Award*").

66. In the Association's submission, the top of market position of faculty salaries at the University have been substantially eroded, and the University's relative position to its peers has deteriorated since 2000-01. For example, according to the data presented by the Association, the salary advantage of the University over other Ontario U15 universities has eroded from 13-21% higher than other universities, to only 2-10% higher in 2021. Of particular note, median salaries at the University have fallen behind median salaries at McMaster University, reflecting an especially steep decline in relative salaries for faculty members who do not fall within the top 10% of earners at the University or

faculty who are not with the Rotman School of Business or the Faculty of Law.

67. In looking to specific comparators, the Association cites *OPSEU v Ontario (Minister of Education)*, 2016 ONSC 2197 (OSCJ) and *Ontario Hospital Association v ONA*, unreported, April 1, 2023 (Stout)(the "*ONA First Reopener*") for the proposition that Bill 124 artificially altered the collective bargaining landscape, and that settlements made under the legislation are not appropriate comparators. Citing *re Beacon Hill Lodges of Canada and Hospital Employees Union*, 1985 CanLII 5413(BC LA)(Weiler) it also argues that settlements outside of Ontario, are in different labour markets and therefore of limited relevance.

68. Instead, the Association argues that particular weight should be given to the voluntary settlement between the University and CUPE 3902, where the parties agreed to ATB increases of 4%, 4% and 3%, effective September 1, 2021, 2022 and 2023. It notes that since the certification of CUPE 3902 Unit 3 (sessional lecturers), the Association has generally obtained at least the same or greater increases and was ahead for the period 2012 to 2020 when Bill 124 was imposed. Consequently, the Association maintains that while the 11.4% (compounded) increase agreed to with CUPE is inadequate, it at least establishes a floor for compensation increases for the Association's members. The Association also relies on post-Bill 124 settlements at Queens, Carlton, Ottawa and Brock, as well as a variety of non-University settlements and awards in the broader public sector, all of which are well in excess of the Bill 124 1% increases. It also notes that in the construction industry, where Bill 124 was not imposed, increases have ranged as high as 20.7% during the period 2022-2025.

69. Central to the Association's argument is the concept of "catch up" to address the extent to which, by Year 3 of the agreement, wages have fallen behind inflation and comparators. In support of the appropriateness of a "catch up" award, the Association relies on the *Burkett 1982 Award,* the *ONA Second Reopener*, *65 Participating Hospitals and CUPE, Re,* 1981 CarswellOnt 3551, *Capital District Health Authority and N.S.G.E.U., Re,* 2004 CarswellNS 749 and a number of post-Bill 124 awards, including the *OPG Kaplan Award, Participating Nursing Homes v. Service Employees' International Union Local 1, Canada,* 2022 CanLII 90697 (ON LA)(Stout), and *Homewood Health Centre Inc. v. United Food and Commercial Workers, Local 75*, 2022 CanLII 49154 (ON LA)(Hayes).

University Proposal and Argument

70. The University proposes an additional ATB increase of 1.7%, for a total increase of 2.7% for the one-year period effective July 1, 2022 to June 30, 2023.

71. In support of its proposal, the University emphasises the principle of replication, as enshrined in Article 6(16) of the parties MOA. The central role of the replication principle under the MOA has been recognized in numerous decisions between these parties, including awards from arbitrators Kaplan, Munroe and Winkler. What these decisions, and others such as *Mount Alison University* (Burkett), reinforce, argues the University, is the importance of assessing objective criteria, i.e., the "market forces and economic realities that would have ultimately driven the parties to a bargain" (Winkler), including relevant collective bargaining outcomes. As the University argues, citing *Bridgepoint Hospital,* 2011 CanLII 76737 (Goodfellow) comparability, i.e., looking to actual comparable collective bargaining outcomes, "puts flesh on the bones of replication, providing the surest guide to what the parties would likely have done, in all the circumstances, had the collective agreement been fully and freely bargained" (at page 4).

72. The primacy of replication, argues the University, has been recognized by numerous arbitrators facing demands for inflationary adjustments. Citing *Toronto Transit Commission and ATU, Local 113, Re* 2022 CarswellOnt 3 (Kaplan)(the "*TTC Kaplan Award*"), *ATU, Local 113 and Toronto Transit Commission, Re* 2022 CarswellOnt 3773 (Wilson)(the "*Kaplan TTC Award*"), and *Ottawa (City) and CIPP*, 2022 CarswellOnt 1365 (Kaplan), the University argues that replication, as informed by looking to relevant comparator outcomes, overrides inflation-based requests for wage adjustments. As the University put it, each of these awards rejected extraordinarily large inflationary adjustments because "a proper application of the replication principle requires a consideration of the boarder collective bargaining patterns, not a myopic focus on fluctuations in the Consumer Price Index".

73. Further, the University argues that in any event none of the awards cited by the Association support anything close to the 13.75% ATB increase the Association is seeking. Many of those awards also included special adjustments where wages had fallen behind the relevant comparators. In this case, on the University's proposal, wage rates at the University of Toronto will continue to be the highest in the country, maintaining its historic position as "top of the market". Further, as found in the *Teplitsky 2010 Award*, the parties' mutual commitment to be top of the market does not mean maintaining the University's relative position at the top of the market, particularly where other university faculty "are

likely seeking catch-up increases with UTFA", and such an approach would lead to "whipsawing" (page 11).

74. Further still, argues the University, even where arbitrators have granted inflation-based increases, those increases do not generally offset past, present and future CPI increases in their entirety (see *Homewood Health Centre* and *ONA Second Reopener*.

75. Turning to the relevant comparators in this matter, the University cites the *Winkler 2006 Award* for the proposition that increased weight ought to be accorded to the outcomes at those comparable universities across the province and the country, i.e., the U15. On this comparison, the University looks to those U15 universities who have reached a non-Bill 124 settlement for the one year period July 1, 2022 to June. In its brief, the University identifies seven such agreements with average increases for the year of 2.06%. Further, it emphasises that settlements like the agreement reached at Queens were "forward looking" and did not include the kind of inflationary catch-up that the Association is seeking. Neither, argues the University, is the fact that settlements in Alberta and Nova Scotia may have been subject to compensation moderation directives a reason to ignore those outcomes. These institutions continue to compete with the University for faculty and librarians and the compensation at those institutions is still relevant.

76. In response to the Association's reliance on the settlement between the University and CUPE Local 3902 in respect of sessional lecturers, the University argues that the main factor influencing that outcome was the fact that CUPE sessionals had fallen behind their comparators at York and Queens. The CUPE agreement, argues the University, stands as an example where the principle of comparability supported the negotiated increases, not as an example of the kind of "unprecedented inflationary offset" that the Association is seeking. In any event, argues the University, the CUPE Local 3902, Unit 3 agreement has never set the pattern for faculty wage increases. The University also notes that it has bargained three other post-Bill 124 CUPE agreements, each for the term July 1, 2021 to June 30, 2023, with each providing for ATBs of 2.6% in year 1 and 2.7% in year 2, outcomes that are consistent with what it is proposing here.

77. Notwithstanding the primacy of the U15 comparators, the University also emphasises that both arbitrators (see Monroe and Winkler) and the parties have recognized that it is also appropriate to look to broader public and private sector settlements and trends. It is particularly important to do so here, it argues, in order to assess settlements outside the context of Bill 124, and where U15 comparators may be unavailable.

78. Looking at the broader collective bargaining landscape does not, the University stresses, mean overemphasising a small number of favourable outcomes in unrelated industries, as the University asserts the Association has sought to do. For example, the University rejects any reliance on construction industry outcomes, which reflect labour supply issues unique to that sector. In its review of broader public sector interest arbitration awards issued after Bill 124 was struck down, the University identifies over a dozen awards, including several under the *Hospital Labour Disputes Arbitration Act* in the long-term care and hospital sectors, none of which include the kind of inflation catch up increase that the Association seeks, and most of which top out at less than 3% annual increases.

79. Throughout its submission on the appropriate comparators the University focuses on a comparison between the single year within my jurisdiction, and that same year under other agreements. This approach is tied to the University's argument that "[a]n award that would allow for compensation matters that pre-date July 1, 2022 to impact the amount of the ATB salary increases awarded for the Year 3 period of July 1, 2022 to June 30, 2023 would be outside the jurisdictional limits imposed by Article 6(19) of the MOA and section 5 of the January 25, 2022 MOS". In the University's submission, to do so would permit the Association to do indirectly what it cannot do directly: that is, to exercise a broad reopener that it did not bargain.

80. In the alternative, however, the University maintains that even if one did look back to the prior two year period, it would still not justify the Association's proposal.

81. The University's first point under this alternative argument is that having regard to the *Teplitsky 2010 Award*, CPI must be considered retrospectively, i.e., for each ATB increase one looks at the previous 12 months of inflation. For the period July 1, 2019 to June 30, 2020, there was no substantial increases to CPI. On this measure, there is no justification for any catch up in respect of the July 1, 2020 ATB. Further, a review of U15 salary increases for the period July 1, 2020 to June 30, 2021 shows a range of outcomes from 0% to a high of 2.15%, with most falling below 2% and an average outcome of 1.27%. For the 2021-2022 academic year, even excluding the Bill 124 driven outcomes at Ontario universities, U15 settlements averaged 1.44%.

82. Finally, the University emphasises that even where arbitrators have found it appropriate to award catch up, they have not generally required employers to make large catch up payments on an immediate basis (see *Constitution Place Retirement Residence* 2016 CanLII 48301 (ON LA) (McNamee), *Garrison Place Retirement Residence,* 2011 CanLII 58257(ON LA) (Laborsky) and *Nova Scotia*

*Agricultural College,* 2012 CarswellNS 1048 (Outhouse).

83. In addition to the principle of replication the University also relies upon the principles of gradualism, arguing that the Association's salary proposal would constitute an extraordinary breakthrough in the absence of exceptional circumstances (see *Via Rail Canada Inc.* (2009) 101 C.L.A.S. 146 and the *Kaplan U of T Award*). It further relies on the principle of total compensation, noting that the Association's proposed 12.75% increase (in addition to the 1% previously awarded) alone would cost $77,745,000, on top of the cost of the various other monetary improvements the parties have agreed to. In contrast, the University's proposed increase would cost just over fifteen million dollars, or an additional 9.6 million on top of the cost of the 1% previously awarded, a figure the University argues is more appropriate in light of the University's financial circumstances and the fact that inflation is decreasing and is anticipated to continue to do so.



Analysis

55. The overarching guiding principle in interest arbitration is the principle of replication. The parties, in their MOA, have expressly adopted this principle in paragraph 16 of Article 6. Article 6 sets the terms for negotiation and interest arbitration, and paragraph 16 directs the Dispute Resolution Panel (in this case the sole interest arbitrator) to issue a report (in this case an award) "which shall attempt to reflect the agreement the parties would have reached if they had been able to agree."

84. In applying the principle of replication, the question that sits at the heart of the dispute between the parties here is this: to what extent would the impact of extraordinary inflation have influenced the agreement that these parties would have reached if they had been able to agree? Inflation is by no means the only factor that informs the appropriate outcome in this case; comparability and other considerations are of course significant, and they will be addressed. But the fact remains that it is the extraordinary impact of inflation over the term of the agreement that underlies the wide gulf between the parties' proposals.

85. Related to inflationary losses is the relevance of the 1% increases agreed to by the parties in years 1 and 2. I have explained above why I find that the principle of replication requires that I consider those years in determining what the parties would likely have agreed to in year 3. Simply put, parties in free bargaining always consider total compensation over the full term of the agreement. It is beyond dispute that an agreement to less favourable terms in

one year can produce more favourable terms in another. Further, inflationary losses are cumulative, and it would be highly artificial to look at only a single year in isolation.

86. The University argues that in seeking to recover "losses" from years one and two, the Association is seeking to obtain indirectly the reopener it failed to obtain directly, and that accounting for those years is beyond my jurisdiction. I have rejected the Association's efforts to set aside its prior bargain, but I do not agree that its proposal for a year 3 ATB increase that catches up for salary erosion in years one and two is akin to a "reopener" or in any way outside my jurisdiction.

87. Bargaining a reopener was not the only way that parties might chose to address the potential unconstitutionality of Bill 124. In this case, the parties chose to address that possibility by referring salary increases for year 3 to interest arbitration where, once Bill 124 is struck down, as it now has been, the Association was entitled to pursue:

> …an ATB increase that is fair and reasonable in light of the unparalleled professional expectations faced by U of T faculty and librarians, trends in recent settlements in higher education, and broader economic considerations. (Schedule A to the MOS)

88. Thus, while the parties did not bargain a reopener, they did leave year three of the agreement open as a metaphorical Bill 124 relief valve. In the normal course, both parties and interest arbitrators will look to the parties' agreement as a whole to determine whether a particular proposal is fair and reasonable or appropriately awarded. There is nothing in the parties' agreement that would constrain an interest arbitrator's normal jurisdiction to consider the terms agreed to for years one and two in determining appropriate increases in the third year, i.e., in replicating free collective bargaining.

89. Considering the 1% Bill 124 compliant increases already awarded, wages over the term of the parties' agreement were estimated to have eroded by 12.75% as compared to the CPI. Using the prior year CPI comparison, the number is 8.6%. The questions are therefore which approach is correct, and how significant a factor ought inflation to be? In answer, and having regard to the bargaining history between these parties, I find that the prior year approach to accounting for CPI best replicates how these parties' have bargained historically, and best replicates a freely bargained outcome here. What also becomes clear when one examines the bargaining history between these parties, is that maintaining salaries in relation to inflation has been a preoccupation and a highly significant factor for these parties for a very long time.

*The Burkett 1982 Award*

90. The parties began bargaining under a memorandum of agreement in 1977 and their early history is set out in the *Burkett 1982 Award*. In 1981 they adopted the so-called "adjudicative" approach to interest arbitration, in which the arbitrator is required to base their award on a series of enumerated factors. The first of those factors was changes in the CPI index for Canada and Toronto, and the other factors included salaries at other universities and for other professions, current compensation, total compensation adjustments in public and private sector collective bargaining settlements and the need for the University "to operate in a reasonable manner". The *Burkett 1982 Award* addressed several of the same issues and arguments that we are faced with here and has served as a foundation on which subsequent awards have built. It therefore merits close consideration.

91. At the time of the *Burkett Award*, over a 10-year period, salaries had fallen behind inflation by approximately 25%. The parties' salary proposals are discussed from paragraphs 13-16. The Association was seeking an increase of 22.1%, which included 12.1% to adjust for increases in the cost of living over the prior year, 8% to begin to "catch up" to losses in relation to CPI and to other comparators, a 1.5% productivity and workload increase and a 0.5% increase in recognition of lost salary over the prior decade. The University, as it does here, objected to any notion of "catch up". It did, though, agree that faculty ought to be protected from inflation over the prior year. To that end it offered an ATB increase of 11.45% which in conjunction with other improvements, including PTR in the University's submission, amounted to a 14.26% increase; an increase it maintained represented a balanced view of all the criteria.

92. Arbitrator Burkett, like others who have followed him, rejected the argument that PTR should be included in assessing the quantum of wage increases. He also rejected the notion of an additional increase for lost wages in prior years, reasoning that prior substandard deals are not "a loan which must be repaid in the form of salary increases in excess of that required on an application of the criteria" (at para. 19). The main issues before him, he found, were "catch up" and protection against salary erosion in the prior year (para. 17).

93. On the first of these issues, Arbitrator Burkett found that "catch up", while not an enumerated criterion, is essential to the legitimacy of the interest arbitration process. Historical benchmark comparisons become artificial if the need for catch up is not accounted for. The question before Arbitrator Burkett was whether the enumerated arbitral criteria agreed to by the parties left room for the application of this otherwise normative consideration. He found that it

did. In the instant case, where the parties have long-since adopted the usual replication model for interest arbitration, the availability of catch up in appropriate circumstances is, as arbitrator Burkett held, fundamental to the comparative exercise and ought to be non-controversial.

94. In weighing the significance of inflation to these parties, Arbitrator Burkett held as follows (at para 31):

> It is appropriate to comment at this juncture that in my view comparisons to other groups or professions and to general wage level indicators are more meaningful for purposes of determining the amount of a salary award to a group whose salaries are in large measure funded from the public purse. Wage settlements do not always move in a lock step relationship with movement in the CPI. If the working public, who both support and benefit from our institutions of higher learning, are receiving wage increases in excess of the rate of inflation there is no justification for limiting salary increases to those who staff these institutions to the rate of inflation. On the other hand, if wage increases are less than the rate of inflation there is no justification for providing faculty with full cost of living protection; a degree of protection against inflation not guaranteed to any other group in society and not guaranteed to faculty on a reading of the criteria as a whole. However, having expressed these views I recognize that the expectation and the practice of the parties is to relate the economic increase to movement in the CPI for the relevant period. Indeed, the first criterion refers to movement in the Consumer Price Index and the University's offer is based on movement in the CPI since July, 1981. I am prepared, therefore, to give considerable weight to the movement of U of T salaries relative to movement in the CPI both prior to and since July 1, 1981.

95. The conclusion that the CPI benchmark has not necessarily been determinative of wage outcomes between these parties but that it has nonetheless been a particularly influential factor for them is a theme that continues through subsequent awards and settlements between these parties. In 1982, Arbitrator Burkett found that a 25% wage increase would be required to address the erosion of salaries relative to the CPI and to wages and salaries generally (para. 45). In constructing his award to address that erosion he noted that (at para. 54):

> …In past negotiations between the parties, the economic increases have been based on an amount needed to restore salary relativities or purchasing power lost during the preceding year. The parties have looked backward as of July 1 of each year and negotiated an amount to reflect what has transpired during the year past, in the knowledge that the same exercise will be repeated the following year…Because of the retrospective nature of the negotiations between these parties

> and because of the erosion of faculty salaries up to July 1, 1981, my award must be comprised of two distinct elements; an element to address the shortfall or erosion of faculty salaries prior to July 1, 1981 and an element to deal with the period July, 1981 to June 30, 1982.

96. In the ensuing paragraphs, Arbitrator Burkett considered all of the enumerated factors, but focussed on movement of the CPI, reasoning that where salaries had eroded to such an extent, it was incumbent on him to provide "significant rectification" (para. 57). Balancing all the factors, including concerns about fiscal responsibility, Arbitrator Burkett ordered a series of increases, split over the term of the agreement, that were intended to manage annual costs while producing an end rate that included an 11.5% increase to maintain salary against the prior years' inflation, plus an additional 6.5% in catch up (para 59). His intent was that "salary restoration [in relation to inflation and comparators] should be achieved within some reasonable period" (para 60).

*The Munroe Awards*

97. After the *Burkett Award* the parties again amended the framework for interest arbitration under their MOA, moving to the so-called "replication model", which continues in place today. As arbitrator Munro explained in *The Governing Council of the University of Toronto and Toronto Faculty Association*, unreported, January 8, 1987 (Munroe)(the "*Munroe 1987 Award*"), the first award under the current model, the model may be less prescriptive than the adjudicative model, but it is not undisciplined (at p.6):

> The essential function of the decision-maker becomes the identification of factors which likely would have influenced the negotiating behaviour of the particular parties in the actual circumstances at hand. It is the dynamic mix of those factor which produces the end result.

98. In other words, focus must be maintained on what these parties in particular would likely have found compelling in the specific circumstances in which they find themselves.

99. In the *Munroe 1987 Award*, the Board found that the parties would have looked for guidance to several factors, including CPI increases in the range of 4.2% (federal) to 5.1% (Toronto) over the preceding 12 months, normative salary increases at other universities of around 4%, and public sector settlements of around 5.0% (pp.9-10). Upon reviewing all the evidence, the Munroe Board awarded a July 1, 1986 increase of 4.5% and a further 2.0% increase on May 1, 1987. Reading the award as a whole, it is clear that like the Burkett Board, insulation from the prior year's inflation, and the ongoing need for catch up were

pivotal considerations, albeit in less extreme circumstances.

100. The next award, also chaired by Arbitrator Monroe, was issued during what he described as the most oppressive recessionary conditions since the Great Depression (pp. 12-13). While the award included improvements to benefits and pension, it did not include any ATB increases (*The Governing Council of the University of Toronto and The University of Toronto Faculty Association*, unreported, June 18, 1993 (Munro)(the "*Munroe 1993 Award"*). In the context of a major recession, the CPI catch up sought by the Association was not available.

*The Winkler 2006 Award*

101. In 2006, the Winkler Board again addressed the question of inflation and catch up in *Re University of Toronto and University of Toronto Faculty* Association, (2006) 148 L.A.C. (4th)(the "*Winkler 2006 Award*"). Much of the award focusses on the parties' mutual commitment to maintaining U of T faculty and librarians as "top of market". The issues raised are again not so different from the parties' arguments here: the university maintained that its proposal for a 2.5% increase was sufficient in part because U of T faculty and librarians were already top of market, and nothing more was required to maintain that position; the Association sought a 4% increase to include "consideration of CPI increases, 'catch-up' and marketplace wage settlements".

102. Arbitrator Winkler, like Arbitrator Burkett, held that CPI increases were an "obviously relevant factor", but that past settlements and awards between the parties could be higher or lower than inflation and had "never been pegged dollar for dollar to increases in the CPI in a given year or multi-year period" (para. 23). On the facts before him, Arbitrator Winkler found that an increase greater than the prior year's inflation was warranted having regard to comparator settlements. It was therefore unnecessary for him to allocate a portion of his award to "catch up", although he noted that it would also have the effect of narrowing the inflationary gap (paras 24-26).

*The Teplitsky 2010 Award*

103. In 2010, Arbitrator Teplitsky succinctly summed up the parties' approach to inflation, affirming the continuing relevance of the factor, as follows (at p. 8):

In my opinion, based on the approach in prior rounds of bargaining, the CPI is considered retrospectively. In other words, for 2009-2010 and 2010-2011, the relevant CPI increases are 2008-2009 and 2009-2010. UTFA submitted that these were approximately 2% in each year. In fact, the total increase int eh CPI, whether one looks at June 2008-June 2010 or July 2008-July 2010, is approximately a total of 2%. The Faculty's position in the past has been that CPI protection is the minimum that ATB increases should generate. In fact, over the past 30 years, total increases in the ATB have coincided almost exactly with the increases in the CPI for the same period. In any bargaining round, the ATB increase has been higher or lower than the CPI increase. For example, in the settlement for 2007-2008 and 2008-2009, the ATB increase exceed the CPI for those years. Although increases in CPI are not determinative, the fact of a 30-year coincidence between the total ATB increase and the increases in CPI, and the obvious role of CPI int eh ATB increase given a. Compensation structure which includes PTR, CPI is a very relevant factor.



*The Appropriate Award for 2020-23*

104. Having also reviewed the bargaining history between these parties, I agree with my predecessors' consistent assessment. Wage increases may lag or exceed inflation from time to time, particularly where other factors are overwhelming. Wages do not remain, as they have all found and as both Arbitrator Burkett and Justice Winkler articulated, "in lock step" with inflationary increases. But inflation is nonetheless "obviously" (Winkler) and "very" (Teplitsky) relevant.

105. Indeed, as the economic data filed by the Association amply demonstrates, salaries for faculty and librarians have, with occasional corrections as discussed above, kept pace with inflation over the past 20 years. As set out in the chart below, average increases have fallen at roughly the mid-point between the federal and provincial CPI increases:

| Year | Canada | Ontario | Canada | Ontario | UTFA ATB | Notes |
|---|---|---|---|---|---|---|
| 1993-1994 | 85.68 | 84.79 | 1.50% | 1.40% | 0% | |
| 1994-1995 | 86.03 | 85.14 | 0.40% | 0.40% | 0% | |
| 1995-1996 | 87.87 | 87.13 | 2.10% | 2.30% | 0% | |
| 1996-1997 | 89.39 | 88.67 | 1.70% | 1.80% | 0% | |
| 1997-1998 | 90.60 | 90.04 | 1.4% | 1.6% | 0.50% | |
| 1998-1999 | 91.44 | 90.84 | 0.9% | 0.9% | 1.50% | |
| 1999-2000 | 93.46 | 93.08 | 2.2% | 2.5% | 1.50% | |
| 2000-2001 | 96.03 | 95.91 | 2.7% | 3.0% | 2.00% | |
| 2001-2002 | 98.16 | 98.38 | 2.2% | 2.6% | 1.50% | |
| 2002-2003 | 101.09 | 100.98 | 3.0% | 2.6% | 3.00% | |
| 2003-2004 | 102.98 | 102.95 | 1.9% | 1.9% | 3.00% | 2.25%+0.75% |
| 2004-2005 | 105.21 | 105.11 | 2.2% | 2.1% | 3.37% | 2.7%+0.615% |
| 2005-2006 | 107.60 | 107.52 | 2.3% | 2.3% | 3.00% | |
| 2006-2007 | 109.61 | 109.12 | 1.9% | 1.5% | 3.25% | |

| | | | | | | |
|---|---|---|---|---|---|---|
| 2007-2008 | 111.94 | 111.17 | 2.1% | 1.9% | 3.00% | 3.0% +$585 in Jan 2008 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 2008-2009 | 114.44 | 113.71 | 2.2% | 2.3% | 3.00% | 3.0%+$605 in Jan 2009 |
| 2009-2010 | 114.89 | 114.18 | 0.4% | 0.4% | 2.50% | |
| 2010-2011 | 117.22 | 117.33 | 2.0% | 2.8% | 2.50% | 1.25% July 2009, 1.25% Jan 2010+flat dollar |
| 2011-2012 | 120.55 | 120.79 | 2.8% | 3.0% | 1.70% | 1.0% + $1000 |
| 2012-2013 | 121.95 | 122.03 | 1.2% | 1.0% | 2.00% | 1.0% + $1520 |
| 2013-2014 | 123.24 | 123.51 | 1.1% | 1.2% | 2.25% | 1.0% + $1815 |
| 2014-2015 | 125.49 | 126.34 | 1.8% | 2.3% | 1.90% | 1.0% in July 2014 and 0.9% in Jan 2015 |
| 2015-2016 | 127.05 | 127.94 | 1.2% | 1.3% | 1.90% | 1.0% in July 2015 and 0.9% in Jan 2016 |
| 2016-2017 | 128.98 | 130.38 | 1.5% | 1.9% | 1.75% | |
| 2017-2018 | 131.09 | 132.57 | 1.6% | 1.7% | 1.75% | 1.0% + $1150 |
| 2018-2019 | 133.92 | 135.50 | 2.2% | 2.2% | 1.90% | |
| 2019-2020 | 136.59 | 138.03 | 2.0% | 1.9% | 2.00% | 1.0% + $1520 |
| **Compounded Average** | | | **1.80%** | **1.87%** | **1.84%** | |

106. Having regard to the bargaining history between these parties in particular, inflation is clearly a very relevant and highly influential factor in replicating a freely bargained outcome, especially in the current economic circumstances, and one that supports a substantially greater wage increase than the 1.75% in additional compensation proposed by the University.

107. This bargaining history also distinguishes the present case from awards such as the *Kaplan TTC Award* relied upon by the University. The University relies on the *Kaplan TTC Award* for the proposition that replication overrides inflation-based claims for wage increases. I do not agree that the case stands for such a proposition.

108. In the *Kaplan TTC Award*, as also discussed at paragraph 41 of my *Participating Hospitals and ONA* award, the parties had a long-established and agreed-upon list of comparators that invariably resolved their collective agreements. There is no mention in the award of a history of tracking inflation,

and at the time there were no freely bargained outcomes that warranted a departure from the parties' established comparators. In the present case, the parties do have a history of arbitrated and negotiated outcomes that are heavily influenced by inflation. The question is not, therefore, whether replication trumps inflation; the question is whether in the specific context of this case, replication warrants giving greater or lesser weight to inflation as a factor that would drive the outcome for these parties had they been able to reach an agreement. In *TTC,* considering the history of bargaining between the parties and the broader collective bargaining landscape, inflation was not a compelling factor. In the instant case, where there is no history of following lockstep behind a particular set of comparators and where there is a history of bargaining and awarding inflationary increases, inflationary factors are plainly of greater significance.

109. Further, what becomes apparent when one looks at the broader context of collective bargaining outcomes today is that inflation has also been a major driver of those outcomes. The more recent broader public sector settlements and awards cited by the Association, including agreements that overlap with the term of the agreement in issue here, amply reflect this reality. In this regard, economic circumstances today are much closer to those that faced by Arbitrator Burkett in 1981 than they are to those that faced Arbitrator Munroe in 1993. As the ongoing impact of inflation has become entrenched and amplified, bargaining outcomes have trended upwards to address it. Private sector outcomes such as those in the construction industry, albeit of limited significance as comparators for faculty and librarians, represent the extreme end of this bargaining trend. But more recent broader public sector outcomes are nonetheless following that same upward trend, with many falling in the range of 3%-4% annual increases over multiple years.

110. In assessing comparators, I have carefully considered all the comparator data put forward by the parties. In so doing, I specifically reject what the Association described as the "time machine" approach to interest arbitration, where information that may not have been available to the parties when they were bargaining directly with each other is ignored. In my view, Arbitrator Kaplan correctly and definitively rejected this approach in *OPG,* at pages 15-19, and I adopt his reasoning here. I note that to the extent that Arbitrator Kaplan's reasoning was framed in the context of a Bill 124 reopener, it is nonetheless equally applicable here, where the parties agreed to leave wages for year 3 unresolved and to refer the issue to interest arbitration, with the explicit understanding that proposals could be adjusted in the event that Bill 124 was struck down.

111. Arbitrator Kaplan's decision in *OPG* also serves as an illustration of the current trend in broader public sector bargaining outcomes. In that case, the

outcome followed upon a freely bargained agreement between OPG and the PWU of 8.25% increases plus lump sums over two years—an agreement reached under an approved mandate from Treasury Board. I do not suggest that nuclear workers are a direct comparator to university professors. But there are many more such examples in the broader public sector in the parties' materials.

112. Looking to the university comparators in particular, I agree with the University, as Justice Winkler also found, that settlements amongst those universities, both in Ontario and nationally, "whose aims and objectives with respect to the combination of education and research most closely resemble

those of the University" (i.e. the U15) warrant particular consideration (para 25). However, it must be acknowledged that outcomes across those universities vary widely for any given year, and unlike the facts in the *TTC* case, there is no history here of rigorously tracking any particular comparator. Further, this exercise is somewhat complicated by the unique circumstances of this case.

113. First, one must account for the impact of Bill 124 and the fact that other provinces also imposed forms of wage restraint that impacted U15 outcomes. It is, as the Association argued, important not to simply replicate outcomes that resulted from the imposition of unconstitutional wage restraint.

114. Second, one must also consider the prevailing conditions at the time those parties entered into their agreements, particularly when those agreements were made without a full understanding of the corrosive impact of inflation over the relevant time frame, and where bargaining followed previously established trends that no longer apply.

115. Further, one must also consider the impact of the agreement between the instant parties for years one and two. As discussed above, comparison to benchmarks is a cumulative exercise. There can be no doubt that over the first two years of their agreement, wage increases for faculty at the University fell behind many of the comparators. I have already found that the "lost" cash flow over the course of those years is not something that can or should be undone here. But it is highly relevant to the question of how any catch up awarded ought to be staged.

116. The relationship between catch up, the incremental nature of collective bargaining and cash flow is well illustrated in the *Burkett 1982 Award*. Here, as the Association emphasises, its members have already suffered substantial erosion in their real wages through inflation and sub-normative ATB increases in years one and two of their agreement, and the University has enjoyed corresponding savings over those years in comparison to other Universities

and other employers more broadly. PTR increases have tracked those substandard ATB increases and have also lagged behind anything that could be described as normative for that period. In these circumstances, particularly where the inflationary comparison is made on a prior year basis and where there are no countervailing and overwhelming economic considerations, there is no apparent reason that faculty ought not to begin catching up now.

117. On balance, having regard to all these factors, including the substantial erosion of wages experienced over the prior years, I find that an additional award of 7%, for a total award of 8%, retroactive to July 1, 2022, is appropriate.

118. Based on the prior-year inflationary assessment, this award goes a significant way toward restoring wages against inflation. It is true, given the retroactive term being decided here, that we know that inflation has continued to rise above recent norms, and that further erosion of wages has occurred. But the practice for these parties has been to consider the prior year's inflation, and that erosion can be addressed by future increases, if appropriate at that time, as these parties have typically done. To be clear, I am not ignoring current levels of inflation because it is new information; I wholeheartedly adopt Arbitrator Kaplan's reasoning in *OPG*. Rather, it is that the reason for giving significant weigh to inflation in this award is because to do so has been the practice of these parties, and that very practice has been based on the retroactive model. Replication must be based on real world bargaining trends and outcomes, not selective cherry picking of factors.

119. This award will also ensure that salaries for faulty at U of T remain "top of market". The parties join issue over how one ought to compare salaries across universities in assessing whether wages are "top of market", and whether one ought to compare averages or medians, or exclude certain outliers. It is unnecessary to resolve this dispute here considering that the quantum of this award will clearly maintain wages for the Association's members at top of market.

120. Finally, this outcome, again considering the total compensation over the three-year term of the agreement, is consistent with more recent trends in broader public sector bargaining, including amongst U15 comparators such UBC and Queens, albeit over a different term and with different staging of increases and cash flow.

121. When these comparators are weighed in conjunction with inflationary considerations and two years of 1% increases, a total increase of 10% over the three-year term of the parties' agreement, with the bulk of that increase in the

final year, reasonably reflects the freely bargained outcome that these parties would have reached had they been able to reach an agreement.

122. I therefore award an ATB increases of 8%, inclusive of the 1% already awarded on an interim basis, retroactive to July 1, 2022.



**WORKLOAD PROPOSALS**

*Guiding Principles and Proposals*

123. The guiding principle in assessing the outstanding workload proposals is of course replication, no less so than in determining monetary issues. The principles of gradualism and demonstrated need are also of particular significance. These parties have a mature bargaining relationship, dating back to 1977. In this context, interest arbitrators are reluctant to award "breakthrough" proposals, altering a long-established *status quo*, absent a demonstrated need to address a real and pressing problem. Interest arbitrators have long reasoned that where

parties have agreed to long-standing terms that are fundamental to their bargain, it is only in the face of a very compelling demonstrated need that they ought to unilaterally alter those terms over the objection of one of the parties.

124. The Association has 9 proposals to amend the workload provisions of the MOA, including proposals with respect to:

- Technical Support;
- TA Support;
- Mandatory Unit Workload Policy Factors;
- Equitable Course Release;
- Annual Workload Documents;
- Distribution of Effort in Unit Workload Polices and Workload Letters;
- Teaching Stream Course Load;
- Teaching Stream Service Release; and
- Librarian Research and Scholarly Contributions.

125. From the Association's perspective, its members are experiencing "crushing workloads that are inequitably distributed within units and disproportionately borne by equity-seeking members". In the absence of clearly expressed expectations with respect to distribution of effort, and the imposition of caps on teaching, it maintains that teaching stream faculty in particular are vulnerable to excessive workload and insufficient time for scholarship. More broadly, it maintains that the current *University of Toronto Workload Policy and Procedures for Faculty and Librarians (WLPP)* is, according to the Association, ineffective at protecting its members from excessive and inequitable workloads

and is insufficiently transparent. The Association's proposals seek to address these problems by implementing concrete parameters for assessing and assigning work and for communicating work assignments to members and the Association.

126. In particular, the Association proposals are intended to:

- Require that unit heads consider the level and/or hours of technical and/or pedagogical support for online teaching available when determining the teaching component of a member's workload (Proposal 1A);

- Ensure clearer, more transparent, and more consistent standards for TA support across the University and within divisions (Proposal 1D);

- Require that unit workload policies expressly address the factors known to most significantly impact teaching and service workload (Proposal 1G)

- Require that course releases be distributed equitably within units (Proposal 1H);

- Require that units annually prepare a Unit Workload Document setting out the assigned teaching and service loads within the unit for the year in order to enhance transparency and equitable workload distribution (Proposal 1I);

- Require that unit workload policies and member workload letters expressly set out members' distribution of effort ("DOE") (Proposal 1J);

- Limit Teaching Stream teaching load to not more than 150% of the Tenure Stream teaching load within the same unit (Proposal 1K);

- Ensure units provide teaching and service release for pre-tenure/pre-continuing status faculty members prior to their interim reviews and some professional practice and service release for pre-permanent status librarians (Proposal 1L); and

- Clarify that librarians' research and scholarly contributions are self-directed (Proposal 1M).

127. From UTFA's perspective, its proposals represent incremental change to address longstanding problems, for which there is a strong demonstrated need.

Further, the Association points to comparator agreements across the University sector where parties have agreed to similar provisions.

128. From the University's perspective, the bulk of the Association's proposals are anything but incremental. They seek to impose ridged workload standards, particularly for teaching stream faculty, where none have previously existed, and to dismantle the localized structure of the WLPP. As provided for in Article 8 MOA, workload is assessed at the Unit level and as set out in the WLPP, it is determined through the collegial process and subject to variability across units. The Association's proposals, argues the University, would impose ridged standards across the University, fundamentally altering the basis upon which these parties have operated for many years.

129. Such changes, argues the University, would constitute unwarranted breakthroughs, contrary to the principle of gradualism. Further, while the Association makes bald assertions about inequitable workload and claims that the WLPP is inadequate to address inequalities, the fact is that there have been only 2 workload complaints filed under the process. There is, it maintains, no demonstrated need to alter the status *quo*, and any changes awarded ought to comply with the principle of gradualism.

*Analysis*

130. The University agrees to the Association's Technical Support proposal to amend Article 4.2 of the WLPP, and that agreement is reflected in our award below. The remaining workload proposals are all in dispute.

131. Having carefully reviewed and considered all the outstanding workload proposals, I find that these proposals would constitute a significant alteration to the status *quo,* and much more so than the Association would allow. With limited exceptions, which I will address below, these changes would impose standards and limitations at the University level, where these parties have freely bargained a model of more localized and flexible workload assignment.

132. I accept, as the Association argues, that other Universities have adopted such standardized approaches to workload. I also accept, as is evident in the materials filed by the Association, that concepts such as "distribution of effort", and the consideration of the various factors identified by the Association in assessing workload, are already very much applied in various ways throughout the University. They are not foreign concepts. It is also true, as the Association argues, that in requiring units to address particular factors in workload assignment, it is not dictating or predetermining how those units might chose to weigh or apply those factors.

133. But in seeking to implement University wide standards, or to dictate the manner in which workload must be assessed or expressed at the local level, the Association is clearly seeking major structural changes to the parties' agreement. It would be naive in the extreme to presume that these amendments would not result in significant changes in practices across the University, and significant disruption to the *status quo*. Indeed, effecting substantial change in the assignment of workload is precisely the reason that the Association is pursuing these amendments. But that is also the reason that it is required to establish a compelling demonstrated need for its amendments before an interest arbitrator would be justified in unilaterally imposing them on the University.

134. It bears emphasising that the existing WLPP already contains provisions directed toward establishing a "fair, reasonable and equitable distribution of workload". It also contains a mechanism for binding dispute resolution where a member complains that their workload does not comply with the policy. The Association asserts that the WLPP has been ineffective. But prior to the last round of interest arbitration, there had only ever been two such complaints. Since then, I have been advised of none. It is difficult to square the lack of any complaints under the existing provisions with the asserted crisis that the Association asserts is reflected in its survey of its membership.

135. Addressing similar proposals in the prior round of arbitration between these parties, Arbitrator Kaplan addressed the same problem with the Association's proposals that I find here. His reasons are apposite and for that reason I will set them out at some length (pp. 4-7):

> The Association makes two proposals to amend *The WLPP* and two proposals to amend *The AAPM* relating to the Progress Through the Ranks Policy (hereafter "The PTR Policy"). These proposals are informed by its view that change is required to address significant and well-established problems of both over-work and inequitable distribution of work. In the Association's submission, clear and transparent workload norms are necessary to address the myriad problems identified and discussed in detail in its written submissions. Excessive and inequitable workload, the Association argues, affects everyone but disproportionately impacts Association members who identify as women or who are racialized and especially as it is experienced by members of the Teaching Stream. Pre-tenure status and employment precarity, not to mention an overall lack of workload transparency, inhibit and discourage filing of workload complaints, formal and informal. In the Association's view, its proposals are fully justified when all of the criteria are examined: its proposals reflect university norms across the country, are justified by evidence of demonstrated need and, considered in the overall, are

incremental, conforming to the gradualism principle and cannot properly be fairly characterized as breakthrough. Moreover, the Association observes, the University of Toronto has staked and maintained a position at the top of the market in salaries, and a corollary of that is that working conditions need to catch up.

For its part, the University submits that when the outstanding Association proposals are seen through the lens of the governing interest arbitration criteria, none of them are justified or should be awarded. It was inconceivable that more than two thousand tenured and tenure track faculty and librarians would go on strike when three of the four outstanding issues relate exclusively to the teaching stream. The case could be, and should be, justified, the University submitted, on the basis of replication alone with the Award incorporating the University's proposals. Application of the other factors confirmed this conclusion. The Association's WLPP proposal – through mandatory inclusion of respective weightings and a cap on the assignment of teaching to teaching stream members – in other words, rigid workload formulas, was not gradual; rather it represented a fundamental change to the long-standing status quo, and it was a proposal made with scant evidence, at best, of demonstrated need.



**Reasons for Decision**

Having carefully considered the submissions of the parties, along with the relevant criteria, it is my view that some changes are in order, particularly with respect to workload transparency. Association members should have their workload written down and available for review and comparison, subject to confidentiality requirements such as, for example, where an accommodation plan is in place. It is only fair that faculty members know how workload is distributed, particularly where it is asserted that workload distribution has a negative impact on members of equity---seeking groups. The change awarded here, together with what was agreed upon at mediation for electronic access to all written assignments within an academic unit (subject to any confidential accommodation agreements), will provide full transparency on individual and relative workloads.

The evidence, however, does not make out a case for the Association's proposed rigid workload formula, or for limitations on the teaching of teaching stream members. As the Association observes in its brief, the workload of faculty and librarians is inherently fluid and cannot be rigidly quantified or measured according to units of time. It evolves within a year and over years. Experience indicates that faculty have a very clear idea of expectations, especially for PTR evaluation.

Consistent with the replication principle, this award attempts to achieve the outcome that would have been arrived at had this dispute run its course and that does not encompass awarding these Association proposals. Moreover, while the Association describes its proposals as modest and gradual, the changes sought are

> major. They are just the sort of significant changes that the parties should reach voluntarily. Demonstrated need, an effective counterpoint to gradualism, and a factor that can lead to a breakthrough, has also not been established. Approximately 3400 faculty workload assignments are made annually. Since 2011, there have only been two complaints referred to the Workload Adjudicator under The WLPP. While there is survey evidence in the Association's brief pointing to problems, the conclusion is inescapable that this is not a pressing issue requiring arbitral attention. This remains an issue best left to the parties to resolve. Accordingly, the Association's proposals for major change are rejected. However, I am persuaded by the submissions that change is appropriate to the PTR Policy.

[emphasis added]

136. I adopt the same approach and reasoning here and come to a similar conclusion. The parties have a history of bargaining incremental change to the terms of the MOA. It is reasonable to conclude that had the parties reached a freely bargained outcome here, they would have continued to move toward greater transparency in workload assignment, as they have in prior rounds. But the evidence before me does not support the conclusion that they would have agreed to the more substantial, top-down changes sought by the Association. My award below is intended to strike this balance.

137. I note that in awarding the Association's alternate Annual Workload Document proposal rather than the University's proposed compromise, I do not agree that the clause prioritizes certain factors that a unit might consider over others. The enumerated factors are, as the University acknowledges, ones that the parties have already agreed are relevant considerations. The fact that each may be of more or less significance in the context of a given work assignment does not alter the fact that providing this information will result in increased transparency.

138. Further, where other factors are relevant and influence the assessment of workload at the unit level, the clause contemplates that the Unit may include those factors in the document as well. The focus of the provision, as the Association argues, is to promote transparency, not to dictate what a unit may or may not consider relevant, or how it may balance relevant considerations. In my view, Arbitrator Kaplan correctly identified the importance of full transparency, "particularly where it is asserted that workload distribution has a negative impact on member s of equity-seeking groups." The proposal awarded represents a further and incremental move toward greater transparency, while maintaining the overall structure of the parties' agreement. Should increased transparency shed light on a problem, that problem can be addressed as a

demonstrated need in future rounds of bargaining.

**FREEZE PROPOSAL**

139. The Association proposes to amend the MOA to include a provision that would maintain salary, benefits, and workload provisions where notice has been given under Article 6, until such time as a new agreement is reached by settlement or award. This provision would essentially replicate the statutory freeze provisions at s.86 of the Labour Relations Act, 1995 (the "LRA"), applicable to certified bargaining agents under a collective agreement. The Association argues that the freeze is necessary to maintain a proper balance of interest between the parties, just as does the statutory freeze under the LRA. The statutory freeze is a normal and essential aspect of every collective bargaining scheme across the country, and the Association maintains that it is equally justified in the context of bargaining under the MOA, notwithstanding that these parties operate outside of a statutory collective bargaining regime.

140. The Association cites the circumstances in The University of Toronto and the University of Toronto Faculty Association (PTR Dispute), unreported, January 4, 2021 (the "PTR Dispute") as evidence of a demonstrated need to establish a freeze provision under Article 6 and argues that the widespread application of the statutory freeze to university/faculty association collective agreements broadly supports replication of the freeze for these parties.

141. The University objects that this proposal is outside the scope of a Dispute Resolution Panel's jurisdiction since it would constitute an amendment to the MOA. Article 17 of the MOA provides that amendments to the agreement "may be made by mutual consent of the parties at any time". It further notes that imposing a freeze provision would constitute a fundamental change to the unique bargaining structure that these parties have created; a structure in which they have proven adept at addressing any changes in terms and conditions, and within which any changes can be addressed retroactively where appropriate.

142. The University also argues that the proposal is an effort to sidestep the arbitration award between the parties and an effort to effectively remove PTR from the negotiation process by rendering it payable prior to the negotiation/arbitration of the next agreement. In addition to arguing that such a provision is outside my jurisdiction, the University maintains that it would offend

the principle of gradualism and demonstrated need and would not replicate any agreement the parties would reach.

143. I need not decide the University's jurisdictional argument to conclude that the Association's proposed freeze would constitute a fundamental alteration of the existing structure within which these parties bargain salary, benefits, and workload (including PTR). The Association is correct that the statutory freeze forms an integral part of the LRA's legislative framework for collective bargaining. But these parties do not participate in that framework and have instead constructed their own unique bargaining framework. Reference to comparator universities who do participate in that statutory scheme are therefore not persuasive evidence in support of the principle of replication.

144. Further, even assuming I have the jurisdiction to grant a proposal that would fundamentally amend the parties bargaining framework, such a fundamental change would require establishing a demonstrated need that is not present here. As Arbitrator Kaplan observed in the PTR Grievance, the Association's expectation that PTR will continue to be paid is well-founded. As Arbitrator Munroe observed in the Munroe 1993 Award, PTR has been "at the heart of the parties bargaining relationship…" (p.13). Each year there is an ongoing collegial process that is predicated on the expectation that it will be paid out. But while the parties have had to bargain around PTR, as arbitrator Kaplan also observed, it has ultimately been paid without exception. Such a history does not support a demonstrated need for altering the long-standing bargaining framework to which these parties voluntarily agreed. Such changes are better left to the parties to negotiate themselves.

## THE ONGOING SIGNIFICANCE OF BILL 124

145. The Government of Ontario has appealed Justice Koehnen's decision striking down Bill 124. That appeal has not yet been decided. The University requests that in the circumstances where I have awarded additional compensation, as I have, that I "remain seized of any and all issues concerning the payment of awarded compensation increases to faculty members and librarians that exceed the limits on such increases prescribed by Bill 124, if Bill 124 is determined to be constitutional". This is essentially the corollary of the Bill 124 reopeners that became the norm when Bill 124 was in effect, and I find it appropriate to remain seized as requested for that reason.

146. The University has also requested that I delay issuing this award, or delay the payment of any compensation under this award, to prevent "double recovery" as between this award and any remedial orders that Justice Koehnen may ultimately make. The Association points out that the University is not a responding party to the constitutional challenge and that "double recovery" is not possible. In any event, the Association agrees that it will not seek "double recovery", in the sense that "so long as this Board takes jurisdiction over UTFA's proposal for the Year 3 increases to reflect losses in Years 1 and 2, UTFA will not seek a further remedy against the University in a Bill 124 remedial trial".

147. Given that the University is not a responding party to the constitutional challenge, any prospect of "double recovery" appears to me to be very remote. Indeed, it appears especially remote given that I have not granted the Association's proposal for lump sum payments in compensation for the "losses" in years 1 and 2, losses that the Association attributes to the interference of Bill 124. It is difficult to imagine how a remedy against the government for having interfered with the Association's constitutional rights could constitute "double recovery" vis a vis the determination by an interest arbitrator that the University of Toronto ought to grant its employees a pay increase. Put differently, I see no reason to delay what constitutes a reasonable order setting salaries, based on all the usual applicable criteria—a decision that is squarely within my jurisdiction and expertise—simply because another adjudicative entity might award the Association's members compensation in remedy of a breach of rights committed by the government—a matter that is expressly not within my jurisdiction.

148. However, because the Association's agreement not to seek remedies that might impact the University or constitute "double recovery" in that proceeding is conditional, and because I have no jurisdiction in respect of the Court proceeding, the most prudent course is to also remain seized in the event that the Association obtains any remedy that impacts the University in its constitutional challenge.

**AWARD**

1. **Wages**-ATB Increase of 8%, inclusive of the 1% increase previously ordered on an interim basis, retroactive to July 1, 2022;

2. **Per Course Stipends/Overload**-Increase Per Course Stipends/Overload by 8%, inclusive of the 1% increase previously ordered on an interim basis, retroactive to July 1, 2022;

3. **Technical Support**-Amend Article 4.2 of the WLPP, as agreed to in the University's brief at paragraph 122, by adding:

   Level and/or hours of technical and/or pedagogical support for online teaching;

4. **Annual Workload Documents**-Amend Article 3 to the WLPP by adding a new Article 3.X as follows:

   3.X. Each Unit shall prepare, on an annual basis, a Unit Workload Document setting out:

   i) The assigned teaching and assigned service workload for each member in the Unit;

   ii) For each course that a member teaches, the assigned teaching credit, the mode of delivery, the class size, and the level and/or hours of TA support, and any other factor which the Unit Workload Committee determines is a reasonable factor for comparison;

   iii) For each member any teaching release and the reason for it (e.g., pre-tenure course reductions), subject to any confidential accommodation agreements.

   The Unit Workload Documents will be provided to all members of the Unit and to UTFA by June 30 of each year.

**CONCLUSION**

149. I remain seized with respect to the implementation of my award. I also remain seized of any and all issues concerning the payment of awarded compensation increases to faculty members and librarians that exceed the limits on such increases prescribed by Bill 124, if Bill 124 is determined to be constitutional and in effect for the period of my award. Finally, I remain seized with respect to any claim by the University that any part of this award constitutes "double recovery" having regard to any remedies arising from the Bill 124 litigation.

Dated at Toronto, Ontario, this 6th day of September 2023.

"*Eli Gedalof*"

_____

Eli A. Gedalof, Sole Arbitrator

**SCHEDULE "1"**

**JANUARY 24, 2022 UTFA PROPOSAL IN CONFIDENTIAL AND WITHOUT PREJUDICE MEDIATION WITH MEDIATOR KEVIN BURKETT, WITHDRAWN IF NOT ACCEPTED ON OR BEFORE JANUARY 25, 2022**

IN THE MATTER OF ARTICLE 6: NEGOTIATIONS
OF THE MEMORANDUM OF AGREEMENT BETWEEN THE UNIVERSITY AND UTFA
(THE "MOA") REGARDING SALARY, BENEFITS AND WORKLOAD,
FOR THE PERIOD JULY 1, 2020 TO JUNE 30, 2023



**MEMORANDUM OF SETTLEMENT**

B E T W E E N :

THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO
(the "University")

- and -

THE UNIVERSITY OF TORONTO FACULTY ASSOCIATION
(the "Association" or "UTFA")

WHEREAS the negotiating committees of the University and the Association have met and negotiated pursuant to the provisions of Article 6 of the MOA and engaged in mediation with Kevin Burkett and have reached a tentative agreement on the terms and conditions set out herein subject to ratification by University Governance and UTFA Council;

AND WHEREAS the members of the parties' respective negotiating committees agree to unanimously recommend to their respective principals ratification of the terms and conditions of this Memorandum of Settlement;

AND WHEREAS the parties acknowledge the restrictions established by Bill 124 on salary rate and compensation increases for faculty members and librarians during the three year moderation period established by Bill 124, and the advice of the Association that it has joined other university faculty associations that have brought a legal

challenge to the constitutionality of Bill 124 and that any agreement in this Memorandum of Settlement with respect to salary rates and compensation is without prejudice to that ongoing constitutional challenge;

NOW THEREFORE the parties agree as follows:

1. TERM

(a) This Agreement is for a three year term commencing July 1, 2020 and ending June 30, 2023.

(b) None of the terms and conditions of this Memorandum of Settlement have any retroactive effect whatsoever prior to the date of Ratification of this Memorandum of Settlement by the parties unless clearly and expressly set out in this Memorandum of Settlement.

2. COMPENSATION – YEARS 1 AND 2 FOR THE PERIOD JULY 1, 2020 TO JUNE 30, 2022

It is the intention of the parties that any compensation increases or improvements are compliant with Bill 124 in circumstances where the period July 1, 2020 to June 30, 2022 covers the first 2 years of the 3 year moderation period for faculty members and librarians under Bill 124.

(a) Salary

The salary increases below apply to faculty members and librarians employed on the date this Memorandum of Settlement is signed by the parties other than as set out below.

July 1, 2020 a 1.0% across-the-board salary increase retroactive to July 1, 2020. For faculty members and librarians who were employed on July 1, 2020 and retired on or before June 30, 2021 their base salary effective the date of their retirement shall be adjusted by a 1.0% across-the-board salary increase (note this is not applicable to a faculty member or librarian who retired pursuant to and under the Special Retirement Program for Faculty and Librarians open for the period January 1, 2020 to June 30, 2020).

(i) July 1, 2021 a 1.0% across-the-board salary increase retroactive to July 1, 2021. For faculty members and librarians who were employed on July 1, 2021 and retired on or before the date of ratification of this Memorandum of settlement by the parties their base salary effective the date of their retirement shall be adjusted by a 1.0% across-the-board salary increase.

(b) PTR

(i) PTR for the July 1, 2019 to June 30, 2020 assessment period has been paid effective July 1, 2020 pursuant to a January 2021 agreement between the parties for the payment of PTR.

(ii) PTR for the July 1, 2020 to June 30, 2021 assessment period has been paid effective July 1, 2021 pursuant to an August 2021 agreement between the parties for the payment of PTR. Pursuant to that agreement the University will make an additional payment of PTR for the 2020-2021 assessment period retroactive to July 1, 2021 of the difference owing based on moving the breakpoints and increments by the 1% amount of the ATB percentage wage increase agreed to for the period July 1, 2020 to June 30, 2021.

(c) The Minimum Per Course Stipend and Overload Rate

(i) Effective the date of ratification of this Memorandum of Settlement, increase from $17,895 to $18,255.

3. BENEFITS

The parties' agreement with respect to benefits for Years 1 and 2 is without prejudice or precedent to any position that either party may take with respect to any issues regarding benefits for Year 3 for the period July 1, 2022 to June 30, 2023 at interest arbitration

Year 1

(a) July 1, 2020 increase the existing Health Care Spending Account ("HCSA") of $650 per faculty member and librarian employee per year (July 1 to June 30), pro-rated

by their percentage FTE and allocated annually, to $830 per full-time faculty member and librarian.

Year 2

Effective July 1, 2021 the existing HCSA shall return to $650 per faculty member and librarian employee per year (July 1, to June 30), pro-rated by their percentage FTE and then increase the existing HCSA of $650 per faculty member and librarian employee per year (July 1, to June 30), pro-rated by their percentage FTE and allocated annually to $700.

Effective July 1, 2022 onward the existing HCSA shall return to $650 per faculty member and librarian employee per year (July 1, to June 30), pro-rated by their percentage FTE.

The benefit improvements set out below for Year 2 shall have no retroactive effect of any nature or kind whatsoever.

(b) Effective as expeditiously as practicable in 2022 following ratification by the parties of this Memorandum of Settlement the following:

(i) Include “Marriage and Family Therapist” and “Addiction Counsellor” to the “Psychologist, Psychotherapist or Master of Social Work” paramedical services benefit.

(ii) Add the costs of laser eye surgery for vision correction as an eligible vision care expense.

(iii) Increase psychology and mental health benefits annual maximum to $5,000 per person and increase the reasonable and customary amounts to no less than the Ontario Psychological Association’s recommended hourly rate.

(iv) Increase vision care to $700 every 24 months and,

(v) Increase major restorative dental to $5,000.

(vi) Increase the annual combined cap for paramedical services to $2,500.

(vii) Increase orthodontics to 75% & lifetime maximum of $5,000

(viii) Add chiropodist to the list of paramedical services covered



Other Benefit Items

(c) Retroactive to July 1, 2021 the parties agree to amend the LTD plan to align with the new UPP such that LTD benefits will terminate on the last day of the month in which the Member attains age 65 to align with the normal retirement date under the UPP (as compared to the 30th day of June coincident with or following the member's 65th birthday which is the normal retirement date under the former plan).

(d) The University and the Association mutually recognize the desirability of introducing gender affirmation coverage to support members who are undergoing gender transition. To that end, the parties agree to jointly engage in discussions for the University to explain the consultations it has already engaged in and to allow UTFA to better understand potential and appropriate benefit improvements in this area.

4 JULY 1, 2022 PTR FOR THE JULY 1, 2021 TO JUNE 30, 2022 ASSESSMENT PERIOD

(a) It has been the University's consistent position that issues related to July 1 PTR are subject to negotiations and/or the dispute resolution process for salary, benefits and workload under Article 6 of the MOA for the relevant July 1 to June 30 period such that it is the University's position that issues related to July 1, 2022 PTR are subject to the dispute resolution process for salary, benefits and workload for the Year 3 period July 1, 2022 to June 30, 2023.

(b) Notwithstanding paragraph 4(a) above the parties have from time to time, as they are entitled to do, agreed to PTR issues for the relevant July 1 prior to reaching an agreement or the conclusion of a dispute resolution process regarding salary, benefits and workload for the relevant July 1 to June 30 period on a without prejudice or precedent basis to the University's position set out in paragraph 4(a) above.

(c) In the context of paragraphs 4(a) and (b) above, the parties agree that PTR for the 2021-2022 assessment period shall be paid on July 1, 2022, with the PTR breakpoints and increments moving by the 1% amount of the ATB percentage wage increase agreed to for the period July 1, 2021 to June 30, 2022. PTR funds shall be allocated utilizing the model in place prior to the 2015 Memorandum of Settlement (i.e. using the same model as was used for the July 1, 2020 PTR payment). The PTR assessment process for PTR to be paid on July 1, 2022 for the July 1, 2021 to June 30, 2022 assessment period is subject to any mutually agreed modifications to the process for determining PTR awards and assessments for that assessment period as may arise as a result of the provisions of paragraph 2.10 of the COVID LOU that; "[i]f the University's operations continue to be limited or impacted by COVID protocols that prohibit or limit indoor gatherings beyond December 31, 2021, the parties shall meet to discuss whether and on what terms there should be any modifications to the process for determining PTR scores and awards for the 2021-22 assessment period."

5 YEAR 3 – INTEREST ARBITRATION FOR SALARY, BENEFITS AND WORKLOAD FOR THE PERIOD JULY 1, 2022 TO JUNE 30, 2023

(a) Pursuant to and in accordance with paragraphs 13 to 28 of Article 6: Negotiations of the MOA the parties agree to refer salary, benefits and workload matters for the one year period July 1, 2022 to June 30, 2023 as set out in Schedules A and B attached hereto to an interest arbitration dispute resolution process on the terms and conditions set out below.

(b) In lieu of a Dispute Resolution Panel (the "DRP") established pursuant to and in accordance Article 6: Negotiations of the MOA, and without prejudice or precedent to either party's position in any future round of Article 6 negotiations, the parties agree to substitute Eli Gedalof as a sole arbitrator in place of the DRP and as sole arbitrator his

interest arbitration award will be treated as a unanimous report for the purposes of paragraph 22 of Article 6 of the MOA.

(c) UTFA's proposals for the one year period July 1, 2022 to June 30, 2023 in the proceedings before the DRP are attached hereto as Schedule A.

(d) The University's proposals for the one year period July 1, 2022 to June 30, 2023 in the proceedings before the DRP are attached hereto as Schedule B.

(e) The one year period July 1, 2022 to June 30, 2023 is the third year of the 3 year moderation period regarding faculty and librarians under Bill 124.

(f) In connection with proceedings before the DRP, for the purposes of the 1% cap on compensation increases during the 12 month period under Bill 124 from July 1, 2022 to June 30, 2023, the "residual" amount available in connection with an across-the-board salary increase of 1% for any other compensation increases that may be awarded by the DRP is $612,060 in total – i.e. under Bill 124 the DRP would not have the jurisdiction to award other compensation increases that had a total cost of more than $612,060 for the period July 1, 2022 to June 30, 2023.

(g) Both the fact of and the terms and conditions of this MOA are without prejudice or precedent to the rights, position or submissions of the University or the Association before the DRP with respect to whether any of the Association's proposals in Schedule A attached hereto or any of the University's proposals in Schedule B attached hereto are, in whole or in part, properly salary, benefits and/or workload matters pursuant to and in accordance with relevant provisions of Article 6 of the MOA and both parties reserve all of their rights to make submissions to the DRP that it has no jurisdiction under Article 6 of the MOA to hear, consider and/or award any of either parties' proposals in whole or in part.

(h) Both the fact of and the terms and conditions of this Memorandum of Agreement are without prejudice or precedent to the rights, position or submissions of the University or the Association before the DRP with respect to whether any of the Association's proposals in Schedule A attached hereto or any of the University's proposals in Schedule B attached hereto are, in whole or in part, permissible compensation increases that the DRP could award under the provisions of Bill 124 and the interpretation and application of Bill 124.

(i) Both the fact of and the terms and conditions of this Memorandum of Agreement are without prejudice or precedent to the rights, position or submissions of the University or the Association before the DRP with respect to whether following the issuance of an award for salary, benefits and/or workload for the period July 1, 2022 to June 30, 2023 the DRP can or cannot remain seized or retain any jurisdiction in the event that thereafter Bill 124 is found to be unconstitutional or should Bill 124 be otherwise modified or repealed with retroactive effect.

6 OTHER

a) Academic Continuity – The parties agree to continue with on-going collegial discussions regarding the Academic Continuity Policy without prejudice or precedent to either parties position on whether the Academic Continuity Policy was or was not or is or is not subject to the Facilitation/Fact-Finding process under Article 6 of the MOA and/or UTFA's right to file a grievance regarding the Policy under Article 7 of the MOA and/or the University's rights to challenge the timeliness or arbitrability of any such grievance or the jurisdiction of the GRP to hear such a grievance or grant any remedies requested, in whole or in part.

b) Privacy and Intellectual Property – The parties agree to establish a Joint Working Group to commence discussions no later than April 1, 2022, or later by mutual agreement, without prejudice or precedent to either party's position on whether these issues were or were not or are or are not subject to the Facilitation/Fact-Finding process under Article 6 of the MOA.

7. By the signature of authorized representatives hereunder the University and the Association confirm their agreement to the terms and conditions set out herein.

8. This Memorandum of Settlement may be signed in any number of counterparts with the same effect as if all parties had signed the same document. All counterparts, including facsimile or email pdf signatures shall be construed together and shall constitute one and the same agreement.

9. All other proposals are withdrawn by both parties.



| FOR THE UNIVERSITY | FOR THE ASSOCIATION |
| --- | --- |
| Per: Kelly Hannah-Moffat | Per: Terezia Zoric |
| Per: Heather Boon | Per: Jun Nogami |

## SCHEDULE A – ASSOCIATION PROPOSALS

**Term - July 1, 2022 to June 30, 2023**

All other proposals withdrawn on a without prejudice basis.

**1. Workload**

**B. Technical Support**

Amend Article 4.2 of the WLPP by adding:

- Level and/or hours of technical and/or pedagogical support for online teaching;

**D. TA Support**

Amend the WLPP to establish:

1. Minimum standards that apply University-wide for access to TA support based on class size, i.e. establish upper limits on the size of courses delivered without access to TA support.

2. Scaled hours of TA support in relation to total number of students in a class using a common, University-wide formula.

3. A requirement that each Division establish a process for increased and equitable distribution of TA support to members with enrolment above the minimum standard (limit) consistent with D(2).

**G. Mandatory Unit Workload Policy Factors**

Add a new clause to Article 2 of the WLPP as follows:

2.X Unit Workload Policies shall include consideration of the following factors:
a) mode of delivery;
b) level and/or hours of technical and pedagogical support for on-line teaching;
c) level and/or hours of technical support for professional practice;
d) class sizes;
e) level and/or hours of TA support;
f) the expected total number of students in all of a member's courses;
g) new or alternative mode or short notice course preparation;
h) graduate supervision.

**H. Equitable Course Release**

Add a new clause to Article 1.2 to the WLPP to provide for equitable course release and course credit for service and teaching in excess of unit norms:

Assignment of individual workload based on the principle that comparable work will be weighed in the same manner, and teaching/service release(s) will be granted equitably within units.

### I. Annual Workload Documents

In order to enhance transparency and the equitable distribution of workload within a Unit, add a new Article 3.X to the WLPP as follows:

3.X Each Unit shall prepare, on an annual basis, a Unit Workload Document setting out:

(i) the assigned teaching and assigned service workload for each member in the Unit;

(ii) for each course that a member teaches, the assigned teaching credit, the mode of delivery, the class size, and level and/or hours of TA support; and

(iii) for each member any teaching release and the reason for it (e.g. pre-tenure course reductions), subject to any confidential accommodation agreements.

The Unit Workload Document will be provided to all members of the Unit and to UTFA by June 30th of each year.

### J. Distribution of Effort in Unit Workload Policies and Workload Letters

Amend Article 2.0 of the WLPP to ensure Unit Workload Policies quantify the distribution of effort in a normal workload in percentages for faculty (e.g. 40/40/20; 60/20/20) and librarians.

Amend Article 2.16 of the WLPP to require workload letters to include a members' distribution of effort and additional details regarding teaching and service assignments.

### K. Teaching Stream Course Load

Add a new Article 7.X to limit Teaching Stream teaching load relative to Tenure Stream teaching load within a unit to not more than 150%.

### L. Teaching and Service Release

Amend Article 3.2 of the WLPP to require units to provide some teaching and service release for pre-tenure/pre-continuing status faculty members prior to their interim reviews and some professional practice and service release for pre-permanent librarians.

### M. Librarian research and Scholarly Contributions

Amend Article 8.1(b) of the WLPP as follows:

"Research and scholarly contributions, including academic, professional, and pedagogical contributions or activities which are self-directed."

## 4. Salary Increases

### A. Across-the-Board increases (ATB)

In light of the limitations imposed by Bill 124, UTFA proposes an ATB increase of 1% effective July 1, 2022.

If Bill 124 is found to be unlawful, UTFA proposes an ATB increase that is fair and reasonable in light of the unparalleled professional expectations faced by U of T faculty and librarians, trends in recent settlements in higher education, and broader economic considerations.

For clarity, UTFA's proposal to increase ATB by 1% is intended to include per course stipend rates.

## 8. Pregnancy and, Parental Leave, and Adoption/Primary Caregiver Leave Accessibility

A. UTFA proposes that the University establish a central fund to provide research and teaching supports to members taking pregnancy and parental leave or adoption/primary caregiver leave. These supports would include, but are not be limited to, RAs, TAs, post-docs, lab managers, and sessionals to facilitate members taking their full leaves.

## 9. Psychology and Mental Health Benefits

A. Increasing maximum benefit
To increase the maximum annual reimbursement for psychology and mental health benefits to $7000 per person and increase the reasonable and customary amounts to no less than the Ontario Psychological Association's recommended hourly rate.

## 10. Eldercare and Compassionate Care Leaves

A. Reporting of leaves
That the Administration develop and implement a mechanism for reporting on leaves taken by, or accommodations given to, faculty members and librarians to care for family members. This anonymized report will include those UTFA members whose family members require intensive physical, psychological, and/or emotional care, including the lengths of any relevant Compassionate Care and Emergency Leaves, Unpaid Leaves of Absences, or Family Care Leave. These reports shall be shared promptly and without unreasonable delay with UTFA at the end of every budget year or following a formal information request by UTFA.

## 11. Dependent scholarship program & Staff Tuition Waiver

**A. Dependant Scholarship –increasing maximum**

To increase the Dependent Scholarship program to cover 100% of the University of Toronto academic fees for five full courses in a general Arts & Science program for a first undergraduate degree.

**B. PHD Tuition Waiver**

To remove any limit on the tuition waiver for the part-time Master's, part-time PhD, and flex-time PhD (including all doctorate programs such as EdD) for UTFA members enrolled in these programs, and to clarify that the full tuition will be waived for these programs.

## 12. Librarians' Salaries & Research and Study Days

A. Increase Librarian Research and Study Days

To increase the number of Librarian Research and Study Days to 24 days, a level commensurate with other research-intensive universities in Canada and the United States.

## 13. Paramedical Services Benefits

UTFA proposes to:

a) Increase the annual combined cap for the following Paramedical Services from $2500 to $5000: Chiropractor, Physiotherapist, Registered Massage Therapist, Osteopath, Acupuncturist, Dietitian, Occupational Therapist.

14. Reasonable and Customary

UTFA proposes that the University Administration conduct an annual audit of UTFA members' claims against the "reasonable and customary" limits applied by Green Shield (or other provider) and provide a report to UTFA on an annual basis.

## 15. Vision Care

UTFA proposes that the maximum for vision care be increased from the current $450 to $800 every 24 months.

## 16. Dental Care

A. Reimbursement for Major Restorative

UTFA proposes that the reimbursement rate for major restorative dental be increased to 100% up to a maximum of $5000 per year.

B. Orthodontics

UTFA proposes that the lifetime maximum on orthodontics be increased to 100% up to

a maximum of $5000.

**17. Retiree Benefits**

UTFA's reaffirms that all benefits improvements equally apply to all retirees as has historically been the case.

**18. Health and Safety**

In January 2020, the parties agreed to establish a joint central health and safety committee. UTFA proposes that this committee be recognized as a Committee that fulfills the legislative requirements of the Occupational Health and Safety Act and has the powers of a Joint Health and Safety Committee.

**20. Maintenance of Salaries, Benefits and Workload during Bargaining**

UTFA seeks agreement that, where notice has been given pursuant to Article 6 of the Memorandum of Agreement, all terms relating to salaries, benefits and workload shall remain in effect until final resolution is reached by settlement or award.

**21. Bill 124**

UTFA's proposals are without prejudice to its position on the constitutionality of Bill 124.

## SCHEDULE B – UNIVERSITY PROPOSALS

**Term** **One year**, from July 1, 2022 to June 30, 2023.

All other proposals withdrawn on a without prejudice basis.

**Total Compensation (Salary and Benefits)**

**Salary**

1. Increase salaries by 1% across-the-board ("ATB") effective July 1, 2022.

**Benefits**

2. Any non-salary compensation increases are subject to mutual agreement on how to "spend" the "residual" compensation of $612,060 available up to the 1% hard cap on total compensation increases under Bill 124.

Any benefit increases to be applicable only to active employees and will not be or become applicable to retiree benefits.

As part of the Administrative Services Only contract for health and dental benefits with Green Shield, there is a stop loss provision whereby claims that exceed a certain level are pooled and become the responsibility of the insurance carrier. The insurance carrier places a significant charge on top of the other administrative fees for the stop loss provisions. All of the administrative fees, including the stop loss charge, are incorporated into the premiums that theUniversity and all employees pay for the benefits coverage.

The unlimited maximum for private duty nursing (which requires reinsurance) and the travel benefit result in a higher stop loss charge than if these benefits had maximums, even though actual claims experience for these benefits indicates very few people make large claims. Thus,in an effort to reduce the stop loss charge (and the resulting premiums paid by both the University and its employees), the University proposes the following:

(a) Deluxe Emergency travel provision to be restricted to travel up to 60 days, except in thecase of faculty and librarians on research and/or study leave. The University would continue to extend travel coverage to faculty and librarians on research and/or study leave so long as they retained their OHIP coverage.

(b) A cap of $10,000 per person per annum on private duty registered nursing servicesbenefit.

In an effort to ensure the ongoing financial stability and affordability of our benefit plans inthe long term, the University proposes the following:

(c) Remove the existing $25 deductible under the EHC plan and introduce a 10% participantco-pay on all EHC claims (including drug) to a maximum out of pocket spend of $250 perparticipant per Plan Year.

In an effort to continue being an employer of choice and helping plan members live their healthiest lives the University proposes the following:

(d) Enhance the existing benefits plan by offering the new pharmacogenetics (PGx) service under Diagnostic Services/Laboratory Tests. The PGx product, which will be subject to prior authorization and only reimbursed when specific criteria are met, focuses on mental health, specifically depression and anxiety. PGx is one of several genetic tests available for medical purposes which determines whether a person has certain genetic mutations that are known to influence their response to a drug in a certain way and based on results, a doctor can choose medications (or doses) that are better suited for that person.

The Survivor Income Benefit provision under the Optional Life Insurance plan is an expensiveform of optional life insurance with rates currently set at 6 times the rates of the basic life insurance rates. This, in combination with employees having difficulty in understanding how the plan works, are likely key factors why the utilization levels are very low. The University proposes the following:

(e) Eliminate the Survivor Income Benefit Provision under the Optional Life Insurance plan.

SCHEDULE "2"

## APPEARANCES

FOR THE UNIVERSITY

**Counsel**
John E. Brooks
Jonathan Maier

**University**
Andrew Ebejer, Legal Counsel, Office of University Counsel
Heather Boon, Acting Vice-President, People Strategy, Equity & Culture
Randy Boyagoda, Acting Vice-Provost, Faculty & Academic Life
Kate Enros, Executive Director, Academic Life & Faculty Relations, Office of the Vice-Provost, Faculty & Academic Life
Phil Harper, HR Research & Reporting Specialist, HR Transformation & Analytics, People Strategy, Equity & Culture
Jessica Eylon, Manager, Special Projects and Governance, Office of the Vice-President, People Strategy, Equity & Culture
Melanie Wright, Associate Director, Academic HR Services, Office of the Vice-Provost, Faculty & Academic Life
Samantha Figenshaw, Faculty Relations Consultant, Office of the Vice-Provost, Faculty & Academic Life

FOR THE ASSOCIATION

**Counsel**
Emma Phillips
Steven Barrett
Mary-Elizabeth Dill
June Mills

**UTFA**
Prof Terezia Zoric, President
Prof Jun Nogami, Vice-President, Salaries Benefits Pension Workload
Prof Sherri Helwig, Vice-President Grievances
Dr. Harriet Sonne de Torrens
Prof Arjumand Siddiqi, UTFA Negotiating team
Prof Mary Alice Guttman, UTFA Negotiating team
Prof David Roberts, UTFA Negotiating team
Reni Chang, Counsel
Helen Nowak, General Counsel
Nellie De Lorenzi, Executive Director

# TAB 15

**IN THE MATTER OF AN INTEREST ARBITRATION**
**PURSUANT TO THE *HOSPITAL LABOUR DISPUTES ARBITRATION ACT, R.S.O. 1990, C.H. 14***

**BETWEEN**

**THE PARTICIPATING HOSPITALS**
**As represented by the Ontario Hospital Association**

**(the "Hospitals")**

and

**ONTARIO NURSES' ASSOCIATION**

**(the "Union" or "ONA")**

**BOARD OF ARBITRATION:** **John Stout, Chair**
**Brett Christen, Hospitals' Nominee**
**Phillip Abbink, ONA Nominee**

**APPEARANCES:**

**For the Hospitals:**
David Brook – O.H.A, V. P., Labour Relations & Chief Negotiations Officer
David McCoy

**For ONA:**
Kayla Sanger, Legal Counsel
Bernadette Robinson – Interim President
Angela Preocanin
Andrea Kay
Steven Lobsinger
Marilyn Dee
Patricia Carr
Dave Campanella
Kelly Latimer

**HEARING HELD MARCH 13, 2023 AND BY WRITTEN SUBMISSIONS RECEIVED MARCH 24, 2023 AND AN EXECUTIVE SESSION HELD MARCH 28, 2023**

## Background

[1] This Central Board of Arbitration (the "Board") was appointed by the parties, pursuant to the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990 c.H. 14, as amended ("*HLDAA*"), to resolve the outstanding issues between the parties with respect to a renewal of the central provisions of collective agreements between the Ontario Nurses Association ("ONA") and 131 Participating Hospitals in Ontario (the "Hospitals") represented by the Ontario Hospital Association.

[2] Collective Bargaining between the parties was established through a Memorandum of Conditions for Joint Bargaining, which is historically how these parties have engaged in collective bargaining.

[3] The parties met in negotiations on February 10-14, 2020 and February 24-25, 2020. The parties engaged in mediation on February 26-28, 2020.

[4] The parties were unable to reach a voluntary settlement and the remaining issues in dispute were referred to this Board as it was then constituted.[1] A hearing was held on April 19 and 20, 2020 and an award was issued on June 8, 2020, see *Participating Hospitals v. Ontario Nurses Association*, 2020 CanLII 38651 (ON LA) (the "June 8, 2020 Award").

[5] In our June 8, 2020 Award we indicated that as a result of the parties inability to agree upon the term for the renewal collective agreements, we were awarding central terms that would remain in force for one year from the date of our award, see ss. 10(10) of *HLDAA*. Therefore, the term of the renewal collective agreements was from April 1, 2020 until June 7, 2021.

[6] We also indicated in our June 8, 2020 Award that we were bound by the limitations placed upon us by Provincial wage and compensation restraint legislation, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* ("*Bill 124*"). *Bill*

[1] The original Board nominees, Kate Hughes, and Brian O'Byrne are no longer able to act. As a result, Brett Christen and Phillip Abbink were appointed as replacement nominees.

*124* limited the amount that an interest arbitration board could award for wages and other compensation. In particular, we were restricted to an annual wage increase of no more than 1% and total compensation of 1% for each of the three years of the *Bill 124* "moderation period."

[7] We reluctantly awarded a 1% wage increase effective April 1, 2020. The Chair specifically noted in the June 8, 2020 Award that we would have awarded a wage increase of "at least 1.75%" to keep nurses in line with other hospital employees who already settled their collective agreements. We also awarded an additional 1% wage increase effective April 1, 2021. We noted that the second wage increase was to ensure that nurses received their wage increase in a timely manner.

[8] In terms of total compensation, we increased the call-back premium for nurses from time and one-half to double time and we provided 13% in-lieu of benefits for full-time employees beyond age 75. These increases in compensation fell within the 1% total compensation permitted under *Bill 124*.

[9] As is usually the case, we remained seized in accordance with subsection 9(2) of *HLDAA* until the parties signed new collective agreements. We also remain seized with respect to a re-opener on monetary proposals in the event that ONA was granted an exemption, or *Bill 124* was declared unconstitutional by a court of competent jurisdiction, or the legislation was otherwise amended or repealed.

[10] On November 29, 2022, Justice Koehnen of the Ontario Superior Court of Justice issued a decision in *Ontario English Catholic Teachers Association et. al. v. His Majesty the King in Right of Ontario*, 2022, ONSC 6658 (the "Koehnen decision"), which addressed ten applications challenging the constitutionality of *Bill 124*. In a well-reasoned decision, Justice Koehnen found that *Bill 124* infringes upon the applicants (including ONA's) right to freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms* and is not justified under s. 1 of the *Charter*. Justice Koehnen declared *Bill 124* to be void and of no effect. Justice Koehnen remained seized to address remedy and any ancillary issues.

[11] On December 8, 2022, ONA contacted the Chair requesting that the Board be re-established to hear submissions regarding wages and monetary compensation from April 1, 2020 to June 7, 2021. The Chair directed the parties to bargain before re-establishing the Board.

[12] The parties met on February 27, 2023 in an attempt to negotiate a resolution to the dispute. Unfortunately, the parties were unable to resolve their differences.

[13] On February 28, 2023, ONA wrote the Chair requesting that the Board reconvene as soon as practicable. The Chair was also advised that new nominees were selected to replace the nominees from the original Board, who were no longer able to act.

[14] The parties engaged in mediation, with the Board's assistance, on March 13, 2023. Once again, the parties were unable to come to an agreement to resolve the issues remaining in dispute. It was agreed that this Board would determine wages and compensation for the first two years of the *Bill 124* moderation period (April 1, 2020 until March 31, 2022) based on written submissions. It was further agreed that the Board would render their decision based on such written submissions, along with the previous submissions made and relied upon in 2020.

[15] The parties are currently engaged in preparing for an interest arbitration before a central board of arbitration chaired by Arbitrator William Kaplan (the "Kaplan Board") for a renewal collective agreement with a term commencing April 1, 2023. The parties are also preparing for a mediation session with a central board of arbitration chaired by Arbitrator Eli Gedalof on April 2, 2023 (the "Gedalof Board") to determine the wage and compensation increases for the last year of the moderation period (2022). In light of this very tight timeline, the parties agreed that a further hearing was not necessary, and this Board would issue a supplemental award in short order, which may include few, if any, reasons.

[16] Accordingly, this supplemental award addresses the additional compensation that is to be provided to nurses for the first two years of the *Bill 124* moderation period (2020 and 2021).

## Analysis

[17] The principles applicable to interest arbitration are well established and we set them out in our June 8, 2020 Award. There is no need to repeat what has already been stated in our earlier award, other than to emphasize the importance of replication as informed by comparability.

[18] Interest arbitration is the last step in collective bargaining for those parties who are not permitted, by statute, to exercise the right to strike or lockout. The interest arbitration board's task is to replicate what the parties would have agreed upon but for *Bill 124*. This means that we are to examine the parties' proposals made at the time in the context of the collective bargaining environment as it then existed when we issued our June 8, 2020 Award. Interest arbitration does not operate in a vacuum, and interest arbitration boards are regularly called upon to consider relevant arbitration or court decisions issued after the hearing but before a final decision is made, the Koehnen decision being a perfect example, see *Participating Nursing Homes and SEIU, Local 1 Canada,* 2022 CanLII 90597. An interest arbitration board also cannot completely ignore subsequent events, particularly when we are being asked to make a decision on issues that we may not have decided in our June 8, 2020 Award but for *Bill 124*.

[19] We also must keep in mind that *Bill 124* undermined the free collective bargaining process between these parties as well as others who were affected by the legislation. *Bill 124* artificially altered the context of collective bargaining on a broad scale with the introduction of wage and compensation restraints in the healthcare sector. One cannot ignore the fact that the settlements and awards involving parties affected by *Bill 124* were artificially deflated when compared to those in the greater economy, including other employees providing essential public services.

[20] Interest arbitration is an artificial exercise by necessity. However, it is informed by objective evidence, including evidence of collective bargaining and the economic environment at the time of the board's award. Interest arbitration becomes even more

artificial when legislative restraint is introduced, which inhibits free collective bargaining and undermines the application of replication. That being said, we must do our best to try and provide the parties with a resolution that is both objectively justified and practically applied to their ongoing relationship.

[21] In their original brief filed in 2020, ONA sought a 2% wage increase in wages, along with a new 15 year step in the wage grid, premium and benefit enhancements. ONA is now seeking higher wage adjustments based on the fact that the retroactive awarding of some of non-wage proposals would be difficult, if not impossible, and essentially rob nurses of what they would have been entitled to in 2020 and 2021.

[22] We disagree with this approach and are of the view that the wage increases ought to be limited to what was proposed at the time of our June 8, 2020 Award. We are of the opinion that there are more practical ways to address the issues arising from retroactive adjustments that may be made with respect to any other compensation that we may award.

[23] In terms of wages, the Chair stated in our June 8, 2020 Award, that we would give “at least 1.75%”. The Hospitals submit that we ought to only provide ONA with an additional 0.75% wage increase in each year. We disagree with this submission.

[24] There is no doubt that we were aware of the negotiated OPSEU wage increase of 1.75% and we acknowledged that the nurses would not have fallen behind other hospital employees. However, we did not in any way limit ourselves to a 1.75% increase in the event that the matter came back before us. OPSEU increases are certainly a strong comparator that provides objective evidence of what the Hospitals may have agreed upon in free collective bargaining with ONA. However, the OPSEU wage increases, and the ONA wage increases have not always been aligned, which we noted in our June 8, 2020 Award. ONA represents a much larger bargaining unit with different needs and desires, and it would be in our view disingenuous to believe that they would just readily accept the same wage increases as provided to other employees in a different context prior to the advent of *Bill 124* and the pandemic.

[25] Replication is not duplication, and interest arbitration boards, particularly central arbitration boards are not required to religiously and slavishly follow other awards or settlements. An interest arbitration board must consider the specific circumstances before them and determine what the parties would have agreed upon if left to freely bargain in the context of the time when the hearing occurs, see *Scarborough Health Network v. CUPE, Local 5852*, 2020 ONSC 4577 (Can LII).

[26] We are of the view that a total wage increase of 1.75% is appropriate for 2020. However, we do not believe that 1.75% is an appropriate wage increase for 2021. In the normal course we would not have awarded any wage adjustment for 2021. Instead, we would have granted the parties the opportunity to freely negotiate the 2021 wage increase in the next round of bargaining as we did with the other 2021 compensation. This is particularly so given the uncertainty at the time, just after the World Health Organization (WHO) declared the COVID-19 global pandemic. We only awarded the additional 1% wage increase because it was a *fait accompli* due to *Bill 124*.

[27] We are now being asked to decide what we would have awarded as wages and compensation for 2021. In our view, we must consider the uncertainty of the pandemic and the economy during this time period. We must also consider the strains being placed on the healthcare system at the time, which were much different than what OPSEU and other unions faced when they settled their collective agreements before the pandemic. ONA raised significant concerns about burn out, recruitment and retention of nurses by the hospitals during what was obviously a very trying period. ONA used the phrase “a crisis within a crisis.” ONA’s concerns were valid, these concerns, coupled with other considerations of the collective bargaining environment and economic uncertainty, lead us to conclude that a higher wage increase is warranted in 2021. Therefore, we find that 2.0% is the appropriate total wage increase for 2021.

[28] The Chair acknowledges that he made comments in *Participating Nursing Homes* and ONA 2021 CanLII 107099 (ON LA), which might lead some to believe he endorsed 1.75% as being the appropriate amount that ONA and the Hospitals may have agreed

upon for 2020 and 2021. That certainly was not intended and upon reflection ought to have been more carefully written, although the comment was couched in terms of "most likely" as opposed to being more definitive. The point of the comment in the *Participating Nursing Homes* award, was that in 2021 the nurses in nursing homes would generally not have settled for less than what the nurses in hospitals might have settled for in 2020. We note that wage increases for nurses in nursing homes may closely follow the rates of nurses in hospitals, but they do not automatically adopt it. If anything, nurses in hospitals have generally received slightly higher wage increases and that is why they are paid higher than nurses in nursing homes. ONA has tried on multiple occasions to close this gap, but they have been unsuccessful to date.

[29] The additional step in the wage grid after 15 years ONA seeks is a breakthrough proposal and we are not awarding it. We acknowledge the concerns raised by ONA but are of the view that in the context of the matter before us the proposal is not justified.

[30] ONA originally sought additional non-wage monetary increases, including increase in premiums and benefits. In their most recent submissions, they sought to have an additional 0.5% per year added to the wage grid instead of providing such non-wage monetary increases. The Hospitals are opposed to any additional compensation beyond wage increases of a total of 1.75% per year (i.e. an additional 0.75% for 2020 and 2021).

[31] The Hospitals acknowledged in their original submissions that increases to night and weekend premiums would be appropriate, albeit in the context of *Bill 124*. In addition, the parties have a historical pattern of providing modest increases to premiums. In our view an increase to the night and weekend premiums is appropriate. However, given the awarding of double time for call-backs in the first year (2020), additional premium enhancements should be limited to 2021.[2] Therefore, we are awarding $0.10 to each of the night and weekend premiums effective April 1, 2021.

[2] We note that we are taking the granting of ONA's most desired proposal for double time payment for call-backs into account when considering the total compensation of our overall award.

[32] In terms of benefits, ONA made a proposal to introduce unlimited mental health services for nurses. In 2018, Arbitrator Kaplan awarded mental health services with a limit of $800 to nurses working in Hospitals and ONA subsequently negotiated similar entitlements in Homes for the Aged. Unlimited mental health benefits have been awarded to other essential services, including fire, police, and paramedic services across the province before the advent of the COVID-19 pandemic. In our view, the provision of mental health services is an emerging benefit that is finding wide acceptance in collective bargaining for employees who work in stressful environments or may experience violence associated with their work. There is no reason why nurses, who are on the front line treating the most acute and traumatic cases should be denied such a benefit. Frankly, providing the nurses with mental health benefits not only assists the individual nurses, but it also benefits the Hospitals. Nurses face many mental health challenges and that can take a toll, resulting in increased sick leave. The provision of additional mental health benefits provides assistance in coping with such challenges and may result in less absenteeism. Therefore, we are awarding ONA's proposal for unlimited mental health benefits for nurses.

[33] In addition, we are awarding a modest $50.00 increase in chiropractic, massage, and physiotherapy benefits as proposed by ONA.

[34] We understand that implementation of health and welfare benefits on a retroactive basis is difficult, if not impossible. Therefore, we are awarding these benefits effective the date of our award and they are to be implemented as soon as possible.

[35] We feel empathy for ONA's position that some monetary compensation ought to be awarded for the delay in implementing benefit enhancements. However, we have taken into consideration this fact in making our decision and we are of the view that on balance, a fair and reasonable result is to implement these benefits as soon as possible. While the benefits being awarded are delayed, ONA also benefited from our awarding double time for call-backs in 2020. As this Chair has stated previously, wage and compensation restraint legislation undermines free collective bargaining, and it is not just

the unions and employees who suffer but so too do the employers. Overall, we are of the view that this supplemental award reflects a fair and reasonable result having regard to the difficult situation we are facing.



[36] Finally, the nominees are both dissenting from this award, and they may file written dissents at a later date. The Chair feels he has adequately explained his decision in this supplemental award. However, the parties may request additional reasons if they feel it is necessary or required. The Chair also reserves his right to provide an addendum should any written dissent raise issues that need to be addressed with reasons. It should be noted that generally in interest arbitration the less said the better for future bargaining. Any request for additional reasons is to be made within seven (7) days or we shall deem these reasons to be sufficient for the parties.

## SUPPLEMENTAL AWARD

[37] After carefully considering the submissions of the parties, we hereby order and award the following changes to the central terms of the collective agreements:

- **Wages:**
    - Effective April 1, 2020 – an additional 0.75% (total 1.75%)
    - Effective April 1, 2021 – an additional 1.0% (total 2.0%)
    - Retroactive compensation in accordance with Article 19.10 of the Collective Agreement.
- **Premiums:**
    - Effective April 1, 2021 – an additional $0.10 on the night shift premium
    - Effective April 1, 2021 – an additional $0.10 on the weekend shift premium
    - Retroactive compensation in accordance with Article 19.10 of the Collective Agreement.
- **Health and Welfare Benefits:** Effective as soon as possible after the date of this award increase the following benefits:
        - Chiropractic, massage, and physiotherapy increase by $50.00.
        - Mental health benefits increase to unlimited coverage.

[38] Unless specifically addressed in this award, all outstanding proposals are dismissed without prejudice to future bargaining.

[39] In light of the uncertainty in this situation, and in the event that the appeal is allowed at either the Court of Appeal or the Supreme Court of Canada, we will remain seized with respect to a re-opener if the *Bill 124* appeal is successful, or a stay is granted and until our awards are implemented. We also continue to remain seized in accordance with subsection 9(2) of *HLDAA* until the parties have signed new collective agreements.

Dated at Toronto, Ontario this 1st day of April 2023

"John Stout"
John Stout – Chair

"Dissent attached"
Phillip Abbink - ONA Nominee

"Dissent attached"
Brett Christen – Hospitals Nominee

**Dissent of ONA Nominee:**

1. While I appreciate the difficult task faced by the Chair in this matter, I must respectfully dissent on one key point. In my view, ONA should not have been limited to the wage increases proposed in 2020, as was decided by the Chair (paragraph 22).

2. The Chair acknowledges that (para. 18):

> … Interest arbitration does not operate in a vacuum, and interest arbitration boards are regularly called upon to consider relevant arbitration or court decisions issued after the hearing but before a final decision is made, the Koehnen decision being a perfect example, see Participating Nursing Homes and SEIU, Local 1 Canada, 2022 CanLII 90597. An interest arbitration board also cannot completely ignore subsequent events, particularly when we are being asked to make a decision on issues that we may not have decided in our June 8, 2020 Award but for Bill 124.

3. As explained by Arbitrator Hayes[3] in an award issued in the summer of 2022 with respect to an agreement spanning 2020-2022:

> 23. If the parties had reached their own 2020-2022 collective agreement at an early date, it is improbable that any allowance for inflation would have been made given the rate then known. The fact is, however, that they did not reach such an agreement and the CPI data is now before us. Arbitral application of the replication principle does not entail willful blindness or embracing a fiction. We do not accept that we should ignore this information because it was not available at the bargaining table over a year ago.

4. In my view, it is entirely appropriate for the Board to consider the current landscape of the economy and relevant comparator agreements in determining the appropriate award for 2020 to 2022. To the extent that the Chair has not done so, I respectfully disagree.

5. An extension of this principle is that ONA should have been able to adjust its proposal for a general wage increase based on the value of other elements of its monetary proposals which cannot be awarded retroactively.

6. In framing its proposals in 2020, ONA argued that Bill 124 did not apply, and tabled a set of proposals reflecting increases to total compensation absent the restrictions of Bill 124. The Board determined that Bill 124 applied, and the Chair acknowledges in the present decision that, "… implementation of health and welfare benefits on a retroactive basis is difficult, if not impossible." Both parties

[3] Homewood Health Centre Inc. v United Food and Commercial Workers, Local 75, 2022 CanLII 46392 (ON LA), at para 23.

referenced total compensation as an important consideration in any monetary increases, which is consistent with long-standing jurisprudence.

7. There is no unfairness here, because the parties met to negotiate the reopener and then engaged in mediation in 2023 (see paragraphs 12 – 14).

8. Since ONA's original proposals included improvements to various benefits, and those benefits cannot in practice be awarded retroactively, it only makes sense that they be permitted to adjust their proposals on monetary items which can be awarded retroactively to reflect the concept of total compensation, which is precisely what they did in the present case. In my view, this means that ONA should have been permitted to ask for an adjusted general wage increase that reflected the value of proposals made in 2020 which can no longer be effectively awarded at this point in time.

_____

Philip Abbink

## Dissent

I respectfully dissent from the Award of the Chair dated April 1, 2023 (the "Award") and the reasons therein.

The Award is a supplemental award to an award dated June 8, 2020 (the "Initial Award") and addresses compensation issues not addressed in the Initial Award which was issued when the *Protecting Sustainable Public Sector for Future Generations Act*, 2019 ("Bill 124") was in effect. After the Initial Award was issued, the Ontario Superior Court declared Bill 124 to be unconstitutional and of no force or effect.

The Award awards an additional .75% wage increase for 2020 (for a total wage increase for 2020 of 1.75%) and an additional 1% wage increase for 2021 (for a total wage increase for 2021 of 2%). The 2% increase to wages in 2021 is not warranted for several reasons in my view and I would have instead awarded a 1.75% increase for 2021.

The Award and Initial Award

As a starting point, it is useful to set out exactly what is awarded for the two-year collective agreement being settled under the Award and Initial Award (and by an award dated September 20, 2021 of a board chaired by Arbitrator Gedalof which addressed non-wage compensation under Bill 124 for 2021). The following has been awarded:

**2020**

- wage increase of 1.75% (retroactive to April 1, 2020)
- further restrictions upon the Hospitals' use of agency employees (Article 10.12(c))
- amendment to Article 17.01(g) to provide an increase to 13% in lieu of benefits for nurses over age 75
- amendment to Article 14.06 to increase the premium for call-backs from one and a half times to double time

**2021**

- wage increase of 2% (retroactive to April 1, 2021)
- increase to shift premiums: 10 cent increase to night premium; 10 cent increase to weekend shift premium; an additional 23 cent increase to night premium (awarded by the Gedalof board)
- $50 increase to chiropractic, massage and physiotherapy benefit
- introduction of an unlimited mental health benefit (previously capped at $800)

The above non-wage compensation items awarded in these awards represent, in my view, an unusually significant increase for the two year period addressed. This is readily apparent when the non-wage compensation awarded is compared to the more normative non-wage compensation awarded by the board chaired by Arbitrator Kaplan in 2018 and by the board chaired by Arbitrator Albertyn in 2016.

The Award of Breakthrough Items

It must be emphasized that two of the above non-wage compensation items are undeniably "breakthrough" items: the double-time for call-back and the unlimited mental health benefit.

In the case of the call-back premium, as set out in paragraph 38 of the Initial Award, no other employee group in the hospital sector has double-time for call-backs. It is a breakthrough item and one which would not have been awarded had Bill 124 been struck down before the Initial Award was issued. The Award indicates that the Chair took this reality into account in fashioning the supplemental terms to be included in the Award (see paragraph 33 of the Award, the footnote to that paragraph, and paragraph 35 of the Award).

Despite these attempts to factor the award of the call-back premiums in the Initial Award into the terms of the Award, the fact remains that ONA obtained a significant breakthrough item which it would not have obtained in the normal course. It is a benefit which will remain in the collective agreement unless and until removed by a future interest arbitration Board. In this respect, I would note that the first attempt by the Hospitals to roll-back the call-back premium to time and a half was rejected by Arbitrator Gedalof in the 2022 award.

It must also be remembered that, as set out at paragraphs 40 and 47 of the Initial Award, in light of Bill 124 being in effect at the time that award was rendered, the Hospitals' proposals regarding the offer and payment of retirement allowances and their proposal to amend the definition of layoff were not addressed (in fact, no Hospital proposals were awarded at all).

Unlimited mental health benefits is also a benefit not enjoyed by any other employees in the hospital sector. The award of this benefit is therefore similarly a "breakthrough" item in this sector.

The achievement of two breakthrough items in a single collective agreement is highly unusual if not unprecedented. This is more so the case where no employer proposals at all have been awarded.

The 2021 2% Wage Increase

Against this background, I would have expected a normative wage increase or a less than normative wage increase to have been awarded. In my view, the 2% wage increase for 2021 was above the relevant comparator and is not normative for the reasons outlined below.

First, as noted by the Chair at paragraph 33 of the Initial Award, OPSEU and the Participating Hospitals agreed to a wage increase of 1.75% for both 2020 and 2021. As a voluntary settlement, this settlement represents highly relevant objective evidence of what the parties in the instant matter would have agreed upon in free collective bargaining.

At paragraph 24 through 27 of the Award, the Chair sets out his rationale for rejecting the Hospitals' submission that a 1.75% increase be the appropriate increase for 2021 and instead

awarding a 2% wage increase for 2021. The Chair, at paragraph 24 of the Award, correctly notes that the OPSEU settlement was negotiated prior to Bill 124 and the onset of the COVID-19 pandemic in March of 2020. At paragraph 27, the Chair highlights other factors in support of the award of a 2% wage increase for 2021 including the uncertainty of the pandemic and the economy in 2021, the strain on the healthcare system at that time, and the several challenges and difficulties faced by members of the bargaining unit throughout the pandemic, which, together, constituted different circumstances than were in existence when the OPSEU settlement was negotiated. In the Chair's view, as a result of the existence of these factors, ONA would have been successful in negotiating a 2% increase in 2021 in free collective bargaining.

It is true that economic and other circumstances were different in 2021 than was the case prior to the onset of the pandemic in March of 2020. Leaving aside the question of whether or not it is appropriate to consider information concerning what occurred in 2021 in the Award, I would note that there are many interest arbitration awards rendered in 2020 and 2021 which did not award a higher wage increase for 2021 than they awarded for 2020.

There are 30 interest arbitration awards relating to employers and unions in the broader healthcare sector not subject to Bill 124 (including for example, for profit nursing homes, long-term care facilities and homes for the aged) which were issued between the onset of the pandemic and the end of 2021 and which awarded wage increases for both 2020 and 2021.

While these awards are not relevant comparators to these parties, the employers and unions covered by these awards also experienced many challenges and difficulties during the pandemic and faced the same uncertainty created by the pandemic and the economy. However, other than one readily distinguishable award (McCall), no board awarded an increase greater than 1.75% for 2021 (most of the increases were 1.5%). More significantly, looking at the remaining 29 cases, the 2021 increase awarded was identical to the 2020 increase in all cases but one (in that one case the 2021 increase was 0.1% higher than the 2020 increase). That is, in virtually every one of these interest arbitration awards (issued from the start pandemic to the end of 2021) the arbitration board did not find it appropriate to award a wage increase for 2021 which was greater than the 2020 increase awarded.

In 2022, there were 21 additional interest arbitration awards in the broader healthcare sector relating to employers not covered by Bill 124 and which awarded compensation increases for both 2020 and 2021. Again, the vast majority of these awards did not award a wage increase of greater than 1.75% for 2021. More significantly, the 2021 wage increase awarded was the same as the 2020 increase awarded in all but four cases (in one of these cases there was only a 0.1% difference). Accordingly, and to the extent that awards made in 2022 have any relevance to a bargaining process concluded in 2020, even the great majority of these awards do not support a higher increase being given for 2021 than was awarded in 2020.

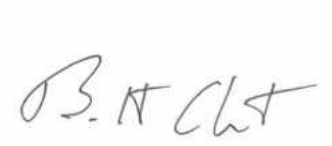
If one looks at just those cases in this group (broader healthcare sector; not subject to Bill 124; increases for both 2020 and 2021; award rendered between the start of the pandemic and the end of 2022) involving ONA bargaining units, the majority of the awards (five of the eight) still

award the same increase for 2020 and 2021 and only two of the eight award a wage increase for 2021 in excess of 1.75%.

Accordingly, the vast majority of awards involving employers in the broader healthcare sector not covered by Bill 124 do not provide objective support for a greater wage increase for 2021 than was awarded for 2020.

Finally, it should also be noted that both the Award and the Initial Award provide several improvements which were in response, or at least partially in response, to the difficulties and challenges faced by the bargaining unit during the pandemic. The Initial Award remits changes to the health and safety language to the parties for further discussion which ultimately led to the award by the Board of an expedited process to address disputes involving PPE. (This process was renewed as part of other improvement to the collective agreement's health and safety language subsequently awarded by the Gedalof board). The Initial Award and the Award also, together, impose greater restrictions on the use of agency employees, provide improvement to chiropractic, massage and physiotherapy benefits, increase shift premiums, and, significantly, award unlimited mental health benefits.

Given the award of these enhancements (and for all of the other reasons outlined above), I do not believe that a wage increase above 1.75% for 2021 should have been awarded.



Brett Christen
Nominee of the Participating Hospitals

# TAB 16

**In the Matter of an Interest Arbitration**
**Under the *Hospital Labour Disputes Arbitration Act***

**BETWEEN:**

**THE PARTICIPATING HOSPITALS**

**(the "Hospitals")**

**AND**

**ONTARIO NURSES ASSOCIATION**

**(the "Association")**

**(Bill 124 Reopener)**

**Before:**

Eli A. Gedalof, Chair
Brett Christen, Hospitals Nominee
Philip Abbink, Association Nominee

**Heard by Written Submissions Filed on April 12, 2023.**

**Executive Session Held on April 17, 2023.**

## AWARD

## INTRODUCTION AND BACKGROUND

1. This board of interest arbitration, differently constituted, issued an award on September 9, 2021, settling the central terms of the collective agreements between the Ontario Nurses Association and 131 Participating Hospitals for the period June 7, 2021 to March 31, 2023 (*Participating Hospitals v. Ontario Nurses Association,* 2021 CanLII 88531 (ON LA) (the "prior award")). These collective agreements were all subject to the compensation restraint provisions of the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, referred to as "Bill 124". Bill 124 imposed a 3-year "moderation period" during which parties and boards were required to restrict any increases to wages or total compensation to 1% per year.

2. At that time, the Association, together with other bargaining agents in the broader public sector, filed a constitutional challenge seeking to overturn Bill 124. Having regard to the outstanding constitutional challenge, the board, as had become common for parties and boards of interest arbitration under the *Hospital Labour Disputes Arbitration Act* ("*HLDAA*"), and as was unopposed by the Hospitals in this case, awarded the following reopener provision:

> We remain seized with respect to reopener on monetary proposals in the event that ONA is granted an exemption, or Bill 124 is declared unconstitutional by a court of competent jurisdiction, or the Bill is otherwise amended or repealed.

3. By decision dated November 29, 2022, the Ontario Superior Court of Justice found that Bill 124 was contrary to s.2(d) of the Charter, not justified under s.1 of the Charter, and declared the Act to be void and of no effect (*Ontario English Catholic Teachers Assoc. et al. v. His Majesty*, 2022, 2022 ONSC 6658 (CanLII) at paras. 362-363)). The Association thereafter requested that the board reconvene to hear and determine the reopener. As the parties' original nominees were no longer available to act, the parties reconstituted this board.

4. Some background, in addition to that which is set out in our prior award, is in order to properly explain the scope of this board's mandate.

5. The term of the collective agreements arising from this board's awards run from June 8, 2021 to March 31, 2023, i.e., almost two years of the three-year moderation period under Bill 124. Our task on the reopener, however, is effectively limited to the last year of the moderation period (April 1, 2022 to March 31, 2023).[1]

[1] As explained in the prior award, the Stout Board that preceded us, in settling the terms of the collective agreements for the period April 1, 2020 until June 7, 2021 (i.e. expiring one year from the date of the Stout award), had already awarded the maximum allowable general wage increases under Bill 124 for the first and second years of the moderation period (*Participating Hospitals (Ontario Hospital Association*) v Ontario Nurses' Association, 2020 CanLII 38651 (ON LA)(the "prior Stout award"). Our board, as it was then constituted, was therefore already restricted for year two of the moderation period to awarding the residual monetary improvements permitted under Bill 124 (a $0.23 increase to the night premium), in addition to all non-monetary matters for that year and all issues related to the third year of the moderation period (including a 1% general wage increase and a $0.24 increase to the weekend premium, which were the maximum monetary improvements permitted under Bill 124). Further, before proceeding with the reopener before this board, the parties first addressed the reopener before the Stout board and agreed that the Stout board would determine all the outstanding monetary issues for year two of the moderation period. Thus, while this board remains seized with the implementation of its prior award for the period June 8, 2021 to March 31, 2023, and while the term of the collective agreement arising from this

6. Following the Court's decision overturning Bill 124, the parties met on February 27, 2023, and attempted to negotiate a settlement of this reopener and the one for the previous period, but were unsuccessful. They then met with this board on April 2, 2023 (the day after the previous board issued its decision on the first part of the reopener) for a day of mediation, but were again unable to reach an agreement. The parties then filed written submissions on April 12, 2023 and this board met in executive session on April 17, 2023. The parties have requested that this Board issue its decision on an expedited basis, as they are scheduled to soon appear before a board of arbitration chaired by Arbitrator Kaplan to arbitrate the next collective agreement (one not subject to any prior award, settlement or reopener).

7. The record before this board therefore consists of the materials filed with the Board as previously constituted and addressed in our September 9, 2021 award, and the supplementary materials filed in support of the Bill 124 reopener filed on April 12, 2023. We have carefully reviewed and considered all of these materials in reaching our decision below.

Position of the Parties

8. In terms of the substantive issues in dispute, the parties each take a fundamentally different perspective on what this Board is required to do in the absence of the Bill 124 restrictions.

9. From the Hospitals' perspective, the Board ought to strictly limit its assessment to the information and collective bargaining landscape as it existed up to September 2021. In the Hospital's submission, there was an established bargaining pattern, set prior to the implementation of Bill 124 and followed in other contexts thereafter, that ought to restrict any general wage increases to 1.75% (i.e., an additional 0.75%). Further, having regard to the various other monetary improvements ordered by the Stout Board and by this board in our prior award, the Hospitals maintain that it would not be appropriate to award any further monetary improvements.

10. From the Association's perspective, an additional 0.75% does not begin to reflect the proper application of the *HLDAA* criteria, replicate free collective

and our previous award is June 8, 2021 to March 31, 2023, we are only here dealing with the reopener for the period April 1, 2022 to March 31, 2023. We note in this regard that to the extent that the Association has sought retroactive compensatory increases from this board that reach back into the prior year, we do not consider it appropriate to do so as the Stout board has already awarded total compensation for that year.

bargaining, or unwind the unconstitutional impact of Bill 124. The Association, argues that there was already a "Nursing Crisis within a Crisis" in 2021, characterized by staffing shortages and widespread burnout, that warranted substantial increases and compression of wage grid. Since that time, the continuing staffing crisis and extreme inflation during the period of this collective agreement has only exacerbated the inadequacy of the artificially deflated compensation increases awarded up to 2021.

11. Accordingly, the Association maintains that this Board cannot be willfully blind to these extreme pressures in applying the guiding principles of interest arbitration. The Association proposes a 3% general wage increase, together with substantial compression of the wage grid for RNs and a long service pay adjustment, which would provide nurses with immediate and substantial additional wage increases of varying amounts depending on the nurse's current place on the grid.[2] The Association also proposes standardization and compression of the wage grid for NPs, resulting in further and substantial wage increases, and several additional and substantial benefit improvements.

## ANALYSIS AND AWARD

The Scope of this Reopener

12. Before addressing the parties' specific proposals, it is necessary to address the parties' submissions on the nature and scope of the Bill 124 reopener that was awarded in our September 29, 2021 decision. The parties' submissions raise two related issues that warrant careful consideration. The first is the extent to which the Bill 124 re-opener should be restricted to ensuring that "established bargaining patterns" are not disrupted. The second is the extent to which this Board should consider information that became available after the date of our prior award in determining the outcome of the reopener. We will address these issues in turn.

Disruption to Established Patterns

13. The Hospitals argue that the role of this Board on the reopener is to restore previously established bargaining patterns that were already in place at the time of our prior award (September 2021), but which were disrupted by Bill 124. In support of this position, the Hospitals rely on a partial quote from our prior award, which in turn originates from this Chair's decision in *Mon Sheong Home for the Aged v Ontario Nurses' Association,* 2020 CanLII (ON

[2] For example, for a nurse at the 3 Year step, the Association's proposal would result in an additional wage increase of approximately 14%.

LA)("*Mon Sheong*"), and assert that the purpose of the reopener is "to protect against the potential disruption to established bargaining patterns in the event that Bill 124 is ultimately overturned by the courts or otherwise found to be inapplicable" (at para. 25 of both our prior award and *Mon Sheong*). In our view, there are several reasons that the reopener should not be so narrowly construed.

14. First, the purpose of the reopener was more broadly articulated than the Hospitals argue here. Paragraph 25 of the *Mon Sheong* award articulates that purpose as follows:

> The inclusion of a re-opener will allow this Board to issue its award in a timely manner, while ensuring that once the constitutional issue has been determined by a court of competent jurisdiction, depending on the outcome, both parties will have an opportunity to address how this Board ought to exercise its own jurisdiction in light of any changes to that legislative landscape.

The Stout board, in its prior award, articulated the scope of the re-opener in similarly broad terms providing that "both parties shall have the opportunity to address how this board of arbitration should exercise their discretion in light of any such legislative changes (at para. 41).

15. That broadly articulated purpose is then reflected in the terms of the re-openers, which do not specify any pre-determined outcome based on any "established pattern". Rather, the boards simply granted a re-opener on "compensatory proposals" (as in *Mon Sheong*) or "monetary proposals" (as in our prior award) in the event that Bill 124 was struck down.

16. In a case like *Mon Sheong*, addressing a pre-pandemic, pre-inflation collective agreement expiring in 2020, with a 25-year history of following sectoral comparators that had already been consistently decided, a focus on disruption to existing patterns makes sense. The circumstances before this board are very different. The Central Hospital Agreement for nurses is a lead agreement that does not follow in lock step with any other pattern agreement. This status is reflected in the many awards and settlements included and referenced in the parties' materials. As the Hospitals acknowledge at page 7 of their brief (albeit in support of the argument that we ought to follow certain outcomes outside the hospital sector), "[a]s of the date of this Chair's award, September 20, 2021, none of the centrally participating unions in the hospital sector had established a wage increase for the 2022 contract year. As such, as of the time of bargaining for the relevant renewal collective agreement, these parties were establishing a new pattern for the hospital sector specifically." Indeed, as of that date there was only a very small handful of

agreements in the long-term care sector for 2022, none of which were with the Association. As such, as of the time of bargaining for the relevant renewal collective agreement, these parties were establishing a new pattern for the hospital sector specifically.

17. It is also necessary to consider that by September 2021, Bill 124 had been in effect for almost 2 years. The legislation represented an extraordinary intervention that fundamentally altered the collective bargaining landscape in the healthcare sector and the broader public sector more generally. We cannot assume that its impact was limited to those employers to whom it directly applied, particularly in regard to the long-term care sector and nursing, where outcomes for nurses are heavily influenced by outcomes in the hospital sector more so than the other way around.

18. Bill 124's intervention into the field of collective bargaining has now been found to have violated the constitutional rights of the Association's members. It is incumbent on this Board to ensure that in seeking to replicate free collective bargaining, it is not simply re-entrenching collective bargaining outcomes that arose from that very breach.

19. Finally, in addressing the context for this reopener we cannot ignore the extraordinary impact that the Covid-19 pandemic has had on nurses in hospitals. In our initial hearing in this matter, we received substantial material and submissions from the Association emphasising what it described as a "crisis within a crisis" in nursing. There was, in the fall of 2021, an especially acute and growing need to attract and retain nurses in Ontario hospitals, in the face of extremely difficult working conditions. We cannot simply assume that bargaining outcomes from outside the hospital sector, that arose in 2019, prior to the pandemic, or those that followed in the early days and months of the pandemic, would have dictated how these parties would have settled the monetary provisions of their collective agreement, bargaining in the fall of 2021, for the year 2022/23, let alone now.

20. In our initial award, after referencing the guiding principles of interest arbitration, including the *HLDAA* criteria, we noted that the application of Bill 124 was a threshold issue that significantly limited what it was even possible for this Board to consider. We found that the Bill effectively rendered the application of the established principles of interest arbitration academic (at para 20). This Board, in the absence of Bill 124, is now able to properly assess these considerations and to give them their due weight. Our role under HLDAA, and the criteria set out therein, requires us to do so, and the terms of the Bill 124 re-opener have been crafted to permit us to now carry out our statutory role as intended.

Post Initial Hearing Events

21. The second issue that warrants careful consideration is whether this board ought to base its assessment of the parties' proposals only on information that was available in the fall of 2021.

*Hospital Submissions*

22. The Hospitals emphasize that this is not a hearing *de novo,* and that the Board's jurisdiction is limited to "making a determination as to what would have been the outcome on only the monetary proposals if Bill 124 had not existed at the time of its award". It is important to bear in mind, argue the Hospitals, that because of Bill 124, they have not had a full opportunity to pursue their own bargaining objectives, such as the kinds of non-monetary offsets they would be seeking in exchange for monetary improvements outside the Bill 124 envelope. As the reopener is limited to monetary items, it is now impossible for them to achieve those gains in this arbitration.

23. The Hospitals also argue that in the normal course, these parties bargain and arbitrate their collective agreements early, often before the expiry of the prior collective agreement. Settlements routinely include wage increases for future years absent specific knowledge of what will happen in those years. In this case, the bargaining process began with disclosure in March 2021 and the Hospitals argue that it culminated with our prior award in September 2021. In the Hospital's submission, to consider events that post-date September 2021 would not serve the replication principle and would confuse future rounds of bargaining which would typically be looking back at the same events.

24. Instead, the Hospitals argue that the replication principle requires that an identifiable, relevant, and clear pattern should be followed absent a material change that occurs "during the course of bargaining". The Hospital acknowledges that interest arbitration boards routinely consider new information, such as additional awards that are released after the hearing but before a final decision. But the Hospitals distinguish those circumstances, which are properly understood as part of the "continuum of collective bargaining", from the re-opener at issue here.

25. In support of their position, the Hospitals rely on *Board of Governors of the University of Calgary v Academic Staff Association of the University of Calgary* (2020) CanLII 67214 (Sims) ("*University of Calgary*"), *Covenant Health (St. Theresa's Villa) v Alberta Union of Provincial Employees (2020)* CanLII 91845 (Smith) ("*Covenant Health*"). The Hospital's also rely on *Council of Academic Hospitals of Ontario and The Professional Association of*

*Residents*, unreported, June 11, 2018 (Kaplan) for the proposition that if the reopener was intended to be determined based on collective bargaining trends at the time the reopener was heard, it would have said so.

26. The Hospitals also rely on *Participating Hospitals and OPSEU*, unreported, November 4, 2009 (Gray) (the "*Gray Award*"), for the proposition that even where boards of interest arbitration have considered post-hearing evidence, it should be cut off after a couple of months to allow for finality in the process.

*Association Submissions*

27. The Association argues that it is incumbent on the Board to consider the impact of skyrocketing inflation, and resultant settlements and awards, beyond the point in time when the initial submissions were made to this board. *HLDAA* requires this Board to consider the "economic situation in Ontario and in the municipality where the hospital is located". Inflation is a critical component of this consideration which, while "not determinative" is nonetheless a "very relevant factor" (see *University of Toronto and University of Toronto Faculty* Association, unreported, July 1, 2010 (Teplitsky). The failure to consider inflation in favour of following a pattern established before that inflation took hold, it argues, would result in nurses taking an effective pay cut, in circumstances where improvements are warranted.

28. The Association emphasizes that the notion that interest arbitrators should consider economic realities at the time of their decision making, including on this reopener, is one that cuts both ways. In *65 Participating Hospitals and CUPE, Re*, 1981 CarswellOnt 3551 (Weiler) (the "*Weiler Award*"), for example, the board ordered greater increases than were provided in an unratified settlement—a settlement that would normally be highly influential in an arbitrated outcome—because inflation had substantially increased in the interim. Conversely, in the *Gray Award*, the board departed from established bargaining patterns to award a smaller general wage increase, because by the time of its award there had been an economic downturn and a decrease in inflation. The Association emphasizes that in this case, to award the 0.75% supplementary increase proposed by the Hospitals would produce a ratio between wages and inflation that is completely out of step with the parties historical bargaining patterns.

29. In support of its argument that the Board ought to look to all of the evidence and comparators that are available for 2022, the Association also notes that the comparator data put forward by the Hospitals is "conspicuously lacking" for the year 2022. In contrast, there are a growing number of settlements and awards for the year 2022 that post-date our original award

in this matter, set out in a memorandum included in the Association's materials, that specifically account for rising inflation, and provide for general wage increases well above 1.75%.

30. The Association relies in particular on *Homewood Health Centre Inc. v United Food and Commercial Workers, Local 75* 2022 CanLII 49154 (ON LA) (Hayes)("*Homewood Health*"), in which the board rejected the notion that it ought to ignore the impact of inflation simply because the parties would not have been aware of its impact at the bargaining table. In the result, the board awarded 3% general wage increases for 2021, instead of 1.75%.

31. The Association also emphasizes the outcome in *Shouldice Hospital Limited and ONA*, unreported, June 29, 2022 (Kaplan). Shouldice is a private hospital that typically follows the ONA central hospital annual increases, and the board, on June 29, 2022, ordered general wage increases of 2%, 2.5% and 3% effective April 1 of 2020, 2021 and 2022 respectively, together with a substantial increase to employer contributions to the Group RRSP plan. The Association notes that the wages at Shouldice were already higher than the Hospitals', but the award nonetheless awarded increases that, at least implicitly, accounted for the impact of inflation.

*Analysis*

32. Having carefully considered the parties submissions, we have concluded that it is both appropriate and necessary to consider all of the information that is before us with respect to "the economic situation in Ontario" (s.9(1.1)3 *HLDAA*), including the impact of inflation. We have also concluded that it is appropriate to consider all of the settlements and awards before us in comparing the terms and conditions of nurses under the central hospital agreement to public and private comparators, as per s.9(1.1)4 of *HLDAA*.

33. In reaching our conclusion, we note that our jurisdiction under *HLDAA* is broadly framed, and clearly provides this Board with the jurisdiction to consider all information it considers relevant:

> **Duty of board**
>
> 9 (1) The board of arbitration shall examine into and decide on matters that are in dispute and any other matters that appear to the board necessary to be decided in order to conclude a collective agreement between the parties, but the board shall not decide any matters that come within the jurisdiction of the Ontario Labour Relations Board.
>
> **Criteria**

(1.1) In making a decision or award, the board of arbitration shall take into consideration all factors it considers relevant, including the following criteria:

1. The employer's ability to pay in light of its fiscal situation.

2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.

3. The economic situation in Ontario and in the municipality where the hospital is located.

4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.

5. The employer's ability to attract and retain qualified employees.

34. Notably, *HLDAA* stands in contrast to s.101 of the Alberta *Labour Relations Code*, referenced in *University of Calgary* and *Covenant Health*, which limits consideration of comparators and economic conditions "for the period with respect to which the award will apply".

35. Fundamental to the Hospitals' argument on this issue is the notion that this Board's decision on the reopener does not constitute, as in a typical interest arbitration, the end point of the "continuum of collective bargaining", and that we are effectively frozen in time in the fall of 2021. As is evident in many of the authorities cited by the parties, the decision in *Shouldice* being just one example, arbitrators under *HLDAA* routinely make decisions that are backward looking, awarding collective agreements with terms that either have or are soon to expire. As the Hospitals appropriately acknowledge, arbitrators in those cases routinely look to outcomes that occurred well after the parties ceased bargaining directly with each other and remitted the matter to interest arbitration.

36. In most of these cases, where comparator bargaining patterns have previously been well established, there is little or no reason to depart from those patterns. But where there have been significant intervening events (in this case a global pandemic, a staffing crisis in nursing, soaring inflation, and freely bargained and awarded outcomes that depart from the asserted pattern) arbitrators exercising their jurisdiction under *HLDAA* will have regard to those considerations (see, e.g., the *Weiler Award*, the *Gray Award*, *Homewood* and *Shouldice*). It is in addressing this well-grounded approach to interest arbitration that the Hospitals seek to distinguish this reopener as no longer part of the "continuum of collective bargaining".

37. The problem we find with the Hospitals' argument is that it does not account for the fact that by virtue of the unconstitutional intervention of Bill 124, the first opportunity that these parties had to engage in meaningful collective bargaining was after November 29, 2022, when the Court issued its decision striking down the Bill. As the Association put forward in its original presentation, it pursued bargaining proposals that fell outside of the Bill 124 envelope. But the Hospitals, not unreasonably at the time, refused to engage on those proposals because they could not agree to anything beyond what was permitted under Bill 124. That was the beginning and the end of monetary "bargaining", subject to discussions around how to allocate the residual of the annual 1% increase to total compensation (in our case to premiums), until the Court decided the constitutional issue.

38. After the Court's decision, however, the parties did meet to bargain the reopener on February 27, 2023, and again on April 2, 2023. This was the first time the parties were able to bargain monetary compensation unhindered by unconstitutional legislation. While this bargaining took place, for reasons that were beyond either party's control, later in the collective agreement cycle than these parties typically bargain, one cannot describe this as anything other than the continuation of collective bargaining. And that bargaining took place in the context of high inflation over the period leading up to and covered by this award, a nursing staffing crisis that was already apparent in 2021, and in circumstances where more recent outcomes for the period covered by this award in the health care sector, broader public sector and private sector, do not reflect an established pattern of 1.75%. The parties were not able to reach an agreement on April 2, 2023, they moved expeditiously to litigate their differences, and this Board is moving expeditiously to decide the issue. This is not a case like in the *Gray Award*, where the parties are seeking to make additional post hearing submissions such as to preclude any finality to the process.

39. We do, however, wish to acknowledge the Hospitals' argument that in the normal course it could seek to extract non-monetary concessions in exchange for monetary improvements, and that the terms of the monetary re-opener preclude it from doing so here. The absence of any such *quid pro quo* is clearly a factor we must take into consideration in assessing the parties' proposals and making our award. But the absence of such *quid pro quo* is not a reason to ignore evidence that speaks directly to the application of the guiding principles of interest arbitration.

40. Neither do we accept that in accounting for inflation and bargaining outcomes that post-date our prior award we are confusing issues for future bargaining. Parties and boards of arbitration are always cognizant of and

account for the outcome of the parties' prior agreements and awards, which form the basis upon which they bargain in subsequent rounds. Both parties are able to account for everything we do here in addressing what ought to happen next. Having now gotten through the upheaval of Bill 124's imposition and then retraction, the parties are free to return to their historical practice of bargaining early agreements, and that is what they are doing. It is not this Board's decision to consider all of the evidence before it that disrupted the parties' typical approach to bargaining; it was Bill 124.

41. Finally, in reaching our decision we do not take issue with the assertion that interest arbitrators are, in the usual course, "followers and not leaders", as articulated in the *TTC* award. In that case, however, the parties had long-established and agreed-upon comparators that invariably resolved their collective agreements. The board found that there was nothing before it to warrant departing from those dispositive outcomes. That is a very different conclusion from that which the Hospitals urge upon us here, which is that even in circumstances where the sectoral pattern has never been established outside of the constraints of Bill 124, and even if there are outcomes before us that warrant a departure from prior awards and settlements, we should nonetheless ignore them because they were not available to us in September 2021. Such an approach would not, in our view, replicate real-world free collective bargaining.

The Parties' Proposals

42. The Hospitals propose that this Board order a 1.75% general wage increase (i.e., an additional 0.75%), and nothing more. The Association proposes that the Board order a 3% general wage increase (i.e., an additional 2.0%). This proposal is made in conjunction with its proposal to compress the 25-year RN grid at both the top and the bottom, resulting in immediate and differential increases for nurses, depending on where they sit on the grid, but exceeding double digits, retroactive to June 8, 2021. It also proposes the introduction of a standardized and similarly compressed wage grid for NPs. Further, the Association proposes benefit improvements to Pregnancy and Parental Leave, Shift Premiums, Meal Allowance, Extended Health Care Benefits, Vacations, and the introduction of an isolation pay benefit. Finally, the Association proposes the introduction of a 10-year long service pay adjustment outside of the grid.

43. In arriving at our award, we have had regard to the well-established principles of interest arbitration and all of the *HLDAA* criteria, always with the overarching goal of arriving at an outcome that best replicates what these parties would have done in free collective bargaining.

Across the Board Increases

44. The comparators put forward by the parties, including those settlements and awards at 1.75% and those both above and below it all merit weight in our consideration, allowing also for the fact that the Central Hospital Agreement for nurses is not one that follows in lockstep with any other. On the facts of this case, however, there are two *HLDAA* criteria that we find warrant significant weight.

45. The first is the economic conditions in the province, and in particular the high rate of inflation leading up to and over the term of this collective agreement. As noted in the awards cited above, inflation is not on its own a determinative factor, and in periods of high inflation, parties cannot generally expect to immediately and fully recover from the erosion of their wages that results. But it is both an economic factor that this Board is required to consider, and one that drives the real-world collective bargaining outcomes that we are seeking to replicate. In 2021 there were already signs that the economy was moving in this direction and subsequent events, awards and settlements have borne out the need to address this consideration.

46. The second is the indisputable staffing crises in nursing, dealt with at length in the Association's materials, that has broadly impacted nursing in Ontario's hospitals. Recruitment and retention are critical considerations that we cannot ignore in rendering our award.

47. In applying these considerations, however, we must also be mindful of the principle of total compensation and the incremental nature of collective bargaining. As the Hospitals argue, when our prior award and the previous board's awards are considered in their totality, the Association has already obtained substantial benefit improvements for its members, including benefits that exceed other hospital comparators, such as double time for callback and unlimited mental health. The Association has not identified significant comparators for the period of this award that would warrant our making additional benefit improvements at this time, particularly in light of what we find it is appropriate to order on wages.

48. Where we find that the Association has made a compelling case is with respect to the award of a 3% general wage increase, and with respect to grid compression, albeit to a more modest extent than proposed by the Association.

49. It bears emphasising that even were we to limit our consideration to the information available in 2021, it is clear that a 1.75% increase for hospital nurses would not have been sufficient. Such an increase would not have

addressed the staffing crisis or reflected the demand that existed for nurses outside of the artificial constraints of Bill 124, even at that time. But this award is for the period April 1, 2022 to April 2023. The staffing crisis continues and the rate of inflation leading up to and over the course of this term is nonetheless substantially higher than it was in September 2021. It is in an entirely different realm than it was prior to and in the earlier stages of the pandemic when parties were bargaining annual wage increases of less than 2%.

50. In our view, the award in *Shouldice* is particularly instructive in identifying what a replicated outcome looks like here. Obviously, we do not suggest that a single private hospital is a determinative comparator for nurses across the Participating Hospitals. But as an agreement outside of Bill 124 that covers nurses for the full Bill 124 moderation period applied to the instant parties, it is nonetheless telling. In that case, the board found that there was no issue with respect to recruitment and retention and that wages already exceeded the wages for nurses in the public system. Nonetheless, having regard especially to job market forces and the fact that the board was not constrained by Bill 124, the Board applied the normal principles of interest arbitration and ordered general wage increases that exceeded those awarded by the Stout board for the years 2020 and 2021, and of 3% for the 2022 year that is the subject of our award. It also awarded improvements to the retirement plan by both substantially increasing and making mandatory employer contributions to the group RRSP.

51. The award in *Homewood*, also a private hospital outside the ambit of Bill 124, is also instructive, both as a relevant arbitrated outcome, but also because it then gave rise to a voluntary settlement with the Association for nurses. In that case, the Board was dealing with a collective agreement for the period July 17, 2020 to July 16, 2022, roughly corresponding with the two years prior to the year we are awarding here. Decided in June of 2022, the Board explicitly held that while it would otherwise have ordered 1.75% for year two of the agreement, having regard to the extraordinary impact of inflation it was appropriate to order an increase of 3.0% effective July 17, 2021. Following this award, the Association bargained for nurses at Homewood for the one-year period commencing April 1, 2022, and the parties voluntarily agreed to 3.0% across the board wages increases effective April 1, 2022.

52. While we have highlighted these two awards, we note that the Association has included in its materials what is clearly a growing number of outcomes, including in the broader healthcare sector, exceeding, in a variety of ways, the 1.75% increase sought by the Hospitals, and awarding general wage increases of 3% or more. In our view, in all the circumstances, including

having regard to inflation and the market forces impacting nurses in particular, and the need to recruit and retain nurses in Ontario's hospitals, we find it appropriate to grant the Association's proposal for a 3% general wage increase (i.e., an additional 2% above what this board has already ordered), retroactive to April 1, 2022.



The RN Wage Grid

53. We also find that the Association's proposal to compress its 25-year RN wage grid is well-founded. The 25-year grid is an extreme outlier in the Ontario hospital sector. Historically, a 25 Year rate did not form part of the RN grid. It was awarded at interest arbitration in 2005, in an agreement covering the period April 1, 2004 to March 31, 2006 (*Participating Hospitals and Ontario Nurses' Association*, unreported, September 8, 2005 (Keller) and Supplemental Award dated November 14, 2005). The Keller board found, at page 8, that there was a legitimate recruitment and retention problem at that time, including a need to retain senior nurses, and that factors such as wages, allowances, and benefits, while not a silver bullet, were part of the solution and one of the few solutions that could be addressed through interest arbitration. In addition to awarding two years of 3.0% general wage increases, described as at the high end of outcomes at the time, the board also awarded an additional 2% increase for nurses with 25 or more years' experience. This aspect of the award was then specifically articulated as a 25 Year step on the grid in the November 14, 2005 Supplemental Award. We note that as a result of a subsequent interest award, the differential between the 8 Year and 25 Year steps was reduced to 1.75%, as it currently exists, but the step has remained in the grid since.

54. As addressed in the Association's materials, neither party had proposed to create a 25 Year step on the grid in 2005. In fact, the Hospitals had proposed to compress the 8-year grid to 6 years. The Association rejected this proposal at the time because of the way it was to be implemented, in favour of pursuing a *status quo* grid with greater (5%) across the board increases.

55. What strikes this board, is that as a means of promoting the retention of experienced and highly valued nurses, the inclusion of a 25 Year step, which serves as an incentive for only the most senior nurses, does not address the current staffing crisis. It was implemented some 18 years ago, and even nurses who were beginning their careers at that time, let alone the many now experienced nurses who followed them, will not see its benefit for years to come. In our view, the Association has made a compelling case that more is now required.

56. The Association also argues for compression of the grid at the bottom end, effectively eliminating the first three rates, making the current 3-year rate the new start rate, followed by six annual steps to the top rate at six years. However, in addressing the Association's proposals for grid compression, we must account for the total compensation in our award. We must also be mindful that while this is not a one-year collective agreement, we are effectively determining the appropriate monetary increases for a single year.

57. In a mature bargaining relationship such as this one, collective bargaining is generally an incremental process. Thus, while the Association's proposal for grid compression is well-grounded, we must find the outcome that best reflects what these parties would have freely bargained for the year under consideration. In doing so, we must recognize the principles of total compensation, incrementalism and comparability, while also meaningfully addressing the problem of recruitment and retention. Balancing these considerations, we find it most likely that the parties would begin by targeting the most anomalous aspect of the grid. To this end, we find it appropriate to compress the grid at the top end, by merging the 25 Year rate into the 8 Year rate and eliminating the 25 Year rate. This change will provide an immediate benefit to a substantial portion of the bargaining unit—those who have more than 8 but less than 25 years of service—while also providing a meaningful retention incentive for those nurses with less than 8 years of service who will see the benefit much earlier in their careers.

58. The board is aware that there may be some wage grids in local appendices that are subject to Article 19.01(d), which refers to the maintenance of "differentials in the wage rates". As the board has not been provided with these grids and we are amending the central wage grid, and out of an abundance of caution, we remain seized in the event that there is any dispute between the parties as to whether the merger of the 25 Year step into the 8 Year step should impact those rates.

59. In our view, with these changes, we have exhausted the total compensation available in this single year. Any further compression of the grid, changes to the complex landscape of highly differential NP grids across the different hospitals, introduction of other forms of retention bonus or benefit improvements must be addressed by the parties in future rounds of bargaining.

## Terms Awarded

For all of these reasons, we award the following terms:

- Retroactive to April 1, 2022, amend RN wage grid to merge 25 Year Rate into 8 Year Rate and eliminate 25 Year Rate.

- Retroactive to April 1, 2022, apply a 3% across the board wage increase (i.e., an additional 2% on top of the 1% increase provided for in our prior award).

60. We remain seized in accordance with subsection 9(2) of *HLDAA*.

Dated at Toronto, Ontario, this 25th day of April 2023

"*Eli Gedalof*"

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Eli A. Gedalof, Chair

"*I dissent*"

_____

Brett Christen, Hospitals Nominee

"*I dissent*"

_____

Philip Abbink, Association Nominee

**Ontario Nurses' Association & Participating Hospitals**
**Bill 124 Re-opener for April 1, 2022 to March 31, 2023**
**Dissent of ONA Nominee**



1. I agree entirely with the Chair's decision regarding the scope of the reopener and the appropriateness of considering evidence and information about events after the initial hearing of this matter in 2021. I disagree, however, that, "… with these changes, we have exhausted the total compensation available in this single year." (para 58).

2. Nurses continue to lose money as their wages and compensation fail to remotely keep pace with inflation. Arbitrator Stout awarded a total of 2% in wage increases for the period of April 1, 2021, to March 31, 2022. Inflation was slightly under 3.8% for that period of time. The result is that the purchasing power of nurses' wages decreased over that year.

3. Similarly, the compensation awarded by the Chair in respect of 2022-2023 does not even remotely keep pace with inflation. I agree that it was appropriate to provide an across the board increase of 3%, which is what ONA proposed. I also acknowledge that compressing the grid by removing the 25-year step, and merging it with the 8-year step, provides additional increases to those nurses between 8 years and 25 years. But even for those nurses, facing inflation in the order of slightly less than 7% over this period of time, the value of their wages in real terms has declined as a result of this award.

4. It would have been entirely appropriate to make further adjustments to the grid, and provide other increases in compensation, in this economic climate. Virtually all of the statutory criteria favour a more significant increase in compensation.

5. As the Chair has observed, we are bound to decide this matter based on the HLDAA criteria. There is no argument that the employer is unable to pay. There was no argument that more significant increases to compensation would result in a reduction in services. To the contrary, the evidence indicated that with a dire nursing shortage, if Hospitals are unable to recruit and retain nurses, there is a risk that services will be reduced or at the very least the quality of those services will be undermined by chronic staffing shortages. Beds do not care for patients, nurses do. There is immense competition for nurses both within Ontario, but also across this country between provinces, and with other jurisdictions such as the United States.

6. The overwhelming economic context is the highest inflation seen in a generation. There is no economic consideration tilting the balance in the other direction. This is the economic reality facing nurses today and over the past year. Their wages are worth less.

7. The most relevant comparators point to the trend of increasing compensation to account for inflation. I agree with the Chair that *Shouldice*[3], *Homewood*[4], and ONA's subsequent agreement with the Homewood, support a 3% increase. I do note that in addition to that increase, nurses at *Shouldice* were also awarded a very significant increase in the employers' contribution to their RRSPs, meaning that total compensation was approximately 5% in the third year.

8. The core concern, which does not appear to be disputed by the parties, is the need to recruit and retain nurses.

9. All of the HLDAA criteria which apply to the present case weigh heavily in favour of a very significant increase in compensation. I acknowledge that the Chair has made significant steps in this regard, but he has simply not gone nearly far enough.

10. In terms of replicating free collective bargaining, it is clear that with respect to the professional services of Registered Nurses, it is a seller's market. In free collective bargaining, what drives agreements are the economic and human resourcing realities. IN the present matter, the strongest driving factors would likely be the need to recruit and retain staff, massive inflationary pressures on incomes, and the fact that nurses can object with their feet, which they are doing already. Ontario nurses are some of the poorest paid in the country, with some of the highest nurse to patient ratios. They can, and are, going elsewhere, or they are quitting.

<u>Recruitment & Retention; Maintaining Services:</u>

11. These two HLDAA criteria are intertwined in this case. If Hospitals cannot find sufficient staff, there will be an impact on services. This is precisely what was seen over the course of the pandemic with increasing wait times, hallway medicine and surgical backlogs. Rather than increased compensation risking a reduction in services, it is precisely a meaningful increase in compensation which is required to protect those services.

12. The *Ontario Health Sector: Spending Plan Review*, from the Financial Accountability Office of Ontario considers the impact of demographic changes and population growth, and the government's plan to build new capacity in the system. The conclusion is that, "These vacancies are a result of the number of positions in the health sector growing faster than the number of workers."

13. The OHA's own publication, "Practical Solutions to Maximize Health Human Resources" concludes that there is a need for recruitment and retention:

> Given the efficient staffing model that was the norm prior to the pandemic, any vacancies now need to be filled in real-time to ensure that there are no service delivery gaps. An increase in turnover coupled with the need to fill net new positions in a competitive environment poses a real challenge to providing care.

[3] *Shouldice Hospital Limited v ONA*, (Kaplan) 2022 CanLII 56317 (ON LA)

[4] *Homewood Health Centre Inc. v United Food and Commercial Workers, Local 75*, 2022 CanLII 46392 (ON LA)

> Moreover, this has a large impact on the day-to-day workload of existing health care workers who grapple with these demands. Providing immediate funding to bolster staffing models would create more manageable workloads for staff, help increase retention rates, and allow hospitals to better respond to patient needs.
>
> At a minimum, as there are new investments in capacity in the near term, there also needs to be corresponding attention paid to the human resource needs to staff these new beds. Ontario's hospitals are grateful for the recent government support for the creation of 3,100 additional beds as well as additional announcements for capacity increases, which will translate into the need for additional health care workers over and above existing staffing levels. However, Ontario already has the lowest nurses per capita in the country and there is a need to immediately bolster staffing models to create more manageable workloads for staff, help increase retention rates, and allow hospitals to better respond to patient needs. To respond to recent and announced capacity increases and to develop more resilient staffing models, the OHA is recommending funding and government policy support to enable the hiring of at least an additional 10,000 registered nurses and 3,500 registered practical nurses as well as other critical health care workers over the next five years as an immediate step forward at this time.

14. This publication carries on to lament the impact of Bill 124, and comment that, "it has been raised as a significant concern impacting health care worker morale and potentially one of several factors leading to health care worker recruitment and retention challenges."

15. I agree entirely with the Chair that, "It is incumbent on this Board to ensure that in seeking to replicate free collective bargaining, it is not simply re-entrenching collective bargaining outcomes that arose from that very breach." Very unfortunately, despite acknowledging that recruitment and retention remains an issue, the OHA's position essentially seeks to rely on patterns established before the pandemic, prior to rampant inflation, and in the context of unconstitutional wage restraint legislation. Also unfortunately, it is hard to understand how awarding increases which are a fraction of inflation will meaningfully address these problems.

16. The evidence in this hearing clearly demonstrated that difficulties with staffing have undermined the provision of healthcare services. Both of these criteria weigh strongly in favour if significant increases in compensation.

<u>The Economic Context:</u>

17. The real economic impact of Arbitrator Stout's award, and the present award, are that in terms of real purchasing power, nurses' wages are shrinking. Because of

inflation, real wages have been declining[5]. This is a reality to which any resident of Ontario can attest – everything is becoming more expensive but wages are not keeping up. This is the undisputed reality of the economic situation in Ontario, and should have been the driving force in determining the appropriate increases to compensation. I strenuously disagree with the OHA's argument that there is anything radical or non-normative in significant increases given this context. In real terms, an increase in compensation of around 4% in 2021-2022, and around 7% in 2022-2023, would have simply ensured that compensation kept pace with inflation.

18. I do not necessarily disagree that compensation is likely only one of the tools available to improve recruitment and retention, and a somewhat imperfect tool, but the fundamental fact remains that people go to work because they get paid, and will ultimately decide whether their compensation is sufficient to engage in a profession, or remain in it.

19. The importance of inflation in respect of determining compensation is discussed in a number of the awards referenced by the parties. In 1981, Arbitrator Weiler was faced with deciding an interest arbitration after membership failed to ratify the agreement[6]. The Chair observed[7]:

> The ideal towards which interest arbitration aims is to replicate the results which would be reached in a freshly-negotiated settlement. The negotiators at the bargaining table typically work towards a figure which will protect the worker against unanticipated inflation and provide real income gains to the extent these are permitted by rising productivity in the economy. It is important to emphasize that the rise in the cost of living — whether measured by the Consumer Price Index or otherwise — is not the be-all and end-all of rational wage determination. If there is real per capita growth in the economy, wage gains can and do exceed the rate of price inflation.

20. Not only has inflation been high, this has also been accompanied by a strong economic rebound from the pandemic, with Ontario's GDP growing around 3.7% in 2022. In the context of high inflation, Arbitrator Weiler also explained why lock-step deference to comparators is inappropriate[8]:

> … The fact is that all of these negotiations are conducted under the shadow of binding arbitration as the ultimate mechanism for impasse resolution. For arbitrators to religiously follow precedents within that sector would be a rather incestuous reasoning process, since these precedents are themselves fashioned by arbitrators, or by negotiators who are anticipating what an arbitrator might do to

[5] See ONA's Exhibit 15, "Pressure Cooker: Declining real wages and rising inflation in Canada during the pandemic, 2020-2022".

[6] *65 Participating Hospitals and CUPE, Re*, (Weiler) 1981 CarswellOnt 3551.

[7] *65 Participating Hospitals and CUPE*, at para 8.

[8] *65 Participating Hospitals and CUPE*, at para 12.

> them. Thus, the parameters of change in the Hospital system as a whole must be drawn from and be compatible with the external world of collective bargaining in the Province.

21. The arbitrator went on to note that at the time the parties negotiated, inflation was around 10.7%, but that at the time of the hearing, had risen to over 12%. He considered that to be a significant increase, and he awarded additional increases above what had been agreed in order to offset inflation, and very close to the rate of inflation at the time[9].

22. A similar situation arose for Arbitrator Gray in respect of the recession in 2009, and the questions was what impact the downturn would have had on bargaining had negotiations continued rather than proceeding to interest arbitration[10]. The Board determined that the recession was indeed relevant to compensation because one of the reasons for wage increases was to offset inflation, and in the context of a recession, that meant that more modest increases were warranted given lower inflation[11].

23. As stated by Arbitrator Shime in relation to university academics: "In that regard I need only briefly repeat what I have said in another context, that is, public sector employees should not be required to subsidize the community by accepting substandard wages and working conditions."[12] This logic applies with even more force to nurses who have just endured a pandemic, been called heroes, and had their wages frozen by the government.

24. This observation was endorsed by Arbitrator Teplitsky in an award relating to the University of Toronto[13], who then issued an award consistent with inflation.

Comparison:

25. The most relevant recent comparators are indeed *Shouldice* and the Homewood (including both Arbitrator Hayes' decision and ONA's voluntary agreement). But, those establish a floor, rather than a ceiling. While inflation was high, the durability of high inflation was unknown. There was no significant evidence of issues with recruitment and retention in respect of either Hospital.

26. In the *Shouldice* decision, a significant increase in RRSP contributions was also awarded, with the result that the increase in total compensation was well above 3% for 2022-2023. Prior to the award, the employer contributed 5% up to $2,500 annually, and after the award it was 7% up to $5,000. At the very least, this is an additional 2% for a total of 5% in the third year of that contract. And, that was on top of what were already more significant increases in the first two years than what was achieved with respect to the Participating Hospitals, when wages at *Shouldice*

[9] *65 Participating Hospitals and CUPE*, at para 34.
[10] *Participating Hospitals and OPSEU*, (Gray), November 4, 2009 (unreported).
[11] *Participating Hospitals and OPSEU*, (Gray), at para 59).
[12] McMaster University v. McMaster University Faculty Association, (Shime), July 4, 1990 (unreported).
[13] *University of Toronto v. University of Toronto Faculty Association*, (Teplitsky), October 5, 2010 (unreported).

were already higher than those in the central agreement. Over the life of the agreement, nurses at *Shouldice* achieved 2%, 2.5% and 5% increases in total compensation, totalling 9.5% over those three years. In the first two years of the ONA central agreement subject to the reopener, the increases were 1.75% and 2%, plus unlimited mental health benefits at the very end. The present award provides for an additional 3% in wages, and approximately 0.68% by compressing the grid. This is significantly less than what was awarded for ONA RN's at Shouldice.

27. In the *Homewood* decision, Arbitrator Hayes also noted that because it is a private Hospital, there are also inflationary impacts for the employer (para 30), which tempered how far he was willing to go in respect of increasing wages due to inflation. There is no such balancing here, where the Participating Hospitals are publicly funded, and inflation is likely to increase government revenues, in combination with a strong economic rebound from the pandemic.

28. As a result, comparators also strongly support significant increases to compensation, and increases above what has been awarded.

Preferred Disposition:

29. I agree with the Chair's decision to provide the general wage increase proposed by ONA based on the above discussion.

30. I also agree with the Chair's decision to compress the grid, merging the 25-year step into the 8-year step. I will add, in respect of compressing the grid, that inter-provincial comparators do not appear to be entirely consistent. But, with respect to other comparable positions covered by agreements between the Participating Hospitals and other unions, the comparators are almost perfectly consistent in that a 25-year step is almost unheard of outside of RN's.

31. This, however did not go far enough. It does go some way to address issues of retention for those with between eight and twenty-five years of seniority. I would have also provided for some amount of long-service bonuses similar to those enjoyed by male-dominated professionals such as firefighters and police, to ensure an incentive for nurses to remain throughout their careers.

32. Only adjusting the top end of the grid, however, does little to resolve the issues of recruitment. That issue must also be addressed, and that requires significant adjustments to the bottom end of the grid. It is essential that not only is nursing generally a financially attractive profession, but that working in public sector Hospitals is an attractive nursing practice. The same logic applies to providing improvements to pregnancy and parental leave, so that nurses can both have a family, and pursue their careers with out penalty.

33. No doubt wages and compensation are not the only way to address recruitment and retention. That can also be dealt with by way of improved benefits and

improving work-life balance. Improvements to vacations, as proposed by ONA, would improve work-life balance.

34. While we do welcome the recent award of unlimited mental health coverage, this has only been in place since Arbitrator Stout's most recent award. In effect, nurses have had very limited increases to health and welfare benefits from 2020 until the present, and in those circumstances, additional improvements are warranted.

35. Because there are so few NP's in comparison to the number of RN's covered by this agreement, the increase in total compensation by awarding a standardized grid at the highest rates would have been very small, in the order of 0.10%. All other RN classifications found in Local Appendices are pegged against the central RN grid by virtue of Article 19.01(d). As a result, the NP classification appears to be the only one covered by this agreement that is not centralized either directly or indirectly.

36. In respect of isolation pay, it is hard to imagine a stronger case of demonstrated need following the pandemic. Awarding that provision would have improved the life of nurses, protected patients, and likely improved staffing outcomes in the long-run. Although there is a theoretical cost to this, as the impact of the pandemic declines, it is less likely to be accessed. It would be incredibly unfortunate if we were to face another pandemic in the future without providing income replacement to those who are required to stay away from work for the health and safety of their colleagues and patients. This issue simply cannot be deferred until it is again a problem. It needs to be addressed before it is again a problem, and should have been done now.

37. Perhaps the criticism of this dissent will be that everything cannot be done in a single round and that incremental changes are the norm. While it may not be possible to do everything in a single year, vastly more could have been done, and should have been done, based on the statutory criteria. The problem with incrementalism is that it punishes employees and provides employers with an unjustifiable windfall through delay. Over the past several years, there was nothing incremental about the reality of the pandemic or inflation. Nurses faced those challenges in real time. Incrementalism demands that they continue to subsidize the public and the public purse, at the expense of their pocketbooks and their welfare, while providing the very services that are so essential.

April 25, 2023

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## Dissent

I respectfully dissent from the Chair's Award and the reasoning and analysis that led to the items awarded.

In my view, the items awarded by the Chair are excessive. This is particularly the case given a bargaining context in which the hospitals had no opportunity to bargain non-monetary priorities in exchange for the monetary gains achieved, having regard to the monetary and non-monetary improvements achieved by the union in the original Stout and Gedalof awards, the significant gains made by the union pursuant to the recent award of Arbitrator Stout, and where the award is a one-year settlement.

As noted by the chair, rising inflation, was one key factor he considered in reaching his award. The Chair's award was also very clearly the product of several specific factors unique to nurses.

In addition, the Chair's award is also clearly motivated by the ongoing shortage of nurses in the hospitals (the Chair repeatedly references "staffing crisis" and "recruitment and retention" throughout the award, including at paragraph 46).

While these were valid issues for the Chair to have considered, his analysis and reasoning that led to the excessive award are deeply flawed.

As noted in the Award at paragraph 6, the parties have requested that the Board's award be provided on a highly expedited basis. As such, this dissent addresses only some of my many concerns with the Chair's Award and outlines these concerns in a summary manner only.

The Award is being issued 19 months after the prior award was issued. I disagree with the Chair's reasoning that led him to dismiss the Hospitals' argument that this Board should limit its review to facts in existence at or about the time of the prior award. The crux of the Chair's reasoning is found at paragraph 37 where he finds that "the first opportunity that **these parties** had to engage in meaningful collective bargaining was after November 29, 2022 (emphasis added)" when Bill 124 was struck down. This is a complete fiction. The Hospitals had no such opportunity. The re-opener language was for monetary issues only. Unions do not generally give monetary

concessions to obtain other monetary gains. Rather to achieve significant monetary gains, they give non-monetary concessions. Here, where the re-opener was for monetary issues only, the hospitals had no ability to advance any non-monetary items in the subsequent bargaining. Accordingly, there was no "meaningful" opportunity for the Hospitals to bargain as stated by the Chair and, in fact, no meaningful bargaining occurred. The Union simply maintained its lengthy roster of monetary items and proceeded to arbitration.

Further, even if the Chair thought it appropriate to consider events subsequent to the prior award and up to the present, he was obligated to consider all relevant circumstances that arose during this period. These include the waning of the pandemic over the period in question, the increase in the availability of effective vaccines for both nurses and the public, the creation of effective COVID treatments, the downward trend in inflation during the first quarter of 2023 (a period covered by the Award), and the $5000 retention payment received by full-time nurses in 2022. None of these factors are given any weight by the Chair.

I also disagree with the Chair's suggestion at paragraph 17 that outcomes for nurses not covered by Bill 124 were negatively impacted by Bill 124 notwithstanding that the legislation had no application to them. The Chair makes this comment as a means of diminishing the relevance of awards from 2020 and 2021 which supported the Hospitals' position. If the Chair was correct, one would have expected the Boards deciding these cases to have expressly stated that the existence of Bill 124 caused them to award a lesser wage increase than they otherwise would have. The Chair did not cite any award where a Board made such a statement and as far as I am aware, none did so. The Chair's comments in this paragraph are simply conjecture.

Throughout the Award, the Chair examines the impact of Bill 124, and the subsequent declaration that it was unconstitutional, upon the Union. The Chair fails to recognize, however, that the Hospitals have been negatively impacted by these events and also that arbitrators have been unable or unwilling to do anything to alleviate those negative impacts. When Bill 124 was in effect, the Hospitals' monetary and non-monetary demands were not considered at all by interest arbitration boards. When Bill 124 was overturned, the re-opener processes did not enable the Hospitals to advance any non-monetary items. These facts should have been

considered and factored into the Award to a much greater extent than they apparently were (there is a reference at paragraph 39 to the Hospitals' inability in the re-opener process to advance non-monetary proposals) in the same manner that their impact on the union was analyzed. In effect, there have been three years where the union has made significant gains at arbitration while the Hospitals' proposals have not even been reviewed or considered.

The compression of the wage grid was awarded by the Chair to address recruitment and retention. There was no empirical data before the Board which indicated that retention was particularly an issue among nurses in the 8 to 25 year category. Despite this lack of evidence, the 25 year rate is being revoked and instituted as a new 8 year rate at significant cost to the Hospitals. The change is not incremental and should not have been awarded.

Over the years, the Hospitals have also sought amendments to the collective agreement to improve recruitment and retention, including the elimination of severance packages for nurses not subject to layoff and the modification of antiquated work assignment restrictions. Similar to the Chair's award, these recruitment and retention proposals should be given serious consideration by future arbitration boards.

April 25, 2023

"*Brett Christen*"

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Brett Christen, Hospitals Nominee

## APPEARANCES

For the Association

Kayla Sanger, Legal Counsel (Interest Arbitration)
Wassim Garzouzi, Legal Counsel
Bernadette Robinson, Interim President
Angela Preocanin, First Vice-President
Alan Warrington, RN, Chair, Hospital Central Negotiating Team
Andrea Kay, Chief Executive Officer
Steve Lobsinger, Senior Executive, Negotiations/Chief Negotiator
Marilynn Dee, Manager II-Negotiations Hospitals
Patricia Carr, Manager II-Negotiations LTC/Community
Dave Campanella, Labour Relations Officer (Economist)

For the Hospitals

David Brook, Vice President, Labour Relations & Chief Negotiations Officer
David McCoy, Director, Labour Relations

# TAB 17

**IN THE MATTER OF AN INTEREST ARBITRATION**

**Between:**

**The Participating Hospitals**

**(Represented by the Ontario Hospital Association)**

**and**

**ONA**



| | |
|---|---|
| **Before:** | William Kaplan, Chair<br>Brett Christen, OHA Nominee<br>Phil Abbink, ONA Nominee |
| **Appearances** | |
| **For the OHA:** | Craig Rix<br>Hicks Morley<br>Barristers & Solicitors |
| **For ONA:** | Wassim Garzouzi<br>Julia Williams<br>Raven Law<br>Barristers & Solicitors |

The matters in dispute proceeded to a hearing in Toronto on May 2 & 3, 2023. The Board met in Executive Session on June 15, 2023.

## Introduction

This interest arbitration was consensually convened to settle the terms and conditions of the central collective agreement between the Participating Hospitals – represented by the Ontario Hospital Association (OHA) – and the Ontario Nurses' Association (ONA). Notice to bargain was given on January 5, 2023. Bargaining took place in January and February, with mediation following in March. The matters in dispute proceeded to a hearing held in Toronto on May 2 & 3, 2023. The Board met in Executive Session on June 15, 2023. ONA represents approximately 65,000 Registered Nurses (RNs) and Nurse Practitioners (NPs) – both full- and part-time (49,580 FTE) – and other health professionals providing frontline health care at 127 Participating Hospitals located across Ontario, rural and urban, teaching and specialist, and they range in size from small – less than 10 nurses – to very large – more than 3000 nurses. This award will set the terms and conditions of the twentieth central collective agreement between these parties.

## Statutory Criteria

*The Hospitals Labour Dispute Arbitration Act* (*HLDAA*) governs these proceedings and sets out the specific criteria to be considered:

> 9 (1.1) In making a decision or award, the board of arbitration shall take into consideration all factors it considers relevant, including the following criteria:
>
> 1. The employer's ability to pay in light of its fiscal situation.
> 2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
> 3. The economic situation in Ontario and in the municipality where the hospital is located.
> 4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
> 5. The employer's ability to attract and retain qualified employees.

The parties have agreed that a *HLDAA* term applies: April 1, 2023 to March 31, 2025.

**ONA Submissions**

**Summary**

In ONA's view, two issues were front and centre in this interest arbitration, and they were inter-related: the need to address a severe RN shortage and to catch up on overall compensation that has fallen behind over the past decade, a situation made even more untenable by continuing high inflation and its corrosive impact on spending power. The solution to these problems included long overdue and meaningful pay increases, grid adjustments, introduction of long-service recognition pay, and enhanced premiums. In addition, penalty provisions were necessary to discourage the ongoing and excessive use of agency nurses; an unbelievably expensive stopgap measure to staff hospitals but one that, perversely, made recruitment and retention of RNs even more challenging. A Nurse Practitioner (NP) grid was also a bargaining priority.

ONA reviewed various interest arbitration criteria – both statutory and normative – in support of its submissions including recruitment and retention, appropriate comparators, the economic situation in Ontario, the extent to which services may have to be reduced, ability to pay along with gradualism and demonstrated need. Application of each of these criteria led to the immediate, indeed inevitable, conclusion that all ONA's compensation proposals were fully justified and should be awarded.

**Recruitment and Retention**

It was almost beyond debate, in ONA's submission, that the Participating Hospitals were unable to attract and retain sufficient numbers of RNs. The evidence in support of this proposition was everywhere. Indeed, it was described in detail in the OHA's own publication, *Practical Solutions to Maximize Health Human Resources* (*Practical Solutions*), in growing numbers of hospital emergency room closures never previously seen in Ontario and skyrocketing waiting lists for urgent surgical procedures, in payment of incentives such as increased overtime – outside the provisions of the collective agreement – to attract and retain nurses, and in the huge expansion in use of agency nurses, paid a multiple of the collective agreement grid rates. Other individual hospital efforts to attract and retain nurses included raffles, swag, visits by therapy dogs, BBQs, recognition of long-service employees, manicures, massages and free snacks. All these steps established, with clear, cogent and compelling evidence, a staffing crisis in need of immediate and meaningful attention.

The assertion of a serious recruitment and retention problem was not, ONA observed, based on anecdotal evidence. It was fully outlined in *Practical Solutions*. Moreover, the OHA's Fall 2022 *Health Human Resources Workforce Survey* showed a tripling of the RN vacancy rate since March 2018: the all-hospital vacancy rate (both full- and part-time) was 10.27% on October 1, 2022; the RN and RN Speciality Rate was 14.78%, up from 4.9% on March 31, 2018. To be sure, some new positions had been created, but that was not, in ONA's view, the principal cause of the nurse shortage. Resignations and a huge increase in turnover were the most important contributors. A March 31, 2018 hospital resignation rate of 4.98% had more than doubled to 10.93% as of September 30, 2022. *Practical Solutions* reported that exhaustion and impossible

workloads led to the burnout of experienced late career nurses who were voting with their feet leaving frontline clinical practice or, far too often, the profession altogether (although sometimes returning to the workplace they just left as much more highly paid agency nurses). Of course, ONA pointed out, these departures – whatever their proximate cause – adversely affected the nurses who remained by increasing their workloads creating a vicious circle of even more nurses who then decide to leave.



The miscellaneous measures that had been put in place ranging from doubling overtime to swag and BBQs, ONA observed, were not working. The same could be said about government initiatives including *The Temporary Reimbursement of Fees for Internationally Educated and Inactive Nurses*, the *Community Commitment Program for Nurses* (offering a $25,000 incentive for nurses who have not practised in Ontario for the last six months but who make a two-year commitment to do so), and a $5000 retention bonus to existing nurses in return for them agreeing to remain working in Ontario. Even with all of these and other initiatives, nurses – the unequivocal data demonstrated – continued to leave hospital health care, with significant numbers returning to work as agency nurses at a multiple of their previous pay.

Indeed, the use of agency nurses by the Participating Hospitals was particularly telling. In 2003 (*Sunnybrook & Women's College & ONA* (133 LAC (4th) 91), ONA grieved a large increase in agency nurse employment largely brought about by recruitment and retention challenges. The award concluded that while agency nurses could be used, a parallel contingent workplace was prohibited by the collective agreement. Nevertheless, many of the Participating Hospitals were regularly employing agency nurses – in fact, were putting them on schedules – because the

staffing crisis left them with no other choice. The immediate result was completely predictable: agencies could, with their higher pay and benefits, attract nurses from the Participating Hospitals, and then return them to the hospitals to work side-by-side with their former colleagues but with superior terms and conditions of employment (including more attractive shifts). Unless agency nurse usage was forestalled and left for true emergencies, the recruitment and retention crisis would inevitably deteriorate even further. A number of examples describing this insidious circle were provided including a frank October 6, 2022 press release – a typical example in ONA's view of a pervasive system-wide situation – issued by the South Bruce Grey Health Centre Chesley hospital site (SBGHC) announcing an eight-week emergency room closure due to a critical shortage of nurses:

> … there have been multiple times over the last 3 weeks where the ED had to close for several full days on short notice due to the overall shortage of nurses.
>
> …
>
> In order to keep services operational, SBGHC has relied on the use of agency nurses to fill vacant shifts. This approach is not an ideal or preferred solution, as agency nurses are costly and not committed to our hospital sites. In addition, our nurses do not feel valued when the agency nurses are making more money for doing the same work. SBGHC would much rather be putting the extra cost spent on agency nurses into the pockets of our own staff, who have worked tirelessly to support our organization and our communities. The unfortunate reality is that without using agency nurses at this time, the organization would be looking at additional closures and reductions.
>
> Active recruitment continues for nurses to come and work at SBGHC, however, the pool of available nurses is very limited in the current environment across the province.

Other examples were also provided.

The money that was being spent on agency nurses, ONA argued, was disturbing for many reasons. At the very least, public funds were being diverted from addressing the staffing crisis and were barely successful in even providing a short-term fix. In the 2020-2021 fiscal year, the Participating Hospitals reported spending $38,350,956 on agency nurses, in 2021-2022,

$70,978,158 and in 2022-2023, $173,669,808 (with the numbers for 2022-2023 probably an undercount for reasons explained in the ONA brief, reply brief and at the hearing). Agency hours grew from 449,608 in 2020-2021, to 1,183,358 in 2022-2023 (or, according to the OHA, 1,259,183). Moreover, at one time agency nurse use was a Greater Toronto Area phenomenon; now it was ubiquitous across the province, urban and rural, as was fully detailed in the ONA submissions and illustrated by another statistic: In 2020-2021, 31 Participating Hospitals reported using agency nurses; two years later, 77 (and that was with some Participating Hospitals not reporting).

The fact was, ONA submitted, all the Participating Hospitals were struggling with RN shortages. Quite clearly, the various *ad hoc* measures to incentivize RNs to work even harder established this, as was further illustrated when skyrocketing overtime was examined. The Participating Hospitals paid overtime – some hospitals well in excess of the negotiated collective agreement multiplier – because they had to; it was the only way to meet staffing needs. In 2016-2017, the Participating Hospitals reported 1.75 million hours of overtime, in 2018-2019, 2.19 million, and in 2021-2022, 3.42 million (at a cost of $277,656.162).

Recruitment and retention is a *HLDAA* criteria. The Participating Hospitals could not recruit or retain, and compensation was the main reason why. The conclusion was inescapable, ONA argued, that there were nurses available – agency nurse usage established that – just not ones willing to work at the current rates. Instead of the various *ad hoc* measures to incentivize RNs to work more, the money would be better directed to improving the terms and conditions of employment by addressing staffing, and also workload, and that would, in turn, encourage RNs

to stay at their jobs and, for those who had left, to return to work. Spending large amounts of money – hundreds and hundreds of millions of dollars – on agency nurses and overtime – to give just two examples that partially and at best inadequately met short-term staffing needs at great cost to morale and with no hope of retaining or recruiting – was not a strategy with any real likelihood of actually addressing the problem. All ONA's compensation requests were, accordingly, fully justified by this criterion alone.



**Relevant Comparators**

In ONA's view, the proper application of *HLDAA* and other interest arbitration criteria required examination of relevant comparators which included nurses in other Canadian provinces, Ontario agency nurses and nurses employed in private hospitals, nurses in the United States and the United Kingdom, and other frontline professionals. Turning first to other Canadian nurses, ONA noted that the Financial Accountability Office (FAO), an Ontario government-appointed body that provides independent analysis of the province's finances, trends in the provincial economy, and related matters, concluded that Ontario currently has the lowest nurse wage rates in all of Canada. Ontario had dropped from fifth place in 2012 to last place in 2022. Not surprisingly, another cause of the RN shortage was nurse migration to other places in Canada and abroad that offered better pay and working conditions; a situation that was not abating notwithstanding various government initiatives (earlier described). Likewise, and as above, agency nurses were better compensated, often substantially so. This private sector comparator was especially apposite with the private sector nurses doing the exact same job in the exact same workplace side-by-side with Participating Hospital RNs but receiving substantially more money.

Other frontline service workers, for example, police and fire, received substantially more compensation, a situation which ONA argued was inappropriate as Participating Hospital RNs were very similarly situated: professionals providing life-saving uninterrupted essential services to the community. Accordingly, police and fire were relevant comparators, and their terms and conditions of employment were appropriately considered in determining the outcomes for RNs. This led to the conclusion that the requested salary and other compensation increases were justified not to mention long overdue. The same could be said about nurse settlements in the United States and the United Kingdom, and information about that was set out in the ONA brief (notably the number of Ontario nurses seeking licensure in the United States has doubled in the last five years). Appropriate comparators did not, in ONA's submission, include service and clerical workers employed by the Participating Hospitals. Comparable classifications had to be considered; or stated a little differently, similar employees doing similar work. That could not be said about the service and clerical employees who were different employees – albeit of the same employer – doing very different work.

**The Economic Situation in Ontario and the Municipality where the Hospital is located**

The impact of inflation, ONA argued, was profound, and it established demonstrated need for a substantial across-the-board increase, together with many other improvements. Before 2010, annual wage increases for RNs exceeded the rate of inflation, but since 2011, inflation has outpaced increases to Participating Hospital salaries in every single year leading to an overall decline in real wages. In 2022, the situation deteriorated further. Inflation for 2023 has been estimated at 3.6%; Scotiabank came in higher with a 4.2% projected increase, BMO Capital Markets at 4.1%. Any award, ONA urged, had to take inflation into account, and also needed to

consider Ontario's burgeoning revenues and surpluses, making general wage and other compensation increases completely affordable. In ONA's estimation, the province was "flush with cash, including an additional $4.4 billion in federal health funding…How the province chooses to spend that money, is simply a question of priorities."

**Extent to which Services May Have to be Reduced**

Services, ONA observed, have been reduced, and it referred to its submissions set out above: emergency room closures, surgical waitlists, etc., all because of a lack of RNs to do the work. Services have been reduced because the Participating Hospitals cannot attract full- and part-time staff and instead misspent many hundreds of millions of dollars on overtime and agency nurses. In ONA's view, a careful and sustainable allocation of resources – money spent on attracting and retaining Participating Hospital RNs – would result in an expansion of services, not a reduction.

**Ability to Pay**

The Participating Hospitals did not assert inability to pay. And ONA did not dispute that the Participating Hospitals faced budgetary constraints, but pointed out it has been long established that public sector employees do not bear the responsibility of subsidizing essential services by accepting, or having awarded, substandard wages. It was also a well-accepted principle that government funders cannot determine interest arbitration outcomes by limiting funding, for to do so would undermine the overall independence of the interest arbitration process. More importantly, the objective data about agency nurse and overtime spending established that there was money available. The issue was not lack of funds, but their allocation.

**Gradualism and Demonstrated Need**

ONA did not necessarily disagree with received wisdom to the effect that there should be no major breakthroughs or gains through interest arbitration without demonstrated need. But ONA's proposals were not breakthroughs – they were the minimum that was required after a decade of wage decline, to catch up to other Canadian nurses and private sector colleagues including agency nurses and nurses at non-Participating Hospitals, such as Shouldice, for example. Moreover, there was demonstrated need. There was a recruitment and retention crisis – the data about that was categorical – and there was an economic crisis with inflation that left nurses with less and less spending power even though there was a pre-existing pattern of their wages, at the very least, keeping up with inflation. The *ad hoc* adjustments and government programs were ineffective, to put it bluntly. The time was, therefore, long past for substantial general wage increases and other adjustments to tackle the nursing crisis head-on and, in that way, ensure future sustainability.

**The ONA Proposals**

ONA proposed the following:

1. Revised Wage Grid, eliminating the Start and First Year rates, and 12% general wage increase on April 1, 2023 and 6% on April 1, 2024. Add Long-Term Service Entitlements: 14 years – 2%, 21 years – 4% and 28 years – 6%.
2. Overtime at two times regular rate and two-and-one-half times on a paid holiday.
3. Substantial increases in shift premiums and restructuring of weekend premiums from $3.04 per hour to one-and-one-half times the straight hourly rate.
4. Increase percentage in lieu for part-time nurses.

5. Create a six-step grid for Nurse Practitioners.
6. Introduce salary continuation for nurses unable to work due to exposure to a communicable disease and/or required to quarantine and/or as required by law.
7. Introduce an 8-week vacation entitlement at thirty years of service.
8. Introduce a Health Spending Account at $1000.00.
9. Extend LTD coverage to age 80.



ONA also proposed a number of non-monetary changes including additional penalty payments for use of agency nurses and increased notice for shift change.

**Submissions of the Participating Hospitals**

**Summary**

There was no doubt, the Participating Hospitals observed, that the last several years have been extremely challenging for Ontario's hospitals and the nurses who worked in them. Prior to the COVID-19 pandemic, a history of restrained provincial funding required hospitals to implement efficient staffing models and deliver quality care while collective agreement rules and restrictions severely limited the hospitals' ability to quickly respond to changing needs. Faced with the pandemic and its unprecedented demands in terms of volume and complexity, Ontario's hospitals were pushed beyond capacity, and this, of course, led to an extraordinary toll on individual workers. While capacity has increased – new beds were added when the pandemic began and more than 3000 additional beds were announced in 2022 with 1700 of those already up and running – the Participating Hospitals were confronted with RN shortages reflected in

emergency room closures and a backlog of surgical and other procedures. Growth in capacity and demand has far outstripped available human resources in the short and medium term.

While staffing shortages could be easily described – there were not enough health care workers to meet demands – the solution to this situation was much more complicated, as was generally the case with intractable problems. Money was not a panacea; changing some of the unduly restrictive collective agreement work rules that left the Participating Hospitals unable to properly deploy human resources could, however, immediately begin to address staffing shortages and provide essential services to the people of the province. Now was therefore the time to address antiquated collective agreement requirements that frustrated the efficient delivery of services and the sensible deployment of nurses to meet urgent needs; collective agreement provisions that increased and exacerbated turnover, cost and instability.

To be sure, compensation was a component of a larger health human resources strategy and with that in mind – and paying attention to economic reality, available and anticipated funding and financial sustainability – the Participating Hospitals proposed wage increases of 3% in each year of the term, and improvements to the shift premiums. Increases of this kind were fully in line with prevailing healthcare settlements and otherwise. The various compensation increases requested by ONA were unaffordable and unfunded.

**ONA's Proposals**

ONA's proposals did not reflect funding realities. As important, they would not work in addressing recruitment and retention. There were vast human resource challenges in Ontario's

hospitals. Spending unprecedented and excessive amounts of money on nurse compensation would not solve staffing shortages because of one central fact: there were not enough nurses in the province to fill the growing demand, in hospitals and elsewhere. A pay raise would not solve that, as was illustrated by the introduction of the 25-year rate and, more recently, the government-funded COVID-19 $5000 bonus: after the 25-year rate was put into place, retirements went up, while the one-time bonus did not impact retention. Compensation was important, but the fact was that terms and conditions of employment were only one part of the equation: addressing recruitment and retention required a multi-pronged approach – set out by the Participating Hospitals in their brief and reviewed at the hearing – with the active participation of numerous stakeholders beyond ONA and the Participating Hospitals.



**The Criteria**

**Hospital Funding**

Also germane, the Participating Hospitals argued, were interest arbitration criteria, both statutory under *HLDAA*, and normative, most importantly replication: replication of free collective bargaining. Neither unions nor employers should be advantaged by the substitution of adjudication for strike/lockout. It was important to be realistic about possible outcomes – and pursuing – as ONA was doing here – a long list of completely unobtainable and unaffordable fiscal objectives in the hope that some would be awarded was not an approach to be encouraged, particularly in the context of a short collective agreement term in uncertain economic times and, as was well known, insufficient funding. Hospitals must operate within the confines of the funding provided to them: that was one of the applicable labour market realities. Economic increases cannot be passed on to the consumer. Available funding was not sufficient to cover

existing obligations; there was no ability to pay for increases beyond what the Participating Hospitals had on offer. As well, ONA's proposals were not established by the normative application of the governing principle that required establishing demonstrated need.



**Economic Conditions**

The rate of inflation, while relevant, did not assist in replicating free collective bargaining given these parties and their long-established bargaining patterns. Simply put, there was no history of matching wage increases to inflation – and that history was applicable here – and where high inflation is not persistent, its role in replication was diminished. Moreover, hospital funding was not indexed to inflation and so inflationary increases were, by definition, unfunded. In addition, arbitrators were on record – and had been for some time – that interest arbitration outcomes could not fully ameliorate against inflation. The Participating Hospitals cited with approval the observations of Arbitrator Hayes in *Homewood Health Centre & UFCW* (unreported award dated June 1, 2022) that "the harsh reality is that no-one can expect to be fully immunized from the negative impacts of extraordinary inflation. This award does not come close," (at para. 31, a finding that was adopted, also with approval, in other cases cited by the Participating Hospitals).

The overall economy was relevant, and the evidence established that the outlook was uncertain. In fact, the normal economic indicators suggest that there would, at best, be slow economic growth with the real possibility of a recession during the collective agreement term (possibly because Bank of Canada interest rate hikes to control inflation might over-correct). On the other hand, inflation had begun to fall, making it less of an applicable factor in these proceedings especially if the trend continued and projections of dropping down to the 2% benchmark were

achieved next year. In further support of this submission, reference was made to various factors suggesting troubling economic times ahead including the projected slowing of real GDP growth, statistics indicating declining employment growth and rising unemployment, the inversion bond yield curves and, more broadly, other disturbing economic developments such as recent and well-known large bank collapses.

While the overall economic situation provided important context, so too did the economic health of the province. Government deficits were the order of the day, and while the plan was to bring the budget in balance, that relied on increased revenue spurred by economic growth. In the meantime, there was a significant debt burden – and the high interest rates that came with it increasing the cost of borrowing – which directly impacted the government's ability to boost program spending. Ontario's debt level has gone from $281.1 billion in 2013, to a projected $435.5 billion in 2023. There was no way around it: public funds were under pressure, would remain so for the foreseeable future (and throughout the entire term of this collective agreement), and that impacted funding to Ontario's hospitals. In the current economic environment additional increases to government deficit spending – and therefore monetary allocations to fund the ONA demands to the Participating Hospitals – were not possible (made even more difficult as both health care costs and patient acuity resulting from an aging populace continued to rise). Even so, the Participating Hospitals had been and would continue to advocate for increased funding.

To the extent that additional funds were and are available, they have been targeted for various measures such as increasing capacity (pre-pandemic, Ontario, for example, had fewer acute hospital beds than any other Canadian province and all but one of the OECD member countries),

reducing surgical backlogs and enhancing emergency services. While the government announced an increase to hospital base funding on March 23, 2023, it has not yet been divvied into priorities and there was no reason to believe that paying for ONA increase would necessarily be among them. Announced additional federal investments in Ontario health care of $4.4 billion – to be allocated over the next three years – while welcome, have likewise yet to be allocated. In the meantime, the Participating Hospitals had to operate in an economic environment where their costs continued to increase, and where none of its funding was indexed to inflation. The Participating Hospitals had to live within their means, and those means made the ONA asks completely unaffordable such that they should not be awarded.

**Recruitment and Retention**

The Participating Hospitals agreed: "there is currently a nursing shortage in the Ontario hospital sector." Where the Participating Hospitals and ONA parted company, however, is whether massive collective agreement increases to compensation had the potential to fix it. To answer that question, one had to understand the causes of the problem; a necessary first step prior to proposing any solutions. And the cause of the problem, in the view of the Participating Hospitals, was the increase in capacity illustrated through the growth in the number of hospital beds. There were 1749 new beds added between 2020 and 2021, the largest one-time increase since 2005. The Participating Hospitals have responded to this by hiring an additional 7.3% of nurses between 2016 and 2023 (46,466 to 49,580 full-, part-time and casual), and further capacity initiatives were underway.

In normal circumstances, the Participating Hospitals pointed out, capacity increases would be accompanied by broader pre-planned health human resource recruitment and realignment to ensure adequate staffing. The exigencies of the pandemic prevented this. More time was needed to train and certify new nurses to catch up. Moreover, context mattered. There were currently 9,310 RN hospital vacancies or 15.46% (out of a total headcount of approximately 60,000), but this had to be understood as resulting from capacity growth as well as from individuals moving intra-hospital. Indeed, while overall turnover rates were higher than pre-pandemic, numbers had begun, in 2023, to decrease; retirements rates had only slightly increased compared to pre-pandemic, and while resignations had gone up compared to pre-pandemic, they had recently begun to dip. Significantly, the overall hospital nursing workforce was larger. It was also important to bear in mind that labour market shortages were commonplace across most Canadian workplaces. An important contrast in comparing RN vacancies with the general Canadian rate of 4.8% was that private sector employers can raise wages to attract staff, an option that is unavailable to the Participating Hospitals because of funding constraints imposed by the provincial government (and government funding was actually insufficient to even meet even ongoing operational needs).

In the meantime, the Participating Hospitals remained the employer of choice, and since 2017, as already noted, RN employment had grown (in large part because of the more than 8000 nursing preceptored placements). The most recent Ontario budget had allocated funding to hire an additional 200 preceptors, and the Participating Hospitals had made specific proposals to create preceptored placements that would, in turn, alleviate the staffing crunch. (Along with other initiatives such as Enhanced Extern Program, and the Learn and Stay Grant, both as detailed in

the Participating Hospital brief and at the hearing.) The Participating Hospitals asked that these proposals be kept carefully in mind. It was obvious that more RNs would do a lot to improve the staffing situation – that was where resources should be directed – not to unaffordable and unfunded compensation increases. Given that there were only 1,879 RNs not currently employed – according to College of Nurses data – it was unlikely that compensation increases would be sufficient to incentivize them to return to the workplace, and the numbers involved would not significantly address the overall current vacancy deficit. Other data established that there has not been an exodus of nurses from Ontario's health care system: losses from RNs leaving the province ranged from .11% to .35% of total headcount between 2018 and 2022 (with more younger nurses choosing to leave compared to other age groups with mid-career departures relatively stable). Newer vintage nurses could be incentivized to stay in a variety of ways, including by the Board awarding another one of the Participating Hospitals proposals for a New Grad Guarantee Letter of Understanding that would provide more placement opportunities for new graduates in hospitals to build skills and competencies.

It was true enough that some of the Participating Hospitals had introduced various temporary incentives to encourage current employees to work additional shifts, or to economically incentivize new applicants through referral and signing bonuses. This was done to address a present-day supply problem, one that would, slowly but surely, begin to be addressed as the other broader based strategies to train and recruit more RNs came into place. Notably, most of these incentives were offered to address specific short-term staffing challenges such as summer vacations and the Christmas holidays. It was not even clear that referral and signing bonuses were successful (establishing that money alone, if at all, would not solve recruitment and

retention). Insofar as agency nurses were concerned, they were only hired as a last resort; intended to address urgent staffing situations, not out of any desire to rely "on exorbitantly priced agency nurses instead of hiring bargaining unit staff." The volume of work performed by agency nurses was a tiny percentage of RN work performed in the Participating Hospitals and, notably, less than a third of the Participating Hospitals made any use of them at all.

The bottom line, according to the Participating Hospitals, was that a multi-stakeholder process involving multi-faceted province-wide initiatives was where attention should be placed to address staffing, not granting requests for unaffordable, unfunded compensation. One thing was for certain: increasing compensation as proposed by ONA was not an effective vehicle to increase nursing supply and would not achieve the stated objective.

**Participating Hospitals Proposals**

Proposals of both ONA and the Participating Hospitals had to be considered through the lens of total compensation and that included the impact of inflation and associated roll-up payroll costs. Bearing all of this in mind, the Participating Hospitals proposed wage increases of 3% in each year of the two-year term, some modest improvements to the evening, night and weekend premiums, the mentorship premium, the student supervision premium and introduction, in year two, of a $100 health spending account. The Participating Hospitals costed their increases in each year at 2.997% and 3.006% in contrast to 25.536% and 5.65% calculated for the ONA proposals.

**Discussion**

This Board of Interest Arbitration is subject to *HLDAA*, which sets out the criteria we are to consider in determining outcome. Specific criteria are listed and have been carefully considered. In addition, the Board must review "all factors it considers relevant," not just the enumerated ones. Accordingly, overall context matters and, in general, that is one in which compulsory interest arbitration is imposed because a legislative decision has been made to substitute adjudication rather than strikes and lockouts as the means to reach a collective agreement. Hospital nurses may not strike; and the Participating Hospitals may not lock them out for public policy reasons that are self-evident. In this compulsory interest arbitration regime, our overriding objective is to replicate what the parties would have agreed to in free collective bargaining where there is the right to strike or lockout. Neither party is to be advantaged or disadvantaged by the substitution of an interest arbitration regime.

**Application of the Criteria**

**Recruitment and Retention**

Under *HLDAA*, a Board of Interest Arbitration is to consider the employer's ability to attract and retain employees. The evidence presented establishes that there is truly a nursing recruitment and retention crisis in Ontario's hospitals: *Practical Solutions* – an OHA report – is unequivocal about this. That is why it recommended "robust retention strategies," and "immediate funding to bolster staffing models." *Practical Solutions* corroborates ONA's submissions: ONA members are leaving their jobs because vacancies were not being filled, creating unmanageable workloads leading to burnout and exhaustion driving employees from the workplace. The evidence referred to in this award unambiguously establishes that there are historic numbers of vacancies, which

generally take a very long time to fill, and the suggestion that this can mostly be explained by employees moving intra-hospitals is not generally supported in the evidence. Increased capacity with staffing not yet catching up is only a small part of the explanation.

Hospitals are using agency nurses because they are compelled to do so. Hospitals are offering inducements, outside the collective agreement, because that is the only way in which they can meet their staffing needs: that is also the only explanation for the incredible expansion in overtime, and for hiring agency nurses at double or triple the collective agreement rates; because compensation is a, if not the, key driver in attracting employees. The Participating Hospitals repeatedly acknowledged in their brief that "there is currently a significant gap between hospital capacity and nursing supply."

*Practical Solutions* says it best:

> In our discussions with members and system stakeholders, it has become clear that workforce issues are at a tipping point – solutions are needed immediately.
>
> …
>
> **HHR Issues at a Critical Point**
>
> Our members have suggested that exhaustion and ongoing workloads have led to burnout of experienced, late career nurses who have decided to leave frontline clinical practice or the profession entirely. There is anecdotal evidence to suggest that some nurses are leaving hospitals to work for agencies and/or other health care facilities (e.g., public health, surgical centres, independent health facilities) or leaving the industry entirely for a more balanced lifestyle. Members felt that these issues affecting nursing care are a risk to the delivery of the most critical services in EDs, operating rooms, and intensive care units. Some hospitals and other health providers have no alternative but to fill vacancies by relying more on agency staff than in the past, often spending significant dollars doing so.
>
> In northern hospitals, utilization of agency nurses combined with a heavy reliance on locum physicians is significantly impacting patient care – concerns were raised that some of these professionals do not have the necessary cultural and/or Indigenous training needed to work within these regions. With limited HHR supply in these environments, aggressive recruitment efforts by staffing agencies and increasing top-ups are driving up hospital costs. Many hospitals report that they are spending inordinate amounts of time, energy and dollars trying to recruit permanent or semi-permanent staff.

**HHR Issues Are Impacting the Delivery of Care**

Many hospitals are dealing with an abundance of one-two sick day calls and an increased number of staff, including physicians, taking extended sick leaves. Members reported that the increased amount of sick time leave is impacting the ability of hospitals to deliver care in specific programs. For example, we have heard about shuttering of neonatal intensive care units, birthing units and surgical wards.

There are also growing concerns that HHR issues are impacting the operations of EDs. Most recently, several hospitals within rural and northern communities have considered potential closures to their EDs because of a lack of nurses in the region. Others have had to scale down or close other programs to staff their EDs or other critical areas of care.

A review of the ED metrics (November 2021) shows increases in ambulance offload times, time to physician assessment of patients and wait times for patients being admitted to an inpatient bed. These increases are being observed all while ED volumes remain relatively low, when compared to previous years. Hospitals and ED physicians have indicated that these increases are due, in part, to HHR challenges, as well as the increasing complexity of care which is in turn straining hospital resources.

**Profound Challenges to Operating Essential Services in Rural and Northern Communities**

For hospitals in small, rural, and remote communities, the challenges to safely operate and provide essential programs and services are now insurmountable given their long-standing HHR concerns. Currently there are more than 300 physician vacancies within rural and northern communities. Hospitals are doing their best to maintain services and keep hospitals open, however significant gaps in nurse and physician coverage are putting hospitals at risk for poor outcomes and creating disincentives to recruitment efforts. *To avert a crisis, there is an immediate need for practical solutions to maximize capacity in the short, medium and long-term* (emphasis ours).

As stated in *Practical Solutions*: "To avert a crisis, there is an immediate need for practical solutions to maximize capacity in the short, medium and long-term." Another OHA publication, *Challenges and Concerns about Future Health Care Workforce Supply* recommends: "Providing immediate funding to bolster staffing models to enable the hiring of at least 10,000 registered nurses…Providing immediate funding to bolster staffing models would create more manageable workloads for staff, help increase retention rates, and allow hospitals to better respond to patient needs." The vast expansion of overtime and agency nurse usage – demonstrated by a truly astonishing growth in both – establishes a true recruitment and retention problem, and it is one that is normatively addressed by compensation increases.

Among the best means to recruit and retain, and to incentivize individuals to enter a profession, is compensation. We simply cannot conclude that the other incentives to retain and presumably

motivate staff – described above – will be successful in retaining (and motivating) nurses given the demonstrated shortages, as documented in the OHA's *Practical Solutions* and elsewhere.

Understandably, the province is offering a variety of policies and programs to address this issue. In the meantime, the Participating Hospitals suggest that compensation increases will not solve these problems, but this submission is not persuasive in a context when many of their members are doing the opposite: using financial incentives to attract and retain staff, and the government is adopting and backstopping this same approach. Wage increases can reasonably be expected to keep people in the workforce, incentivize people who have left to return (including RNs who have let their registration lapse together with the almost two thousand RNs the College of Nurses records as not currently employed), and attract future employees. We have borne in mind that the Participating Hospitals, as they acknowledge in their brief, are competing for nurses "within a competitive labour market."

Having said all of that, we also agree that a multi-faceted approach involving all relevant stakeholders is necessary in the short, medium, and long-term. However, our task is to determine the appropriate outcome in settling this collective agreement and we conclude that the Participating Hospitals' proposals of a general wage increase of 3% in each year together with extremely minor premium adjustments and the introduction of small healthcare spending account, will not be effective in addressing recruitment and retention. (Mentorship and student supervision premiums are discussed further below.)

**The Economic Situation in Ontario and the Employer's Ability to Pay**

The Participating Hospitals argued that there is no guarantee that any awarded increases will be funded and urged us to keep that in mind. However, after carefully reviewing these submissions, we have concluded that this is not a factor to be considered in determining outcome. The Province cannot determine the results of independent interest arbitration through its funding allocations; that would fetter the independence of this process, which is to replicate free collective bargaining and arrive at an independent award after having applied the statutory and normative interest arbitration criteria.

The economic situation is relevant, however. The FAO in its May 31, 2023 *Ontario Health Sector: 2023 Budget Planning Review* estimates that the province has allocated a total of $4.4 billion more than what is necessary to fund existing programs and announced commitments from 2022-23 to 2025-28. There is, however, a sobering flip side: the FAO also projected that if all hospital employees were awarded retroactive compensation (under Bill 124 reopeners), hospital spending could increase by an additional $2.7 billion over this period. At the same time, recent Federal Government GDP updates establish reasons for optimism about the overall economic situation, and high employment augers well for recovery, not recession.

Considering the economic context includes reviewing the impact of inflation on wages. It is indisputable that nurses have seen their spending power eroded by inflation, with increases in the cost of living now baked into consumer prices. Some economists predict recession, other economic indicators indicate otherwise, suggesting positive signs of recovery. In considering

what to award we have, of course, reviewed the two previous reopener awards decided weeks before submissions were made in this case.

**The Earlier Reopener Awards**

There are two ONA Bill 124 reopener awards: (*ONA & Participating Hospitals*, unreported award of Stout dated April 1, 2023 and *ONA & Participating Hospitals*, unreported award of Gedalof dated April 25, 2023). In our view, the first of the two earlier ONA reopener awards did not, in awarding an additional 1%, consider the impact of inflation, and to the extent that it did it is fair to say that this was not reflected in the result. The second ONA award is a different matter: it unequivocally indicated that "soaring inflation" had been considered and in addition to a requested wage increase, a change was made to the grid worth approximately 1.75%, positively impacting approximately half the bargaining unit (and, by and large, the most senior nurses). Nevertheless, neither of these awards addressed inflation in any meaningful manner (and the data is categorical: nurse wage rates have fallen substantially behind). Free collective bargaining, on the other hand, has begun to reflect persistent high inflation in outcomes.

**Replicating Free Collective Bargaining**

Settlements outside of healthcare have not generally been considered or applied in determining central hospital awards. On the one hand, the unions assert that the dramatically changed economic landscape means that they must be reviewed, while on the other, they are rejected as comparators by the Participating Hospitals as either relevant or useful. Most recently, in *CUPE/OCHU & SEIU & The Participating Hospitals* (an unreported Bill 124 reopener award dated June 13, 2023), attention was turned to this issue and it was determined that in the current

context – with high and persistent inflation – it was both appropriate and necessary to broadly consider collective bargaining settlements from groups not traditionally referred to.

That conclusion followed an earlier decision reached in like circumstances: In *Participating Hospitals & OPSEU,* unreported award of Gray dated November 4, 2009 (the Gray Award), an arbitrator was asked by the Participating Hospitals in a central OPSEU case to consider settlements from outside health care – economic settlements from the Ontario and federal governments, teachers, municipal police, the OPP, firefighters, LCBO, municipalities, and energy – in support of its submission that a central pattern settlement not be followed, but reduced, because of a severe economic downturn. The Gray Award did just that: it considered settlements from across the economic landscape and declined to follow the central ONA award which would have otherwise set (a higher) general wage increase. This approach has even earlier antecedents: the last time inflation was high and persistent.

In *Participating Hospitals & CUPE* (unreported award of Weiler dated June 1, 1981), the arbitrator reached a number of conclusions that we follow (because the Board in that case, like the Gray Award and the Board in this one, had to address extraordinary economic circumstances). The Weiler Board held that the appropriate standard for decisions in this sphere should be drawn from external collective bargaining between sophisticated union and management negotiators whose bargains are shaped by real economic forces: "The parameters of change in the Hospital system as a whole must be drawn from and be compatible with the external world of collective bargaining in the Province" (at 6). Summarily stated, in extraordinary circumstances it is entirely appropriate to look at settlements from sectors not

normally considered. Having done so, we find that the best evidence of free collective bargaining is the recent OPG and PWU settlement – authorized by Ontario's Treasury Board – and the also recent settlements between the Government of Canada and PSAC covering 155,000 core public servants and employees of the Canada Revenue Agency (ratified by both parties in June 2023). For whatever reason, including possibly happenstance, in terms of the numbers, these settlements – again freely negotiated in strike/lockout regimes – are identical.

In OPG and PWU, wage increases of 4.75% and 3.5% were agreed upon for 2022 and 2023, along with signing bonuses of $2,500 in each year, not to mention other significant compensation improvements. In the federal government PSAC settlement, the parties agreed on the exact same percentage general wage increases for 2022 and 2023, along with a $2,500 signing bonus, and some other (more modest) compensation improvements. These two settlements are extremely instructive and have informed our view of how to best replicate free collective bargaining in this round. These settlements are among the best evidence available of free collective bargaining in a high and sustained inflation environment. They fall far short of what ONA has requested – and they do not fully immunize against inflation – but our job is to replicate what the parties would have done in free collective bargaining because we follow free collective bargaining. The last time significant inflation so dramatically affected spending power, arbitrators, like Professor Weiler in the case earlier cited, awarded double-digit increases. But in doing so the Weiler Board was following free collective bargaining outcomes, not leading them.

It is our view that freely bargained outcomes are the touchstone, and in the federal sphere they were achieved after relatively lengthy strikes. We conclude that these voluntarily negotiated

outcomes covering so many employees in the quasi-public and public sector are the best guide for setting compensation in current circumstances. Our job, to repeat, is to replicate free collective bargaining, and to ensure that the parties end up no better and no worse than if their right to strike and lockout had not been curtailed. Obviously, these settlements are most important for determination of the general wage increase in 2023. Notably, in neither of these settlements was recruitment and retention a factor, which it most definitely is in this proceeding. Replication of free collective bargaining and determination of wage increases is more challenging for 2024.



**Overall Approach**

As is well known, the Participating Hospitals were unable to pursue any of their non-monetary collective bargaining objectives in the two ONA reopeners because jurisdiction in those proceedings – the situation in all reopener awards – was and is limited to compensation. This is not those cases. And, free from Bill 124 reopener jurisdictional constraints, the Participating Hospitals have advanced some non-monetary proposals to target staffing – to provide for limited redeployment of nurses without it being characterized as a layoff – which, in our view, are quite properly awarded, albeit with modifications (as set out below). This award must do what it can to address recruitment and retention in both its monetary and non-monetary results.

Accordingly, this award has been crafted to respond to the three most important issues/interest arbitration criteria requiring attention: replication of free collective bargaining, recruitment and retention and the economy, in particular the impact of inflation on real wages. The purpose of the award is to make targeted adjustments, both monetary and non-monetary, within the context of a

two-year term that is already underway to address urgent and compelling staffing needs and to provide fair compensation adjustments reflecting free collective bargaining. The award also addresses lacunae arising out of the grid adjustments in the second ONA reopener.

We have, therefore, replicated free collective bargaining by awarding general wage increases of 3.5% in 2023 and 3% in 2024 and have also made adjustments – given recruitment and retention – to the grid building upon the second ONA reopener. The award takes inflation into account and is an acknowledgement of the incontrovertible evidence that for more than a decade inflation has greatly outpaced RN rates (and that current inflation was inadequately considered in the two recent ONA reopeners and needed, in any event, to be reflected in this award as it continues to significantly erode spending power). We have also increased premiums for Mentorship, Student Supervision and Team Leader as each of these functions is critical to the professional development of new nurses. We have, however, made no adjustments to any of the shift premiums as they are already best in class.

Notably, there are over 9000 RN vacancies across the Participating Hospitals. In our view, it makes no sense to require a hospital to hire an agency nurse rather than redeploy a member of staff for a short-term reassignment. Likewise, it is completely counter-productive to pay nurses to leave employment when both parties are agreed that there is an RN shortage. Stated somewhat differently, we have attempted to provide the Participating Hospitals with some relief so that they can make short-term staffing reassignments without risking an adverse legal outcome: an arbitral award determining that something more than a partial or single shift reassignment is a layoff and that the layoff provisions in Article 10.14(b) then come into effect. Steps need to be

taken to enable the Participating Hospitals to avoid overtime and hiring agency nurses, and this is in the mutual interest of both parties. We are firmly of the view that in the midst of a nursing shortage – and ONA correctly described this as a crisis – collective agreement provisions that deem a reassignment of more than one day a layoff, and then financially incentivize nurses to leave employment as the layoff provisions come into effect, are counter-productive to shared goals and the public interest.

However, the fact is that under Article 10.08, anything more than a partial or single shift reassignment of nurses from their area of assignment has – as a result of the case law – been construed as a layoff. In case after case, arbitrators have concluded that even where, for example, a unit was briefly closed for renovations and the nurses were temporarily reassigned, that that was a layoff or, in another example, where a unit was closed and the nurses provided with similar work with similar shifts at the same hospital, that that too was a layoff. Article 10.14 requires hospitals to make offers of early retirement to incentivize departures during the layoff process – including layoffs resulting from a process that began following reassignment of a nurse for more than one shift in circumstances where the hospital has neither the intention nor the desire to reduce workforce, but merely to realign it. The data establishes that the Participating Hospitals are trying to grow the ONA bargaining unit, not reduce it: there are four thousand more RNs working in the Participating Hospitals in 2023 than were present in 2020, and those numbers will only continue to expand (barring truly unforeseen developments and contrary to every single projection).

Hospitals need the ability to temporarily reassign for more than a single or partial shift without doing so being construed as a layoff. On the other hand, highly valued job security language – admittedly introduced when layoffs were a fact of life – can only be impaired to the minimum extent possible. Our award has attempted to balance these interests in addressing the recruitment and retention crisis in a context where job security interests remain front and centre and where overall compensation has been meaningfully addressed.

The award provides hospitals with additional flexibility to deal with short-term reassignments without triggering a layoff and everything that would flow from it. The award gives the Participating Hospitals the ability to redeploy nurses while maintaining valued seniority protections. Surely the parties would agree that it is nonsensical to offer early retirement packages and severance pay to nurses who are actually needed in the workplace. The provisions awarded are not a concession (an unlikely outcome in replicating free collective bargaining in the current context) and they must be viewed in the context of an award that has fully recognized compensation as highly motivating when it comes to recruitment and retention.

We have declined ONA's invitation to introduce penalty provisions for agency nurse use.

In our view, penalty provisions are an issue that the parties should agree about – as was previously the case – or the Legislature should act. We agree with the Participating Hospitals and ONA that the best practice is to hire RNs and, in the words of the Participating Hospitals not to rely: "on exorbitantly priced agency nurses …." Notably, *Practical Solutions* called on the government to establish governing rules including price controls. This was repeated in the

OHA's *Short-Term Actions to Address Health Human Resource Challenges*. ONA's proposal for further transparency on use of agency staff, however, has evident merit and has been awarded with revisions.

There are approximately 500 NPs in 70 of the Participating Hospitals and we acknowledge that a common grid has been an ONA priority in earlier bargaining rounds. We are declining to award an NP grid, or any of the other NP proposals (noting that a minimum start rate is already in place). Obviously, the general wage increase applies to all NP rates.

The pandemic established demonstrated need for isolation pay, and we have awarded a new collective agreement provision that will provide nurses who have been exposed to a communicable disease with salary continuation when they are required to quarantine because of their hospital's policies, or as required by law, or by direction of Public Health.

**Award**

**Grid**

Effective April 1, 2023 and prior to the general wage increase, amend grid as follows:

| | |
|---|---|
| Start: | $36.65 |
| 1 Year | $37.57 |
| 2 Years | $38.51 |
| 3 Years | $40.24 |
| 4 Years | $42.05 |
| 5 Years | $44.15 |
| 6 Years | $46.36 |
| 7 Years | $48.68 |

| | |
|---|---|
| 8 Years | $52.53 |

**Wages (after new grid)**

| | |
|---|---|
| April 1, 2023: | 3.5% |
| April 1, 2024: | 3.00% |

**Percentage in Lieu**

Effective April 1, 2024 add 1%: Move to 14-10.

**Mentorship and Student Supervision Premiums**

Effective date of award increase to $2.

**Team Leader Premium**

Effective date of award increase to $4.

**Isolation Pay**

Effective date of award:

Employees who are absent from work due to a communicable disease and required to quarantine or isolate due to (i) the employer's policy, and/or (ii) operation of law and/or (iii) direction of public health officials, shall be entitled to salary continuation for the duration of the quarantine.

**Layoff**

Effective 30 days following issue of award:

10.08 Layoff – Definition and Notice

(a) A "Layoff" shall include a reduction in a nurse's hours of work and cancellation of all or part of a nurse's scheduled shift.

Cancellation of single or partial shifts will be on the basis of seniority of the nurses on the unit on that shift unless agreed otherwise by the Hospital and the Union in local negotiations.
A ~~partial or single shift~~ reassignment **of 4 consecutive shifts or less** of a nurse from her or his area of assignment will not be considered a layoff.

The parties agree that the manner in which such reassignments are made will be determined by local negotiations.

(b) A "short-term layoff" shall mean:

i) A layoff resulting from a planned temporary closure of any part of the Hospital's facilities during all or part of the months of July and August (a "summer shutdown") or during the period between December 15th and January 15th inclusive (a "Christmas shutdown"); or

ii) A layoff resulting from a planned temporary closure, not anticipated to exceed six months in length, of any part of the Hospital's facilities for the purpose of construction or renovation; or

iii) Any other temporary layoff which is not anticipated to exceed three months in length.

(c) A "long-term layoff" shall mean any layoff which is not a short-term layoff.

(d) The Hospital shall provide the local Union with no less than 30 calendar days' notice of a short-term layoff. Notice shall not be required in the case of a cancellation of all or part of a single scheduled shift, provided that Article 14.12 has been complied with. In giving such notice, the Hospital will indicate to the local Union the reasons causing the layoff and the anticipated duration of the layoff and will identify the nurses likely to be affected. If requested, the Hospital will meet with the local Union to review the effect on nurses in the bargaining unit.

**(e) <u>Process to Avoid Permanent or Long-Term Layoffs</u>**

**i) Where in the Hospital's determination there will be one or more layoffs of a permanent or long-term nature, the Hospital shall provide the Union and all nurses on the affected unit(s) with no less than thirty (30) calendar days written advance notice. The advance notice will describe the unit(s), reasons causing the layoffs, number of nurses that would be laid off and a list of vacant positions and any positions not yet posted to be used as transfer opportunities that may be filled in order to avoid the layoffs.**

**ii) In accordance with seniority, the Hospital will offer those nurses on the unit(s) and within the classification(s) where the proposed layoff(s) would otherwise occur the opportunity to elect to be transferred to a transfer opportunity provided that the nurse is qualified to perform the available work. A nurse's election must be provided to the Hospital in writing within the advance notice period in Article 10.08(e)(i). The number of nurses so transferred shall not exceed the number of nurses who would otherwise be subject to layoff.**

**iii) If the number of nurses who voluntarily elect to transfer to a transfer opportunity within the advance notice period in Article 10.08(e)(i) is less than the number of nurses who would otherwise be subject to layoff, transfers will occur in reverse order of seniority provided that the nurse is qualified to**

**perform the available work and the transfer does not result in a reduction of the nurse's wage rate or hours of work, is located at the nurse's original work site or at a nearby site in terms of relative accessibility for the nurse and is on the same or substantially similar shift or shift rotation.**

**Where more than one nurse is to be transferred in order to avoid a layoff, nurses shall be entitled to select from available transfer opportunities in order of seniority. The number of nurses so transferred shall not exceed the number of nurses who would otherwise be subject to layoff.**

**iv) The Hospital bears the onus of demonstrating that the forgoing conditions have been met in the event of a dispute. The Hospital shall also reasonably accommodate any reassigned employee who may experience personal hardship arising from being reassigned in accordance with this provision.**

**v) A transfer of a nurse to a transfer opportunity under this article is not a layoff and also need not be posted.**

**(f)** Notice

**Following the completion of the process under Article 10.08(e), i**n the event of a proposed layoff at the Hospital of a permanent or long-term nature within the bargaining unit, the Hospital shall:

i) Provide the Union with no less than five (5) months written notice of the proposed layoff.

ii) Provide to the affected employee(s), no less than four (4) months written notice of layoff or pay in lieu thereof.

NOTE: Where a proposed layoff results in the subsequent displacement of any member(s) of the bargaining unit, the original notice to the Union provided in (i) above shall be considered notice to the Union of any subsequent layoff.

In the event of the elimination of a vacant position or in circumstances where the Hospital decides not to fill a vacated position, the Union will be provided with notice at the time the decision is made.

The Hospital shall meet with the local Union to review the following:

iii) The reasons causing the layoff/elimination.

iv) The service which the Hospital will undertake after the layoff/ elimination.

v) The method of implementation including the areas of cut-back and the nurses to be laid off.

vi) Any limits which the parties may agree on the number of nurses who may be newly assigned to a unit or area.

10.09 Layoff – Process and Options

(a) In the event of a layoff, nurses shall be laid off in the reverse order of seniority provided that the nurses who are entitled to remain on the basis of seniority are qualified to perform the available work. Subject to the foregoing, probationary nurses shall be first laid off.

(b) Nurses shall have the following entitlements in the event of a layoff.

Prior to implementing a short-term layoff on a unit, nurses will first be offered, in order of seniority, the opportunity to take vacation day(s), utilize any compensating/lieu time credits or to take unpaid leaves in order to minimize the impact of a short-term layoff.

i) A nurse who has been notified of a short-term layoff may:

(A) Accept the layoff; or

(B) Opt to retire if eligible under the terms of the Hospital's pension plan as outlined in Article 17.04; or

(C) Elect to transfer to a vacant position, provided they are qualified to perform the available work; or

(D) Displace the least senior nurse in the bargaining unit whose work they are qualified to perform.

ii) A nurse who has been notified of a long-term layoff may:

(A) Accept the layoff; or

(B) Opt to retire if eligible under the terms of the Hospital's pension plan as outlined in Article 17.04; or

(C) Elect to transfer to a vacant position provided that they are qualified to perform the available work; or

(D) Displace another nurse in any classification who has lesser bargaining unit seniority and who is the least senior nurse on a unit or area whose work the nurse subject to layoff is qualified to perform.

iii) In all cases of layoff:

(A) Any agreement between the Hospital and the Union concerning the method of implementation of a layoff shall take precedence over the terms of this article. While an individual nurse is entitled to Union representation, the unavailability of a representative of the Union shall not delay any meeting regarding layoffs or staff reductions.

(B) Where a vacancy occurs in a position following a layoff hereunder as a result of which a nurse has been transferred to another position, the affected nurse will be offered the opportunity to return to their former position providing such vacancy occurs within six (6) months of the date of layoff. Where the nurse returns to their former position there shall be no obligation to consider the vacancy under Article 10.07. Where the nurse refuses the opportunity to return to their former position the nurse shall advise the Hospital in writing.

(C) No reduction in the hours of work shall take place to prevent or reduce the impact of a layoff without the consent of the Union.

(D) All regular part-time and full-time nurses represented by the Union who are on layoff will be given a job opportunity in the full-time and regular part-time categories before any new nurse is hired into either category.

(E) Full-time and part-time layoff and recall rights shall be separate.

(F) Casual part-time nurses shall not be utilized while full-time or regular part-time nurses remain on layoff, unless the provisions of Article 10.10 have been complied with or unless the matter is covered by local scheduling.

(G) No new nurses shall be hired until all those nurses who retain the right to be recalled have been given an opportunity to return to work.

(H) In this Article (10.09), a "vacant position" shall mean a position for which the posting process has been completed and no successful applicant has been appointed.

(I) The option to "accept a layoff" as provided in this Article includes the right of an employee to absent themselves from the workplace.

(c) i) Where there are vacant positions available under Article 10, but the nurse is not qualified to perform the available work, and if such nurse is not able to displace another nurse under Article 10, the nurse will be provided with the necessary training up to sixteen (16) weeks' training to enable the nurse to become qualified for one of the vacant positions. In determining the position for which training will be provided the Hospital shall take account of the nurse's stated preference.

ii) When nurses would otherwise be recalled pursuant to Article 10 but none of the nurses on the recall list are qualified to perform the available work the Hospital will provide necessary training up to sixteen (16) weeks to nurses, in order of seniority, to enable them to become qualified to perform the available work.

iii) Where a nurse receives training under this provision, they need not be considered for any further vacancies for a period of six (6) months from the date they are placed in the position.

…

10.14 (b) **Where a nurse would otherwise be laid off as a result of a permanent reduction in her or his hours of work following the process in Article 10.08(e), ~~B~~b**efore issuing notice of long-term layoff pursuant to Article 10.08(**f**)(ii), and following notice pursuant to Article 10.08(**f**)(i), the Hospital will make offers of retirement allowance in accordance with the following conditions:

i) The Hospital will first make offers in order of seniority on the unit(s) and within the classification where layoffs would otherwise occur.

ii) The Hospital will make offers to nurses eligible for retirement under the Hospital pension plan (including regular part-time, if applicable, whether or not they participate in the hospital pension plan).

iii) The number of retirements the Hospital approves will not exceed the number of nurses who would otherwise be laid off.

A nurse who elects a retirement option shall receive, following completion of the last day of work, a retirement allowance of one (1) week's salary for each year of service, to a maximum ceiling of thirty-five (35) weeks' salary.

iv) If a nurse(s) on the unit referred to in paragraph (i) does not accept the offer, the Hospital will then extend the offer, in order of seniority, to eligible nurses in the same classification in the unit where a nurse who has been notified of a long-term lay-off elects to displace in accordance with Article 10.09 (b) ii) (D) and one subsequent displacement. The Hospital is not required to offer retirement allowances in accordance with this provision on any subsequent displacements i.e., the offer shall follow the displaced nurse, to a maximum of two displacements.

NOTE: For the purposes of this provision, Charge Nurse and Team Lead shall be considered as within the same classification as a "General Duty RN", or any other classification agreed by the parties.



## Agency Nurses

Effective date of award:

(e) The Hospital will provide the Union, on a quarterly basis, with satisfactory reporting respecting the use of agency nurses as follows**:** and the percentage that use represent of total bargaining unit hours worked (RN).

i) Agency nurse hours worked per unit.
ii) Total bargaining unit hours worked per unit.
iii) Percentage of agency nurse hours worked per unit.
iv) Total agency nurse hours worked hospital-wide.
v) Total bargaining unit hours worked hospital-wide.
vi) Percentage of total agency nurse hours worked hospital-wide.

The Union may, at its expense arrange for an audit of the information provided and the employer will cooperate in that audit process.

## LOU: Supernumerary Positions (Nursing Graduate Guarantee) and Internationally Educated Nurses

Effective date of award:

Delete Paragraph 3.

Amend Paragraph 9:

Such nurses can apply for posted positions during the supernumerary appointment but may not transfer to a permanent position before the end of the supernumerary appointment.

## LOU: Supernumerary Positions-Nursing Career Orientation (NCO), Initiative for Internationally Educated Nurses (IENS).

Effective date of award:

Delete Paragraph 2.

Amend Paragraph 8 (formerly 9):

Such nurses can apply for posted positions during the supernumerary appointment but may not transfer to a permanent position before the end of the supernumerary appointment.

**Conclusion**

At the request of the parties, we remain seized with respect to the implementation of our award.

DATED at Toronto this 20th day of July 2023.

*"William Kaplan"*

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William Kaplan

I dissent. Dissent Attached.

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Brett Christen, OHA Nominee

I dissent. Dissent Attached.

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Phil Abbnik, ONA Nominee

DISSENT

I respectfully dissent from the Award of the Chair dated July 18, 2023 (the "Award") and the monetary items awarded therein.

The Award covers a two-year period from April 1, 2023 to March 31, 2025 and follows two re-opener awards (the "Re-opener Awards") chaired by Arbitrator Stout and Arbitrator Gedalof, respectively, which together cover a three year period (the "Stout Re-Opener" and the "Gedalof Re-Opener"). The Re-opener Awards addressed compensation issues not addressed in awards issued when the Protecting Sustainable Public Sector for Future Generations Act, 2019 ("Bill 124") was in effect (the Ontario Superior Court declared Bill 124 to be unconstitutional and of no force or effect in November 2022). Under the Re-Opener process, there was no opportunity for the hospitals to negotiate any trade offs against the monetary gains sought (and obtained) by the Union.

As noted by the Chair, the Union's arguments for greater compensation and benefits relied very heavily on the on-going shortage of nurses to fill available vacancies or, in terms of HLDAA criteria, recruitment and retention. The Award details some of the measures adopted or recommended by the Government of Ontario, some Participating Hospitals and the OHA to deal with the identified recruitment and retention issues. The Chair correctly notes that the solution to the issue is a multi-faceted one and one which cannot be achieved solely through increases to compensation and benefits. To state the obvious, increases in compensation cannot attract nurses to vacancies where there are insufficient nurses in Ontario to fill those vacancies nor do such increases in any way assist hospitals in matching available staff to hospital units which are experiencing short or long-term staff shortages.

In the present proceeding, as part of the multi-faceted approach to improving recruitment and retention, the Participating Hospitals made considered, reasonable and targeted proposals, which together, were designed to respond reasonably to the economic and funding environment facing hospitals and to assist hospitals in addressing staffing shortages by enabling the efficient short-term movement of available staff to enhance patient care in other areas of the hospital, by reducing expenditures on expensive severance packages in circumstances where the hospital is not reducing bargaining unit staff, and by assisting hospitals in restructuring staffing on units to provide enhanced patient care. The Participating Hospitals also proposed modest amendments to existing Letters of Understanding Re: "Supernumerary Positions (Nursing Graduate Guarantee) and Internationally Educated Nurses" and "Supernumerary Positions – Nursing Career Orientation (NCO), Initiative for Internationally Educated Nurses (IENS)" to enhance the utility of these programs, which facilitate the recruitment of new and internationally trained nurses into hospital vacancies.

The Award grants these Participating Hospital proposals, albeit with some modification, in furtherance of the stated goal of the Award to ameliorate staffing issues in the hospitals. There can be no reasonable objection to the award of these items in the present circumstances facing hospitals, where similar language exists in another central agreement, and in a proceeding in which the Union's request for non-normative monetary enhancements rested almost exclusively upon the recruitment and retention criteria. The amendments to the collective agreement language granted in the Award are exactly the type of trade off which would occur in free collective bargaining in exchange for monetary enhancements and are fully justified on the basis of replication. In mature bargaining relationships, the rule in free collective bargaining is "give to get"; unions achieve monetary gains in exchange for addressing legitimate employer needs for flexibility or other

similar goals. The plethora of interest arbitration awards in the hospital sector which ignore this reality while paying lip-service to the principle of replication do not represent an approach to be endorsed.

Even setting aside a replication analysis, the Participating Hospitals' proposals were fully and amply supported by demonstrated need. The proposals, in one form or another, have been advanced on many occasions in past negotiations and should have been granted long before the present Award.

My issue with the Award, then, is not with the general approach undertaken. It is clear that the Chair undertook a careful and thorough review of a massive amount of data and other information which was submitted to the Board by both parties. Rather, my objection is that the Chair erred in balancing the trade-offs appropriately; the monetary items awarded to the Union are simply too great for the modest hospital proposals awarded in exchange. In particular, the grid adjustments and ATB increases awarded exceed, in my view, what would have been achieved by the Union in free collective bargaining, particularly given the tremendous fiscal pressures hospitals operate under.

I understand that the on-going recruitment and retention issues relating to nurses are unique in the hospital sector and, as noted repeatedly by the Chair, the Award is a product of that fact. However, in my view, more modest compensation increases were warranted particularly having regard to the appropriate and traditional hospital sector comparators and the principle of total compensation.

I also strongly disagree with the Award's increase to the percentage in lieu of benefits for part-time employees by 1% effective April 1, 2024. The payment in lieu of benefits has been expressed by the parties as a percentage of wages rather than as a set amount so that the payment to part-time

employees would grow as the base of the calculation (wages) increased. By choosing the percentage formula, the parties have determined, in my view, that there is no need to increase the percentage itself. In any event, as a result of the ATB increases and increases to the grid awarded, the in lieu amount received by part-time employees will significantly increase over the two year period covered by the Award. Given this fact, I don't feel that this change is supported by replication and also that it should not have been awarded having regard to the principle of total compensation.

Dated July 20, 2023

Brett Christen
Nominee of the Participating Hospitals

**Dissent of Union Nominee**

For the first time, an interest arbitration board has recognized the severe recruitment and retention crisis facing Ontario hospital nurses together with the devastating impact of persistent multi-year inflation on wages in a meaningful way. Significantly, the award moves Ontario's nurses from second to last place in Canada to first place. More needs to be done, but this was an important first step.

Also significant is the award of isolation pay for infectious diseases. Path-breaking and unprecedented, though clearly much needed, this will improve the resiliency of the healthcare system in the event of future pandemics, and quite fairly provides compensation to nurses who are not permitted to work to protect their colleagues and patients.

I do, however, have concerns about the Chair's decision to award significant changes and wholesale additions to the reassignment and layoff language. In my view, there was no demonstrated need for these changes, and to the extent they would have occurred in the context of free collective bargaining, one would expect that even more significant increases in compensation would have been negotiated for ONA to have agreed to any alteration of this valued and longstanding language. I also note that there is the risk of a perverse impact resulting from these amendments. The Chair's explanation for these changes is to allow the Hospitals flexibility to staff their operations as needed. That said, Nurses who apply for and accept a position on a specific unit do so because they want to work on that unit. Having done so, and in many cases having developed considerable expertise in their chosen area of specialization, there is the real risk that transferring them to a different area of practice without their consent will undermine the steps the Chair has taken to address retention and recruitment. Obviously, the impact of these changes needs to be carefully monitored and, if need be, appropriately addressed in future rounds.

I am disappointed that the Chair has not awarded a centralized NP grid, which was a priority for ONA. Every other grid in the ONA central agreement is centralized, and the local grids for special classifications are pegged to the grid. Based only on the principle of comparison, NPs doing the same work for the same kind of employer should be paid the same. I anticipate that this will remain a priority for ONA and expect that this proposal will be awarded in the near future.

# TAB 18

**IN THE MATTER OF AN INTEREST ARBITRATON**

**BETWEEN:**

**The Participating Hospitals**

**and**

**OCHU/CUPE**



**Before:** William Kaplan, Chair
Brett Christen, OHA Nominee
Tim Gleason, Union Nominee

**Appearances**

**For the OHA:** Craig Rix
Hicks Morley
Barristers & Solicitors

**Participating Hospitals Bargaining Committee**
Justine Boyd, Joseph Brant Hospital
Paulette Clannon, St. Joseph's Healthcare, Hamilton
Kevin Gibbons, Royal Victoria Hospital
Allison Green, Renfrew Victoria Hospital
Kelly Hanselman, North Bay Regional Health Centre
Shirley Ward, Scarborough Health Network

**Ontario Hospital Association**
David Brook
David McCoy
Philip Cifarelli
Joyce Chan
Adrian Di Lullo
Louci Apkarian

**For CUPE/OCHU:** Steven Barrett
Simran Prihar
Goldblatt Partners

Barristers & Solicitors

Ryan Willis, CUPE Researcher
Doug Allan, CUPE Researcher
Declan Ingham, CUPE Researcher
Barbara Frey, CUPE A/Health Care Sector Coordinator
Jonah Gindin, CUPE National Representative
Michael Hurley, President, Ontario Council of Hospital Unions/CUPE
Sharon Richer, Secretary-Treasurer, Ontario Council of Hospital Unions/CUPE
Dave Verch, First-Vice-President, Ontario Council of Hospital Unions/CUPE
Treena Hollingworth, Area 1 Vice-President, Ontario Council of Hospital Unions/CUPE
Kevin Cook, Area 2 Vice-President, Ontario Council of Hospital Unions/CUPE
Calvin Campbell, Area 3 Vice-President, Ontario Council of Hospital Unions/CUPE
Susan Keeling, Area 4 Vice-President, Ontario Council of Hospital Unions/CUPE
John Jackson, Area 5 Vice-President, Ontario Council of Hospital Unions/CUPE
Dave Tremblay, Area 6 Vice-President, Ontario Council of Hospital Unions/CUPE
Judy Bain, Area 7 Vice-President, Ontario Council of Hospital Unions/CUPE

The matters in dispute proceeded to a hearing held on March 21, 2024. The Board met in Executive Session on April 10, 2024.

**Introduction**

This award resolves the outstanding issues in dispute between the Participating Hospitals (Participating Hospitals) and CUPE/OCHU (union) for a central collective agreement with a two-year term: September 29, 2023, to September 28, 2025. The union represents approximately 36,000 service and clerical employees in a wide variety of classifications in more than 100 bargaining units at 52 hospitals. These employees make an indispensable contribution to the well-being of the people in this province.

The parties have a mature bargaining relationship: this is their 21st consecutive central collective bargaining round.

Bargaining took place in November and December 2023. Mediation occurred in January and February 2024. Unfortunately, the parties were unable to resolve all issues in dispute, and a hearing, therefore, proceeded on March 21, 2024. The Board met in Executive Session on April 10, 2024. The collective agreement settled by this award will be comprised of the items agreed to in bargaining, the unamended provisions of the predecessor collective agreement and the terms of this award. Any union or Participating Hospitals proposal not directly dealt with is deemed dismissed.

It is fair to say that the parties were far apart when bargaining, and at mediation. In general, the union sought numerous improvements – in wages and benefits along with additional job security enhancements – and was adamantly opposed to all the Participating Hospitals' proposals as either sub-normative from a monetary perspective, or concessionary. The Participating Hospitals,

pointing to financial limitations, and the need for prudence given funding restraints and overall economic uncertainty, sought compensation increases that it characterized as fair and affordable. They also proposed changes to several central terms so that they could better manage staffing, avoid unnecessary expenditures, and achieve efficiencies in the delivery of patient care.



**The Criteria**

In determining the outstanding issues, we have carefully considered the governing criteria both normative and statutory. The normative criteria include the replication of free collective bargaining, but also demonstrated need, total compensation, and gradualism. The statutory criteria are set out in the *Hospitals Labour Disputes Arbitration Act*:

> 9 (1.1) In making a decision or award, the board of arbitration shall take into consideration all factors it considers relevant, including the following criteria:
>
> 1. The employer's ability to pay in light of its fiscal situation.
> 2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
> 3. The economic situation in Ontario and in the municipality where the hospital is located.
> 4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
> 5. The employer's ability to attract and retain qualified employees.

**Union Submissions**

In the union's view, and turning to the criteria, all its proposals were justified by their appropriate application. For example, its proposed general wage increases of 4% in the first year and 5% in the second were necessary to combat persistent inflation, and were affordable given overall economic conditions, including the robust state of provincial finances. Recovery, not recession, was clearly underway. Also affordable, and necessary from a comparator perspective, were improvements to other monetary provisions: premiums, insured benefits including dental, a

health care spending account, vacation, benefits beyond age 65, and bereavement leave. All the sought-after economic enhancements were absolutely justified by the continuing recruitment and retention crisis – one that had been repeatedly acknowledged by the Participating Hospitals – not to mention a morale crisis caused by unsatisfactory working conditions including impossible workloads made even more untenable by the massive understaffing. Vacancy and turnover rates were not substantially improving, and, in the result, union members were, in two words, burnt out. In addition, there was a strong case for catch-up as this was the first opportunity to bargain unhindered by unconstitutional wage restraint legislation, legislation that had artificially supressed wages. A significant wage adjustment was required to restore lost spending power.

Indeed, in the union's submission, when the most important of the normative criteria were considered – the replication of free collective bargaining – the evidence was irrefutable that its proposals were justified: settlements were tracking upwards in health care and more generally. Various examples – from the public sector and private sector – were provided and analyzed to substantiate this point. What was unsupportable was the wage offer of the Participating Hospitals: 3% in the first year, and 2.5% in the second. No one in health care – or more generally – was settling for these low numbers and the union asked that these proposals be categorically rejected. These sub-normative across-the-board adjustments would also significantly hamper progress towards equality given the gender composition of the different bargaining units. On the other hand, the union's proposals would have the exact opposite effect.

In the union's submission, the overall, application of the criteria, both normative and statutory, strongly supported long overdue wage and benefit improvements, together with the introduction

of a committee to study staffing ratios (with the possibility of pilot projects) and the establishment of a full-time job creation committee; both to address the continuing and unabated recruitment and retention challenges. There was also clear, cogent, and demonstrated need to amend the existing contracting-out language to ensure that any contracting out that did occur was not at the expense of employees who were currently doing the work. Given announced government intentions to increase the role of the private sector in delivering health care – for example, both surgical and diagnostic – the protection of the publicly funded system and the people who work in it was more important than ever. Instead of contracting out, the union proposed an amendment to the collective agreement to facilitate contracting in.

Other union proposals were directed at increasing the number of full-time staff and restricting the use of agency staff performing bargaining unit work (except in emergency situations). The union also sought amendments to the health and safety article to ensure appropriate consultation should another epidemic or pandemic be declared and pay and seniority protection when an employee was directed to self-isolate as a precautionary measure. All its proposals, the union submitted, would improve terms and conditions of employment. The benefit to employees was clear, but once implemented the union's proposals would also deliver immediate and tangible benefits to patients and the broader community.

The union insisted that the Participating Hospitals' concessionary proposals be dismissed out of hand. The union had spent decades – often at the expense of improvements to wages and benefits – negotiating provisions that protected job security. There was no labour relations reason, and

certainly no demonstrated need, to delete or even amend any of these important collective agreement protections.

**Submissions of the Participating Hospitals**

In the submission of the Participating Hospitals, this interest arbitration had to be placed in context. Part of that context were the tremendous staffing needs brought about by the COVID-19 pandemic. The Participating Hospitals rose to that challenge but moving forward, new problems now needed to be solved, such as the well-documented backlog in care along with a growing demand for services arising from an unprecedented growth in the provincial population. Labour costs had increased and would continue to do so. Inflation was affecting the price of goods. The Participating Hospitals needed to be innovative, creative, flexible and solution-oriented. That meant a central collective agreement that was modernized to reflect contemporary circumstances. That meant living within its financial means.

The funding model was complicated. The Ontario government was clearly increasing allocations – a year-over-year review of provincial funding illustrated this – but there was not enough money to meet current costs much less anticipated future spending. Government monies were finite and had to be distributed over numerous and competing priorities. Funding was directed at a wide variety of targets: fair wages to be sure, but other priorities too such as reducing wait times and expanding capacity, to give just a few examples from a very long list. The union's wage and other monetary demands had to be considered in this context.

Indeed, it was this very context, the Participating Hospitals pointed out, that informed its overall bargaining approach and the specific proposals it advanced. Those proposals were best considered in three silos. First, the Participating Hospitals sought to reduce collective agreement restrictions that prevented them from making changes to achieve efficiency such as properly deploying staff without attracting additional and unnecessary costs. The second group of proposals were aimed at introducing new initiatives, for example, a weekend worker, that would give employees flexibility to work weekends, and at the same time help relieve specific staffing challenges. In the third silo were the monetary proposals. The Participating Hospitals had to live within their restricted means; the monetary aspect of any award had to be fair to valued employees but, at the same time, reflect economic reality.

What did not reflect economic reality were the union's proposals, both monetary and non-monetary. They were completely unaffordable and entirely unjustified. For example, the union was seeking various new job security provisions; but they were ill-advised and unworkable. Introducing new constraints would make it even more difficult for the Participating Hospitals to effectively manage their human resources. The union's proposed committee to study staffing ratios (and pilot projects) was a case in point. However well intended, ratios would prevent the Participating Hospitals from making best use of all available employees – full-time, part-time and casual – to meet evolving patient needs. The same could be, and was said, about the union's proposal to outright ban the use of agency staff to perform bargaining unit work (except in emergency situations). Occasions would unfortunately continue to arise when hospitals had no choice but to employ agency workers to deliver hospital health care. That was a fact of life.

In the view of the Participating Hospitals, the union seriously miscast the state of the economy and provincial finances. There was still a possibility of a recession; at best, the economic future was uncertain with government deficits, detrimentally affected by high interest rates, understandably and necessarily requiring a curtailing of public spending.

All the economic indicators, the Participating Hospitals argued, and this was elaborated at length in their brief, led to the conclusion that fiscal restraint was in order, not excessive and unaffordable spending. There was simply no money available to fund the union's economic demands. There was no basis to introduce new work rules into a collective agreement that already severely limited the ability of the Participating Hospitals to efficiently and affordably deliver patient care. The Participating Hospitals rejected all the union's non-monetary proposals for reasons detailed in its brief.

While recruitment and retention was an applicable criterion, job vacancies should not, the Participating Hospitals argued, automatically and reactively lead to compensation increases. Health care job vacancies were the result of the recent and dramatic growth in capacity. For example, there had been the large increase in the number of new beds. Along with multiple other initiatives, this had led to a significant rise in employee ranks. Yes, there were still job vacancies. But the number of FTEs was up and vacancies were down. The important point, however, was that more money would not attract new employees. What was required was time: time to train and recruit new staff. Supply had to be increased.

The union's solution to this problem – oversize wage and other economic adjustments – were unaffordable; more importantly, they would not result in new employees being hired. There were no new employees to hire, and previous interest arbitration awards, most notably the Bill 24 reopener, had already significantly increased compensation, described by the Participating Hospitals in their brief as "substantial." Notably, base funding levels have not been adjusted to account for the various Bill 124 awards, and there were serious sustainability issues that could not, and should not, be ignored. In this context, the Participating Hospitals asked that its proposed general wage increases, increases that it asserted balanced the competing interests, be awarded, together with increases to the night and weekend premiums of .15¢.

The Participating Hospitals also suggested that no changes should be made, or needed to be made, to benefits, vacation or bereavement leave and that no health care spending account be introduced. In summary, the Participating Hospitals were of the view that its economic offer was both fair and appropriate in the circumstances.

Also appropriate in the circumstances, and long overdue in the view of the Participating Hospitals, was that its non-monetary proposals be given the most careful consideration. Stated somewhat differently, the Participating Hospitals were bringing forward legitimate proposals to address staffing free from out-of-date, burdensome and unjustified collective agreement fetters that had no continuing relevance to contemporary circumstances where every dollar mattered and where there should be a shared intention to make the most of very scarce resources. For example, the Participating Hospitals proposed a change to the job staffing provision. Hospital jobs, it argued, should be awarded on skill and ability, not seniority. Another change that was sought

was the introduction of new language providing for transfer opportunities instead of costly and unnecessary layoffs (in circumstances where there was shared agreement between the parties that there were many jobs that needed to be filled). Staffing solutions had to be responsive to staffing realities. A must-have, from the perspective of the Participating Hospitals, were changes to retirement allowance provisions that required hospitals to pay employees early retirement allowances even if their departure would not reduce the number of layoffs. This provision, simply stated in the Participating Hospital's view, made no sense in any circumstances. Simply put, there was no rational reason to pay necessary employees to leave when there were jobs to be filled.

What did make sense, however, was the Participating Hospital's proposal for a weekend worker. It was in the interest of employees who would receive substantial additional compensation for the weekend work, and it was in the interest of the hospitals as it provided them with an additional tool in the chest to assist in staffing hard-to-fill weekend shifts. The proposal would also help expand the workforce by attracting employees to hospital work who might not be otherwise available.

What also made sense was awarding a letter of understanding for a Nursing Graduate Guarantee Program (NGG Program). An NGG Program would provide hospitals with access to supplemental funding. Participants were supernumerary – above funded complement – and the NGG Program would bring RPNs into the workplace (and hopefully retain them after they arrived, addressing a crucial staffing shortage). There was every reason to award this provision – found in the ONA central collective agreement – and no reason not to.

**Discussion**

In considering the outstanding proposals, we have paid very careful attention to the criteria, both normative and statutory. We have looked at and applied sector norms to the outstanding monetary issues including wages, premiums, benefits and bereavement leave. We have not, however, awarded any improvements to the vacation provision as total compensation must be considered. A Health Care Spending Account has been introduced. It is quite appropriate – and this is increasingly reflected in negotiated collective agreements – for employees to make their own crucial health care spending decisions. The introduction of this new benefit will assist them in doing so. The changes to the health and safety provision of the collective agreement to require consultation in the event an epidemic or pandemic is declared and to provide for pay and seniority protection when an employee is directed to self-isolate as a precautionary measure reflects hospital norms and is now widely acknowledged as a best practice.

There are continuing recruitment and retention challenges in hospital health care. To promote recruitment and retention, we have awarded the union's proposals for a new Letter of Understanding Re: Full-time Job Creation, while another new union-proposed LOU on Work of the Bargaining Unit will provide transparency in the use of agency staff. We have also made some changes to the contracting-in provision. These measures are all intended to address staffing. The same can be said about the new LOU awarding the NGG Program. Likewise, we are including a new staffing provision for a weekend worker. The NGG Program – and the union candidly acknowledged that there was "merit" to it – will attract more employees to hospital health care, and the weekend worker provision is in the interest of both employees and the Participating Hospitals. It incentivizes employees to fill hard-to-staff weekend shifts.

We are satisfied that the case has been made for some adjustment to Article 9.08. We do not think that scarce health care dollars should be spent on voluntary exits if approving those exits and spending this public money does not reduce the number of layoff notices that would otherwise need to be given. We do not characterize this change as concessionary; it is appropriate, prudent, and responsible.



**Award**

**Wages**

Across-the-board increases as follows:

Effective September 29, 2023 – 3.00%.
Effective September 29, 2024 – 3.00%.

Retroactivity to current and former employees within ninety (90) days following issue of award.

**Premiums**

Effective September 29, 2023:
Increase weekend premium by $0.37 ($2.77 to $3.14).

Effective thirty (30) days following the date of the award:
Amend shift premium to separate evening premium (1500 – 2300 hours) and night premium (2300 to 0700 hours).
Increase new night premium by $0.72 ($2.26 to $2.98).

**Benefits**

Effective sixty (60) days following the date of the award:
Increase Massage by $75 ($375 to $450).

Increase Physiotherapy by $75 ($375 to $450).

Increase Chiropractic by $75 ($375 to $450).

Include Implants into coverage for Crowns, Bridgework, and Repairs and increase from $1000 to $2000 maximum annually with 50/50 co-insurance.

Introduce Orthodontic coverage at $2000 maximum lifetime with 50/50 co-insurance.

Age limit for coverage under semi-private, extended health care, dental, and accidental death and dismemberment benefits for active employees increased from age 65 to 80.

Introduce Health Care Spending Account for active employees at $100 annually.



**Bereavement Leave (Article 12.04)**

Amend as follows:

Any employee who notifies the Hospital as soon as possible following bereavement will be granted bereavement leave for four (4) consecutive working days off without loss of regular pay from regularly scheduled hours in conjunction with the death of the spouse, child, or parent.
Any employee who notifies the Hospital as soon as possible following a bereavement will be granted bereavement leave for three (3) consecutive working days off without loss of regular pay from regularly scheduled hours in conjunction with the death of the sister, brother, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, grandchild, brother-in-law, sister-in-law or grandparent of spouse.

An employee shall be granted one (1) day bereavement leave without loss of regular pay from regularly scheduled hours to attend the funeral of**, or attend a memorial service (or equivalent in order to accommodate religious and cultural diversity) for** their aunt or uncle, niece or nephew.

The Hospital, in its discretion, may extend such leave with or without pay. Where an employee does not qualify under the above-noted conditions, the Hospital may, nonetheless, grant a paid bereavement leave. For the purpose of bereavement leave, the relationships specified in the preceding clause are deemed to include a common-law spouse, and a partner of the same sex.

**Full Time Job Creation Committee**

Introduce new Letter of Understanding as follows:

Letter of Understanding re: Optimal Staffing Composition

The parties agree that periodic review of the composition of full-time, regular part-time, and casual staff ensures the optimization of the hospital workforce and may support quality work environments, support continuity of patient care, ensure adequate staffing resources, and support cost-efficiency. Such reviews should reflect the recruitment and retention considerations of the internal and external workforce, including the desire for stability and flexibility while ensuring service stability for patients in a 24/7 environment. It is also understood that such reviews occur at a point in time, and the optimal composition of full-time, regular part-time, and casual staff for a unit/department may change over time.

To this end, the parties agree to meet annually to discuss departments/units that would benefit from a review of the optimal composition of full-time, regular part-time, and casual staff. In order to conduct the review, the parties may review the following information for these departments/units:

- Overtime hours,
- Hours worked by casual staff,
- Hours worked by regular part-time staff above their commitment as per the local appendix of the collective agreement.
- Recruitment and retention data,
- Job postings,
- Hours worked by agency staff.
- Work Schedules

Where appropriate, if there are hours identified above that are consistent and recurring, they may be used to add or create full-time or regular part-time positions.



## Work of the Bargaining Unit (New Article 11.03)

Introduce New Letter of Understanding as follows:

Letter of Understanding re: Agency Staff Reporting

The Hospital will provide the Union, on a quarterly basis, with satisfactory reporting respecting the use of agency staff as follows:

i) Agency RPN and PSW hours worked per unit.
ii) Total bargaining unit hours worked per unit.
iii) Percentage of agency RPN and PSW hours worked per unit.
iv) Total agency RPN and PSW hours worked hospital-wide.
v) Total bargaining unit hours worked hospital-wide.
vi) Percentage of total agency RPN and PSW hours worked hospital-wide.

The Union may, at its expense, arrange for an audit of the information provided, and the employer will cooperate in that audit process.

## Contracting In (Article 10.03)

Amend as follows:

**(a)** Further to Article 9.08(A)(d)(i)(1) the parties agree that the Redeployment Committee will immediately undertake a review of any existing sub-contract work which would otherwise be bargaining unit work and which may be subject to expiry and open for renegotiation within six (6) months with a view to assessing the practicality and cost-effectiveness of having such work performed within the Hospital by members of the bargaining unit.

**(b)** **On request by the Union, and no more than annually, the local parties will review contracted services which fall within the work of the bargaining unit. The purpose of the review will be to determine the practicality of increasing the degree to which bargaining unit employees may be utilized to deliver such services in the future.**

## Infectious Diseases (Article 19.02)

Amend as follows:

(g) Within a reasonable time frame following the declaration of an epidemic or a pandemic by public health officials, the employer will meet with the joint health and safety committee to consult on how to implement protections for health care workers

(h) Employees who are absent from work due to illness shall receive sick pay in accordance with Article 13 (or in the case of part-time employees, percentage in lieu). Employees who are absent from work due to a communicable disease and who are required to quarantine or isolate due to (i) the employer's policy, and/or (ii) operation of law and/or (iii) direction of public health officials, shall be entitled to salary continuation and seniority accumulation for the duration of the quarantine.

For clarity, a part-time employee required to quarantine would receive salary continuation, including percentage in lieu, for all regularly scheduled shifts that they are absent for due to the quarantine requirement.

## New Letter of Understanding – NGG

Introduce new Letter of Understanding re: Nursing Graduate Guarantee Program as follows:

LETTER OF UNDERSTANDING
RE: Nursing Graduate Guarantee Program

1. The Hospital may introduce supernumerary positions to newly graduated or internationally educated nurses in compliance with the government's 2023-24 Guidelines for Participation in the Nursing Graduate Guarantee Program. If these guidelines are amended in a way that directly impacts the terms and conditions of this LOU, the parties will meet centrally to renegotiate this letter of understanding.

2. Only so many positions will be created as are covered by government funding for supernumerary positions.
3. Newly graduated nurses are defined as those nurses who have graduated from a nursing program or refresher program within the last year.
   Internationally educated nurses are defined as those nurses who received their basic nursing education in a country other than Canada.
4. The Hospital will consult with the Union with regards to supernumerary positions in accordance with the 2023-2024 Nursing Graduate Guarantee Program Guidelines.
5. The applicable mentorship premium in the local appendix will apply.
6. Such supernumerary positions will not be subject to internal postings as per Article 9.05.
7. Such nurses will be full-time and covered by the full-time Collective Agreement.
8. The duration of such supernumerary appointments will be for the period of funding or such other period as the local parties may agree, provided such period is not less than twelve (12) weeks.
9. Such nurses can apply for posted positions during the supernumerary appointment but may not transfer to a permanent position before the end of the supernumerary appointment.
10. For the purpose of job posting, supernumerary nurses will be deemed to have no seniority within the bargaining unit. If they are the successful applicant in a job competition they will then be credited with service and seniority credits equal to all hours worked in their supernumerary position.
11. If the nurse has not successfully posted into a permanent position by the end of the supernumerary appointment, they will be reclassified as casual and this will not be considered a layoff.
12. The Hospital bears the onus of demonstrating that such positions are supernumerary.

## New Article re: Weekend Worker

A weekend worker schedule may be developed. Weekend worker schedules are available in units and/or departments where 12 hour extended tours exist.
A weekend worker schedule is defined as a schedule in which a full-time employee works a weekly average of thirty (30) hours and is paid for thirty-seven point five (37.5) hours at their regular straight time hourly rate.

The schedule must include at least two extended tours which fall within a weekend period as defined by the collective agreement, and an additional standard or extended tour as determined by the Hospital and the Union. An employee working a weekend schedule will work every weekend except as provided for in the provisions below.

If the Hospital and the Union agree to a weekend schedule, the introduction of that schedule and the manner in which the position(s) are filled, shall be determined by the local parties and recorded in the Appendix of Local Provisions. This schedule may be discontinued by either party with notice as determined within the Appendix of Local Provisions. Such agreement shall not be unreasonably withheld. The opportunity for an individual weekend worker to discontinue this schedule shall be resolved by the local parties.

All provisions/entitlements of the collective agreement apply except as amended herein.
(a) Weekend premiums shall not be paid.
(b) Vacation Bank

Vacation entitlement is determined by Article 17.01(A).
For the purposes of Article 17.01(A), hours worked or credited as paid leave will be based on an accelerated rate of 1.25 hours credit for each hour worked.
The mechanism for utilizing accrued vacation will be determined by the local provisions' appendix and the template agreement.
Drawing from the vacation bank will occur at an accelerated rate of 1.25 paid hours for every hour taken as vacation (i.e., 7.5 hours worked equals 9.375 paid; 11.25 hours worked equals 14.0625 hours paid).
Vacation must be taken as a full weekend off (i.e., Saturday and Sunday). The maximum number of weekends off cannot exceed the week entitlement level determined by Article 17.01(A).
Single vacation days may be taken on weekdays, which need not be in conjunction with the Saturday and Sunday. Single vacation days may be taken on the weekend subject to operational requirements.
Cash-out and carry-over provisions for the accrued vacation will be determined locally.
Article 17.03 does not apply.

(c) Paid Holiday Bank

Employees qualify in accordance with the Article 16.02. The paid holidays are identified in the Appendix of Local Issues.
Credit to the paid holiday bank is as set out in the local issues appendix.
Drawing from the paid holiday bank will occur at an accelerated rate of 1.25 hours paid for every hour taken (i.e., 7.5 hours worked equals 9.375 hours paid; 11.25 hours worked equals 14.05 hours paid)
If an employee works on a paid holiday as defined by the local parties, they will receive one and one-half (1½) pay for all hours worked on a holiday. Article 16.04 also applies.
The holiday bank can be used as income replacement for absences due to illness or injury or for lieu time off on a weekday.
Cash-out and carry-over provisions for the bank will be determined locally.

(d) Sick Leave

The employee will not receive pay for the first seventeen (17) weeks of any period of absence due to an illness or injury. Subject to the availability of paid holiday banked hours, the employee will be eligible for Employment Insurance for weeks two (2) through seventeen (17) for any absence due to an illness or injury.
The Hospital will provide the employee with sixty-five (65%) percent of their regular earnings for weeks eighteen (18) through thirty (30) for any absence due to an illness or injury.
The employee may utilize their accrued vacation bank, the overtime bank, the paid holiday bank, and the paid sick leave bank (where applicable) as income replacement for absences due to illness or injury, as described in (b), (c) and (g). For those hospitals that have an accumulating sick leave plan an employee's sick leave bank is frozen when they transfer to a weekend worker schedule. The employee may utilize their

sick leave bank available under Article 13.01(c) for unpaid absences due to illness and Employment Insurance top-up in accordance with the formula for converting hours as described in Article 9.07(A).

The employee is eligible for long-term disability benefits as described in Article 13.01, only in agreements providing LTD benefits.

Employees may be required to provide medical proof of illness for any absence of a scheduled shift, which is neither vacation nor an approved leave of absence.

(e) Leaves of Absence

For the purposes of an unpaid 7.5 hour shift, the deduction from pay shall equate to 9.375 hours. For the purposes of an unpaid 11.25 hour shift, the deduction from pay shall equate to 14.05 hours

(f) Tour Exchange

In all instances of tour exchange, the tours must be of the same duration.

(g) Overtime

Overtime will begin to accrue after sixty (60) hours in a two (2) week period averaged over the scheduling period determined by the local parties.

Overtime will apply if the employee works in excess of the normal daily hours.

(h) Scheduling Provisions

The scheduling and premium provisions relating to consecutive weekends off in the Local Appendix where they exist do not apply to employees working under this provision.



## Article 9.08

Amend Article 9.08 (B) and (C) as follows:

9.08(B) – RETIREMENT ALLOWANCE

Prior to issuing notice of layoff pursuant to article 9.08(A)(a)(ii) in any classification(s), the Hospital will offer early retirement allowance to a sufficient number of employees eligible for early retirement under HOOPP within the classification(s) in order of seniority, to the extent that the maximum number of employees within a classification who elect early retirement is equivalent to the number of employees within the classification(s) who would otherwise receive notice of layoff under article 9.08(A)(a)(ii).

**The Hospital need not approve an employee's request for an early retirement allowance if approving such allowance will not reduce the number of layoff notices which would otherwise be made under article 9.08(A)(a)(ii).**

An employee who elects an early retirement option shall receive, following completion of the last day of work, a retirement allowance of two (2) weeks' salary for each year of service, plus a prorated amount for any additional partial year of service, to a maximum ceiling of fifty-two (52) weeks' salary.

9.08(C) - VOLUNTARY EXIT OPTION**:**

If after making offers of early retirement, individual layoff notices are still required, prior to issuing those notices the Hospital will offer a voluntary early exit option in accordance with the following conditions:

(i) The Hospital will first make offers in the classifications within department(s) where layoffs would otherwise occur. If more employees than are required are interested, the Hospital will make its decision based on seniority.

(ii) If insufficient employees in the department affected accept the offer, the Hospital will then extend the offer to employees in the same classification in other departments. If more employees than are required are interested, the Hospital will make its decision based on seniority.

(iii) In no case will the Hospital approve an employee's request under (i) and (ii) above for a voluntary early exit option, if the employees remaining are not qualified to perform the available work.

(iv) The number of voluntary early exit options the Hospital approves will not exceed the number of employees in that classification who would otherwise be laid off. The last day of employment for an employee who accepts a voluntary early exit option will be at the Hospital's discretion and will be no earlier than thirty (30) calendar days immediately following the employee's written acceptance of the offer.

**The Hospital need not approve an employee's request for a voluntary early exit option if approving such option will not reduce the number of layoff notices which would otherwise be made under article 9.08(A)(a)(ii).**
An employee who elects a voluntary early exit option shall receive, following completion of the last day of work, a separation allowance of two (2) weeks' salary for each year of service, to a maximum of fifty-two (52) weeks' pay.



## Conclusion

At the request of the parties, we remain seized with respect to the implementation of our award.

DATED at Toronto this 18th day of April 2024.

*"William Kaplan"*

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William Kaplan, Chair

I dissent. Dissent attached.

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Brett Christen, OHA Nominee

I dissent. Dissent attached.

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Tim Gleason, OCHU/CUPE Nominee

## DISSENT

I respectfully dissent from the Award of the Chair dated April 18, 2024 (the "Award").

## Background

The Award is the first central award between these parties since the central re-opener award dated June 13, 2023 (the "Re-Opener Award") between the Participating Hospitals and CUPE/OCHU and SEIU (in that central round CUPE/OCHU and the SEIU bargained together). The Re-Opener Award settled the terms of the collective agreement with the term of September 29, 2021 to September 28, 2023 (the "2021 Collective Agreement"). The prior collective agreement covered a four-year period from September 29, 2017 to September 28, 2021 (the "2017 Collective Agreement") and provided for general annual wage increases of 1.4%, 1.4%, 1.6% and 1.65% (which were in line with the relevant comparators).

During the term of the 2017 Collective Agreement, hospitals faced a period of unprecedented change and challenge: the sudden on-set of the COVID Pandemic, the resulting spike in staff shortages, a quick and sharp rise in inflation, and numerous related challenges. These challenges required hospitals to quickly innovate and continuously adapt to continue to meet patient care demands despite the severe fiscal pressures that they were operating under. The bargaining for the 2021 Collective Agreement was the first opportunity for the hospitals and Union to negotiate with respect to the significantly changed landscape which had developed under the 2017 Collective Agreement.

When the bargaining for the 2021 Collective Agreement commenced the *Protecting Sustainable Public Sector for Future Generations Act*, 2019 ("Bill 124") was in effect. The parties were, not surprisingly, unable to conclude a voluntary settlement of the central terms of the hospitals' collective agreements and the impasse proceeded to interest arbitration before a Board Chaired by Arbitrator Sheehan. Although the hospitals had many issues, including the need for increased scheduling flexibility, that they would have liked to achieve at the arbitration, given the existence of Bill 124, the hospitals realistically assessed that few gains could likely be made in the proceeding and advanced only modest demands at arbitration. Regrettably, but like other awards in the hospital sector issued under Bill 124, the Board's Award dated November 3, 2022 (the "Initial Award") did not seriously consider any of the employer's modest proposals and none were

awarded. The Initial Award did award, however, new non-monetary language to the Union in the form of a new provision on infectious disease and enhanced language on workplace violence. In addition, and within the monetary constraints of Bill 124, the Initial Award provided a 1% wage increase, increases to shift and weekend premiums, the introduction of a charge nurse premium at $2/hr, an increase to the temporary transfer/responsibility premium to $1/hr and the introduction of a new mental health benefit, capped at $800 annually.

The Initial Award, like other awards in the hospital sector issued under Bill 124, also contained a typical re-opener clause which allowed for monetary issues to be re-visited in the event that Bill 124 was determined to be unconstitutional. After the Initial Award was issued, the Ontario Superior Court declared Bill 124 to be unconstitutional and of no force or effect (in 2024, the Ontario Court of Appeal dismissed the Ontario Government's appeal of that decision).

The Re-Opener Award (issued by a Board chaired by Arbitrator Kaplan) addressed the additional compensation to be awarded under the re-opener provision of the Initial Award. Like other situations involving re-openers, there was no opportunity for the hospitals to negotiate any trade offs against the monetary gains sought by the unions. Further, due to the delay related to the Bill 124 litigation and the re-starting the of the central and local processes following the striking down of Bill 124, the Re-Opener Award wasn't able to be released until June, 2023 a few months before the expiry of the Collective Agreement. In this anomalous circumstance, the Union was able to rely upon actual inflation data relating to the entire first year of the agreement and the majority of the second year of the agreement, recruitment and retention data relating to most of the period covered by the collective agreement, data which showed that inflation had exceeded the general wage increase for the last year of the 2017 collective Agreement, and upon significant wage and benefit enhancements granted in two ONA separate Re-Opener Awards (relating to two earlier Bill 124 Awards) which due to the Bill 124 delays had, again anomalously, both been issued in April 2023.

In these unusual circumstances, the Re-Opener Award granted significant wage increases and several other enhancements to the Union such as a $2/hour RPN wage adjustment, the folding of the legislated PSW wage adjustment into the wage grid prior to the implementation of the awarded general wage increases, an increase in call back pay from time and a half to double time, an

increase in the vision benefit (over 24 months) from $300 to $450, the introduction of coverage for massage therapy at $375/yr, the replacement of the per visit cap for physiotherapy, chiropractic and massage with a reasonable and customary limitation, a further increase to shift ($1.00 increase) and weekend ($1.50 increase) premiums (the Initial Award had also increased these premiums) and an allowance for the payment of both shift and weekend premiums on hours worked (where such entitlement did not already exist).

On any balanced assessment, the Initial Award and the Re-Opener Award represent a significant increase in wages, benefits and other enhancements for a two-year collective agreement. When it is remembered that no employer proposals were awarded in either the Initial Award or Re-Opener Award, the imbalance of these two awards is even more pronounced.

Numerous locals of the Union have also sought additional enhancements to the local portion of their collective agreement, which, again as a result of the delays related to Bill 124, are still in the process of being determined by a local issues arbitration board. Together the local unions have sought numerous wage adjustments to specific classifications, increases to uniform and meal allowances, the introduction of mentorship and student supervision premiums (or increases to existing premiums), and other enhancements and amendments, including to already overly restrictive local scheduling provisions. To the extent that any of these local union proposals are actually granted by the local issues board, the imbalance of the 2022-2023 Collective Agreement applicable to each particular participating hospital will be exacerbated.

**The Chair's Award**

My first concern then with the Award is that it awards any union proposals at all. In light of the Bill 124 and subsequent re-opener process in which the Hospitals were practically and effectively precluded from pursuing any proposals and the resulting 2022-2023 collective agreements in which no hospital proposals were awarded, the ledger needed to be righted. In my view, the Award would have gone some way to doing so by, at the least, awarding only the Hospital proposals granted in the award and declining to award any of the union's proposals.

The hospitals proposals relating to Nurse Graduate Guarantee Program and Weekend Worker, which were awarded by the Chair, are directly responsive to the recruitment and retention issues

raised by the Union in the Re-Opener proceeding and would likely have been awarded in that proceeding, in my view, had the hospitals been able to advance proposals. The amendments granted by the Chair to Article 9.08 (relating to the circumstances in which a retirement allowance is to be available) are analogous to the severance pay amendments made in the recent ONA central award and also, in my view, would likely have been awarded in the Re-Opener proceeding had the hospitals been able to advance proposals. For these reasons, I would have awarded the Hospital proposals which were awarded in the Award but would not have awarded the Union's proposals awarded in the Award given the gains made by the Union under the unusual circumstances in which the settlement of the last collective agreement occurred.

My second concern with the Award is with the wage increases awarded. In light of the trend, albeit erratic, of declining inflation, I would have awarded the 3% (in year 1) and the 2.5% (in year 2) wage increases proposed by the Hospitals to reflect this declining trend.

It must, however, be acknowledged that the arbitrator, recognized (as he did in *ONA and Participating Hospitals*, unreported award of Arbitrator Kaplan dated July 20, 2023; and re-affirmed in *OPSEU and Participating Hospitals*, unreported award of Arbitrator Kaplan dated August 3, 2023, at page 26) that real collective bargaining involves give and take on the part of both parties. In hospital interest arbitration, experienced Arbitrators with a sophisticated understanding of collective bargaining have in the past, as the Arbitrator did in this case, recognized that the replication of authentic collective bargaining must include trade-offs including the award of important employer proposals. These arbitrators have recognized that for true replication to be achieved, even employer proposals which are strongly opposed by the union must be awarded such as occurs in collective bargaining between parties without recourse to interest arbitration where unions are often required to accept employer proposals they strongly oppose to conclude a collective agreement.

For example, Arbitrator Adams, in the 1995-2001 CUPE/SEIU Central award (*CUPE and SEIU and the Participating Hospitals*, unreported award of Arbitrator Adams dated June 28,1999) granted two important employer proposals (at p.7 and p.8), the second of which significantly modified the layoff process under the collective agreement by amending the definition of layoff

and reducing the required notice of layoff. The amendments to the layoff process were made notwithstanding that the employer's proposal was strongly opposed by the union.

Similarly, in a case arising out of the amalgamation of several hospital sites into the Scarborough Health Network (*Scarborough Health Network and CUPE, Local 5852*, unreported award of Arbitrator Gedalof dated May 26, 2019) Arbitrator Gedalof awarded hospital proposals relating to Temporary Vacancies/Posting (p.6) and Mobility Between Sites (p.6). Arbitrator Gedalof discussed his award of the latter hospital proposal in a subsequent award (*Scarborough Health Network and CUPE, Local 5852*, unreported award of Arbitrator Gedalof dated December 15, 2020, at p.20) noting, at para. 50, that the Hospital had been awarded a "substantially more favourable" mobility provision notwithstanding the "vociferous objections" of the union.

Accordingly, experienced interest arbitrators in the hospital sector have in the past recognized that the replication of real collective bargaining requires the award of important employer proposals notwithstanding strong and vociferous objection from the union.

The predominate and unfortunate history of interest arbitration in the hospital sector in Ontario, however, is that too often arbitrators (in both central and local negotiations) have awarded only union proposals and, in doing so, have spectacularly failed to replicate true collective bargaining results. Where this flawed approach continues un-checked the result is both inevitable and consequential. Unions learn that they don't need to give serious consideration to any employer proposal since there is little risk that they will be awarded at interest arbitration. Where the employer proposals are in respect of changes needed to address the evolving workplace, costly inefficiencies continue. Worse, where the employer proposals are in respect of changes needed to match available staff to areas of greatest need, patient care continues to be compromised. Unions also learn to maintain proposals which should be dropped and proceed to interest arbitration with a laundry list of proposals greatly increasing the time and expense associated with the interest arbitration process. Where agreements at bargaining on particular proposals are occasionally reached, they tend to be to be in the nature of agreements on "chickenfeed". In short, the collective bargaining process in the hospital sector has often been undermined rather than facilitated by the interest arbitration process. Where the parties, whether at local or central negotiations, do

occasionally achieve a freely negotiated settlement it is despite, and not because of, the history of interest arbitration in this sector.

As noted above, I would have decided this matter differently given the significant advances made by the Union under the unusual circumstances relating to the settlement of the 2021 collective agreement. However, if one considers the Award without this context, it must be acknowledged that the Award replicates a possible outcome that could have occurred in free collective bargaining. Both parties made progress on some of their key items without getting exactly what they wanted, failed to achieve other key proposals, and both undoubtedly would have preferred the other party to have achieved less. In other words, the result of the Award is one which is not that different from most freely negotiated collective bargaining settlements.

While I do not agree with the manner in which the Chair dealt with some of the particular proposals before the Board, providing a detailed explanation of these concerns would only tend to distract from a more important point. The Award, like the Chair's 2023 central award in *ONA and Participating Hospitals*, goes some significant way to addressing the bleak history of interest arbitration in this sector by providing an award which attempts to fairly balance the respective interests of both the parties and which attempts to replicate the types of trade-offs and compromises which occur everyday in real collective bargaining where resort to interest arbitration is not an option. The interest arbitration process in this sector will be greatly improved if other interest arbitrators in future do the same.

Dated April 18, 2024

Brett Christen

Nominee of the Participating Hospitals

**DISSENT OF UNION NOMINEE**

While I am in agreement with the Chair's recognition of the serious challenges faced by the Union's members, and the circumstances which justify important improvements to the collective agreement, I would have gone further to address these, and I must therefore dissent. The Chair's award is an important step toward the necessary goal of parity with other collective agreements in the health care sector, and I anticipate that in the next round of bargaining, full parity should and will be achieved, but in my view, this was warranted in this award.

Furthermore, while the wage increases awarded by the Chair represent significant improvements, for the reasons urged upon the board by the Union, an increase of 4% in the first year would have been more than justified. Leaving aside uncertainty about what the future holds for the economy, there is compelling evidence of a serious crisis of recruitment and retention in the hospital sector, and the Union's members are paying the price in the form of burnout, stress and overwork. The demonstrated effect of inflation on workers' spending power more than justifies this increase, and a similar (or greater) increase, in year two.

The Chair's award goes a long way toward bringing the Union's benefits and premiums into line with other employee groups, and I expect this to continue in subsequent rounds, but I fear that an incremental approach to addressing discrepancies in important benefits for mental health and well being as well as vacation will be counterproductive, as the hospital sector continues to struggle to attract new employees. The Union presented evidence of serious mental health challenges faced by its members, which cannot be readily distinguished from those faced by ONA members, who receive unlimited mental health support. It is broadly understood that the cost of mental health

treatment far exceeds the limits of the existing benefits in the Union's collective agreement. In my view, there is no justification for perpetuating these disparities, and I fully expect them to be addressed in the next round of bargaining.

The evidence presented by the Union demonstrated that years of neglect of health care workers has led to serious consequences for the health care system, and these have implications for the broader society. While OCHU members have carried much of this burden, the retention and recruitment crisis will need to be addressed, and an important first step would be to acknowledge that disparities between the Union's members and RNs simply cannot be justified or sustained in the future.

In my view, the Participating Hospitals failed to establish a demonstrated need for changes to the voluntary exit provisions in the collective agreement. While I appreciate the Chair's observation that these are not, in his view, concessions, I would emphasize the Union's submissions about the important incentives and deterrent effect that these job security protections afforded. However, given the basis for the Chair's change in this regard, I am certainly confident that the Chair did not intend that these changes would be seen as a precursor for any further erosion of the Union's longstanding, critical and hard fought job security protections in future rounds, and that they will not be used to justify any future excursion onto that slippery slope. I take the Chair's observation as confirming that this change is not a signal that any such erosion is appropriate.

In summary, while I agree with the direction and objectives of the Chair in his award, I would have awarded more substantial improvements in wages and benefits, on the basis that there is both a

demonstrated need together with an absence of any justification for perpetuating the disparities highlighted by the Union, and no demonstrated need for the voluntary exit change the Chair has directed.

Tim Gleason, OCHU/Union Nominee

# TAB 19

**IN THE MATTER OF AN INTEREST ARBITRATION**

**Between:**

**The Ontario Teaching Hospitals (OTH)**

**and**

**The Professional Association of Residents of Ontario (PARO)**



**Before:** William Kaplan
Sole Arbitrator

**Appearances**

**For the Hospitals:** Bob Bass
Bass Associates

**For PARO:** Steven Barrett
Nadine Blum
Goldblatt Associates
Barristers & Solicitors

The matters in dispute proceeded to a hearing held by Zoom on September 6, 2023. OTH rebuttal submissions were received on September 11, 2023.

## Introduction

On May 21, 2021, an award was issued resolving all outstanding issues between the Teaching Hospitals of Ontario (OTH) and the Professional Association of Residents of Ontario (PARO) for a collective agreement with a term of July 1, 2020 to June 30, 2023. The award was constrained by the *Protecting a Sustainable Public Service for Future Generations Act, 2019* (Bill 124*)*. That legislation was subject to court challenge. Accordingly, and as was normative, the award included a reopener provision should the constitutional challenge prove successful, or should Bill 124 be otherwise modified or repealed with retroactive effect, or for some other legally relevant reason. On November 29, 2023, the legislation was struck down, and an appeal has since been argued. No interim stay was sought. The decision of the court remains outstanding. After the legislation was declared to be of no force or effect, the reopener provision was invoked and a mediation was held on June 28, 2023. The mediation proved unsuccessful and the matters in dispute proceeded to a hearing held by Zoom on September 6, 2023. OTH rebuttal submissions were received on September 11, 2023.

In brief, PARO sought wage adjustments (over and above the 1% already paid in each year) of 1%, 2% and 3.75% in each of 2020, 2021 and 2022. The OTH offered additional increases of .75%, 1% and 2%. In the third year PARO also sought specific PGY adjustments to align Ontario residents with maritime residents. Both parties made proposals for increasing stipends: PARO sought a doubling, OTH offered increases of 1.93% in 2020, 2.63% in 2021, and 5.37% in 2022. PARO sought improvements to two benefits: vision and mental health. OTH argued in favour of the status quo.

## PARO Submissions

PARO submissions began with a detailed review of the critical role played by 5500 residents employed by Ontario's teaching hospitals in the healthcare system. Residents, in short, provide

diagnosis and direct care on a 24/7 basis. While the contribution of residents was second to none, they were under-compensated compared to residents in some other provinces, especially in Atlantic Canada, with Bill 124 leaving them even further behind. This unsatisfactory situation was exacerbated by pervasive inflation over the course of the collective agreement term. Inflation had had, and was continuing to have, a corrosive effect on spending power. In 2021, inflation in Ontario averaged 3.5%; but in 2022 it reached a 40-year high of 6.8%. There was no sign of inflation abating anytime soon. For 2023, inflation was currently sitting at 2.8% but excluding gasoline, it was 4% in June with grocery prices up 9.2% that month and mortgage interest costs up more than 30%. It was far from clear where exactly Ontario inflation would land in 2023, but no economist was predicting anything less than 3%. It seemed most unlikely that there would be any return to historic – annual 2% – norms anytime soon. In the meantime, Ontario's economic indicators and outlook were both good – outlined by PARO in its brief and at the hearing – while allocating funds to the hospital sector was an established government priority, a factor worth bearing in mind in a context where PARO funding came directly from the province, not individual hospitals.

Obviously, PARO pointed out, in determining the reopener, interest arbitration criteria had to be borne in mind: replication, internal and external comparability, trends in settlements and adjudicated outcomes, the economy and cost of living, were the ones most germane to this proceeding. No particular factor was paramount, however. In earlier proceedings, both external and internal comparators have been identified as extremely relevant. Indeed, extra-provincial comparisons of residents have been widely accepted by Ontario adjudicators over successive rounds for the purposes of determining compensation (an approach also followed by interest arbitrators determining resident compensation in other jurisdictions). The fact was that at one point, PARO-represented residents led the other provinces in compensation; that was no longer true. While some progress had recently been made in redressing this, PARO noted that Ontario

residents remained in 3rd place, a ranking made even more problematic as most residents lived in the GTA, with its much higher cost of living.

In PARO's view, it would not be appropriate to follow the two earliest central healthcare reopener cases. There first of these was *ONA & Participating Hospitals*, (unreported award of Stout dated April 1, 2023) – the Stout Reopener – and the second was *ONA & Participating Hospitals*, (unreported award of Gedalof dated April 25, 2023) – the Gedalof Reopener. Neither of these awards, PARO argued, appropriately addressed inflation. Notably, neither of these reopeners were followed in subsequent central healthcare interest reopener cases. PARO urged that they should not be followed here, a conclusion which was reinforced when the growing body of freely bargained reopener settlements and awards were reviewed from across the collective bargaining landscape. Simply put, these ONA reopeners were not being followed anywhere by anyone.

At the same time, freely bargained settlements were trending up, significantly so in many cases as was illustrated by examples on point. And arbitrators, PARO observed, while initially reluctant to recognize inflation in salary outcomes – awaiting free collective bargaining results to replicate – had completely reversed course, given freely bargained settlements, and given that the need to address inflation had become imperative. All these factors, and others informed, PARO's wage demands. In addition, the bargaining history between these parties illustrated a shared understanding of the need to move towards parity with Maritime doctors. It should have happened earlier, and very well could have but for Bill 124. There was no justification for further delay: it was time to complete that work with further targeted adjustments over and above general wage increases.

Also important were call stipends. Under present arrangements, a resident on weekend call, received a call stipend of $6.25 an hour; for overnight 12-hour calls, it was $11.06 an hour.

Home call rates, where the resident was required to be available and within close geographic proximity to their hospital, and where the resident was often required to return to the hospital, received $3.13 an hour for weekend home call and $5.03 an hour for overnight home call. Earlier stipend adjustments were an important first step in redressing this issue, but the time was long overdue for meaningful attention to be paid to this inequity: PARO proposed a doubling of rates, a proposal that was also justified when both internal (other hospital health care professionals including, to give two examples, resident physicians in the MRPP, and doctors represented by the OMA), and external comparators (residents in other provinces) were considered.

In terms of benefits, PARO sought a modest improvement to vision care (reflecting central hospital awards) and an increase to the mental health benefit to $2000.

**OTH Submissions**

In the OTH's submissions, the two ONA reopeners should be followed as the PARO Bill 124 term matched the ONA years (and did not match the other central healthcare terms): accordingly, comparing with other – higher – central hospital health care awards was completely arbitrary and self-interested. Indeed, PARO's proposal was classic cherry picking. For example, PARO sought the OCHU/SEIU 4.75% for its third year (2022), but not the negotiated results for 2020 and 2021 (1.60% and 1.65%). The OTH also objected to the absence of Quebec comparative data; this too was, in the OTH's submission, self-interested for that data demonstrated how well Ontario residents were paid when compared to Canada's second largest province.

ONA was, moreover, the long-established, repeatedly recognized comparator and that meant 1.75% in 2020, 2% in 2021 and 3% in 2022, which is what the OTH proposed (inclusive of the 1% already paid). This result was also fully in accord with the negotiated agreement between the Ministry of Health and Long-Term Care and the Ontario Medical Association (2021-2024). Mention was also made that unlike other healthcare professionals, doctors, when they begin

billing, move immediately to the maximum rate. The residents would soon enjoy an enormous salary bump as they moved into practice (as illustrated in the OTH brief). In the meantime, Ontario residents were among the best paid in the country.

The data was categorical: Ontario provided the highest wage rate for 93% of the residents working in Canada. Put another way, the wages received by 7% of the residents in the Maritimes – outcomes that have not been followed across the country – was not a template to be followed. The Maritimes skyrocketed in 2011, the result of an outlier interest arbitration award. For competitive reasons, NFLD had to follow suit. But these anomalous Atlantic Canada outcomes had not been replicated anywhere else in Canada and, the OTH argued, should not be followed here. Notably, Ontario residents are at the very top when Atlantic Canada was excluded. Even with the higher salaries out East, medical school graduates from Ontario still chose Ontario first. Ontario was a popular destination for students trained elsewhere. CARMs data indicated that in choosing a province for residency, salary, as a factor, came third.

There were other reasons in favour of the OTH's approach. Change in interest arbitration – itself a conservative process – should be incremental. Total compensation needed to be considered and relevant criteria addressed. One important distinction between this case and the central hospital awards that PARO relied upon was recruitment and retention. That factor played an oversize role in those other proceedings but had nothing to do with this one. Recruitment and retention was self-evidently not a factor. It could not and should not impact outcome. It was also worth noting that residents were short term employees and students who benefited from the education component.

Insofar as stipends were concerned, the OTH was of the view that modest increases were in order: 1.93% in 2020, 2.63% in 2021, and 5.37% in 2022. It was important to remember that stipends were not shift premiums, they were payments for being on call. It was also important to

know that with most of the stipends, Ontario was already close to the top, and with some modest tweaking these rankings could be further improved. At the very least, when the different stipends were examined and compared to the other Canadian jurisdictions, it was clear that Ontario, in the overall, was competitive. Likewise, there was no justification to increase either vision or mental health. The OTH paid the full cost of these benefits – unlike the various hospital comparators, there was no premium sharing arrangement. Overall PARO benefits were superior and there was, therefore, no need to upwardly adjust them.



**Discussion**

As has been established in several awards, in addressing reopeners it is necessary to consider all relevant information including negotiated and awarded outcomes from all sectors, not just the traditional comparators. It is also now generally agreed that there are no cut-off dates following which relevant evidence is to be ignored. I have followed this approach. In brief, both internal and external comparators must be examined. In this case, the best comparators for determining appropriate compensation requires an examination of what residents receive elsewhere in Canada for the exact same work. Both parties acknowledge that there is a national market for residents and so resident compensation from across the country is properly reviewed as are health care settlements and awards not to mention free collective bargaining settlements more generally.

PARO referred to and the OTH relied extensively on negotiated and awarded outcomes for the same general period under review from retirement homes and long-term care, but these results are rejected on the basis that they fall far short of even beginning to address inflation and are completely inconsistent with central hospital results – which is where the residents work. The differences between the work performed in retirement and long-term care homes and hospitals, not to mention the predominate classifications of the employees doing that work, are legion and one can readily conclude that these comparators are inapposite.

Clearly there is a historical relationship between PARO outcomes and ONA results. However, in earlier cases the predecessor to OTH suggested that much lower CUPE/SEIU results should be followed; in this case instead of pointing to the now higher CUPE/SEIU reopener amounts, it argues in favour of the lower ONA reopener amounts. It is quite clear, however, while ONA has been a long-standing and natural internal comparator as doctors and nurses work side-by-side, this comparator relationship is not an exclusive one and no one has ever said that it is: outcomes with other groups also inform results. In any event, I do not conclude that this is an appropriate case to follow the ONA reopeners as neither of them appropriately addressed inflation (although the Gedalof Reopener did include important grid changes in addition to the general wage increase). At the very least, for present purposes because of inflation, the ONA reopeners are not a reliable or relatable internal comparator for the years in question.

There are well established freely bargained outcomes in 2020, when inflation was significantly lower, and that leads one to conclude that the appropriate additional increase for that year is, as the OTH proposes, .75%. Inflation was 3.5% in 2021. How then could it be appropriate to follow a reopener that provides for a total of 2% in 2021? Inflation was 6.8% in 2022. How then could it be appropriate to award (a total) of 3%? This collective agreement expired on June 30, 2023. More than half of 2023 is now over. No one is seriously suggesting that inflation will be anything less than 3% this year. In these circumstances, PARO's general wage increase requests are granted with exception, as noted above, of the first year where the evidence is compelling that the appropriate amount is an additional .75%.

Simply stated, the ONA reopeners are not being followed because they do not address inflation. In contrast, other recent central hospital reopeners are more persuasive with general wage increases supplemented with other targeted improvements to deal with both inflation and recruitment and retention. Recruitment and retention is not a factor here for obvious reasons: it can never be an issue for residents who must obtain residencies as part of their licensing and is

not subject in any way at any time to market forces. In addition to the now normative general wage increases for the years in question, some adjustments to specific PGY steps are provided for, effective date of award, as part of a total compensation approach.

An adjustment to call stipends is necessary – both parties are in agreement about this – but must be done taking total compensation into account. PARO's proposed increase to call stipends has been costed (by it) as representing 4.88% of total compensation. From that perspective, this is untenable when considered alongside the general wage increases and the improvements to PGY steps. Much more modest increases have been awarded and have been made effective date of award.

Both benefit requests are also awarded. The vision improvement is completely normative and there is no reason why residents should not enjoy the same vision entitlement as their workplace colleagues. The fact that PARO benefits are 100% paid has never been a factor leading to reducing entitlements. The need for an increase in mental health benefits is self-evident – the pandemic was grueling and challenging for everyone, but especially so for front line healthcare workers – a modest increase for mental health benefits really requires no elaboration or discussion given continuing workplace challenges.

**Decision**

**Wages (Additional amounts over and above the 1% in each year previously paid)**

July 1, 2020: .75%

July 1, 2021: 2%

July 1, 2022: 3.75%

Apply these general wage increases to Chief and Senior Resident Stipends.

**Specific PGY Adjustments**

Effective date of award, increase PGY1 by a further $740, PGY7 by a further $990, and PGY8 by a further $1555.

**Call Stipends**

Effective date of award, increase the in-hospital weekday and conversion weekday call stipend to $161.86, the in-hospital weekend and conversion weekend call stipend to $198.49, the home weekday and qualifying weekday call stipend to $80.93, and the home weekend and qualifying weekend call stipends to $99.24.

**Benefits**

**Vision Care**

Effective sixty days following issue of award, increase by $75.00.

**Mental Health**

Effective sixty days following issue of award, increase by $1000.

**Conclusion**

At the request of the parties, I remain seized with respect to the implementation of my award including, if necessary, to address any issues that may arise should the government's Bill 124 appeal prove successful.

DATED at Toronto this 14th day of September 2023.

*"William Kaplan"*

William Kaplan, Sole Arbitrator

# TAB 20

**IN THE MATTER OF AN IN INTEREST ARBITRATION**

**BETWEEN:**

**Ontario's Teaching Hospitals (Acting as successor to CAHO)**

**and**

**Professional Association of Residents of Ontario**



| | |
|---|---|
| **Before**: | William Kaplan<br>Sole Arbitrator |
| **Appearances** | |
| **For Ontario's Teaching Hospitals**: | Bob Bass<br>Bass Associates |
| **For PARO**: | Steven Barrett<br>Nadine Blum<br>Goldblatt Partners<br>Barristers & Solicitors |

The matters in dispute proceeded to a hearing by Zoom on June 10, 2021.

**Introduction**

This interest arbitration was convened to resolve the single outstanding issue remaining in dispute between Ontario's Teaching Hospitals (the Teaching Hospitals) and the Professional Association of Residents of Ontario (PARO). PARO represents approximately 5500 residents in Ontario. The Teaching Hospitals are the successor to the Council of Academic Hospitals of Ontario – and it is the representative of Ontario teaching hospitals – each affiliated with a medical school – that employ residents. There is no question – and this is described in detail in the written submissions – about the significant and essential role played by residents in Ontario's healthcare system. The evidence convincingly establishes that residents – like all other frontline healthcare workers – have, during the pandemic, gone beyond the call of duty in working extra-long hours providing essential and exemplary services, often at considerable personal risk – services to the people of Ontario that were, and are, well in excess of their normal responsibilities and assignments.

Following a hearing held on May 15, 2021, an initial award setting out compensation was issued on May 20, 2021. The single outstanding issue is a PARO proposal that residents be awarded pandemic pay, and it proceeded to arbitration on June 10, 2021. In advance of that hearing, both parties filed detailed written briefs which, along with the submissions made at the hearing, have been carefully considered in reaching this decision.

**The Outstanding Issue in Dispute**

PARO proposes Pandemic Pay:

Each resident employed as of July 1, 2020, will receive a pandemic pay lump sum amount of $6,120 dollars and will be entitled to receive any front-line pandemic pay as may be subsequently provided to any other hospital employees.

(The total amount was calculated as follows: $4/hour x 80 hours/week x 16 weeks = $5120 (wage subsidy) + $1000 (lump sum: 4 x $250) **= $6,120.**)

**Some Background**

On April 25, 2020, the Ontario government announced a program of support for the "Frontline Heroes of COVID-19." And that support was pandemic pay of $4.00 per hour worked on top of existing hourly wages, as well as a $250 monthly lump sum for employees working at least 100 hours in a designated 4-week period. The stated purposes of the program included assisting frontline staff who were experiencing severe challenges and who were at heightened risk. Residents were not on the eligibility list. To state it most neutrally, this omission caused considerable consternation. Suffice it to say that changing the exclusion to inclusion garnered considerable support including from the Ontario Hospital Association (OHA). In the meantime, residents continued to step up in caring for Ontario's patients, as is most recently reflected in the April 24, 2021 agreement entered into between PARO and the OHA to facilitate the paid voluntary redeployment of residents outside of their training programs so that they could relieve staffing pressures throughout the system.

**Positions of the Parties**

PARO takes the position that its Pandemic Pay proposal should be awarded. Not only did replication dictate the result, so too did the need to ensure both internal and external comparability. The sought-after increases might have been explicitly prohibited by Bill 124, *Protecting a Sustainable Public Sector for a Future Generation Act, 2019*. However, the government enacted Regulation 195/20 ("Treatment of Temporary COVID-19 Related Payments to Employees") under the *Reopening Ontario (A flexible Response to COVID-19) Act, 2020* which provided for temporary COVID-19 related payments. That regulation temporarily suspends otherwise governing portions of Bill 124 in hospitals – the workplace of residents – and authorizes the additional compensation notwithstanding Bill 124. There was, PARO therefore argued, no statutory bar to awarding the proposal; one that was, in any event, fully justified by the application of governing interest arbitration criteria. In addition, for reasons set out in its brief, PARO took the position that using an 80-hour weekly average for calculation purposes was entirely appropriate (based on survey data and for other reasons).

In the view of the Teaching Hospitals, the PARO proposal should be rejected. The government was entitled to determine who received pandemic pay and who did not. This was the decision of the government and one it was entitled to make. The fact of the matter was that many frontline health care workers were excluded as an exercise of public policy. Simply put, there were other healthcare workers who did not receive this payment. Recruitment and retention factors, notably, did not apply in the case of residents – they did, however, for the other targeted groups. In addition, this type of special adjustment has been regularly rejected by

interest arbitration boards over the course of the pandemic. A number of authorities were advanced illustrating this submission. And for these reasons, and others, the Teaching Hospitals asked that the proposal be rejected.



**Decision**

Having carefully considered the submissions of the parties, the PARO proposal is awarded albeit with modification. The proposal is not statute-barred. In fact, the opposite is true: it is explicitly authorized. Moreover, in this case, the proposal actually replicates what the parties would have done in free collective bargaining. The evidence about this, as presented in the PARO brief, is overwhelming. When one adds in considerations of internal and external comparability, the case for granting this PARO proposal is made manifest (notwithstanding the Teaching Hospitals submissions about recruitment and retention). As the Ontario government made clear in its funding announcement:

> The goals of this temporary pandemic pay were to:
>
> - provide additional support and relief to frontline workers
> - encourage staff to continue working and attract prospective employees
> - help maintain safe staffing levels and the operation of critical frontline services

Recruitment and retention did not apply to residents, but the other goals of the temporary pandemic pay program are completely applicable. Residents were intimately and integrally on the frontlines: there is no ambiguity about this and there is, likewise, is no rational basis for their exclusion. None of the authorities that were submitted are of assistance in disposing of this matter.

The payment should be based on a 60-hour week and this is awarded together with the prescribed weekly lump sum. This award, needless to say, conservatively estimates the extent of resident hours worked, not to mention the very real personal and professional challenges they faced, especially in the uncertain attenuated early days when so much about the transmission of COVID-19 was unknown.

**Conclusion**

The PARO proposal is awarded to affected individuals in the prescribed time period. The request to anticipate future like payments, if any, and provide, in this award, for future resident eligibility, is declined. That is a different matter for another day. At the request of the parties, I remain seized with respect to the implementation of this award.

DATED at Toronto this 14th day of June 2021.

*"William Kaplan"*

William Kaplan, Sole Arbitrator

# TAB 21

**IN THE MATTER OF AN INTEREST ARBITRATION BETWEEN:**

**The Crown in Right of Ontario**

**and**

**OPSEU/SEFPO Unified Bargaining Unit**

**Before:** **Gerry Lee**
**Sole Arbitrator**

**Appearances**

**For the Crown:** **Sunil Kapur**
**Patrick Pengelly**
**McCarthy Tetrault**
**Barristers & Solicitors**

**For OPSEU/**
**SEFPO Unified:** **Coleen Houlder, OPS Unified Bargaining Team Chair**
**2021 OPS Unified Bargaining Team**
**Len Elliott, OPS Supervisor**

**The matters in dispute proceeded to a mediation-arbitration on January 20th and 21st, 2024.**

## Introduction

This mediation-arbitration was convened to address the wage reopener agreement in the collective agreement for the term of January 1, 2022 to December 31, 2024 between The Crown in right of Ontario (hereafter the "Employer") and the OPSEU/SEFPO Unified Bargaining Unit (hereafter the "Unified Bargaining Unit"). In resolving the wage reopener issues, careful attention has been paid to the relevant criteria. Both parties identified various classifications in the bargaining unit that they viewed warranted exceptional consideration in the form of a special wage adjustment. These matters are addressed below. Any outstanding issue not specifically addressed in this award is deemed dismissed.

## Wage Increases

1. **Wage Increases inclusive of 1% already negotiated (for all classifications in the Unified Bargaining Unit except Non-Law Student Employees).**

   January 1, 2022: 3.0%
   January 1, 2023: 3.5%
   January 1, 2024: 3.0%

   The wage increases would be applied to all current and past employees, including members on any leave including LTIP, who were employed during the period of January 1, 2022, to current.

### Special Wage Adjustments

Both parties identified and each made submissions for special wage adjustments for certain Unified Bargaining Unit classifications. Many of the classifications identified in specific ministries by the parties have experienced very significant attraction and retention challenges related directly to compensation issues. The compensation issues for the identified classifications have led to material staffing challenges, and, in certain cases, concerns around continuity of critical frontline services and services concerning public health and safety. Accordingly, I award the following special wage adjustments for the specific classifications in certain ministries set out below in Appendix A. Special wage adjustments shall be effective January 1, 2024.

2. **Wage Increases for First and Second Year Summer Law Students**

   First and second year law students have not had a change in their wages since 1999 (other than the 1% wage increases already negotiated for 2022, 2023 and 2024). As a result, there have been material recruitment and retention issues. Accordingly, a one-time special adjustment to apply all ATBs reached with the Unified Bargaining Unit between January 1, 2000 and January 1, 2024 (inclusive). The special wage adjustment shall be effective January 1, 2024 and is set out in Appendix A.

## 3. Nursing Experience Credit

The parties shall amend the OPSEU/SEFPO Unified Bargaining Unit collective agreement with the following language in respect of Nursing Experience Credit, which is consistent with the recent OPSEU/SEFPO Corrections Bargaining Unit interest arbitration award dated December 4, 2023:

This letter shall apply to full-time, part-time, and fixed-term nursing positions. Claims for related clinical experience, if any, shall be made in writing by the nurse within 90-days of the date of hire to the Employer. Credit for related experience will be retroactive to the nurse's date of hire. The nurse shall co-operate with the Employer by providing verification of previous experience. Having established the related clinical experience, the Employer will credit a new nurse with 1904 or 1725.50 hours as applicable for each year of experience, up to the maximum of the salary grid. The nurse shall be placed at the corresponding step on the salary grid commensurate with their years of experience. Merit dates/hours shall be adjusted to reflect a partial year's credit.

For clarity, this credit for clinical experience shall only be used for placement on the wage grid and will have no impact on fixed-term seniority or Continuous Service Date (Articles 18 and 31A.17).

If a period of more than two (2) years has elapsed since the nurse has occupied a full-time or a part-time nursing position, then the number of increments to be paid, if any, shall be at the discretion of the Employer. The Employer will give due consideration to an internationally educated nurse's experience where the process for registration with the College of Nurses of Ontario has prevented them from occupying a nursing position for a period of more than two (2) years. For full-time nurses, the Employer shall give effect to part-time nursing experience, and for part-time nurses the Employer shall give effect to full-time nursing experience. NOTE: For greater clarity, related nursing experience includes related nursing experience out of province and out of country.

Within 180 days from date of this award, current employees in nursing positions will have a one (1) time opportunity to submit in writing a claim for related clinical experience to the Employer. The nurse shall co-operate with the Employer by providing verification of previous experience. These claims shall be reviewed by the Employer and employees shall be placed at the corresponding step on the salary grid commensurate with their years of experience. Merit dates/hours shall be adjusted to reflect a partial year's credit. Any retroactive amounts owed shall be limited to the date of the interest arbitration award.

## Conclusion

At the request of the parties, I remain seized with respect to the implementation of this award.

DATED at Toronto this 21 day of January 2024.

Original signed by:

Gerry Lee, Sole Arbitrator

Appendix A

**Various Classifications in Certain Ministries**

Effective January 1, 2024:

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 16710 | AMBULANCE COMMUNICATIONS OFFICER 1 (MOH) | | | | | | | |
| | 01/01/2024 | 37.36 | 38.52 | 39.31 | 40.22 | 41.87 | 44.36 | 45.69 |
| 16711 | AMBULANCE COMMUNICATIONS OFFICER 2 (MOH) | | | | | | | |
| | 01/01/2024 | 38.95 | 40.15 | 41.39 | 42.75 | 44.51 | 47.05 | 48.44 |
| 95504 | OPERATIONAL (BU) OST15 (OCWA) | | | | | | | |
| | 01/01/2024 | 1,226.83 | 1,264.80 | 1,314.73 | 1,366.80 | 1,420.23 | 1,477.15 | 1,521.52 |
| 95504P | OPERATIONAL (BU) OST15 (PEEL) (OCWA) | | | | | | | |
| | 01/01/2024 | 1,691.73 | 1,737.64 | 1,797.98 | 1,860.88 | 1,925.46 | 1,994.28 | 2,047.87 |
| 95505 | OPERATIONAL (BU) OST16 (OCWA) | | | | | | | |
| | 01/01/2024 | 1,316.68 | 1,357.40 | 1,411.82 | 1,468.45 | 1,527.40 | 1,588.62 | 1,636.27 |
| 93032 | UTILITY PLANT ELECTRICIAN (OCWA) | | | | | | | |
| | 01/01/2024 | 34.62 | 35.69 | 36.49 | 37.58 | | | |
| 93030P | MAINTENANCE ELECTRICIAN (PEEL) (OCWA) | | | | | | | |
| SA | 01/01/2024 | 39.26 | 40.34 | 41.12 | 42.22 | | | |
| 93034 | MAINTENANCE ELECTRICIAN, FOREMAN/WOMAN (OCWA) | | | | | | | |
| | 01/01/2024 | 36.74 | 37.85 | 38.82 | 40.00 | | | |
| 93034P | MAINTENANCE ELECTRICIAN, FOREMAN/WOMAN (PEEL) (OCWA) | | | | | | | |
| | 01/01/2024 | 42.06 | 43.21 | 44.18 | 45.40 | | | |
| 93010 | MAINTENANCE FOREMAN/WOMAN (OCWA) | | | | | | | |
| | 01/01/2024 | 33.17 | 34.20 | 34.92 | 35.96 | | | |
| 93010P | MAINTENANCE FOREMAN/WOMAN (PEEL) (OCWA) | | | | | | | |
| | 01/01/2024 | 39.91 | 41.01 | 41.73 | 42.86 | | | |
| 93006 | MAINTENANCE MECHANIC 3 (K7 SALARY NOTE) (OCWA) | | | | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| SA | 01/01/2024 | 30.92 | 31.88 | 32.55 | 33.55 | |
| 93006P | MAINTENANCE MECHANIC 3 (PEEL) (OCWA) | | | | | |
| SA | 01/01/2024 | 38.14 | 39.19 | 39.91 | 40.98 | |
| 40402 | WASTE AND WATER PROJECT OPERATOR 1 (OCWA) | | | | | |
| | 01/01/2024 | 27.92 | 28.79 | 29.50 | 30.14 | 31.06 |
| 40402P | WASTE AND WATER PROJECT OPERATOR 1 (PEEL) (OCWA) | | | | | |
| | 01/01/2024 | 34.08 | 34.95 | 35.66 | 36.30 | 37.21 |
| 40404 | WASTE AND WATER PROJECT OPERATOR 2 (OCWA) | | | | | |
| | 01/01/2024 | 29.49 | 30.41 | 31.13 | 31.89 | 32.83 |
| 40404P | WASTE AND WATER PROJECT OPERATOR 2 (PEEL) (OCWA) | | | | | |
| | 01/01/2024 | 35.68 | 36.58 | 37.32 | 38.06 | 38.99 |
| 41100G | RESOURCE TECHNICIAN 1 (G29 SALARY NOTE) (MNRF) | | | | | |
| | 01/01/2024 | 25.38 | 26.16 | 26.72 | 27.53 | |
| 41102G | RESOURCE TECHNICIAN 2 (G29 SALARY NOTE) (MNRF) | | | | | |
| | 01/01/2024 | 27.36 | 28.20 | 28.92 | 29.60 | 30.48 |
| 41104G | RESOURCE TECHNICIAN 3 (G29 SALARY NOTE) (MNRF) | | | | | |
| | 01/01/2024 | 29.16 | 30.07 | 30.74 | 31.52 | 32.43 |

**Nursing Classifications for OPS Unified**

Effective January 1, 2024, a one-time special adjustment such that the following Unified Bargaining Unit Nurse classification nurse wages rates will be at parity with the OPS Correctional Bargaining Unit Nurse classification wage rates:

| | |
|---|---|
| 41500 | Psychiatric Nursing Assistant 1(P1 Salary Note) |
| 41502 | Psychiatric Nursing Assistant 2 (P1 Salary Note |
| 41504 | Psychiatric Nursing Assistant 3 (P1 Salary Note) |
| 41506 | Psychiatric Nursing Assistant 4 (P1 Salary Note) |
| 50052 | Nurse 2, General (N2, N3 Salary Note) |
| 50054 | Nurse 3, General (N1, N2, N3 Salary Note) |
| 50072 | Nurse 2, Clinic (N2 Salary Note) |
| 50110 | Nurse 2, Special Schools (N2 Salary Note) |
| 50112 | Nurse 3, Special Schools (N1, N3 Salary Note) |
| 50120 | Nurse 1, Public Health (N2 Salary Note) |
| 50050 | Nurse 1, General |

50064 Nurse, Outpatient Clinics (N2, N3 Salary Note)
50070 Nurse 1, Clinic (N2 Salary Note)
50075 Head Nurse, Output Clinics (N1, N2, N3 Salary Note)
50080 Nurse 1, Nursing Education
50082 Nurse 2, Nursing Education (N3 Salary Note)
50084 Nurse 3, Nursing Education
50122 Nurse 2, Public Health
50124 Nurse 3, Public Health
50128 Nurse, Occupational Health & Safety (N2 Salary Note)

Salary notes N1, N2 and N3 from the General Notes and Allowances deleted effective January 1, 2024).

No nurse to see reduction in wages as a result of implementation of this award.

**First and Second Year Law Students**

Effective January 1, 2024:

U0164 First Year Law Student $26.52
U0165 Second Year Law Student $29.75

# TAB 22

**IN THE MATTER OF AN INTEREST ARBITRATION**

**BETWEEN:**

**The Crown in Right of Ontario**

**and**

**AMAPCEO Bargaining Unit**

**Before:** **Gerry Lee**
**Sole Arbitrator**

**Appearances**

**For the Crown:** David Au, Assistant Deputy Minister
Steven MacKay, Director
Stephanie Borcsok, Manager

**For AMAPCEO:** Marisa Pollock, Counsel, Goldblatt Partners LLP

**The matters in dispute proceeded to a mediation-arbitration on January 26, 2024.**

## Introduction

This mediation-arbitration was convened to address Bill 124 remedy issues between the Crown in right of Ontario (hereafter "Employer") and the Ontario Public Service (OPS) AMAPCEO Bargaining Unit, pursuant to the parties' interest arbitration agreement.

The Employer and AMAPCEO began negotiations for their current collective agreement, which covers the period of April 1, 2022 to March 31, 2025, in March 2022 and, following several months of negotiations, reached an agreement in October 2022. During that time, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* ("PSPSFGA" or "Bill 124") was in effect and the parties were subject to the terms and conditions of the PSPSFGA, which included a 3-year "moderation period" during which the parties were required to restrict any increases to wages or total compensation to 1% per year. Accordingly, the parties agreed in a letter of understanding that the compensation increases agreed to under the collective agreement are without prejudice to the rights of AMAPCEO to challenge the provisions of Bill 124 and to seek any appropriate remedy in the event such challenge is successful.

Subsequently, Bill 124 was declared unconstitutional on November 29, 2023. The parties have since entered into an agreement to refer the remedy issues to interest arbitration.

In this award, all relevant criteria, including statutory and other criteria, have been carefully considered in resolving the outstanding remedy issues. Any outstanding issue not specifically addressed in this award is deemed dismissed.

## Wages Increases inclusive of 1% already negotiated (for all classifications in the AMAPCEO Bargaining Unit)

| | |
|---|---|
| April 1, 2022: | 3.0% |
| April 1, 2023: | 3.5% |
| April 1, 2024: | 3.0% |

The wage increases would be applied to all current and past employees, including members on any leave including LTIP, who were employed during the period of April 1, 2022 to current.

## Special Wage Adjustments

Both parties recognize that nursing positions in other OPS bargaining units (e.g., OPSEU Corrections) have recently been awarded market pay adjustments that

better reflect the going wage rate for nursing positions in Ontario. As such, and in consideration of the parties' mutual interest to address this same issue in the AMAPCEO bargaining unit, I award the following special wage adjustment for the following specific jobs: Clinical Nurse Advisor, Nurse Case Manager, Nurse Advisor, and Senior Nurse Consultant.

Effective January 1, 2024:

- Clinical Nurse Advisor (6A012), Nurse Case Manager (6A012), and Senior Nurse Consultant (6A012) will be adjusted as follows: $82,810 - $122,028 / annum.

- Nurse Advisor (5A012) will be adjusted as follows: $76,790 - $110,635 / annum.

**Conclusion**

- At the request of the parties, I remain seized with respect to the implementation of this award.

DATED at Toronto this 26th day of January 2024.

Gerry Lee, Sole Arbitrator

# TAB 23

**IN THE MATTER OF AN INTEREST ARBITRATION**

**BETWEEN:**

**The Crown in Right of Ontario**

**(Represented by Treasury Board Secretariat)**

**and**

**OPSEU/SEFPO**

**(Correctional Bargaining Unit)**



| | |
|---|---|
| **Before:** | William Kaplan<br>Sole Arbitrator |
| **Appearances** | |
| **For The Crown:** | Sunil Kapur<br>Patrick Pengelly<br>McCarthy Tetrault<br>Barristers & Solicitors |
| **For OPSEU:** | Nini Jones<br>Cassandra Jarvis<br>Olivier Bishop-Mercier<br>Jones Pearce<br>Barristers & Solicitors |

The matters in dispute proceeded to a hearing on November 25, 2023.

## Introduction

This interest arbitration was consensually convened to decide matters in dispute between The Crown in Right of Ontario and OPSEU for the renewal of the collective agreement for the Correctional Bargaining Unit (Corrections) which expired on December 21, 2021. OPSEU (union) represents approximately 8500 employees, spread across two ministries: the Ministry of the Solicitor General and the Ministry of Children, Community and Social Services (employer). Union members work in a variety of classifications: Correctional Officers (CO) and Youth Service Officers (YSO) (59%), Probation and Parole Officers (PO) (13.2%), Health Care (Nurses, Psychologists, Pharmacists, Social Workers) (9%) Administrative (8.8%), and otherwise. About a third of all employees are engaged on a contract or fixed term basis (FXT). Since 2018, when Corrections became a stand-alone bargaining unit, terms and conditions of employment – if not agreed – are to be resolved by interest arbitration.

An interest arbitration hearing proceeded in Toronto on November 25, 2023. However, prior to that the parties were able, on their own, and in mediation in September 2022 and April and July 2023, to resolve some outstanding issues, and all agreed-upon items are to be incorporated into the collective agreement settled by this award. Any union or employer proposal not directly dealt with in this award is deemed dismissed.

## Overall Context

This interest arbitration must be placed in context: Part of that context is, of course, the COVID-19 pandemic (pandemic) where employees worked very hard in the most difficult of circumstances to keep inmates, people on probation, themselves and the community safe.

Another important factor to keep in mind is inflation: persistent and high inflation has had a dramatic effect on wages and spending power (discussed below). Also relevant to these proceedings is that the *Protecting a Sustainable Public Sector for Future Generations Act* (Bill 124) was enacted prior to commencement of bargaining, and it established a three-year moderation period limiting compensation in each of the three years to 1%. As is well known, on November 29, 2022, the Ontario Superior Court declared Bill 124 unconstitutional, and while the decision is currently under appeal, no stay was sought. In the aftermath of the judicial decision, the union significantly revised its monetary proposals, costed by the employer at $261.6M annually – or more than 30% to base – a costing that was vigorously disputed by the union.



**Statutory Criteria**

In determining the outstanding issues, all factors considered relevant, including those set out in Section 29.7(2) of the *Crown Employees Collective Bargaining Act,* must be taken into account:

> The Employer's ability to pay in light of its fiscal situation.
>
> The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
>
> The economic situation in Ontario.
>
> A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
>
> The employer's ability to attract and retain qualified employees.

**Union Submissions**

In the union's view, the members of the Corrections bargaining unit were woefully undercompensated – especially when compared with their federal counterparts – an intolerable situation made worse by the ravages of inflation, which showed no sign of meaningfully abating

any time soon, if ever. The members of this bargaining unit occupied mostly frontline positions and/or predominately worked in institutions where – daily – they faced a ubiquitous threat of violence. The members of this bargaining unit, the union continued, kept our communities safe and did so with especially heroic and steadfast service during the darkest days of the pandemic.

The union described in detail the everyday challenges of working in a correctional institution (and they predated the pandemic and continue to this day). COs, nurses and ancillary employees worked in dangerous overcrowded conditions where routine work could be immediately interrupted by both threatened and real acts of violence. The inmate population was volatile, presented with trauma, with mental health challenges and suffering from substance abuse; in summary, an incarcerated population of the most dangerous and physically and psychologically vulnerable members of society. Across the system, whether a CO, YSO, nurse or ancillary employee, or a PO working outside an institution, the men and women of this bargaining unit did their jobs in extremely difficult and stressful circumstances. Nurses provided healthcare to thousands of people while employees engaged in ancillary services made an indispensable contribution to the operation of correctional institutions.

Working during the pandemic was especially challenging: correctional facilities were susceptible to the rapid spread of disease; hardly a surprising situation given movement of staff and inmates in and out, along with overcrowded living conditions and very poor ventilation. To inhibit the spread of COVID, numbers were temporarily reduced (but have crept back up) and lockdowns were frequently imposed. But the job of maintaining the safe care, custody and control of the inmate population became even harder as outbreaks became more and more common and new

rules and regulations were imposed all dramatically increasing the responsibilities of the COs. In the meantime, chronic staff shortages caused by high turnover made a hard job even more difficult.

That revolving door of employees – discussed in further detail below – was illustrated by data indicating, for example, that in 2018-2019, approximately 25% of the COs across the province had less than two years of work experience. This was the direct result of the terms and conditions of employment, and the employer's failure to recruit and retain, leading to increased employee illness, work-related stress, negative life events, burnout and compassion fatigue. The high number of contract employees made the situation even worse (and many of them had to wait years before being able to become full-time and permanent).

The preceding background and context informed many of the union's proposals.

As noted above, after Bill 124 was declared unconstitutional, the union revised its economic demands to reflect that the moderation period prescribed by legislation – that had informed its initial asks – was no longer governing. The union sought, among other things, wages of 6.8% in the first year, 5% in the second year and 4% in the third year, introduction of Factor 85, and special classification adjustments for 13 classes ranging from 7.1% to 33%. The union also sought improvements in a wide variety of areas, as elaborated below. All its proposals, the union submitted, were justified by the appropriate application of the statutory and normative interest arbitration criteria beginning with replication and demonstrated need.

**Replication/Demonstrated Need**

The primary goal of interest arbitration, the union argued, was to replicate free collective bargaining where there is a right to strike or lockout. Neither party is to be advantaged or disadvantaged by the substitution of interest arbitration for the right to strike or lockout. Replication meant following recent collective bargaining settlements, and a growing number of awards that replicated these freely bargained settlements, all of which were reviewed by the union, and all of which supported the union's economic demands. Demonstrated need was amply established and was fortified by a review of the statutory criteria. Not all statutory criteria, the union pointed out, need be met to justify a proposal. And in this case, it was appropriate to begin with the applicable comparators.

**A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.**

The union took strong issue with any suggestion that Corrections should be compared with, and then follow, the Unified Bargaining Unit (Unified). That was not, the union suggested, replication: it was duplication and it was unjustified. There were appropriate comparators for Corrections and they were Federal correctional officers: FCX, and Ontario policing. Notably, Arbitrator Burkett recognized in a 2015 award that federal and Ontario corrections officers were paid more or less the same before 2001, but that a delta between the two then began to grow. Arbitrator Burkett concluded that the widening salary differential established "a specific catch-up objective for Ontario correctional employees." The union insisted that the Burkett award and its findings were governing. Notably, as the union pointed out, Arbitrator Burkett began to remedy this situation when he awarded special catch-up increases based on FCX wages, and a

pattern of doing so was then established by the further adjustments that followed in the next award resolving the differences between the parties.

These catch-up increases were, the union submitted, entirely justified because Ontario and Federal correctional employees perform the same job, especially the Ontario COs and FCXs. Both groups of correctional officers are responsible for the care, custody and control of inmates and face the same challenges in their very comparable workplaces.

A comparison could also be drawn between COs and Ontario policing employees and also between Corrections and Federal POs. There was a significant overlap in duties again acknowledged – the union pointed out – by Arbitrator Burkett in his 2015 award and again, a finding that was governing. In these circumstances, there was no justification for the wage delta between these groups, an unacceptable situation that the union urged be finally remedied after having been repeatedly raised.

**The economic situation in Ontario**

The economic situation in Ontario had to be considered, and that meant taking inflation meaningfully into account. To be sure, inflation had begun to modestly decelerate, but barely: it still remained above 3% in 2023 and no one was predicting an early return to historic norms, (targeted at 2%). The dramatic increases to the cost of living experienced in 2021 and continuing to this day, were now hard baked into prices and that will persist, the union argued, over the entire term of this collective agreement (and no one was predicting de-inflation). Moreover, the union pointed out, annual inflation numbers actually understated its real impact. For example,

food inflation was even higher than the annual composite figure – about 10% in 2022 – and prices were continually increasing in virtually every single food category. This was a serious matter; indeed, it was one that was recognized by the Federal government with its 2023 introduction of a grocery rebate for eligible Canadians. At the same time, and paradoxically to fight inflation, rising interest rates were having a real impact on working people: mortgage rates had increased at a dramatic rate with a knock-on effect on the cost of rental housing. The bottom line, the union submitted, was that substantial wage increases were needed to meet historical and projected inflation, not to mention the contribution and service of Corrections employees.



**The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased**

In the union's view, none of its proposals could lead to a reduction of services and none of its proposals would require taxation levels to be increased. To be sure, more funding had to be allocated to Corrections, but doing so was necessary and affordable. Ontario's economy was robust and provincial finances strong. The economy rebounded quickly from the pandemic, with impressive GDP increases. Data and projections for 2023 were similarly rosy with government revenues on the rise while deficits were on the decline. There was, the union observed parenthetically, no inability to pay and no reason, in any event, why Corrections employees should continue to subsidize the community by accepting substandard wages and working conditions. The law on this point was categorical: public sector employees must be fairly paid for the services they provide.

**The employer's ability to attract and retain qualified employees**

The overall labour market was tight and nowhere was this better illustrated than in Ontario's correctional institutions: they were chronically understaffed. The employer's assertions to the contrary were not, the union submitted, credible or compelling. For instance, there may be many people applying for CO positions – that number was provided – but how many of these met minimum qualifications? That number was not disclosed notwithstanding repeated union requests, and the union urged that an adverse inference be drawn. The union also pointed out that between 2019 and 2022 the number of bargaining unit employees dropped despite the addition of 500 net new positions across the Ministry of the Solicitor General, and the share of employees with more than ten years of service declined from 42% to 37%. There was a high degree of turnover of FXT employees – a population comprising approximately 1/3 of the bargaining unit, and the situation was so dire in some regions that in 2022 the employer was required to introduce a northern incentive to attract employees to work at select adult institutions. Notably, there was a significant use of overtime – about 1,270,000 hours a year – and the only explanation for that was that the institutions were understaffed. In all these circumstances, the claim could not be persuasively made that there was not a recruitment and retention crisis: the evidence was to the exact opposite effect.

**Union Proposals**

Beginning with wages, the union argued that appropriate across-the-board increases, and classification adjustments, were critical. That meant the following general wage increases in each year of the term: 6.8%, 5.0% and 4.0%. These increases were all justified and in line, the union argued, with the increasing weight of freely bargained settlements and interest arbitration awards

replicating these settlements. None of these awards and settlements emanated, the union acknowledged, from its proposed comparators, but it was now widely recognized as appropriate, in the current economic circumstance of high and persistent inflation, to cast a wide net and consider and apply economic outcomes from all sectors, especially freely bargained agreements.

When this analysis was completed, it was beyond question that replication, together with all the other criteria, required significant wage increases: the specific general wage increases the union sought. These increases were the bare minimum necessary for union members who were coming off a decade of stagnant wage growth – members who were finding it harder and harder to pay their bills because of the corrosive effect of inflation on wages. It was also necessary to keep in mind the actual terms and conditions of their employment where they had to daily face the ongoing challenges of an overcrowded, understaffed, and dangerous workplace.

The union also sought numerous special classification adjustments ranging from 7% to 31%. These targeted increases were necessary to correct demonstrated inequities between comparable employees and to give effect to the statutory criteria. The union emphasized that some catch-ups were ordered in the last two interest arbitrations between the parties. Those catch-up awards began to remedy some of the identified disparities, but overall did not come even close to completing this task. Moreover, the earlier awarded catch-ups did not include all the classifications where the incumbents remained significantly behind. The union asked that attention be paid to these justified increases. Detailed submissions were made about all classifications for which adjustments were sought.

There was, the union repeated, a serious recruitment and retention crisis overall, but especially so with nurses. Indeed, the employer had acknowledged as much. RNs could not be recruited and retained and so agency nurses had to be employed to fill urgent gaps. At the same time, it was almost impossible to fill Nurse Practitioner (NP) positions: 75 positions have been created, but only 8 NPs were employed across the province. Federal correctional nurses were the appropriate comparators as there was no dispute that the nurses in both federal and provincial institutions did exactly the same thing. The same could be and was said about nurses employed at the Brockville Mental Health Centre and at Waypoint. The union sought a special adjustment of 19.5% to bring Corrections nurses to industry standard. The union also advanced a proposal – comparable to that found in the central agreement between ONA and the Participating Hospitals – to credit nurses with prior clinical experience.

The union sought the elimination of the first three steps on the Correctional Officer Supervision classification. A nine-step grid had been unilaterally imposed and the union took issue with it as non-normative in the bargaining unit. Elimination of the first three steps was also necessary to eliminate undesirable wage compression, as the union illustrated in its submissions. Introduction of Factor 85 – replacing Factor 90 – was a union priority and was necessary and justified to bring Corrections into line with all its established comparators and could be achieved at a reasonable annual cost of only $9M, or an approximately 1% salary increase. A suite of benefit improvements was also sought, including for mental health.

The union was categorically opposed to the employer's benefit package: it had not requested and did not want a Health Care Spending account, which made no sense for this bargaining unit for

reasons that the union explained. For example, FXT employees pay 100% of the benefits premium cost but would not be eligible, under the employer's proposal, to receive the Health Care Spending account. How the union asked, could that be fair? Other aspects of the employer proposal, for example a brand-new drug plan, would amount to an unjustified breakthrough for which there was no quid for the quo: it moved from 3 drugs requiring prior authorization – the current situation – to as many as 200. Other administrative changes – supposedly in the name of cost savings – imposed new financial burdens on employees and did or would do nothing but fetter their access to important negotiated benefits. This proposal, the union insisted, was advanced with absolutely no evidence of demonstrated need and was justified solely on the basis that Unified and other bargaining units had agreed to it.

Another amendment proposed by the union would ensure that all wage increases were incorporated into the calculation of LTIP benefits for disabled members. The union proposed that contract employees be given the option to pay 100% of the premium for benefits and access health benefit coverage– not just on hire – but after issue of this award in recognition that individual circumstances may have changed and that it can often take years for these FXT employees to roll over to regular classified status. It also proposed memorialization of the current threshold for rollover eligibility to regular status: rollover at 1725.50 or 1904 straight time hours as applicable. This change would also improve the situation of some POs, where an eighteen-month threshold was in place. Improvements to bereavement leave, military leave and union leave were advanced, along with enhancements to compensating time off and the PO Allowance and to the definition of qualified medical practitioners for the purpose of enlarging the list of individuals accredited to provide sick notes, among other proposals.

The union completed its submissions by categorically rejecting various employer proposals particularly its overtime concession. Current overtime provisions were normative sectorally and elsewhere across the unionized landscape, and the union provided the evidence establishing this. Other employer proposals, for example Use of Lieu Days/Holiday Payment, Compensating Time Off and FXT Shift Schedules, to give just three of a number of possible examples, were outright concessions without any demonstrated need. In another example, requiring a doctor's note after three days of absence instead of the current five would serve no useful purpose other than to impose a real burden on sick employees – many of whom did not have a family doctor – not to mention the medical care system that was already struggling to meet demand. The proposal was completely contrary to public policy.

**Employer Submissions**

As stated in its brief, "the employer respects and values the critical services performed by Correctional Bargaining Unit employees," but this award settling the terms and conditions of employment for the members of the bargaining unit, the employer argued, had to be tempered by the appropriate application of the relevant and governing interest arbitration criteria, both statutory and normative.

**Replication**

This factor – replicating free collective bargaining – was critical. It meant fashioning an award which, to the largest extent possible, approximated the result the parties would have reached if they had freely negotiated a collective agreement. The best way of giving effect to the replication principle, the employer argued, was to look at how these parties had previously approached their

collective bargaining, together with an examination of the results that had been reached, either voluntarily or through interest arbitration. That meant – given a longstanding pattern – looking at collective bargaining outcomes reached with Unified and when they were examined, it was clear, in the employer's submission, that even with certain explainable anomalies, that Corrections, more or less, followed Unified. In current circumstances, this meant 1% in each year of the agreement with a me-too for any additional monies received in any Unified reopener.



**The Employer's ability to pay in light of its fiscal situation/ The economic situation in Ontario**

Extremely relevant, in the employer's submission, was the government's ability to pay in light of its fiscal situation. Interrelated with this was the economic situation in Ontario. As provincial debt grew relative to GDP – and Ontario was a highly indebted jurisdiction: it had the highest per capita debt in Canada – the ability to manage, service and repay debt was becoming increasingly difficult. Economic uncertainty was the order of the day. Government revenue growth was slowing (after the initial post-pandemic rebound). The 2023 Ontario Budget projected a $2.2 billion deficit, another deficit was forecast in 2023-24, before, hopefully, a return to surpluses in 2024-25. Any budget surplus, including the relatively low ones currently forecast for the future, was needed to pay down public debt, not to fund completely unaffordable and ultimately unjustifiable collective bargaining demands. Unduly increasing public sector compensation would hinder the government's ability to achieve and maintain a balanced budget; indeed, it would inevitably require a reduction in program spending or an increase in taxes, and quite likely both. It was actually a vicious circle: high wage settlements would likely lead to even higher inflation and the high interest rates that inevitably follow, all creating an inflationary loop.

Stated somewhat differently, the employer pointed out that high interest rates inevitably constrained government spending by increasing the cost of borrowing, borrowing that would be required to pay for unaffordable wages, should the union's profligate demands be awarded. The only way out – absent large tax increases – was for compensation increases to be restrained. Under no formulation could the union's overall economic package be described as fair and reasonable.

In current economic circumstances, the government needed to take a responsible approach to its finances. Publicly funded services had to be affordable and sustainable; they needed to reflect what was possible and prudent in the overall economic context where there was little near-term improvement projected in the provincial debt ratio while, at the same time, program expenditures were rapidly increasing. Only a balanced approach to compensation could ensure program spending was not placed at risk in the event of an economic downturn, which was quite possibly on the horizon. It was, accordingly, imperative that any awarded outcome reflect total compensation – and on this score the union's aggregate proposals, when costed, were simply unaffordable, not to mention unjustified when considered alongside the historical comparator – Unified – and just about any freely bargained settlement anywhere.

**Comparison as Between the Employees and other Comparable Employees in the Public and Private Sectors of the Terms and Conditions of Employment and the Nature of the Work Performed**

The fact of the matter, the employer argued, was that the parties had an established history and practice of never looking to outside comparators for general wage increases and should not depart from that history and practice now. General wage increases reached at Unified were

inevitably mirrored in Corrections. That was, the employer argued, the legally and factually significant baseline that the union's proposals had to be measured against. Since at least 1993, this employer and this union have not looked to outside comparators to determine general wage increases. There has been one comparator and that was and is Unified. Further illustrating how Unified results governed Corrections was illustrated as well by the transfer of approximately 2000 members of the Unified bargaining unit to Corrections in 2018.

There could be no serious debate, in the employer's submissions, that these employees, in Corrections since January 1, 2018, were best compared to employees in the same or similar classifications in the Unified (a result also required to ensure mobility and avoid unjustified pay disparities as provided for in the permeability provisions set out in Appendix 64 of each collective agreement), to avoid whipsawing, and to maintain pay equity. Any special adjustments – assuming some were awarded – a result the employer strongly opposed – should not apply to the 2000 employees who were formerly members of Unified. This group of employees should receive the exact same terms and conditions as apply to employees in the same or similar classifications in Unified. What justification could there possibly be, the employer asked, to grant a 23% special adjustment, for example, to Maintenance and Trades classifications in Corrections over and above what the same classifications received in Unified? The answer to the question, the employer suggested, was obvious: none. Any delta between the two – and all the other applicable special adjustments the union sought, if awarded – would moreover, detrimentally affect the freely negotiated permeability arrangements referred to above.

Likewise, the small group of legacy positions in Corrections should continue – as has long been the case – to follow Unified. In some of the proposed classification adjustments, the employer noted, the union was seeking increases amounting to 50% of current rates – based on comparators in other jurisdictions – in a situation where incumbents were already well compensated and where there was no objective application of any of the criteria justifying this kind of outcome especially in the complete absence of any evidence whatsoever of recruitment or retention challenges.



**Federal Correctional Officers Not a Comparator**

Before explaining why FCXs were not a proper comparator, the employer categorically rejected any suggestion that any previous interest arbitration award – intended to replicate free collective bargaining – could be in any way binding on any subsequent interest arbitrator. That concept was, the employer argued, without legal foundation and should not be accepted. In any event, any previous determination that the COs were appropriately compared to FCXs was based on inadequate and out-of-date data and was, moreover, plainly wrong.

There were many reasons to reject FCXs as a comparator.

First, the employer argued, COs in this bargaining unit have a long-established pattern of following the general wage increases reached at Unified (and continued to do so even after that 2016 arbitral award that mistakenly suggested FCX2s were a valid comparator for CO2s). Clear, cogent and compelling evidence was necessary – but was absent – to justify a departure from the pattern.

Second, in management's submission, the duties of the CO2 were not the same as the FCX2. FCX2s engaged with inmates in their living units, assessed inmate needs, supervised inmates, prepared and implemented correctional plans and interventions to meet those needs, provided clear behavioural expectations and assessed progress, and performed counselling, to list just some of the hands-on duties and responsibilities. This sharply contrasted with the largely custodial functions of the COs working in Ontario institutions (invariably from enclosed stations/posts with a prison population comprised overwhelmingly of remands). The typical CO2 was primarily responsible for static security: only a relative handful of the more than 3000 CO2s in the system were assigned to what might be broadly described as case management duties, and of those, only fewer had case management functions equivalent or comparable to the FCX2.

Third, there was a wide delta in knowledge and skills, mental demands and training between FCX2s and CO2s. Relative accountability also differed: FCX2s, for instance, made recommendations about eligibility for temporary release. COs in Ontario did not have that responsibility, or anything like it. The only outside comparator that was conceivably relevant, in the employer's submission, were other provincial correctional officers such as in Alberta (and Ontario fared favourably in any Alberta comparison on the compensation front when total compensation was considered).

And fourth, there was also no demonstrated need or justification for a catch-up increase (especially when placed in context, a context that established a widening not narrowing of the wage gap over decades). There was no justification for catch-up, a conclusion that was reinforced when total compensation was considered: the unjustified classification increase

requested for CO2s to bring them to the union's identified federal rate was $50.5M annually. Gradualism principles also applied ruling out any such award.



**Federal Parole Officers Not a Comparator**

For similar reasons that FCX2s were not a valid comparator for CO2s, Federal Parole Officers were not, the employer argued, an appropriate comparator for POs. Notwithstanding that same earlier arbitration award between these parties relied on by the union for its correctional officer comparator submissions, that award, in management's estimation, wrongly concluded that the POs in Ontario did the same job as their federal counterparts (with salary increases to follow). In a nutshell, there was a wide delta between the duties and responsibilities of a PO and those of a parole officer working in the federal system. There were key differences in responsibilities because the individuals being supervised were not the same: probationers vs. parolees.

Parolees often had long criminal records, were difficult to manage, high-risk and high-need, and included offenders with extensive histories of violence and sexual assault, affiliations with gangs and organized crime. Their supervision was intensive and demanding. In contrast, POs generally supervised probationers convicted of far less serious crimes often without any custodial term ever having been served. Other differences in duties and responsibilities – reflecting the real differences in the client population – were outlined in some detail in the employer's brief.

**Corrections Nurses**

To be sure, Corrections nurses – there were approximately 400 of them – perform unique and critical work in correctional and youth justice facilities: "Nurses in correctional and youth justice

facilities perform work that has some similarities to the work performed by nurses in hospitals," the employer brief observed. There were recruitment and retention challenges illustrated by a growing reliance on agency nurses to fill staffing gaps. Accordingly, the employer was not opposed to a modest, fair and appropriate special wage adjustment, especially considering the recent wage outcomes received by ONA nurses employed in The Participating Hospitals.

**Employer's Ability to Attract and Retain Qualified Employees**

There was, the employer argued, no recruitment and retention issue (other than with nurses) because current compensation packages, not to mention other terms and conditions of employment, struck an appropriate balance between competing market forces of supply and demand. Seen through a total compensation lens, COs and other members of this bargaining unit were well extremely well-paid, (even when compared to the comparators that the union advanced, and that the employer rejected).

The fact of the matter was that demand for jobs in Corrections, far outstripped supply. The evidence – set out in the employer brief – established that application volumes always exceeded vacancies. For example, within the Ministry of the Solicitor General, there were two mass centralized recruitment processes completed for CO positions between April 1, 2022, and March 31, 2023. The first competition yielded 1425 applications to fill 158 vacancies; the second, 2163 and 180. Likewise, for the same period, for PO positions there were approximately 50 applications per posting. A similar story could be, and was, told about postings in the Ministry of Community and Social Services. When the Ministry of the Solicitor General and Ministry of Community and Social Services were considered together, there were, again between April 1,

2021 and March 31, 2023, approximately 53 applications per posting (with open competitions attracting even more applicants). No one could credibly assert a recruitment issue, nor were there any retention challenges whatsoever: thousands of potential applicants were looking for Corrections jobs and the attrition rate was completely normative. Simply put, people wanted to work at Corrections and once they obtained a Corrections job, were staying put. For example, more than 50% of current employees have been on force for more than ten years. Between 2018 and 2022, voluntary turnover (excluding retirements) was extremely low.



**Employer Proposals**

Accordingly, the employer proposed – and these are the most significant items – general wage increases of 1% in each year of the three-year term (with a me-too with any wage increases awarded in the Unified reopener), improvements to psychological services, and introduction of a Health Care Spending Account, albeit contingent on implementation of other cost-savings measures in its comprehensive benefits proposal (a benefit package that was widely and voluntarily accepted in the Ontario public service by OPSEU and other bargaining units).

The employer also sought the award of several efficiency-oriented proposals to address absenteeism; most significantly, amendments to the collective agreement so that employees only became eligible for paid overtime after they performed work in excess of their regularly scheduled hours over two pay periods (with a need to make up for any leaves of absence taken during those two pay periods before any overtime premium would apply). Other efficiency-oriented proposals included changes to Use of Lieu Days/Holiday Payment, Compensating Time Off, FXT Shift Schedules, Employee Portfolios, Employee Transition and Reskilling,

Recruitment and Staffing. The employer also sought to change the requirement to provide a medical certificate after five days of absence due to sickness or injury to three days of absence, a proposal it agued would reduce chronic absenteeism.

**Discussion**

In its brief, the employer observed that "given the previous rounds of collective bargaining, the legislative parameters in place at the time, and the recent experience of the COVID-19 pandemic…[it]…expected this round of collective bargaining with the … Correctional Bargaining Unit to be challenging." This prognostication proved accurate. After Bill 124 was declared unconstitutional, the landscape dramatically changed for obvious reasons. In this round, the employer seeks fiscal restraint/moderation, and changes to long-standing work rules especially one related to the overtime premium as well as changes to doctor note requirements to counteract excessive absenteeism, together with other efficiencies to reflect a modern and flexible organization. For its part, and also in summary, the union's proposals address its concerns about staffing shortages and retention, and the need to significantly improve wages, benefits, pensions, and terms and conditions for FXT employees, of whom there are many.

Complicating resolution was the fact that the union effectively seeks arbitral recognition that while it may have once been tied to Unified outcomes, that was no longer the case and that the only relevant comparators are to be found in Federal corrections and from policing. The employer disagrees. In its view the Federal comparators are inapposite, policing is not an applicable comparator – the jobs are completely different – and Unified has been and continues to be the start and finish point both for replication and for comparators. This was true before

2018 when there was one bargaining unit, and this has remained true since 2018 when the two were split.

A few general observations are in order.

On the one hand, there is a long-standing pattern of Corrections following Unified. But on the other, there is also more recent acknowledgement, given effect through special adjustments, highlighting important differences between the two bargaining units. To be sure, the union is fully entitled to point to results outside of Unified that it asserts are relevant, for example from law enforcement. The union can also – for reasons that appear to be now widely accepted – direct attention to freely bargained settlements and interest arbitration awards from a wide variety of sectors – something made necessary by the extraordinary and persistent inflation over the first two years, and possibly throughout, this term. If the Unified reopener process was completed, that too would be very instructive. Terms and conditions freely negotiated by this employer and its other bargaining units are also relevant to any replication analysis. But that does not and cannot lead to the conclusion that they must be robotically duplicated. Simply put, the separate Corrections bargaining unit can obviously assert its priorities, which may not necessarily be outcomes achieved in Unified.

Turning first to the competing benefits proposals, the fact of the matter is that there is one employer with one benefit plan with widespread virtually universal applicability across the OPS. That is a practical reality. A balance between the competing interests is required and is,

hopefully achieved by replicating that benefit plan together with curated changes relevant to this bargaining unit based on the criteria including demonstrated need.

Accordingly, there are additional improvements to psychological benefits, improvements that are necessary given the challenges of the work and the workplace. The awarded benefits do not include the Health Spending Account for the small number of FXT employees who participate (as was voluntarily agreed by this union and employer for the Unified bargaining unit) because there are no savings generated to fund it, not to mention the application of replication principles more generally.

The union proposed that LTIP payments be adjusted to reflect wage increases including any catch-up or special adjustment, not just across-the-board increases. That proposal is denied. Awarded is the Experience Credit for Nurses based on that found – subject to some necessary revisions – in the central agreement between The Participating Hospitals and ONA. Correctional institutions are facing a true recruitment and retention crisis with nurses, reflected in many ways including increasing reliance on agency nurses. Crediting for nursing experience will not solve that problem, but it is an important step in efforts to do so.

CO wages are at the crux of this dispute, as is the contentious question of whether FCXs are the most appropriate comparator. Notably, both parties suggest the other relies on outdated and incomplete information in support of its proposals. It would be helpful if an objective professional assessment/comparison of the CO/FCX positions, duties and responsibilities was

undertaken in anticipation of the next collective bargaining round (which will commence shortly as there is, for all intents and purposes, only one year left in the term).

Union comparisons between COs and police officers (uniform) are unpersuasive. The evidence is clear that they are not the same – the jobs could not be more different – a conclusion readily arrived at by extensive experience in these matters. Both correctional officers and police perform important functions in our criminal justice system – and society greatly benefits from both – but they are not comparators. This is not to say, as noted above, that reference cannot be made to police settlements. These settlements covering numerous law enforcement positions can help inform the discussion and consideration of matters in dispute. Comparisons between Federal parole officers and their Ontario counterparts only go so far; there are both similarities and differences.

It is nevertheless evident that the COs, YSOs and POs, who come into regular contact with inmates are working in stressful and potentially volatile and dangerous environments. Many provincial inmates, both remanded and sentenced, present with mental health challenges, substance abuse and other trauma, with often a direct impact on the people who work in these facilities, a situation that is exacerbated by overcrowding and which can and does lead to violence or threatened violence (as noted, inmate populations were decreased during the pandemic but counts have begun to rise). The job of a CO and YSO is both structured and routine, until it is not. The same can be said about the work of PO, although obviously not to the same degree. In both cases, and throughout the system, hard and soft skills, judgment and experience are required to successfully perform these important public service functions.

Corrections nurses provide healthcare and are responsible for assessing, diagnosing and treating a wide range of physical and mental health needs. There is clearly a nurse recruitment and retention issue: the use of agency nurses provides proof of that. For all these reasons, and others, classification adjustments are being awarded for COs, YSOs and POs, and a new grid for nurses (discussed below).

I am not persuaded by any of the other sought after classification adjustments other than the special adjustments just mentioned. I do, however, accept that the Correctional Supervisor Wage Grid requires amendment. Generally accepted pay principles – ensuring appropriate deltas between the pay rates of the supervised and their supervisors, and avoidance of compression – is appropriate and is directed.

**Nurse Compensation**

As the employer frankly acknowledged, it does face serious recruitment and retention challenges, as is reflected by its increasing use of agency nurses (whose jobs are limited while working in Corrections as they cannot access the computer systems and do not provide mental health care). This is also demonstrated by the employer's inability to recruit Nurse Practitioners (NP). The applicable RN grids between ONA and The Participating Hospitals for the term of the collective agreement is awarded (Salary notes N1, N2 and N3 from the General Notes and Allowances of deleted effective January 1, 2024). There are a small number of NPs working in correctional institutions, and their compensation is also remitted to the parties, to be addressed following implementation of the ONA-Participating Hospitals RN grids.

**Other Proposals**

The employer's overtime proposal is non-normative and is rejected. Likewise, the employer's proposal enabling it to require sick notes after three days would be burdensome on employees, not to mention its impact on an already strained health care system. To the extent employees are engaging in pattern absenteeism, or the employer has reason to suspect abuse, it should take appropriate action (for example, Article 44.10 or CASMO not to mention other readily available management tools).

The employer's proposal making necessary changes to Pregnancy and Parental Leave to reflect legislative amendments to the *Employment Insurance Act* and the *Employment Standards Act, 2000* is awarded (with minor revision). These changes were freely negotiated/awarded with Unified and were also agreed to by OPPA, AMAPCEO, OCAA, ALOC, and PEGO). Replication of provisions agreed to by bargaining agents with this employer for tens of thousands of employees is persuasive.

Accordingly, and for this same reason, also awarded, are Employee Portfolio, Employee Transition and Reskilling – New Memorandum of Agreement and Recruitment and Staffing, Article 6, 56, New Appendix on Reach-back and Appendix 39 (subject to some minor revisions). Interest awards need to be balanced – reflecting free collective bargaining – and these awarded proposals are all within the range of what would be achieved in free collective bargaining absent the statutory interest arbitration default. Notably, the union did not reject any of them out of hand; indeed, there was considerable agreement, for example, about the necessary changes to Pregnancy and Parental.

**Award**

**Term**

As agreed: January 1, 2022, to December 31, 2024.

**Wages (All Classifications except nurses)**

| | |
|---|---|
| January 1, 2022: | 3% |
| January 1, 2023: | 3.5% |
| January 1, 2024: | 3% |

**Special Adjustments**

Correctional Officers, Youth Workers, Probation Officers/Probation and Parole Officers

| | |
|---|---|
| January 1, 2022: | 1% |

**Nurses**

| | |
|---|---|
| January 1, 2022: | 3% |
| January 1, 2023: | .875% |
| April 1, 2023: | New Grid |
| Start: | $37.93 |
| Step 1: | $38.88 |
| Step 2: | $39.86 |
| Step 3: | $41.65 |
| Step 4: | $43.52 |
| Step 5: | $45.70 |

Step 6: $47.98

Step 7: $50.38

Step 8: $54.37

No nurse to see reduction in wages as a result of implementation of this grid.

January 1, 2024: 3%

I remit to the parties implementation of this new grid for any of the classifications in the Nurse Series and remain specifically seized to resolve any disputes.

**RPN**

Add $2 per hour increase to all steps on January 1, 2024 prior to general wage increase.

I remit to the parties implementation of this increase and remain specifically seized to resolve any disputes.

**Nurse Practitioner**

NP compensation remitted to the parties to be addressed following implementation of the ONA-Participating Hospital Grid. I remain seized to decide this issue should the parties be unable to agree.

**Experience Credit for Nurses – LOU**

Add:

This letter shall apply to full-time, part-time, and fixed-term nursing positions. Claims for related clinical experience, if any, shall be made in writing by the nurse within 90-days of the date of hire to the Employer. Credit for related experience will be retroactive to the nurse's date of hire. The nurse shall co-operate with the Employer by providing verification of previous experience. Having established the related clinical experience, the Employer will credit a new nurse with 1904 or 1725.50 hours as applicable for each year of experience, up to the maximum of the salary grid. The nurse shall be placed at the corresponding step on the salary grid commensurate with their years of experience. Merit dates/hours shall be adjusted to reflect a partial year's credit.

For clarity, this credit for clinical experience shall only be used for placement on the wage grid and will have no impact on FXT Seniority (Appendix COR19) or Continuous Service Date (Article 18).

If a period of more than two (2) years has elapsed since the nurse has occupied a full-time or a part-time nursing position, then the number of increments to be paid, if any, shall be at the discretion of the Employer. The Employer will give due consideration to an internationally educated nurse's experience where the process for registration with the College of Nurses of Ontario has prevented them from occupying a nursing position for a period of more than two (2) years. For full-time nurses, the Employer shall give effect to part-time nursing experience, and for part-time nurses the Employer shall give effect to full-time nursing experience. NOTE: For greater clarity, related nursing experience includes related nursing experience out of province and out of country.

Within 180 days from date of this award, current employees in nursing positions will have a one (1) time opportunity to submit in writing a claim for related clinical experience to the Employer. The nurse shall co-operate with the Employer by providing verification of previous experience. These claims shall be reviewed by the Employer and employees shall be placed at the corresponding step on the salary grid commensurate with their years of experience. Merit dates/hours shall be adjusted to reflect a partial year's credit. Any retroactive amounts owed shall be limited to the date of the interest arbitration award.



**Benefits**

Employer proposal awarded January 1, 2024 with amendments:

Psychological benefits improved, effective January 1, 2024: elimination of ½ hour cap for both employees and dependents, increase to $2500 for employees and $1750 for dependents.

Effective January 1, 2024, add Psychotherapist coverage (member of College of Registered Psychotherapists), where such services are equivalent to those provided by a Psychologist to existing Psychological services coverage. For clarity the annual maximum would cover charges for the services of a Psychologist, which would include Master of Social Work or a Psychotherapist.

Paramedical services reimbursement Physiotherapists, Chiropractors, and Massage increased to $35 effective January 1, 2024.

Vision to $400 effective January 1, 2024.

Employer directed to provide updated benefit handbook to all employees within 180 days from issue of award.

**Correctional Supervisor Wage Grid**

Eliminate first three steps effective January 1, 2024.

**FXT**

Add:

Effective sixty days following issue of this award, all active fixed term employees shall have a one-time option to elect to pay 100% of the premium toward insured benefit plans set out in Articles 39 (Supplementary Health and Hospital Insurance) and 40 (Dental Plan) for the duration of their contract and any subsequent extensions or reappointment not broken by a 13 week or greater period of non-employment. Employees will be insured under the insured benefits plan effective the first of the month immediately following their election and following at least two (2) months of continuous service.

**Military Service Leave**

Remitted to the parties to amend to provide that in addition to existing entitlement, the Deputy Minister may approve unpaid leave of absence for purpose of Canadian Forces Reserve training and/or any obligations pertaining to the Canadian Forces Reserve and, if leave granted, to provide for accrual of service and seniority while on that leave.

**Pregnancy and Parental Leave**

Effective 90 days following issue of award, employer proposal awarded except for proposed LOU (p. 185 Employer Brief) re subsequent changes and requirement to negotiate cost neutral changes.

**Employee Portfolio**

Employer proposal awarded.

**Employee Transition and Reskilling – New Memorandum of Agreement**

Employer proposal awarded.

**Recruitment and Staffing, Article 6, 56, New Appendix on Reach-back and Appendix 39**

Employer proposals awarded except 6.1.3 and 56.1.3.

Remitted to parties to add additional language so union can track for compliance.

**Housekeeping**

Employer proposals awarded.

**Conclusion**

At the request of the parties, I remain seized with the implementation of this award.

DATED at Toronto this 4th day of December 2023.

*"William Kaplan"*

William Kaplan, Sole Arbitrator

# TAB 24

**IN THE MATTER OF AN INTEREST ARBITRATION**

**Between:**

**OPG**

**and**

**The Society of United Professionals**



**Before:** William Kaplan
Sole Arbitrator

**Appearances**

**For the Employer:** Tom Moutsatsos
Hicks Morley
Barristers & Solicitors

**For the Society:** Michael Wright
Wright Henry
Barristers & Solicitors

The matters in dispute proceeded to a hearing in Toronto on November 29, 2023, and December 1, 2023.

## Introduction

This interest arbitration was consensually convened to settle the terms of a collective agreement between the parties with an agreed-upon term of January 1, 2024, to December 31, 2025. The principal business of OPG (OPG or the employer), as is well known, is the generation and sale of electricity. The Society of United Professionals represents 3443 (Society) engineers, scientists and other professionals who work at the employer (and thousands more throughout Ontario's electrical sector and elsewhere). The parties have a mature bargaining relationship.

In August 2023, the parties exchanged bargaining agendas and they met in collective bargaining throughout the fall (up to the first day of hearing). In brief, the Society sought significant wage improvements while the employer proposed changes to work rules to provide cost savings and efficiencies. The parties were able to agree to a number of items during collective bargaining. With my assistance, the parties were also able to agree to additional items which I will refer to as "the

Bundle." All agreed-upon items and the Bundle are to be incorporated into the collective agreement settled by this award.



## The Criteria

Section 15 of the collective agreement sets out the agreed-upon criteria to be considered in cases between the parties:

> The mediator-arbitrator shall consider the following issues as relevant to the determination of the award on monetary issues:
>
> a) a balanced assessment of internal relativities, general economic conditions, external relativities;
>
> b) OPG's need to retain, motivate, and recruit qualified staff;
>
> c) the cost of changes and their impact on total compensation;
>
> d) the financial soundness of OPG and its ability to pay.

In deciding the outstanding issues careful attention has been paid to these collective agreement criteria, and to the normative ones that generally apply especially replication of free collective bargaining. Both parties extensively reviewed various sectoral settlements.

**Society Submissions**

The Society began by categorically rejecting the employer's salary offer of 2% in the first year and 1.5% in the second. These numbers could not be found in the sector, or anywhere else for that matter. OPG's profitability was increasing, with record earnings expected in 2023, all detailed by the Society in its submissions.

In these circumstances, the Society argued in favour of its suggested wage increases of 4.25% in the first year, and 4% in the second, together with a 1.5% catch-up payment to deal with a long-standing internal relatively issue that required immediate attention. The Society further sought the reintroduction of the Escalator Clause – a provision which the Society argued was increasingly becoming sector normative.

General economic circumstances also supported the Society's wage ask. Overall, the economy was doing well. The likelihood of an economic retraction was becoming increasingly remote. On the other hand, inflation was not only persistent but had become entrenched. The

Society argued that as a result its members had been significantly impacted – and this was continuing – from inflation's corrosive effects.

In the last round of bargaining, the employer wrongly asserted that inflation was transitory. That was completely unfounded, just like the current employer claim that inflation was on its way to returning historic norms. No one was credibly suggesting that 2% inflation would arrive anytime soon. In this context, a clear arbitral consensus had emerged that interest arbitrators must take inflation into account in arriving at the appropriate outcome. All the economic factors, therefore, supported the Society's economic proposals.

The other collective agreement factors also supported the Society's requested increases. Beginning with internal relativity, the Society pointed out that there was a wage disparity between the Society and PWU – the employer had an established track record of bargaining high wage results with the PWU – and this needed to be taken into account. Accordingly, the Society sought an internal relativity adjustment of

1.5%. Equally compelling – and applicable – were sectoral results of direct comparators.

There was now a plethora of voluntary settlements – settlements with the Society – that showed where this award should land (including Bruce Power, agreed to by the parties to be the most appropriate comparator). Notably, none of the various settlements the Society reviewed contained any offsets of benefit to the employer. For all these reasons and others, the Society asked that its requested wage increases, including the catch-up and the COLA clause, be awarded, not the sub-normative wage proposals advanced by the employer which should be rejected.

**Employer Submissions**

In the employer's view, the appropriate outcome was 2% in the first year and 1.5% in the second. There was no basis to award the proposed catch-up. That request was merely yet another attempt by the Society to relitigate issues from over a decade ago, matters that were now of historical interest, if at all. A decision was issued a long time ago. There

was no reason to revisit it now. Likewise, there was definitely no reason to reintroduce the Escalator Clause.

Insofar as the employer's wage proposals were concerned, they had to be placed in context, as the criteria required. OPG was facing the impending permanent closure of at least two units at the Pickering Generating Station, and possibly all six. This fact alone introduced real economic uncertainty into the equation and could lead to a significant downsizing (with huge associated costs). Net zero carbon goals were also on the agenda, and there were huge expenses that came with them.

It was also important to bear in mind the scrutiny that the employer faced from the regulator and its shareholder. OPG was not a private sector company (unlike Bruce Power, for example, which was not a comparator in the employer's view for this and many other reasons including ownership and structure). The employer needed to be fiscally responsible and prudent. The conclusion was inescapable that this was not the time for a profligate wage increase (especially one that will set a

floor for other negotiations with a different union and the real prospect of ratcheting/whipsawing).

Inflation, the employer agreed, was real, but it was easing. It did not, therefore, need to be addressed. In fact, inflation peaked in mid-2022, but since then price pressures have been reduced with a corresponding decline in inflation numbers. It was expected that inflation would continue its decline, to 2% in 2025. In this context, it would be improper to award a non-normative wage increase because of inflation (especially since in the last interest arbitration award between the parties – the reopener – inflation was more than appropriately addressed).

In addition, the employer argued that external wage outcomes did not support the Society's wage demands. Together with the reasons set out above, OPG rejected the notion that Bruce Power was a comparator. OPG pointed out that most of its employees were based in Durham, a completely different situation than Bruce Power where its location in Bruce County posed real recruitment challenges – challenges reflected in

wage outcomes that were completely inapplicable to OPG where there was no recruitment or retention issue, none whatsoever.

The employer also pointed to many sectoral settlements much closer to the numbers it advanced, and reference was made to them in the employer's brief and at the hearing. There were some non-normative wages increases – the ones relied on by the Society – but they were wholly inapplicable to this case when seen in context. Again, part of that context was that Society members already received significant non-normative increases in the reopener award.

It was also worth bearing in mind, OPG observed, that Society-represented employees were extremely well-compensated. For 2023, the average base salary was more than $160,000 for a forty-hour work week. Society members had a pension plan that was best in class, as were their other terms and conditions of employment. For all these reasons and others, the employer asked that is wage proposals be awarded.

**Award**

Having carefully considered the submissions of the parties, it is my view that the collective agreement and normative criteria appropriately applied lead to an award of 3.75% in the first year and 3.25% in the second along with a one-time administrative adjustment to salary schedules. In reaching this result, notice is taken that the employer is, on the one hand, profitable but, on the other, has ongoing capital expenditures relating to closures/refurbishments/transformation. It is also subject to ongoing regulation by the OEB and close scrutiny by its shareholder and the public.

Ontario's economic situation is relevant and has been considered in arriving at outcome. The economy may be slowing, and provincial deficits impose real challenges to government spending. No one can rule out the possibility of a recession during the collective agreement term. However, and at the same time, persistent inflation has eroded, and continues to erode, spending power (and previous inflationary increases now appear to be fully baked into prices). Inflation may be

deaccelerating but will come in above 3% in 2023. A return to targeted 2% inflation during the collective agreement term is aspirational. In the meantime, a demonstrated need to address inflation has been established and is reflected in voluntary sectoral settlements (and across the economy more generally). This point requires some elaboration.

An examination of sectoral results, such as the freely bargained settlements at Bruce Power (as augmented by an operating COLA clause) and Hydro One (economic increases of 4.5% on April 1, 2023, 4.0% on April 1, 2024, and 3.5% on April 1, 2025), make it manifest that the increases that are being awarded here replicate free collective bargaining. I also note that the recent Electrical Safety Authority (ESA) agreement with the Society, which was reached after a nine-day strike, includes negotiated economic increases of 5.75% for 2023, 3.4% for 2024 and 2.85% for 2025, wherein the 5.75% includes a special one-time "administrative revision" to be added to the 2023 general wage increase.

Given the general wage increase provided in this award, it is appropriate to suspend the application of the COLA clause.

**Wages**

January 1, 2024: 3.75%

January 1, 2025: 3.25%

**Administrative Adjustment to Salary Schedules**

January 1, 2024: 1% (contemporaneous with general wage increase)

**Article 64 – Units of Application**

Parties to meet, discuss and review including dispute resolution within 120 days of issue of award. Failing agreement, I remain seized to assist the parties as a facilitator.

**LOU #202**

Both parties made proposals concerning LOU #202.

Given my role as mediator and arbitrator, I worked hard with the parties to resolve their respective differences. This included advising the Society that despite its forceful arguments they would not be successful before me regarding their opposition to the movement of staff to Durham Region, including staff currently located in Niagara. This also involved advising OPG that it would help to facilitate agreement on outstanding issues by considering options to offset impacts to employees.

The parties were able to achieve agreement on almost all the items contained within LOU #202, save and except for those paragraphs related specifically to the move of Niagara employees which I have included as part of my award. As such, the full revised LOU #202, capturing both agreed to changes and my award, will read as follows:

**LETTER OF UNDERSTANDING #202**

**between**

**ONTARIO POWER GENERATION INC.**

**-and -**

## THE SOCIETY OF UNITED PROFESSIONALS

The Move of Employees from Niagara, 800 Kipling Avenue and 700 University Ave. Sites to 1908 Colonel Sam Drive**

1. In the event that OPG identifies Society-represented employees for relocation from Niagara**,** 800 Kipling or 700 University Ave. to 1908 Colonel Sam Drive, and such employees shall meet their Earliest Unreduced Retirement Date ("EURD") before January 1, 2030**,** or in the case of Niagara based employees who reach the age of 55 on or before January 1, 2030, and reside more than 40 road kilometres from 1908 Colonel Sam Drive, the following shall apply to these employees:
    A. Subject to paragraph (B) below, such employees may work from their previous work location of Niagara**,** 800 Kipling or 700 University Ave., respectively, up to two work days a week. These two days are in addition to any ability to work at an Alternate Work Location (AWL) under Letter of Understanding (LOU) #199, or such similar terms and conditions, if available, while in effect, until January 1, 2030**.** After this date, the employee may still have access to work from home under LOU #199 should LOU #199 still be in effect, in accordance with the terms and conditions of the LOU, if eligible for an AWLA. For clarity the employee is expected to report to work at 1908 Colonel Sam Drive on other work days when not traveling to a temporary work headquarters.
    B. Pre-January 1, 2030, all such employees shall be required to attend 1908 Colonel Sam Drive at least one day per work week for which there will be no paid travel time or mileage. The date(s) on which they shall be required to attend shall be at their Supervisor's discretion.
    C. Should OPG no longer have an 800 Kipling or 700 University Ave. location prior to January 1, 2030 and the employee is

able to access an AWL under the terms of LOU #199, the employee shall attend 1908 Colonel Sam Drive at least one day or shift per work week for which there will be no paid travel time or mileage. Days not required to be at 1908 Colonel Sam Drive may be worked at an AWL under the terms of LOU #199. Otherwise, all days will be worked at 1908 Colonel Sam Drive.

D. For clarity, the ability to work from an AWL or a previous location does not determine an employee's location for any Article 64 purposes, including for the Modified Article 64A Process set out in Memorandum of Agreement **"**Pickering End of Commercial Operations (PECO) JRPT Redeployment Agreement**"** ("PECO MOA").

E. As of January 1, 2030, OPG may direct any employee covered by this agreement to work fully at 1908 Colonel Sam Drive for all days not covered by an AWL under LOU #199 or such similar terms and conditions.

2. Employees at Niagara, 800 Kipling or 700 University Ave. who elect to relocate will work from 1908 Colonel Sam Drive and be entitled to relocation benefits pursuant to the terms of the collective agreement and paragraph #7 below. For clarity, employees who elect to continue working at Niagara, 800 Kipling or 700 University Ave. or elect to work from home under this agreement will not be eligible for relocations benefits in respect of the move to 1908 Colonel Sam Drive, including beyond January 1, 2030. In the event the employee accepts a different position at a building other than 1908 Colonel Sam Drive in the future, they may be eligible for relocation benefits subject to the terms of the collective agreement.

3. The Society will withdraw all grievances, related to the posting / hiring of individuals within the Hydro/Thermal Unit of Application (UofA) at a Durham site. The parties agree that OPG has the ability to hire employees within any Unit of Application, except for those

staff who directly work for Renewable Generation Station Operations and Renewable Generation Station Engineering**,** for positions within Durham Region, which the Society will not challenge or grieve.

4. OPG and the Society will carry out a:
    - Article 64B redeployment in 2023-2024 as a single JRPT for each 'Business Unit' Unit of Application for employees at 800 Kipling and 700 University to redeploy them to 1908 Colonel Sam Drive. For this purpose, employees will be assigned to a Unit of Application as defined in 64.9.2 of Appendix A of the PECO MOA. For clarity, there will be no displacements amongst or within work groups moving to 1908 Colonel Sam Drive. The parties recognize that the redeployment dates for specific work groups (that for this purpose is defined as under a Band G manager) as determined by OPG may vary.
    - For clarity, OPG may exclude employees within the Energy Markets and Fund Management organizations from such 2023-2024 JRPT and there shall be no displacement of staff in those organizations[1]. The parties agree that OPG may relocate such employees to 1908 Colonel Sam Drive, subject to the provisions in Item #1 above, on a date after January 1, 2025 as determined by OPG without the need to operate Article 64B, save and except for the payment specified under the terms and conditions of Article 64B Attachment #1, 2.2.10(b) which will apply should the employee voluntarily terminate their employment upon being notified of the relocation.
    - Niagara based employees identified to redeploy to 1908 Colonel Sam Drive will remain at Niagara and participate in the Modified Article 64A JRPT set out in the PECO MOA for their Unit of Application should one be initiated prior to May 1, 2026. These employees will have their base location identified as

[1] Nothing in this clarity note shall prevent qualified employees from being matched to vacant positions within the Energy Markets and Fund Management organizations.

Darlington for purposes of the 'mix and match' process defined in 64.10 of Appendix A of the PECO MOA. This decision to treat Niagara employees as if they were at Darlington will not impact these employees' rights to a Voluntary Exit (VE).

- For clarity, if OPG notifies the Society at any time that it is not initiating a Modified Article 64A JRPT for the applicable Unit of Application for Niagara based employees (i.e. Corporate or Enterprise Projects & Operations) prior to May 1, 2026 as identified above, subject to the provisions in Item #1 above, OPG may relocate such employees to 1908 Colonel Sam Drive through the operation of an Article 64B JRPT for the affected Unit(s) of Application. For clarity, any severance that may be provided under such circumstances will be in accordance with Article 64B.

Additionally, notwithstanding 64.13 and 64.23 of Appendix A of the PECO MOA, such an employee will have the right to elect to terminate their employment with OPG and be entitled to lump sum payments as calculated in Article 64.12(b) of Appendix A of the PECO MOA, if they are not accepted for a VE. Should an employee elect to terminate on this basis, they will not participate in the 'mix and match' process defined in 64.10 of Appendix A of the PECO MOA. Employees who participate in this 'mix and match' process and relocate as a result will have their relocation entitlements based on their Niagara residence under the terms of the collective agreement and paragraph #7 below.

An employee who has elected to terminate per above will be accepted for a VE where they would have been offered a VE had they been part of the 'mix and match' process. This will be determined by performing a simulation of the 'mix and match' process including these employees.

Notwithstanding the paragraphs above, Niagara based employees identified to redeploy to 1908 Colonel Sam Drive may, at their sole discretion, after notifying their supervisor**,** voluntarily elect to move to

Durham Region beginning January 1, 2022. Any relocation entitlements will be based on their Niagara residence.

Employee election to terminate per above will be solicited in conjunction with the irrevocable Employee Preferences as per 64.5.21 of Appendix A of the PECO MOA. Employees who elect to terminate their employment will terminate six (6) months from the receipt of the election to terminate, being Step (l) of Appendix C of the PECO MOA, unless termination is:

i. extended by OPG for up to twelve (12) months;
ii. extended by greater than twelve (12) months if so jointly agreed by the employee and OPG; or
iii. the employee and OPG jointly agree to an earlier termination date.

Notwithstanding the above, Niagara-based employees terminating with lump sum payments as calculated in 64.12 (b) or a VE in accordance with 64.6.5 of Appendix A of the PECO MOA will have the ability to avail themselves of a non- working bridge to the pension milestone on the same terms as under 64.6.6 of Appendix A of the PECO MOA.

5. The parties agree that OPG may relocate employees within the Dam Safety and Water Resources organization at Niagara to 1908 Colonel Sam Drive, subject to the provisions in Item #1 above, through an operation of an Article 64B JRPT for the affected Unit(s) of Application. For clarity, any severance that may be provided under such circumstances will be in accordance with Article 64B.

6. OPG will pay a monthly payment of $850.00 less all necessary deductions, for a period of 12 months at the end of the 12 week transfer expense decision period (in accordance with Article 52.3.3 a) to all regular, Society represented employees (not including those on long term disability) whose base location is at Niagara, Kipling, or 700 University Ave. and who are relocated to 1908 Colonel Sam Drive, provided they meet the following conditions:

a. eligible for relocation reimbursement in accordance with the terms of the collective agreement and elect to continue employment with OPG; and
b. elect not to relocate their residence and receive no relocation reimbursements at the end of the 12 week transfer period as per Article 52.3.3 (a). For clarity, there shall be no relocation entitlements paid for the move to 1908 Colonel Sam Drive other than the entitlements claimed for the 12 week transfer period as per Article 52.3.3 (a) to an employee who elects the payment noted above; and
c. remain in a regular Society represented position (not including those on long term disability) located in Durham on the date of payment; and
d. the provisions in paragraph #1 above do not apply.

7. For employees identified by OPG for relocation from Niagara, 800 Kipling or 700 University to 1908 Colonel Sam Drive in paragraph #1 above, the prescribed property value limit of five (5) times the employee's annual base salary in the new location under Article 52.3.2 will be increased to seven (7) times for the relocation to 1908 Colonel Sam Drive.

**For clarity, OPG may identify a building listed in Article 105.2 as Darlington other than 1908 Colonel Sam Drive for employees from 700 University Ave., Kipling, and Niagara for relocation and such identification shall not be considered a material change to this agreement and the terms and conditions of this agreement will continue to apply.

**COLA**

Suspended during term of the collective agreement.

## Conclusion

At the request of the parties, I remain seized with respect to the implementation of my award.

DATED at Toronto this 16th day of December 2023.

*"William Kaplan"*

William Kaplan, Sole Arbitrator

# TAB 25

**In the Matter of an Interest Mediation-Arbitration**

**Pursuant to a March 18, 2024 Memorandum of Agreement**

**BETWEEN:**

**YORK UNIVERSITY**

**(The "University")**

**AND**

**YORK UNIVERSITY FACULTY ASSOCIATION**

**(The "Association")**

**BEFORE:** Eli A. Gedalof, Sole Mediator-Arbitrator

## AWARD

1. This mediation-arbitration arises from an agreement between the parties to re-open their May 1, 2021 to April 30, 2024 collective agreement (the "Collective Agreement"). I was duly appointed as mediator-arbitrator under a March 18, 2024 Memorandum of Agreement between the parties, for the purpose of determining what is commonly referred to as a "Bill 124 Reopener".

2. On March 18, 2022 the parties entered into a Memorandum of Settlement resolving the terms of the Collective Agreement. At the time, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* ("Bill 124") was in effect, but was subject to an ongoing constitutional challenge brought by several unions. In accordance with the strictures of Bill 124, the parties agreed to 1% annual wage increases. At the same time, the parties also agreed to the following Letter of Understanding re Wage Reopener:

> The Parties hereby understand and agree that in the event that the Protecting a Sustainable Public Sector for Future Generations Act, 2019 ("Bill 124") is repealed, or successfully challenged through the courts such that it is of no force and effect and is not the subject of any ongoing appeal,

during the term of the renewal collective agreement (i.e. at any point prior to April 30, 2024), the parties agree to re-negotiate the portions of those salary and compensation provisions of this collective agreement that were limited by Bill 124, but only to the extent permitted by law and having regard to the Employer's financial position.

This Letter of Understanding will expire on April 30, 2024.

3. By decision in *Ontario English Catholic Teachers Assoc. et al. v. His Majesty*, 2022 ONSC 6658 (CanLII), the Ontario Superior Court found that Bill 124 was contrary to s.2(d) of the *Charter*, not justified under s.1, and void and of no effect. This decision was upheld by the Ontario Court of Appeal, insofar as it related to unionized employees, in *Ontario English Catholic Teachers Association v. Ontario (Attorney General)*, 2024 ONCA 101. Following the Court of Appeal's decision, the government of Ontario repealed Bill 124. The University and the Association, together with several other unions, then entered into a March 18, 2024 MOA giving rise to this proceeding.

4. The terms of my appointment include the following:

…

3. The sole issue in respect of the multi-party mediation, or multi-party interest arbitration, if necessary, would be whether in respect of the 3-year Bill 124 moderation period there should be any additional across-the-board salary increases, in addition to the 1% across-the-board salary increases under the current collective agreements. For clarity, in connection with any multi-party interest arbitration proceedings, the interest arbitrator would have no jurisdiction to make any interest arbitration award other than or inconsistent with these terms and if issues are not resolved through mediation, in any multi-party interest arbitration proceedings the arbitrator's jurisdiction with respect to the moderation period would be limited solely to across-the-board salary increases, if any, in addition to the 1% across-the-board salary increases under the applicable collective agreement.

4. In circumstances where there is either a mediated agreement or an interest arbitration award providing for an across-the-board salary increase, in addition to the 1% across-the-board salary increases already provided, in any year of the applicable collective agreement, employees in the applicable bargaining unit, will receive a lump sum payment less

applicable deductions required by law calculated based upon the agreed-upon or awarded across-the-board wage increases and their effective dates. This payment will be effective on the commencement of a pay period following the date of the agreement or interest arbitration award and made on a regular pay date as expeditiously as practicable following the agreement or interest arbitration award. After completing payments to current employees, the University will notify former employees using the last contact information on file and will provide a reasonable period of time for the former employee to provide confirmation of either the banking information on file or other banking information to facilitate a lump-sum payment to them. For clarity, it is agreed that any salary increase for any year of the applicable collective agreement as determined in either a mediated agreement or an interest arbitration award applies to former and current employees in the applicable bargaining unit.

5. The University and the unions participating in the multi-party mediation process, and any multi- party interest arbitration, if necessary, shall share equally in the costs for the mediator-arbitrator related to the multi-party mediation and any multi-party interest arbitration.

6. If a multi-party interest arbitration is necessary, the arbitrator shall have the powers of an arbitrator under section 48{12) of the Labour Relations Act, 1995. Further, the interest arbitrator can, in their discretion, hold separate discussions with the University and each separate participating union as the interest arbitrator considers necessary or appropriate and will issue separate interest arbitration awards for each participating bargaining unit.

…

5. The parties met with the mediator-arbitrator on April 9, 2024 and filed comprehensive briefs with extensive supporting materials. Having carefully reviewed and considered the materials and representations before me, I make the following award:

(a) There shall be additional across-the-board increases to Article 25.03 base salaries, Article 25.09 Overload Rates, and Stipends for positions in Appendix P (Letter of Understanding Regarding Academic Administrative Positions) in addition to the 1% effective each May 1 already provided. Increases shall be as follows:

May 1, 2021 an additional 1% increase (2% inclusive of previously agreed increases).

May 1, 2022 an additional 2 % increase (3% inclusive of previously agreed increases).

May 1, 2023 an additional 3% increase (4% inclusive of previously agreed increases).

(b) All Article 25.03 base salaries, Article 25.09 Overload Rates and Stipends for positions in Appendix P (Letter of Understanding Regarding Academic Administrative Positions) shall be increased according to the paragraph above with the commencement of the pay period beginning on June 1, 2024.

(c) All employees in the bargaining unit on the date of this Award shall receive a lump sum payment, less applicable deductions required by law, in an amount equivalent to the Article 25.03 base salary (and if applicable any Article 25.09 Overload Rates, and any Stipends for positions in Appendix P (Letter of Understanding Regarding Academic Administrative Positions)) they actually received between the period May 1, 2021 and May 31, 2024 and the Article 25.03 base salary (and if applicable any Article 25.09 Overload Rates, and any Stipends for positions in Appendix P (Letter of Understanding Regarding Academic Administrative Positions)) they would have received during the same period of time if the additional increases in paragraph 5(a) above had been implemented. The lump sum payment will be made in connection with a regular salary payment before the end of July 2024. Employees who receive a lump sum payment will receive a pay statement via HR self serve.

(d) After completing the implementation of paragraphs 5(b) and (c) above regarding employees in the bargaining unit on the date of this Award, the University will notify former employees who were in the bargaining unit on or after May 1, 2021 but ceased employment on or before the date of this Award using the last contact information on file for such former employees and will provide such former employees with a sixty (60) calendar day period of time to provide confirmation of their banking information on file or provide other banking information to facilitate a lump sum payment to them. The Employer will provide YUFA with a list of former employees who have not responded within thirty (30) days of the issuance

of the notification. Lump sum payments, less applicable deductions required by law, will be made to such former employees in an amount equivalent to the base salary under Article 25.03 (and if applicable any Article 25.09 Overload Rates, and any Stipends for positions in Appendix P (Letter of Understanding Regarding Academic Administrative Positions)) they actually received between the period May 1, 2021 and the date of the termination or cessation of their employment and what they would have received during the same period of time if the additional increases in paragraph 5(a) above had been implemented. Former employees who receive a lump sum payment will receive a pay statement via mail to their home address currently on file.

6. This award resolves all claims that YUFA or any former or current employees represented by YUFA may have in any way against the University or any other party, including the government of Ontario in the remedial phase of the constitutional challenge to Bill 124, for lost compensation of any nature or kind arising from Bill 124.

7. I remain seized as mediator and, if necessary, arbitrator, of any issue regarding the interpretation, application, administration or alleged violation of the terms of this Award.

Dated at Toronto, Ontario, this 13th day April of 2024

"*Eli Gedalof*"

_____

Eli A. Gedalof
Mediator/Arbitrator

# TAB 26

**IN THE MATTER OF AN INTEREST ARBITRATION**
**(pursuant to the Labour Relations Act, 1995 (the "Act") and the Residential Stability Accord dated December 23, 2021)**

BETWEEN:

**LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183**
(the "Union")

-and-

**TORONTO RESIDENTIAL CONSTRUCTION LABOUR BUREAU**
("TRCLB")

-and-

**DURHAM RESIDENTIAL CONSTRUCTION LABOUR BUREAU**
("DRCLB")

-and-

**METROPOLITAN TORONTO APARTMENT BUIDLERS' ASSOCIATION**
("MTABA")

**Arbitrator Harvey Beresford**

**Hearing held on April 21, 2022**

## Appearances:

For the Union: L. A. Richmond, Hong Hua (Emily) Li, John O'Grady, Jack Oliveira, Armando Camara, Bernardino Ferreira, Domenic Pilegge, Victor Ferreira, Graham Williamson, Maheen Merchant

For the Association: Carl W. Peterson, Diane Laranja, Richard Lyall, Andrew Pariser, Ahd AlAshry

1. I have been appointed pursuant to the **TRCLB/DRCLB/MTABA JOINT PROPOSAL AGREEMENT 2022-2025** (The Joint Proposal Agreement") entered into by the parties on December 23, 2021, to settle by way of Interest Arbitration any unresolved issues arising out of the negotiation of the renewal of the May 1, 2019 to April 30, 2022 collective agreements between the parties. There are three collective agreements, and I will be addressing the issues between the parties for the renewal of each agreement. TRCLB, DRCLB and MTABA (collectively referred to as the "Builders") are accredited under the Act to bargain with the Union.

**INTRODUCTION**

2. The TRCLB represents approximately 150 low-rise residential builders in OLRB Geographic Area 8 and in the County of Simcoe.

3. The DRCLB represents approximately 60 low-rise residential builders in the Regional Municipality of Durham (except in the Towns of Ajax and Pickering), the Township of Cavan in the County of Peterborough and the Township of Manvers in the County of Victoria.

4. The MTABA represents approximately 150 apartment builders (high-rise and condos) in OLRB Geographic Areas 8, 9, 10, 11 and 18 and the part of Area 12 west of the Trent-Severn Waterway.

5. The Union and the Builders have a long relationship of some 27 to 41 years. The Builders have individual collective agreements with the Union but given significant commonality in interests and a number of overlapping members, have agreed to negotiate all three agreements together.

6. The parties have agreed to most items in bargaining and I will order that all these items be included in the Renewal Collective Agreements in my final award.

**THE ISSUES**

7. **Wages: - Union Proposal** -applicable to all three Builder agreements

   - May 1, 2022 + $4.25
   - May 1, 2023 + $2.15
   - May 1, 2024 + $2.10

   **Wages: - Builders Proposal** - applicable to all three Builder agreements

   - May 1, 2022 + $2.20
   - May 1, 2023 + $1.40
   - May 1, 2024 + $1.40

   In all cases, wages represent total package cost. The Union proposal amounts to a 15.3% increase for the term of the agreement (8% + 3.8% + 3.5% with the first year 8% composed of 1.9% for recouping "real wage loss", 5.3% for inflation protection and .08% for economic gain).

   The Builders proposal represents a 9.3% increase for the term of the agreement in the case of the MTABA agreement and 9.7% for the TRCLAB and DRCLB agreements.

   All percentages do not take into account the consequent compounding over the term of the Renewal Collective Agreements.

8. **Statutory Holidays – Union proposal** (only for MTABA)

   - Add Truth and Reconciliation Day (September 30)
   - Add Remembrance Day (November 30th) if added to the Ontario Formwork Agreement

MTABA – no change to existing Agreement.

9. **Sick Days (New) – Union Proposal** (applicable to all three Builder Agreements)

   - Add three paid sick days

   MTABA – no sick days in existing Agreement and not agreeing.

10. **Boot Allowance (New) – Union Proposal** (only for MTABA)

    - $250 per year

    MTABA – no boot allowance in existing Agreement and not agreeing.

11. **Handyman Tool Allowance – Union Proposal** (only for MTABA)

    - Increase from $50.00/month to $75.00/month

    MTABA – no change to existing Agreement.

12. **Travel Allowance – Union Proposal** (only for MTABA)

    - Employer provide free parking or reimbursement

    MTABA – no change to existing Agreement.

13. **New Classification – Specialized Labourer/Machine Operator – Union Proposal** (only for TRCLB and DRCLB)

    - Establish with hourly rate of 110% of Labourer rate

TRCLB/DRCLB – not in agreement.

14. **Working Foreman – Union Proposal** (only for TRCLB and DRCLB)

- Increase from 105% to 110% of Labourer rate

TRCLB/DRCLB – not in agreement.

**15. Servicemen/Handymen – Union Proposal** (only for TRCLB and DRCLB)

- Increase tool allowance from $1500 annually to $150 monthly
- Replace transportation monthly allowance of $600 with gas credit card

TRCLB/DRCLB – no change to Agreement.

16. **Employer Proposal - Residential Stability Accord** (applies to all three Agreements)

- Extend the existing Accord from April 30, 2025 to April 30, 2028 or alternatively, insert Article 10.04 in the TRCLB and DRCLB Agreements in the MTABA Agreement

Union – no change to existing Agreements.

17. **Employer Proposal – No Inferior Agreements** (applies to all three Agreements)

- Amend existing "No Inferior Collective Agreements" LOU to cover any agreement and eliminate "side-deals"

Union – no change to existing Agreements.

## SUBMISSIONS ON WAGES

18. The Union made the following arguments in support of its wage proposal:

- The residential construction sector "is on fire" with no end in sight for the current growth in the sector. It supported its submission with data showing the high numbers of crane sites in the GTA, the increase in the number of building permits and housing starts.

- There is a real labour shortage that is not going to disappear in the next three years. It provided data showing that in the construction industry overall, there are currently more than 20,000 job vacancies. Younger workers are going into other types of employment and construction workers, particularly skilled workers, are moving to other industry sectors where pay is greater.

- Inflation is high and not coming down anytime soon. As of March 2022, year over year, the Canadian inflation rate is 6.7%, up from 5.7% in February. The most recent Bank of Canada Inflation Forecast (April 2022) is 5.3% for 2022, 2.8% for 2023 and 2.1% for 2024.

- Increases in comparator agreements are substantial. "Comparator Agreements in the residential sector with Local 183 are the most important agreements to assess the replication factor in interest arbitration".

- The 2022-2025 collective agreement between the Masonry Contractors Association of Toronto (MCAT) and Masonry Council of Unions of Toronto and Vicinity (MCUTV) (Bricklayers, etc, Local 1 and LIUNA Local 183) negotiated a $10.00 increase over 3 years which amounts to a 15.556% in the bricklayer rate. Bricklayers work in both high-rise and low-rise residential construction but predominantly in low-rise. It is the builders that bear the burden of this increase.

- The settlement between the Residential Low-Rise Forming Contractors Association of Metropolitan Toronto and Vicinity and LIUNA Local 183 is another $10 wage increase over three years with an 18.1% increase in the labourer rate.

- The agreement between Residential Carpentry Contractors Association of Toronto and LIUNA Local 183 provides for a 13.1% increase in the carpenter rate.

- The Residential Framing Contractors Association and LIUNA Local 183 settlement is a $12 dollar wage increase with a compounded carpenter/framer rate increase of 20.7%. This agreement applies to only non-piece workers and are not the largest group of workers in the Association.

- The settlement between the Independent Unionized Landscape Contractors Association and LIUNA Local 183 is for $8 over three years and compounded percentage increases ranging from 15.4% to 19.2%.

- High-Rise Trim LIUNA local 183 - $8.85 – 14.5% (compounded)

- Concrete and Drain LIUNA Local 183 - $11.00 – 19.3% (compounded)

- The fundamental rationale behind the Union's wage proposal is to provide for recovery of ground lost to inflation during the term of the expired collective agreement; to protect against current and future inflation as set out in the Bank of Canada April report; to provide for some economic gain for workers.

19. The Builders responded to the Union wage proposal and in support of their wage proposal with the following submissions:

- Their wage proposal is consistent with increases that have been provided throughout the parties' bargaining relationship. The

past four 3-year collective agreements have incorporated wage increases around 7.27-9.48%.

- Many comparator collective agreements for the 2022-2025 period are significantly lower than the amount proposed by the Union and in line with the Builders proposal.

- ICI Ironworkers total wage increase of $6.06 – 9%

- ICI Electrical Contractors - $6.05 – 8.6% but with a post negotiation wage adjustment potential of $1- 10+%

- ICI Tile is a 9% increase

- ICI Hazmat – Painters – 9%

- ICI Residential High-Rise Electrical $6.06 – 8.6% but with the same wage adjustment potential – $7.05 – 10+%

- Residential Painting – 10%

- Drywall Local 27 – 12%

- Precast Forming LIUNA Local 506 - $8.00 – 13.7%

- ICI Sewer & Watermain LIUNA 183 - $7.50 – 12.5%

- ICI Heavy Construction $7.50 – 11.9%

- ICI Carpenters - $5.96 – 9.5%

- ICI Bricklayers - $5.39 – 9% (With a year 3 reopener to a maximum of an additional 3%)

- In Toronto, the residential building construction price index shows that the cost to build increased by 25.6% from the fourth quarter of 2020 to the fourth quarter of 2021. Prices continue to rise in 2022. The same inflation that affects wages also hits the Builders. Prices of raw materials as measured by the Raw

Materials Price Index were up 6.5% on a monthly basis in January 2022 and up 30.5% year over year.

- The housing market is expected to cool down as a result of rising interest rates and rising consumer prices. Interest rates are expected to rise sooner and faster based on recent statements from the Bank of Canada. All of this will negatively impact demand in the next few years.

- Most of the Union's wage submissions are predicated on assumption – either false or uncertain.

- The current labour shortage is in the skilled trades and not with labourers. It is a problem that requires a long-term fix and it won't be solved by increasing wages.

- We only have one year of significant inflation. There is no trend that one can reliable predict. Additionally, the effect of inflation on the builders as well as workers has to be considered.

- No interest arbitration decision supports the notion that an arbitrator should go back and pay more because of past inflation. The Builders can't go back and adjust their construction costs or the prices of the units that they sold during the preceding three years.

- In looking at comparators, arbitrators have not treated Builders and contractors alike. Arbitrator Steinberg rejected the idea that the Builders and contractors should be the same in his 2013 award dealing with the same parties. Invariably, the contractors get higher wages.

**SUBMISSIONS ON UNION AND BUILDERS NON-MONETARY PROPOSALS**

**20. New Statutory Holidays:** The Federal Government has proclaimed Truth and Reconciliation Day (September 30) as a new national holiday. It is now a holiday under the collective agreement

between the Formwork Council of Ontario and the Ontario Formwork Association which means that high-rise residential formwork will be on holiday while the workers covered by the MTABA/LIUNA Local 183 agreement will be required to work when there is no formwork being done. If Truth and Reconciliation Day is recognized as a holiday, so should Remembrance Day which is also a federal holiday. Accordingly, if the Formwork collective agreement adds Remembrance Day, it should also be added to the MTABA agreement.

21. **Sick Leave:** The Union admits that sick leave is what interest arbitrators would call "breakthrough". However, it is justified in light of Covid which is a "breakthrough crisis". Covid issues are continuing and workers will get sick. Additionally, some sick leave coverage will help keep existing employees and attract new and younger persons to construction work.

22. **Boot Allowance:** This is a new provision that will give workers with six months service an annual boot allowance of $250. The Builders can afford it in these good economic times.

23. **Handyman Tool Allowance:** This is an increase from $50/month to $75/month and will help workers purchase tools that are increasingly costly. It will also discourage movement between sectors.

24. **Parking – MTABA:** The current agreement language requires the employer to provide free parking at the job site for employees required to use their own vehicles to report to the site. The Union proposes that where free parking is not available, the employer shall reimburse each week the reasonable costs of parking in proximity to the site. This will "allow workers to travel without suffering the risk of infection from fellow travellers in the same vehicle.

25. **New Specialized Labourer/Machine Operator Classification – TRCLB & DRCLB:** The Union proposes this new classification be created with a wage rate 10% above the labour rate. It will recognize the current practice of many employers and properly reward the higher skilled workers who routinely operate

equipment. It will encourage less skilled workers to upgrade their skills and discourage movement to other employers.

26. **Working Foreman Rate Increase – TRCLB & DRCLB:** Increase the rate from 105% of the labour rate to 110% in order to properly recognize their skill, knowledge and initiative. They are now paid the same as the handyperson and should be paid more than the workers they supervise.

27. **Handyperson Tool Allowance and Transportation Allowance Increase:** Increase the tool allowance from $1500 annually to $150 monthly in order to allow the worker to buy the tools needed when they are needed. Change the current $600/month allowance to a free gas card. The price of fuel has greatly increased and this is needed to properly compensate the handyperson.

28. **Extension of the Residential Stability Accord – Builders Proposal:** The Builders submit that request to extend the Accord from April 30, 2025 to April 30, 2028 is based on the past misconduct of the Union and is necessary to provide stability in the residential sector. Alternatively, if not awarded, the Builders seek the addition of language in the MTABA agreement as follows:

    - "The Union agrees that it will not involve the Employer in any dispute which may arise between the Union and any other Company and the employees of such other Company. The Union further agrees that it will not condone a work stoppage or observe any picket line placed on a job site for jurisdictional purposes."

    This language is not new and is currently in the TRCLB and DRCLB agreements. The Builders state that their proposal will offer protection against future Union unfair labour practices.

29. **No Inferior Agreements – Builders Proposal:** The Builders' agreements currently contain a Letter of Understanding stating that the Union will not enter into a collective agreement with a builder or developer that is not part of the applicable Association that is more beneficial to that employer. The Builders want to amend the LOU in two respects. Firstly, to provide that the Union will not enter into

any superior agreement in any form with the objective of "maintaining a level playing field among all builders in contractual relations with the Union"; and secondly, to state that the Union will use its best efforts to ensure that any builder in contractual relations with the Union become bound by the appropriate Builders Collective Agreement.

**DECISION**

**30.** I have read the documents and briefs filed by the parties and considered their oral submissions made at the hearing.

**31.** Both parties referred me to the 2013 interest arbitration decision of Larry Steinberg concerning the same three collective agreements that are before me and I have taken into consideration much of the same analytical framework used by arbitrator Steinberg in his award. He referred to the following:

- The current economic climate and its relation to the residential sector.

- The degree to which there are sufficient 2022-2025 settlements to allow the replication principle to reflect the consensus of the industry.

- Settlements in the residential sector are more relevant comparators than those in the ICI sector.

- Settlements to which the Union is a party in the residential sector must be given weight.

- The previous settlement between the parties must be given some weight.

- Comparisons for the purpose of replication must take into consideration not only dollar amount increases in wages but also percentages in order to ensure that any increase bears some normative relationship to others in the industry. Increases to a

collective agreement with lower rates may produce an unreasonable percentage increase.

**32.** **The economic outlook** based on the available evidence presented to me appears to be robust in the short term which is good for both the Builders and the workers. While the ability to forecast may be "fraught with peril" in the words of Mr. Peterson, it is nevertheless an essential task of interest arbitrators. We must consider and assess the likely short-term future on the basis of the evidence presented to us. It is difficult to predict what effect inflation will have on continuing construction of new low-rise and high-rise units but if we rely to any degree on the Bank of Canada (BOC) three-year inflation outlook as of April 2022 (5.3% in 2022; 2.8% in 2023; 2.1% in 2024) which was proffered by the Union, it is likely that inflation will not by itself significantly affect the industry. However, rising interest rates may have some impact, but it is beyond my ability to assess to what degree.

**33.** Inflation will have a direct impact on the workers and to some extent the Builders, as submitted in argument, and must be considered in determining the wage increases for the Renewal Collective Agreements.

**34.** It is also clear that there is a labour shortage, not only in construction, but generally in many parts of the workforce. Absent very detailed data, it is not a factor that I can take into account in deciding wage rates.

**35.** **The number of current settlements** is likely sufficient to demonstrate an emerging pattern within the overall construction industry and provide appropriate comparisons for the purpose of applying replication. I don't intend to engage in a lengthy pronouncement on the replication principle other than to note that it is the combination of replication and comparability that factor significantly in determining interest arbitration outcomes. Replication is the attempt to "replicate" the results that would be achieved in free collective bargaining and comparability directs the arbitrator to other settlements both feely negotiated and arbitrated.

**36.** 2022-2025 wage settlements are from lows of 9% to highs of 20%. In describing the lows, I am assuming that there will be a Post Negotiation Wage Adjustment as provided for in the ICI Electrical Contractors agreement.

**37. The Comparators** provided by the Union show increases from $8 to $12 over the life of the new agreements with percentages ranging from 13.1% to 20.7% and most are in the residential sector with LIUNA Local 183. The Builders comparators are mainly in the ICI sector and range from 9% to 13.7%. While it is impossible to know the bargaining dynamics involve in each settlement, it is clear that the Builders proposal is at the low end of these wage settlements. I note that even the inflation projection of the BOC exceeds their offer on a percentage basis. However, there is no clear "benchmark" wage increase and no clear consistency in any of the increases and no obvious "me too" pattern.

The Builders submit that in this round of bargaining, unlike in previous years, the ICI sector "is a reasonable comparator for the residential sector as the same factors affecting the Builders' ability to increase the total package rates (i.e. broken supply chain, rising material costs, delays, etc.), have also affected the ICI sector. "The construction industry in general is experiencing unprecedented challenges in financing projects as a result of the COVID-19 pandemic, record levels of inflation and the conflict in Ukraine."

While there is no doubt that these factors are causing ICI employers difficulties, they are also part of the economic landscape that residential sector employers are facing, and the current wage settlements in that sector are generally higher than in the ICI sector.

**38. The bargaining history of the parties** appears to be accurately described by the Builders and not objected to by the Union but the degree to which that history should affect this current settlement is somewhat problematic. The past four three-year collective agreements between the parties averaged increases of 7.27-9.48%. Unfortunately, we are experiencing inflation at levels not seen in decades and the past increases were not negotiated in a similar

climate. While of historical value, the past is not a strong factor to be considered in today's circumstances.

**39. Recouping "real wage loss"** proposed by the Union is in the nature of a "breakthrough" bargaining demand. I have not been advised of any precedent in construction negotiations or interest arbitration decisions where this has been awarded. Regardless, the impact of past inflation is experienced by the Builders as well as the workers and I do not consider it a factor to be taken into consideration in setting the wage increases for the Renewal Collective Agreement.

## The Wage Increases

**40.** In determining the wage increases, I have taken all factors and comparisons into consideration. Clearly, the Builders proposal is too low and the Union's is too high. I note in particular that the BOC April 2022 inflation projection represents, without compounding, an inflation impact of 10.2%. If I consider the Union estimated average wage package (EAWP) of $52.88/hr as of April 30/22 as the starting point, the compounded BOC impact is 10.49% with an end package of $58.44/hr. This would result in wage increases on May 1 of each year of $2.80, $1.56 and $1.20. However, compensating solely based on predicted inflation is not the end consideration. The comparator agreements must also be considered.

41. I have not considered any wage recoup proposed by the Union. I find that the comparators used by the parties helpful but not definitive.

42. Taking all factors into consideration, I have concluded that the following wage increases are reasonable in the circumstances and so award:

- May 1, 2022 - $3.00
- May 1, 2023 - $1.70
- May 1, 2024 - $1.70

43. This represents an approximate 12.1% increase in the Union's EAWP of $52.88/hr and an end estimated average wage package of $59.28/hr.

44. It is important to note that the use of the Union's EAWP is only for the purpose of illustrating the impact of the increases based on the EAWP it provided. For clarity, the wage increases being awarded are $3.00, $1.70 and $1.70 on May 1, 2022, May 1, 2023 and May 1, 2024. These are, as agreed to by the parties, total package increases.

45. In the circumstances, I decline to award any of the other proposals made by either party.

46. There is no established trend at this time of including the new federal Truth and Reconciliation holiday in construction collective agreements. Similarly, I have not been provided with any evidence that Remembrance Day is a common holiday found in construction agreements. Contrary to the Union submission, there is a cost in loss of productivity to the Builders for each additional holiday. I am denying the Union's statutory holiday proposal.

47. The requested addition of sick days is a "breakthrough" proposal, and I was not provided with evidence of any other construction agreement containing sick days. The availability of vaccines and the diminishing number of infected persons is a hopeful indication that COVID-19 is of less concern going forward. The sick day proposal is denied.

48. The proposed addition of a new boot allowance is also denied. If in the future such an allowance becomes a fixture in comparable collective agreements, its inclusion may be appropriate but not now.

49. Similarly, the increase in the Handyperson tool allowance, the increase cost associated with the Travel Allowance proposal, the new Specialized labourer/Machine Operator classification, the increase in the working foreman rate and the gas credit card proposal for the Servicemen/Handymen are all additional cost items for the Builders and not warranted in a time of high wage rate increases.

50. Both Builder proposals – extending the Residential Stability Accord and No Inferior Agreements with the related request to add new language to the MTABA agreement similar to Article 10.4 in the TRCLB and the DRCLB are denied. These are important rights issues that are best left to the parties to negotiate.

51. I direct the parties to enter into the appropriate renewal collective agreements which, in addition to the wage increases I have awarded, shall contain all the terms and conditions agreed to by the parties in bargaining prior to the issuance of this award and all the terms and conditions of the expired collective agreements unless otherwise amended by the parties in bargaining.

52. The wage increases are effective on the dates indicted in my award and are retroactive where applicable.

53. I remain seized until the new collective agreements are signed by the parties.

Dated at Toronto, Ontario this 3rd day of May 2022.

"Harvey Beresford"
_____