In the Matter of an Arbitration

BETWEEN:

ONTARIO MEDICAL ASSOCIATION

(the "OMA")

- AND -

MINISTRY OF HEALTH

(the "MOH")

(together, "the PARTIES")

REPLY BOOK OF AUTHORITIES OF THE ONTARIO MEDICAL ASSOCIATION

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VOLUME ONE:

TAB 1

In the matter of an interest arbitration under the
Hospital Labour Disputes Arbitration Act, RSO 1990 (“HLDAA”)

BETWEEN;

PARTICIPATING NURSING HOMES

(“The Employer or “PNH”)

-and-

ONTARIO NURSES’ ASSOCIATION

(“the Association” or “ONA”)

AWARD

Board of Arbitration:

Sheri Price, Chair

For the Employer:

Bob Bass
Dan McPherson
Mary-Claire Bass
Kyle McPherson
John Scotland
Mike Putt
Mark Chodos
Dorish Augustin
Meghan Scherer
Andrew Hall
Sandra Fougere
Ivana McIntosh
Filippo Falbo
Lindsay Bousfield
Courtney Dunlop-McDonald
Shawn Riel
Linda Calabrese

For the Association:

Wassim Garzouzi
Julia Williams
Melissa Tilley, Team Chair, Region 2 Representative, RN
Christopher Bolestridge, Region 1 Representative, RN
Genevieve Tiri, Region 3 Representative, RN

JoAnn Carey, Region 4 Representative, RN
Irene Aguiar, Region 5 Representative, RN
Erin Ariss, President, RN
Angela Preocanin, First Vice President, RN
Andrea Kay, Chief Executive Officer, RN
Matthew Stout, Executive Lead Labour Relations
Patricia Carr, Manager, Negotiations, RN
Marilynn Dee, Manager, Negotiations, RN
David Cheslock, Manager, Labour Relations, RPN
Kieran Maxwell, Manager, Anti-Racism and Anti-Oppression, RN
Marie Haase, Labour Relations Officer, Negotiations, RN
Joshua Henley, Labour Relations Officer, Negotiations
Kayla Sanger, HLDAA Specialist
Brandon Walker, HLDAA Specialist
Dave Campanella, Economist
Ryan FitzGerald, Benefits Specialist
Victoria Romaniuk, Manager Administration
Jaclyn Hayes, Labour Relations Assistant

Hearing held in Richmond Hill on May 1, 2, 2024

INTRODUCTION

[1] This Arbitration Board was convened pursuant to *HLDAA* to resolve the outstanding central issues in dispute between the parties with respect to the renewal of the collective agreements.

[2] My mandate is to resolve the outstanding "central issues" between the parties with respect to the renewal of the "central template" provisions of the collective agreements between the Ontario Nurses Association ("ONA") and 208 Participating Nursing Homes ("PNH"). The Homes operate for profit and not-for-profit long-term care ("LTC") nursing homes across the province of Ontario.

[3] ONA represents approximately 68,000 Registered Nurses (RNs, also referred to as "nurses") and other health-care professionals employed and providing care at hospitals, LTC facilities, public health, the community, industry, and clinics. ONA represents most RNs employed by Ontario LTC nursing homes. The size of the bargaining units tend to have 10-15 RNs and some LTC bargaining units include Nurse Practitioners (NPs), Registered Practical Nurses (RPNs), Personal Support Workers (PSWs), Health Care Aides (HCAs) and Guest Attendants (GAs).

[4] The collective agreements between the PNH and ONA include the central template provisions and individual "local" provisions. This award only addresses the parties' dispute with respect to the central template provisions.

[5] The PNH and ONA met in direct bargaining on April 15-18, 2024. Conciliation took place on April 30, 2024.

[6] The parties were able to agree on several items during direct bargaining. These agreed upon items will be included in the renewal collective agreement template.

ISSUES IN DISPUTE

[7] The parties presented extensive proposal packages.

DECISION

[8] This award is responsive to the manner in which the parties bargained and presented their proposals. ONA made clear that its priority was wages. Economic data was provided to the Board, as well as outcomes from the healthcare sector generally.

[9] In determining the matters in dispute, I have applied the criteria as set out in s. 9(1.1) of HLDAA, including most notably retention, recruitment, replication and comparability.

[10] Having regard to these criteria, the collective agreement shall consist of the former collective agreement, as amended by all items agreed to by the parties, together with the following items:

TERM

[11] July 1, 2024 – June 30, 2026

WAGES

[12] Effective July 1, 2024, new RN Grid:

	New
Start	$33.99
1 Year	$35.46
2 Year	$36.62
3 Year	$38.57
4 Year	$40.13
5 Year	$42.05
6 Year	$43.90
7 Year	$47.63
8 Year	$51.46

[13] The parties agree to maintain the percentage differentials in the wage rates which presently exist between the classification of Registered Nurse and the other classifications which are covered by these Collective Agreements.

[14] Effective July 1, 2024 – 3% ATB

[14] Effective July 1, 2025 – 3% ATB

[15] Wages are retroactive to the dates indicated. All items not awarded are denied, without prejudice to the positions that were taken by the parties.

NEW PARTICIPANTS

[16] The matter of new participants is referred back to the parties. To the extent that matters remain in dispute, they are referred to the Board of Arbitration constituted under the Memorandum of Conditions for Joint Bargaining.

[17] I remain seized in accordance with subsection 9(2) of *HLDAA* until the parties have signed new collective agreements.

Dated at Toronto on May 21, 2024

"signed"

Sheri Price

TAB 2

Most Negative Treatment: Check subsequent history and related treatments.

1981 CarswellOnt 3551
Ontario Arbitration

65 Participating Hospitals and CUPE, Re

1981 CarswellOnt 3551

In the Matter of The Hospital Labour Disputes Arbitration Act

A group of 65 Participating Hospitals, (the Hospitals) and The
Canadian Union of Public Employees and Local Unions, (the Unions)

Paul Weiler Chair, S.E. Dinsdale Member, A.S. Tirrell Member

Heard: April 6, 1981; April 7, 1981
Judgment: June 1, 1981
Docket: None given.

Counsel: Yves Campeau, Robert Bass, for Hospitals
P.J. O'Keefe, W.F. Brown, for Union

Subject: Public; Labour

Related Abridgment Classifications

Labour and employment law
I Labour law
I.6 Collective agreement
I.6.a Nature of collective agreement
I.6.a.vii Renewal
Labour and employment law
I Labour law
I.8 Labour arbitrations
I.8.l Interest arbitration
I.8.l.ii Arbitrable issues

Headnote

Labour and employment law --- Labour law — Collective agreement — Nature of collective agreement — Renewal
Labour and employment law --- Labour law — Labour arbitrations — Interest arbitration — Arbitrable issues
INTEREST ARBITRATION
Criteria — Renewal collective agreement pursuant to Hospital Labour Disputes Arbitration Act between 65 participating hospitals and bargaining representative of 6000 service workers — Union membership had rejected agreement reached by parties for 65 cent yearly wage increase, replacement of sick leave system with long-term disability benefit program, and minor adjustments in fringe benefits, amounting to 20% increase in hospitals' compensation package over two years — Union members went on illegal strike at some 40 hospitals — Terms of parties' agreement presumed to be sound and workable basis for new contract, to be revised only if and where it was clearly shown to be warranted — Given prevailing economic trends, wage settlement was reasonable estimate of what was needed to offset wage and price inflation as seen at time it was entered into, but was eroded somewhat in light of increasing inflation and contract settlements — As some further catch-up in wages was warranted, wage increases of 80 and 85 cents awarded, staged as 65 cents in September 1980, 15 cents in June 1981, 50 cents September 1981 and 35 cents in June 1982 — As union already received adjustment to quickening pace of inflation and most of first year of two-year contract had already passed, proposals for COLA clause or wage re-opener alternative rejected — Terms of settlement confirmed for most fringe benefits and contract language — Proposal for language preserving all superior benefits

not awarded — Employer's proposal for part-timers to share in group benefits rejected and general practice of payment in lieu of benefits to continue, at 12% — Parties' settlement agreement to replace sick leave plan with HOODIP not included in award for new central agreement — Union's proposal for new workload committee rejected — Union's request for "no reprisals" clause providing total immunity from discipline for striking employees to be addressed in grievance arbitration system

Table of Authorities

Cases considered by *Paul Weiler Chair*:

Alcan Smelters and Chemicals Co. and CASAW, Local 1, Re (1976), [1977] 1 Can. L.R.B.R. 157, 1976 CarswellBC 1472 (B.C. L.R.B.) — considered

Statutes considered:

Hospital Labour Disputes Arbitration Act, R.S.O. 1980, c. 205

Generally — referred to

Labour Relations Act, R.S.O. 1980, c. 228

Generally — referred to

Public Hospitals Act, R.S.O. 1980, c. 410

Generally — referred to

Words and phrases considered:

Union

. . . A Union is an association of workers who are joined together of their own free will and consequently they are not, nor cannot be, regimented by their leaders . . .

good union

. . . one which represents the interests of its members not only vigorously and well but with dedication to their causes . . .

***Paul Weiler Chair*:**

I.

1 This Arbitration Board has been constituted to hear a dispute between the Canadian Union of Public Employees (CUPE) and certain of its Locals on the one hand, and 65 Ontario hospitals on the other hand. These Participating Hospitals, whose negotiations are coordinated by the Ontario Hospital Association (the OHA), engaged in centralized bargaining with CUPE for 6,000 service workers in these acute care hospitals in Ontario. This year the parties have been unable to reach a new collective agreement. Under the Hospital Labour Disputes Arbitration Act, binding interest arbitration as the procedure for resolving such an impasse and settling the terms of the agreement. Hearings in this matter were conducted in Toronto on April 6th and 7th and this is our decision as to the issues in dispute at the central bargaining table.

II.

2 The events which led up to this arbitration were highly-publicized and well-known. Normally I would be reluctant to narrate the emotional details here. However, some of this background is directly relevant to the issues which we must resolve. Thus, I shall recite the events which are pertinent to this case.

3 The hospitals and CUPE were parties to a collective agreement which expired on September 28, 1990. Negotiations for its renewal began in July of 1980. With the assistance of a conciliation officer provided by the Ministry of Labour, the parties reached agreement on September 26 for a new two-year pact. Without getting into the details of the settlement, suffice it to say that the key elements were across-the-board increases of 65 cents and 65 cents in each year of the contract, replacement of the sick leave system with a long-term disability benefit program, and a number of minor adjustments in fringe benefits. In total, the package amounted to approximately a 20% increase in the Hospitals compensation package over the two years.

4 Needless to say, this memorandum agreement was subject to ratification by both the Hospitals and their employees. In early October, the Union membership rejected the settlement by a resounding 91% margin.

5 No final agreement having been reached by the negotiators, the next step under the Act was binding arbitration. The Hospitals moved to institute that procedure. The Union resisted. Under the auspices of the Ministry of Labour the parties went back to the bargaining table in early December. However, the Hospitals were unwilling, at this stage at least, to do any more than restructure their offer within the confines of the 20% compensation package. The Union still refused to name its nominee for arbitration and instead conducted a province-wide strike vote among its members. By a wide margin of those voting, the CUPE membership endorsed an illegal strjke. A strike did take place in some 40 hospitals in late January, in the face of orders from the Ontario Labour Relations Board and the Ontario Supreme Court. The work stoppage did not produce a settlement of the contract dispute and the Union and its members now face a variety of legal proceedings and disciplinary measures.

6 More significant for our purposes, the parties did get back to the bargaining table once more, in a midnight-hour effort to head off the confrontation. By this time the Union had returned to its original demand of a $2 an hour increase in each year of the collective agreement, plus a cost of living clause and a host of other changes in the collective agreement. A special mediation team eventually did elicit some movement from the parties. The Unions demands dropped to $1.25 an hour in each of two years. The Hospitals moved up to 75 and 70 cents an hour respectively. However, no further progress was made, the strike took place, it lasted for a week, and now this arbitration has ensued. By the time of the hearing, the parties had retreated to their respective positions: 65 cents a year from the Hospitals and $2 a year (plus a full COLA clause) sought by CUPE.

III.

7 The significance of these events to the issues facing us will be developed shortly. However, as a preliminary to this Board's analysis of the problem, I believe it worthwhile to articulate the general principles from which we will begin. It is true, as has often been pointed out, that wage determination can never be an exact science, whether conducted through collective bargaining or binding arbitration. A large element of human judgment is inevitable. But in a dispute which has generated the emotion and the trauma of this one, it behooves us to develop with care that general reasoning which leads us to our ultimate disposition of the key matters in dispute.

8 The ideal towards which interest arbitration aims is to replicate the results which would be reached in a fresly-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 aconomy. 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 determinetion. If there is real *per capita* growth in the economy, wage gains can and do exceed the rate of price inflation. That was the happy experience of Ontario workers in the Sixties and early Seventies, when real wage gains averaged 2% or so annually. Unfortunately, the Canadian economy has not generated real *per capita* growth in recent years. Thus, there has not been that type of economic surplus to distribute in collective bargaining. In fact, recently even the annual rate of price inflation has not been met. The reason is that much of Ontario's inflation is due to unfavourable trends in its external terms of trade; whether because of higher energy prices which accrue primarily to the benefit of Albertans, or because of the decline in the value of the Canadian dollar which affects the relative prices of its exports and imports. If the level of Ontario's Gross Provincial Product (GPP) is growing at a rate of 10 or 11% a year (in nominal terms), this establishes the parameters in which income gains are feasible for Ontario workers as a whole, irrespective of whether price inflation is now at a 12 or 13 percent pace (just as happened earlier in the decade when the converse was true and the GPP was rising faster than the CPI).

9 The implication I draw from this premise is that the key ingredient in interest arbitration must be movements of relative wages. Binding arbitration is very much the exception rather than the rule in Canadian industrial relations. 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 these real economic forces.

10 The problem of course is to determine which external settlements are the relevant ones. Traditionally the Ontario Hospital Association has emphasized the internal pattern found within the hospital sector itself. There is some plausibility to this view. There are 235 hospitals in Ontario employing some 125,000 workers. Of these, 75,000 employees are represented by 12 different trade unions: some professional, some craft, some industrial in persuasion. A total of 619 separate collective agreements have been signed with 187 hospitals. The bulk of the 37,000 unionized service workers are divided between two major unions, the Canadian Union of Public Employees and the Service Employees International Union (the SEIU). On the face of it, the Hospital employers are on the other side of the bargaining table, operating within a wide variety of bargaining structures. But everybody knows that the ultimate paymaster for the system is the Ontario government and the Ontario taxpayer. If there are marked deviations in the wage and contract conditions which obtain between one hospital and the other, perhaps even as between workers in the same hospital, those adversely affected naturally feel this is inequitable if it stems simply from the fact of separate negotiations and/or arbitration.

11 Still one cannot concentrate solely on internal relativities as between one group of hospital workers and another. Such a focus gives us no purchase on how the hospital compensation as a whole is or should be moving. It is one thing for an arbitrator, faced with a single hospital or union whose negotiations are taking place late in the bargaining round this year, to dispose of his case by reference to the general pattern which has been established in the sector. But this tack will not prove terribly helpful to the arbitrator who must adjudicate the dispute in one of the three or four major centralized bargaining structures (or, as is the case of this Chairman, who is dealing with two of them, both CUPE and the SEIU). 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 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.

12 This sentiment is reinforced from another side. In recent years there has been some concern about the pace-setting character of public sector bargaining (whether it be subject to arbitration or subject to the threat of strike). The argument is that such negotiations are distorted to some extent by the fact that the government is the employer, and it is subject to political as opposed to purely aconomic considerations. I have argued else-where that this case is somewhat overdrawn. Still I do believe that private sector negotiations should play the dominent role in wage determination, at lease as far as interest arbitrators are concerned. If the results of free collective bargaining are to be the norm, we should look to the compensation bargains which are struck by unions and employers who are directly exposed to the forces in the market economy, in whichever direction this standard may take us. (And for that reason I personally find the pattern of economic settlements in Ontario's commercial sector to be considerably more persuasive than those produced by hospital negotiators in other provinces.)

IV.

13 In this case, though, the Hospitals argued that this Arbitration Board had available to it a better index of the type of compensation package which would flow from free collective bargaining: the memorandum of agreement which actually was signed by the Union and Hospital negotiators on September 26, 1980. This settlement was the result of intense negotiations by the parties over a period of two months, it embodied reciprocal compromises in the position of both sides, and, indeed, the key wage item was the final settlement proposal of the experienced negotiators of the Union itself. The Hospital's basic position at the arbitration hearing was that the Board should impose this tentative settlement on the parties, irrespective of its rejection by the employees (although the Hospitals were prepared to make certain refinements which might make it more palatable to the latter).

14 There is considerable arbitral authority for that position. Indeed, in each of the 9 cases in the Ontario Hospital sector in which this issue has been presented, that has been the action taken by the Arbitration Board in question. Three of these cases have involved rejection of the settlement by the Board of Trustees at the Hospital, and it was the trade union which relied on this principle. Indeed in the most recent such decision, *Arnprior and District Memorial Hospital* (1980 — Brown), the Canadian Union of Public Employees itself vigorously and successfully asserted that the arbitrator must adhere to a *voluntary* settlement, produced by *able and experienced* negotiators, after *intensive* sessions which included a great deal of *compromise* on each side.

Thus, unquestionably there is force in the Hospital argument here that the eventual consensus of negotiators at the bargaining table is the best index of the appropriate terms of the new contract, not the judgment of a number of outsiders on an Arbitration Board whose exposure to the issues come simply from two days of listening to and discussing the briefs written by the parties.

15 Still, I do not think that this result should be automatic. Each of the arbitrators who have addressed this problem has been careful to phrase his reasoning in terms of a general presumption, rather than a binding rule. Almost all of the cases where the issue has been posed have involved single hospitals where one side or the other wanted to deviate from a pattern of settlement which had already emerged in the sector. The one situation where this was not true involved centralized bargaining in 1978 between CUPE and 55 of these Participating Hospitals. However, not only had that settlement, the one which had been rejected by the CUPE membership, already been accepted by the SEIU that year, but it also embodied the maximum compensation increase which was permitted by the Anti-Inflation Guidelines. Thus, the decision of Kevin Burkett, the arbitrator in that case, to impose the settlement in his award took place in quite a different setting than this one; where this tentative agreement was one which would cover 65 Ontario Hospitals and 16,000 service workers, but would also establish rather than reflect a standard for the entire round of Hospital negotiations which ultimately will set the terms of employment for 75,000 unionized hospital workers in 180 hospitals in the Province.

16 In my view it would not be desirable to establish in the jurisprudence of interest arbitration an unyielding doctrine that a tentative memorandum of settlement should always be the basis for the arbitrator's award. The first and most important reason is that such a doctrine would eviscerate the process of membership ratification of the contract terms by which they are to be governed. The members could vote to ratify the settlement, but never, effectively, to reject it. Unquestionably employee rejection of a compensation package which has been labouriously produced at the bargaining table can be a traumatic experience for the employer, which is deprived of the settlement that it thought it had, for the Union officials whose judgment has been repudiated, and for the general public, which may experience the cost of further impasse. It is also true that the employees can be unrealistic in their expectations, or even that they may be manipulated by other Union officials who are not responsible for the agreement. (We shall have some further things to say about this settlement in that regard.) But this is the price to be paid for industrial democracy and for ultimate membership control of the actions of their Union leaders. In the outside world of industrial relations, workers jealously guard their right to meaningful ratification votes, and, if they reject a tentative contract, they have the right to try to persuade the employer to give them something more or somethind different (perhaps with the pressure of a strike). Hospital workers should not have taken away from them the right to persuade their arbitrator that the initial bargain, however *bona fide* in its inception, was and is clearly inappropriate now.

17 A further reason for such an escape hatch is to be seen in the unfortunate scenario which overtook this set of negotiations. Suppose a group of hospital workers fervently believes that the settlement negotiated by their leadership is patently unfair. The forum in which the law tells them they should make that case is binding arbitration. But the arbitration fraternity is now to tell them (through this jurisprudence) that the tentative agreement will be imposed on them nonetheless. In that setting, the only recourse which may seem open is illegal (and uncontrolled) strike action, endangering patient safety and eroding the fabric of law in the industrial community.

18 The still-fragmented state of Hospital labour relations is another factor. The CUPE negotiators represent only their 16,000 members in this industry. Even if, despite the above, one were prepared to disenfranchise the CUPE membership in the ratification process, that arbitration doctrine would not apply to the other service workers represented by the SEIU, the nurses represented by the Ontario Nursing Association, and so on. These unions would still be entitled to argue that the CUPE settlement was misguided, and, if they could persuade their arbitrators that it was, to achieve different terms in their award. Granted that, and also the Hospital's own concern about internal relativities as between different hospital workers irrespective of their Union, and it would seem to make even less sense to deny as large a group of workers as this one the opportunity to make the same case to their Arbitration Board.

19 The point of these considerations, though, is simply to show why it would be unsound industrial relations for an interest arbitrator automatically to ratify a tentative settlement reached at the bargaining table, no matter how dubious its terms may look in retrospect. In no way do they blunt the force of the Hospital's underlying point that the initial memorandum of agreement must be a major factor in our deliberations. If seasoned representatives produce a comprehensive package out of the give and

take at the bargaining table, in pattern-setting negotiations which obviously were seen as significant as were these ones, the product of their work must be treated as strong *prima facie* evidence of an economically-sound bargain. In the world of fully free collective bargaining, where Union members do have the option of rejecting such a settlement, everyone knows that any further improvements will take place within the general parameters of this initial package. It would be counterproductive for the Union negotiator to return to the table with his first lengthy shopping list of demands, many of which he had already dropped or compromised, and also to adopt a radically different view of an appropriate wage increase. This would be a recipe for an immediate breakdown in talks and a lengthy strike. The Ontario hospital worker may not be able to strike, but he also does not have to strike in order to win a new contract. Thus, as and when the Union goes to arbitration, it should not be able to treat the initial memorandum as just the plateau from which it now presses a host of additional, rich concessions. The arbitrator, like the negotiators themselves, should treat the settlement as fixing the ballpark figures for the new contract. For reasons which I have already developed, the arbitrator should be prepared to scrutinize the terms of the tentative agreement, perhaps find that certain items are misguided, or at least that others have been overtaken by changing economic conditions. But he should begin that inquiry from the premise that the terms actually agreed to by the representatives of the parties are a sound and workable basis for the new contract, to be revised only if and where this is clearly shown to be warranted.

V.

20 With these preliminaries I now turn to the most important item in negotiations in this arbitration — the basic wage increase. As I mentioned earlier, the memorandum of settlement provided for two wage increases; 65 cents an hour on September 15, 1980, and another 65 cents an hour on September 29, 1981. In simple percentage terms, the $1.30 wage hike represented a 19.6% increase in the previous contract rates (and with a special trade adjustment amounted to a 19.7% increase in wages). If the two 65 cent increases are compounded over the two years, the parties in effect agreed to a 9.8% increase in the existing rate in the first year, and an 8.9% increase in the new rates in the second year.

21 This settlement was negotiated during August and September, 1980. At that time, the prevailing inflation rate in Canada, at least as measured by the CPI, was 10.7%. More important is the level of collective bargaining settlements. The data then available from Labour Canada for the second quarter of 1980, for units of 500 employees or more across Canada, indicated that new settlements were being negotiated as a level of 11.1% for contracts without COLA provisions. The second quarter Ontario Ministry of Labour figures, which include all settlements in this province for units of 200 employees or more, indicated an average 9.6% increase in contracts without COLA clauses. Each of these sets of percentage figures are calculated on the base rates in the collective agreements in question, not on the average Hourly rates as I have put the Hospital settlement above. This makes a real difference since the memorandum contained an across-the-board cents per hour increase. Assuming the base rate in the previous CUPE contract to be $6 an hour, the relevant percentage increase in the memorandum in these terms is 10.8% in the first year and 9.18% in the second year. Thus, given the prevailing economic trends of last summer, the CUPE-Hospital settlement was quite a respectable one (abstracting for the moment from any argument about catch-up).

22 Since that time, the pace of inflation has picked up considerably. The CPI is now running at a shade over 12% annually. Labour Canada's contract settlements are now averaging 11.6% (and 12% a year in two year agreements), while the Ontario Ministry figures jumped up to 11.3% in the third quarter, though they settled back to 10.9% in the fourth quarter. The ratio which we assume these parties intended between their September settlement and the then available data on price and wage inflation has been eroded somewhat in light of these recent trends. Presumably it was in light of these factors that the Hospitals were ready to improve their offer in early 1981 to 75 cents and 70 cents an hour, albeit under the pressure of an illegal strike. If one were to translate this new offer into the terms already used, a $1.45 increase in two years would be 21.8% of the current average hourly rate of $6.64 and 24.2% of the current base rate of $6 an hour. Compounding the increases over the two years, this Hospital proposal amounted to 11.3% and 9.5% increases respectively on the average hourly rates, and 12.5% and 10.4% on the base rates. Relative to what other Ontario workers have been able to achieve in the last several months, this compares very favourably indeed (including, I might add, with recent contracts negotiated by CUPE for its members in the Cities of London, Guelph, Niagara Falls, Peterborough, and Waterloo, none of whom won inoreases this large, notwithstanding that they do enjoy the full right to strike under the Ontario Labour Relations Act).

VI.

23 The position of CUPE in this arbitration seems situated in a different economic universe. Notwithstanding that its representatives had signed a settlement for 65 cents a year, the Union's official position in this arbitration returned to its pre-negotiating demands of $2 an hour per year; 30.1% per year on the average hourly rate and fully 33.3% a year on the previous base rate of $6 an hour, In the course of the arbitration hearing, the Union spokesman did acknowledge that they had retreated during the strike negotiation to $1.25 a year for each of the two years. Still this would amount to 18.8% on the average rate and 20.8% on the base rate in the first year, and overall to 37.6% and 41.7% respectively. When one recalls that the Ontario contract settlements generally, and CUPE municipal settlements in partioular, are now hovering near the 11% mark in base rate increases, this would seem to be a startling position indeed.

24 Not surprisingly the position of CUPE is that such percentage comparisons of wage gains in any one year are deceiving. They assume the validity of the existing base rates upon which such percentages are calculated, and thus they ignore the impact of unfavourable treatment in the past. The thrust of the CUPE argument is that the economic position of the Ontario hospital worker has been badly eroded by the interest arbitration system (and the Anti-Inflation Board) in the last several years.

25 If the Union's case were granted on this point, then one might justify in the award a sizable catch up component over and above the 11-12% or so which is needed to keep the hospital worker even with price inflation and wage relativities. Since the Union's claims become so highly publicized in the last several months, it behooves this Board to canvass the relevant data with care.

26 The most difficult judgment to make in any such historical analysis comes right at the beginning: the selection of the relevant time freme. For example, if one were to extend the period as far back as a decade ago, the fact is that the CUPE hospital member enjoyed an overall increase in weekly earnings of 19.3% from September 1970 through September, 1980, while the CPI went up 120% and Ontario average weekly wages increased by 1.39%. The Seventies as a whole was a period of major real and relative wage gains for Ontario hospital workers.

27 The Hospitals themselves conceded that such a comparison would be deceiving. At the beginning of the Seventies the hospital employee was badly underpaid. This fact was finally recognized by the Ontario government in 1974 and major breakthrough settlements were won that year establishing a much fairer relationship between hospital service workers and their external counter-parts. Thus, both sides in this arbitration tacitly recognize that the appropriate period of comparison was the five years from mid-1975 through mid-1980, and the bulk of their data was directed at this time span.

28 The following was the basic argument made by the Union about this period. Using the Registered Nurses Assistant (the RNA) as the key contract rate, the maximum monthly RNA rate was $839 in September 1975 and $1,143 in September 1980, a total increase of 36.2%. During the same period the CPI rose by 52.2% while the industrial earnings composite in Ontario wnet up by 52.0%. The result is that the wages of Ontario stayed essentially even with the price inflation during the last half of the Seventies, while the hospital worker lost 10.5%. Putting it another way, the Union claimed that the RNA's monthly earnings had actually declined to $751 in 1975 dollars. In that perspective one might appreciate the membership's unhappiness with another settlement which not only reinforced the existing situation, but actuelly added to the erosion of the real earnings of the RNA. Assuming 12% annual inflation for the next two years, implementation of the memorandum of agreement would leave the RNA earning $723 in 1975 dollars by September 1982, as compared with the $839 paid in September 1975.

29 On the surface, these figures would seem to make a powerful case. However, when one probes behind them, a rather different picture emerges. The first questionable assumption concerns the selection of the RNA maximum rate. With the exception of the maintenance tradesman, this is the top-rated classification in the CUPE unit, paid at an hourly rate of $7.03, as compared to the average hourly rate of $6.64 across the unit. The significance of this fact is that CUPE typically negotiates an across-the-board cents-per-hour increase for its members. Suppose these increases are at the prevailing rate of wage and price inflation in percentage terms for the unit as a whole. The inevitable result still will be that the RNA will receive less than the inflation rate, while the maid-aide at the bottom of the unit receives more (and that will be true of the current award as well). However, having chosen this form of settlement for its own reasons, CUPE can now hardly look back at such contracts from the

point of view of the RNA classification alone, to try to make a general case about the overall erosion of real earnings. Rather, a fair appraisal of hospital contracts must trace average earnings in the entire unit, not in one selected classification.

30 Another difficulty with the Union's analysis comes in the precise definition of the five-year time frame. In particular, CUPE has compared the RNA wage rate *after* the increase in September 1975, and *before* the increase which would come into effect in September 1980 (whether at the figure in the memorandum of settlement or higher). The sound comparison should be *before* each of these two contract increases; in effect from August 1975 through August 1980. The reason is that a primary role of wage increases in this day and age is to protect the workers from anticipated inflation. This is a major function of the increase in September, 1975. The actual wage and price inflation which took place in the period just after September 1975 was counted in the Union's comparative percentages. So also must be the wage hike that month — of just under 5% — which was designed to protect the Hospital worker during that same period.

31 The final soft spot in the Union's data consists in its use of the *monthly*, rather than the *hourly* rate. This is significant precisely because an arbitration board in 1979 awarded CUPE a reduction in weekly hours from 40 to 37 1/2 hours with no reduction in overall salary. In effect the hourly rate went up an additional 6.5%, which is not reflected in a comparison of just the monthly rates in 1975 and 1980. In substance, that Arbitration Board awarded a part of its contract improvements in increased leisure for the CUPE members, rather in actual take-home pay. That this was a real benefit achieved by the CUPE membership is shown sufficiently, perhaps, by asking whether, they would have traded this for the contract of the SEIU counterparts whose similar monthly rates have been paid for 40 hours work every week.

32 Suppose one were to look at the last five years of the CUPE contracts on the contrary assumptions: i.e., by comparing the average hourly rate, across the unit as a whole, in the five year period from August 1975 through August 1980. During this period the CPI went up 51.2%, while the CUPE contract rates rose by 51.3%, leaving its members essentially even in real terms. Meanwhile, the industrial composite of average earnings in Ontario went up 50.2% which gave the CUPE members a relative earnings gain of 1% during the same five years. As the Hospital representatives argued vigorously to this court, no persuasive case for a special catch-up increase can be found in these statistics.

33 From another point of view, though, these latter figures are slightly deceiving. First of all, while the 1979 award did reduce the province-wide average from 40 to 37.5 hours a week, many CUPE locals had already achieved that level. Apparently the province-wide average was 38.9 hours before the Brown award. Thus, to count the entire 2 1/2 hours in calculating the hourly wage gains in that year somewhat overstates its impact. As well, it is apparent that some of the September 1975 increase was intended to be part of the 1974 catch-up settlement, rather than simply to preserve the status quo against subsequent inflation My final judgment, contrary to the Hospitals, is that the position achieved by CUPE members in 1974-1975 breakthrough has been eroded a modest amount, but nowhere near the extent asserted by the Union.

34 Let me summarize the results of this lengthy review of the data. The initial memorandum of settlement, which provided increases of 65 cents a year for two years, was a reasonable estimate of what was needed to offset wage and price inflation as seen at that time, assuming that no catch-up was appropriate. Subsequent economic trends have overtaken the initial figures somewhat, and, for the reasons given, some further modest catch-up is warranted. I noted earlier that wage determination is not a mathamatical science. My judgment is that increases at 80 cents and 85 cents a year through the two years of this contract would be appropriate. This will provide a 12% increase in the average hourly rate in the first year and 24.8% overall. In relative terms, this is a substantial hike, amounting to 13.3% in the base rate for the first year (compared to the current Ontario average of just under 11%). In light of this fact, and since much of this increase is intended to offset developing inflation, it would seem appropriate to stage these increases throughout the life of the contract, thus reducing somewhat the actual pay-out by the Hospitals (and by the Ontario taxpayer). Thus, our precise award is for a 65 cents an hour increase effective September 29, 1980, another 15 cents an hour increase payable on June 1, 1981, another 50 cents an hour payable on September 29, 1981, and a final 35 cents payable on June 1, 1982. And having awarded that, I want to make clear my judgment, at least, that this does restore to the CUPE hospital members the ground which they have lost relative to other Ontario workers since 1975.

VII.

35 There is another crucial ingredient of the wage issue. The Union seeks a cost of living provision to protect whatever wage increase it wins in this award. The Hospital vigorously opposes the introduction of any such COLA clause. They point out that there are no examples anywhere in the Ontario Hospital sector of such a contract provision. That last argument has something of a dubious Catch-22 flavour to it as far as I am concerned. In effect, it is asserted that arbitrators should not order a COLA clause until and unless they find a precedent freely negotiated by a Hospital (or perhaps only by a number of Hospitals). But no Hospital, knowing that Ontario arbitrators are acting on this principle, would likely be persuaded to grant the first COLA clause at the bargaining table. In my view, Hospital arbitrators should now address the notion on its intrinsic merits, as a matter of industrial relations principle rather than pure hospital/arbitral precedent. Because debate about this topic usually attracts more heat than light, I shall examine it with rather more detail than usual.

36 Unquestionably a persuasive case can be made for some form of protection of hospital workers against the type of inflation which has been experienced in Canada in recent years. If at the outset of a contract the employer is prepared to pay its employees a certain real value for their services, why shouldn't these nominal dollars be adjusted to keep pace with future increases in the price of the goods upon which these workers must spend their pay cheques?

37 The real issue, though, is not about the necessity for adjustment of wages to price inflation. It concerns the mechanism by which this is accomplished. A COLA clause is not the only contract provision designed for this purpose. Only too often it is forgotten that such is the primary role of the normal process of contract negotiations. Parties at the bargaining table sit down, make estimates of future inflation, and agree to wage increases which will accommodate them. If their estimates are off (either up or down) appropriate adjustments can be made in the next set of negotiations in their ongoing relationship.

38 I found it troubling that this Union's proposal totally ignores these simple facts of collective bargaining life. CUPE wanted a COLA clause which provided for monthly adjustments of 1% in the wage rate for each 1% increase in the CPI (or fraction thereof) during the life of the contract. But the major ingredient in the general wage increases which it sought (and the one which we awarded) was protection against anticipated inflation during that same period. Thus CUPE's COLA clause would in effect doublecount the inflation which took place throughout the collective agreement. The Union cannot have it both ways. If its members are to have the assurance of a total COLA provision against inflation as it occurs, then they are not entitled to any immediate fixed increase in anticipation of that same inflation. (And since the Ontario economy has not been growing in real *per capita* terms in the last several years, the only specific wage hike which would be warranted would be the once-and-for-all catch-up increase).

39 By and large, employees do prefer the certainty of fixed contract increases (as do their employers who can plan their pricing decisions accordingly). Both sides then take the chance that their inflation projections will prove inaccurate, especially during a multi-year collective agreement. A COLA clause is a device for reducing this risk for the employees. But any such COLA provision will take quite a different form than the one proposed by CUPE. It would be triggered only when inflation passes the level (here 11-12%) for which the built-in wage increase was designed. Following this logic, the trigger will often be set slightly above that inflation rate (perhaps at 13-14%). The reason is that if the inflation pace were to slow (to 9-10% from its current 12%), the COLA clause would not operate to cut the agreed wage increase. As well, much if not all of the wage increase is normally introduced at the start of the contract (as was true of the memorandum of settlement agreed to by these parties). This means that the employees in question will enjoy substantial real income gains during much of the contract, gains which are only gradually eroded near its end. It is for these reasons that active wage earners operating with fixed increases under collective agreements fare somewhat better than do old age pensioners who rely solely on after-the-fact COLA increases.

40 Does this mean that a more sophisticated COLA clause, one designed with such a trigger, is warranted? Not necessarily. There are further complications in the process of inflation adjustment which must be confronted.

41 In particular there is the issue of what measure of inflation is to be used for revising the wage levels. The customary response is the consumer price index. But the fact that this is the practice does not make it economically sensible. There are two significant defects in undue reliance on the CPI. One is the fact that any measurement of the price of a fixed basket of goods takes no account, in the short run at least, of changing economic responses to sharp differences in relative prices which make up

the overall price level. The GNE Price Deflator for Personal Consumption Expenditures is a much better measure of the actual impact on consumers of rising prices (and I have advocated the use of the latter in the Ontario Workers' Compensation System).

42 Much more important is this problem. While either the CPI or the GNE Price Deflator may establish a *prima facie* claim for an income adjustment, neither of these guarantees that the economy is generating the wherewithal to pay for it. This is of obvious concern to the private employer which has no insurance that its own sales revenues will increase proportionately to general price inflation. Such an argument of simple inability to pay does not apply to the government which can use its compulsory taxing power to raise the monies which it needs to fund a COLA provision. But the underlying principle remains the same. As I noted earlier, the fact that domestic price inflation reaches a certain level does not mean that the Gross Provincial Product is increasing at the same rate. If the reason for the increased price of certain key consumer goods — now, energy in particular — is that wealth is being transferred from Ontario citizens to producers outside, such that our GPP is growing by only 10% while the CPI is rising at 12%, then the Ontario economy as a whole cannot provide everyone with an income increase which will match this inflation rate. In such unhappy circumstances, the Ontario citizenry as a whole must absorb an overall 2% cut in its real income. If some people avoid that result (perhaps because they enjoy a full COLA clause), then the rest have to tighten their belts even further to absorb this lucky group's share. Absent a special claim to a catch-up increase to make up ground lost to past inflation, it is hard to see why people who happen to work for the government should be entitled to this protection from inflation which not everyone can have.

43 The fact that I am skeptical of the virtues of a simple guaranteed full COLA clause, tied to the CPI in this way, does not mean that I see no virtues in a more flexible mechanism for inflation adjustment. The high and volatile inflation we have experienced in Canada in the last decade has acted as a deterrent to the negotiation of relatively long-term collective agreements, which otherwise would provide valuable employment stability to employees, their unions and their employers. I have always been attracted to the notion of a limited wage reopener as a more balanced response to this problem. This provides the employees with the reassurance that if inflation suddenly spurts past the level which was anticipated by their union representatives when they negotiated their wage increase, they have the chance to achieve an additional adjustment. But the employer is not tied to a single CPI figure which may have no relation to the revenues which it needs to pay for such an adjustment. Instead, both sides must focus on the actual economic trends as of that point of time. What is the level of unanticipated inflation? Was it internally generated, in which case the government at least is likely to enjoy matching revenues from its current taxation rates, or was it externally produced, in which case some income shortfall will be needed? What has been the previous experience of this group of employers relative to inflation under earlier contracts? What is their actual level of current incomes, and do these leave them with such a relatively low level of discretionary income that the current inflation is inflicting particular hardship on them? None of the relevant questions are answered by a simple simplistic formula tied to the CPI. In my view the parties should retain the flexibility to tailor their inflation adjustment to the complexities of their own concrete situation.

44 Of course, one price of the latter such mechanism is that it takes some time and effort. In the hospital sector, for example, as and when the provision was triggered at a certain level of unexpected inflation, negotiations would have to take place. If these were not completed according to a specified time table, arbitration would be required. I am satisfied that this could be accomplished relatively expeditionsly, given the will on both sides to make it work. Ontario arbitrators should now give serious thought to this as a sensible alternative to the polar options now put to them: either a COLA clause or no inflation protection at all. But these simple logistical problems dictate that the device should only be used as the *guid pro cuo* for a long-term contract for two years or more. In the situation facing this Board, while the agreement on its face is to last for two years, most of the first year has already gone by. The Union has already received from us an adjustment to the quickening pace of inflation since the September memorandum of settlement was signed. Our award has actually projected just another 17 months into the future, during which time we have guaranteed these hospital workers wage inoreases whcih are based on anticipated price inflation of 16-17% and average wage gains of 14-15% during this time frame. Should even these estimates be overtaken by economic events, this would not happen until near the end of the contract. Given that, the parties can readily make allowances (in whichever direction this is warranted) in negotiations for renewal of the collective agreement. Thus, while I have dealt with the issue in come detail in this award, in deference to the arguments of the parties, our ultimate decision is to [illegible text] both a COLA clause and [illegible text] wage reopener alternative.

VIII.

45 Up to this point we have dealt with just the issue of the basic, across-the-board wage increase for this bargaining unit, together with the problem of how best to cushion these wage gains against future inflation. As in any set of negotiations, there remain on the table a variety of demands for changes in contract language and improvements of contract benefits — some twenty or so items from the Union alone. Since these so-called fringe benefits now amount to fully 30% of the total labour costs for the hospital service worker, it is important to carefully scrutinize these remaining issues.

46 I have always thought it essential *not* to look at any such item in isolation. With rare exceptions any such proposed improvement looks plausible on its face. The Union can point to some number of bargaining relationships where this point has already been conceded. It may even be true that, taken one by one, no single revision will actually cost that much. But, cumulatively, these changes can mount up substantially. Thus, sophisticated parties in free collective bargaining look upon their settlement as a total compensation package, in which all of the improvements that-year are costed out and fitted within the global percentage increase which is deemed to be fair to the employees and sound for their employer that year. In fact, the general wage hike itself generates corresponding increases in the vast bulk of the compensation package represented by the wages, since it increases the regular hourly rate upon which holidays, vacations, overtime and other premiums depend. This means that in any one negetiating round only limited room is left available for improvements in the scope and number of these contract revisions, and the Union must establish its own priorities among these various fringe items.

47 These facts of free collective bargaining must be kept in mind if arbitration is, indeed, to try to replicate the results which would be achieved in the former setting. The reason is that the arbitration model does not inherently require the parties to make these tough choices in their negotiating positions. Inside the bargaining unit, for example, one group of employees may want higher pensions, enother segment seeks longer vacations, a third is interested in a new dental plan, while others simply want as much higher take-home pay as possible (depending on their respective posisions, ages, family situations, and so on). In the arbitration contaxt, the Union does not have to worry that if it asks for too many things at once, the result will be a painful work stoppage. Indeed, the Union may be tempted — as also the Employer which has its own diverse constituencies which it does not went to alienate — to carry all of these initial demands for-ward to the arbitration hearing, on the theory that it has nothing to lose by asking. And, indeed, a party may even hope that the more improvements it does ask for, the more will be given. Certainly it is essential to the integrity of arbitration that these latter assumptions not be reinforced.

48 Another important implication of the realities of collective bargaining is illustrated by the facts of this case: In particular, the fact of the memorandum of settlement. Bargaining between these parties was not chilled by the prospect of compulsory arbitration. The negotiators actually did address the entire array of demands made by the Union (and the Hospitals), granting some, modifying others, and forgetting about the rest. The Hospitals agreed to improve the dental plan, to increase the employer's contribution to the health welfare insurance package, to hike shift premiums and standby pay, to lengthen vacations for certain categories of employees, to expand entitlement to certain types of leaves of absence, to grant modest skill trades adjustments, and so on.

49 However the memorandum of settlement was rejected by the Union members by a resounding vote. Apparently the key trouble spots were the wage increase and COLA demand (with which we have already dealt at length) and sickness pay (which we will address shortly). In these circumstances what would the parties likely have done in the setting of free collective bargaining, with a work stoppage hovering in the background, a painful prospect to both sides? Grudgingly perhaps, the employer would return to the bargaining table, find out precisely which items had proved to be the major stumbling blocks in the original package, and eventually make some accommodations to these employee concerns (maybe with reciprocal concessions from the trade union). The last thing the trade union would do would be to bring out its entire laundry list of initial bargaining demands. It would know that this would only alienate the employer negotiators who had, in good faith, made their earlier concessions only on the assumption that the remaining items had been dropped. For the Union to proceed now as if on the assumption that no package settlement had ever been reached would probably precipitate a quick strike.

50 In the arbitration setting, though, the Union negotiators need not worry about a strike. Thus, CUPE, accepting all of the earlier Hospital concessions as given, now seeks to erect on this plateau a number of further, costly contract changes. For example, having won double time for overtime in the special, limited context of overtime work on a paid holiday, the Union would now like this new double-time standard awarded by this Arbitration Board across the board. The same attitude is apparent regarding vacations, the health and welfare package, skill premiums, skill trades adjustments, and elsewhere.

51 As I observed earlier, the task of the interest arbitrator is to try to replicate the results of the process of free collective bargaining. Realistically this means that a memorandum of settlement must be accepted as definitive of just about the entire range of fringe benefits and contract language in this round of bargaining. There are two or three issues which we will scrutinize more closely because of how they figured in the employee rejection. One matter — payment in lieu of benefits to part-time employees — was actually left to be arbitrated by the parties in their original settlement and thus we will canvass this in some detail. For the rest, we confirm the terms of the memorandum and reject the Union's attempts to stack further gains on top of it in arbitration.

IX

52 The first such issue warranting some comments from this Board flows out of the still tenuous state of centralized bargaining in Ontario Hospitals. The terms of the collective agreement vary a great deal across individual Hospitals. It is a lengthy process to standardize the level of benefits and relevant contract language. This means that employees in one hospital are ahead (at least as to one contract provision) while their fellow union members in another hospital are behind (though perhaps the latter fare better in other respects). Nor is it always the case that when the parties agree on a uniform standard in their centralized negotiations, this will inevitably match the highest plateau reached at any of the Hospitals. Thus the problem of "superior benefits". Should they be cut back to the common level at the same time that others are being raised up to the norm? Or should they be preserved — "red-circled" as it were — until the other hospital units catch up, presumably using the superior benefit as their target?

53 Understandably the Hospitals object to the latter being the automatic result. From their point of view, centralized bargaining should be seen as involving some give and take on the part of both sides. If everything moves in only one direction, if no hospital is able to improve its contract language to levels earlier obtained by its counterparts, what incentive would be left to the employers to join in centralized bargaining with the Union?

54 There is a good deal to that argument as a matter of logic, but less in terms of pragmatic industrial relations. Like it or not, once a group of workers achieve a plateau, they stick to it stubbornly, unwilling to retreat from it, and certainly not without themselves receiving some gain in return. And it is teribly difficult to persuade a group of service workers in an Ottawa hospital, for example, to dilute a benefit level which they have enjoyed for some time, simply because another hospital, in Thunder Bay, for example, is prepared to improve that benefit for its local Union. If the latter tack is insisted on simply because negotiations are centralized, the inevitable result will be to feed dissident opposition to ratification of the ultimate settlement.

55 While I do believe in a strong presumption in favour of preserving superior benefits, I do not favour writing this into the contract as an automatic unyielding rule, as the Union proposed here. There is a practical difference between a tangible contract benefit, regularly enjoyed by a number of employees in a unit — where the better provisions should be red-circled — and the development of technical contract language which only remotely and indirectly effects the current employees — where standardization should be able to be pursued in a mature collective bargaining. A classic illustration of the latter is a provision which gives the Local Union the right to interview new hirees at the Hospital for fifteen minutes. Most of the Participating Hospitals previously had no such provision. Now all of them will have it. However, five of these Hospitals had previously permitted the Union a thirty minute interview. Surely the employees in those Hospitals would not claim that they are being unfairly deprived of a significant economic benefit or personal right, such that the concept of superior benefits must be rigidly adhered to against this type of standardization.

56 In this situation the Union and the Hospital negotiators did turn their minds to this problem when they actually addressed individual benefits. The key employee benefits which were improved — e.g., vacations, the health and welfare package, and

the like — did permit retention of superior local conditions. The only cases in which exceptions were made involved technical problems of contract language or its administration, only remotely affecting the employeas (with the one possible exception of the standby clause). In our view, it would be wrong for this Board to second-guess this judgment made at the bergaining table. Thus, while accepting the basic principle defended by CUPE at the arbitration hearing, we confirm the excaptions which its representatives agreed to at the bargaining table.

X.

57 We turn next to the problem of part-time employees. As is customary in the acute care hospital sector, a substantial number of part-time service workers are employed in these Hospitals. Most of them are represented by the Union, some with their own separate collective agreements, others with addenda to the full-time agreements. Much of the contract structure designed for the full-time group is applicable to the part-timers, but other aspects of these arrangements present special problems for the latter. The parties have created a Technical Committee which has attempted to grapple with these issues but has not yet been able to sort them out to an agreed solution. They have put one issue to this Board: the form and amount of payment to the part-timers in lieu of fringe benefits. (At the hearing, the Union also asked this Board to address further issues — regarding the definition of a part-timer and their rate of progression along the salary grid. However, as we read the terms of reference to us, these latter issues ware not submitted and we have no jurisdiction here to deal with them.)

58 The vast majority of fringe benefit schemes in the full-time agreements do not now apply to part-time employees: in particular, sick leave, the pension plan, and the health and welfare package. Some Hospitals provide no compensation at all. In most of the Hospitals where the part-time employees are represented, they are given a payment in lieu of such benefits, sometimes 15 or 20 cents an hour, alternatively a percentage, ranging up to 10%, of their hourly wage rate. This is done both to ensure that part-time employees actually receive fairly comparable total compensation for doing the same work which is performed by full-time employees, and also to protect the compensation package which the Union has negotiated for the full-timers from erosion through excessive use of part-timers. While maintaining this basic principle, the Hospitals seek to change the form of payment by which it is achieved. They propose a new arrangement whereby the part-time employees will be given an opportunity to participate in the group plans, with the Hospitals paying a *pro rata* share of the premiums (proportionate to the number of hours worked by each part-timer relative to the full-time schedule).

59 There are admitted virtues to this concept. Those part-timers who would like to have the advantages of the benefits in a group plan, one which almost invariably is cheaper than coverage for a single person, would be given the opportunity to do so. On the other hand, those part-time employees who choose not to participate in the plans would not be paid at a rate that is higher (now 10%) than the wage rates paid to permanent employees for doing the same work; since some permanent employees may well have chosen to stay out of the plans (to save their share of the premium cost when their spouse has already obtained the family benefit elsewhere).

60 However, there is a major practical difficulty with this Hospital proposal, whatever its abstract virtues. Take the case of the dental plan, for example. The Hospital now pays 50% of the premiums. If a part-time employee regularly works only 1/3 of the full-time work week, the Hospital under its proposal would pay only 1/6 of the premium (1/3 of 1/2). To take adzantage of this Hospital offer, the part-timer would have to pay the other 5/6 of the premium from a monthly salary which is just 1/3 of the norm. The same would be true of OHIP, extanded health care, life insurance, and the pension plan (as and when the latter is brought into the Hospital scheme). Inevitably the part-timer could and would take advantage of only one or two of these fringe benefits, if that. As to the others, the ones which were not opted for, the employee would lose the entire benefit of the Hospital contribution, thus defeating the basic purpose of Hospital payment for this part of the compensation package which is represented by fringe benefits.

61 Just as is true in other parts of this award, I believe this Board should be conservative in altering an established principle such as this one which now obtains in the part-time agreements. I want to make clear that I am not suggesting that the novel approach brought by the Hospitals is undesirable in principle. Indeed, the parties may well want to turn their minds to alleviating the basic difficulty which I have noted. If a "cafeteria" approach were adopted to fringe benefits for part-timers, the latter might well be allowed to select a single preferred benefit and have the entire cost of the employer's overall premium contributions

for full-timers rolled into this one plan (one which might not be available at the spouse's place of work). But for this year, the current general practice of a payment in lieu of benefits should continue.

62 The Union sought a standardized and higher percentage rate of payment in lieu of benefits — 20 percent. This figure is out of line with the evolution of this concept in the Ontario hospital sector. Recent service agreements with non-participating Hospitals and recent arbitration awards involved in the Ontario Nurses Association have hovered around the 12 percent point. The Arbitration Board dealing with the SEIU contract this year is awarding 12 percent as well. In line with these precedents we award CUPE the standard figure of 12 percent in these participating Hospitals.

XI

63 It was agreed by the parties at the arbitration hearing that one of the most salient issues in the employees' rejection of the memorandum of settlement concerned HOODIP — the Hospitals of Ontario Disability Income plan. Much of the controversy enveloped the replacement by HOODIP of the current scheme for accumulation of sick leave credits, a provision obviously considered by the CUPE members to be a superior benefit. Thus, this matter warrants some further comment from us.

64 Both of these systems are addressed to the same problems what to do about providing income to the unfortunate employee who becomes sick or is hurt, but whose disability has nothing to do with his work, and thus is not compensable under workers' compensation. The traditional sick-pay approach is to permit the employee (usually after a brief probation period) to begin accumulating sick leave days (perhaps at 1 to 1 1/2 days a month) up to a maximum ceiling (ranging from 100 to 150 days). When the employee becomes sick the accumulated days are then available to be used. When the employee returns to work, the procass of accumulation begins once more. A typical, feature, and an attractive one as far as many employees are concerned, is that upon termination of employment some or all of these sick days can be cashed out (in effect, a form of severance pay).

65 The basic flaw in this concept is also apparent. It provides full compensation for the short-term, less significant illness, and cash bonuses for those employees lucky enough to stay relatively healthy. But, once an employee has used up his sick leave, he is left with absolutely no protaction at all. HOODIP is designed to respond primarily to the latter situation. Each full-time employee is credited, after three months service, with an immediate 75 days sick leave. These provide replacement of income in varying amounts: from a minimum of two-thirds for employees of less than one year up to 100 percent of income for employees with four years or more of service. That protection will continue for up to a full fifteen weeks (and once the employee has returned to work for three weeks, the 75 day entitlement is reinstated in full). But if the employee is ill even after that date, he first of all goes on the Unemployment Insurance Commission Benefit Plan for a further fifteen weeks at 60 percent of salary (thus using up the statutory benefits to which these employees and the Hospitals have contributed). After that date, the HOODIP long-term disability feature is actuated. This protects employees of one year's service or more, as long as they are ill, until recovery, death, or the age of 65. The degree of income replacement ranges from 60 percent for employees with less than 10 years service to 75 percent for employees with more than 30 years service.

66 In concept, there can be absolutely no doubt that HOODIP is a much superior approach. Traditional sick leave schemes maximize the protection for minor illnesses and minimize the protection for major catastrophes. Worse, the cash-out provision in effect redistributes the pool of money available for this benefit from those who are sick to those who are lucky enough to have stayed well. Presumably in recognition of that fact, the parties in these negotiations followed the lead of Unions in other Hospitals and decided to replace the sick leave plan with HOODIP. To my mind at least that seems to have been an enlightened judgment. But the CUPE members did not see it that way. Rather than being persuaded by the virtues of the new HOODIP protection, the employees focused on the fact that they were losing their right to accumulate and cash in sick leave credits in the future. (The memorandum did not eliminate the already accumulated sick leave days. These were to be "banked" for each employee, used to top off HOODIP benefits while still in employment, and then cashed out if and when employment was terminated.) And the fact is that a lot more employees are able to take advantage of this right (albeit in small amounts) than the few people who need long-term disability income (which can entail very substantial payments). As well, a variety of features were built into HOODIP which placed limits on the degree of income maintenance during short-term illness, limits which looked unfavourable by comparison with the standard sick leave notion. In any event, as we noted above, the HOODIP clause figured prominently in the drive to reject the entire memorandum of settlement.

67 However unfortunate I believe that verdict to have been, I also feel that arbitration boards must be sensitive to such employee sentiments. In the normal world of free collective bargaining, I feel it highly unlikely that an employer would have insisted to the point of a strike on getting its way on such an item (since apparently the overall costs of HOODIP are comparable to those of the sick leave system). Thus, contrary to the Hospitals position at the arbitration hearing, this is one part of the memorandum which we do *not* include in our award for a new central agreement (along with the change in the Medical Care Leave clause which was tied in closely to this transfer to HOODIP).

68 However, CUPE wanted more from this Board. It wanted the current sick leave scheme maintained, a long-term disability program stacked on top of it, and the Cadillac version of an LTD plan at that. We are not prepared to accede to that request. For reasons elaborated on earlier, this is not the year in which a rich new fringe benefit can be fitted within the parameters of the compensation package (and the Union gave us no cost estimates for its plan). Eventually the CUPE members and the leaders are going to have to face the fact that there is a limited amount of money to expend on this area of their employment conditions, and decide that it should be expended where it would do the most good.

XII

69 A further issue raised by CUPE in this arbitration hearing concerned workloads. The Union argued that recent reductions by the Government of Ontario in hospital budgets had not just reduced the number of beds in Ontario hospitals but had reduced the number of full-time employees even further, thus increasing the workload of the service worker to excessive levels and creating a risk to patient care. In response to this concern, the Union proposed a new contract provision which would allow employees to lodge complaints about excessive workloads to a new Joint Hospital-Union Workloading Committee. In the event the Committee agreed on the disposition of such a complaint, its decision would govern. In the event there was no agreement, the matter could be pursued to grievance arbitration, which would have the authority to judge the workload to be excessive and to mandate corrective measures.

70 The Hospitals did not agree with the Union on the basic facts. They produced figures to show that in the last five years the nursing complement in Ontario hospitals (including RNA's and Orderlys) has increased by 5% while the total number of patient days in the hospitals has declined. True, the staff performing other service functions in hospitals has declined by some 12% in that same period. But the Hospitals say this is due to the introduction of new, labour-saving technology in the hospitals, while the loss of jobs has been primarily accomplished through attrition.

71 To one who views this debate from the perspective of the arbitration tribunal, this issue testifies to the deficiencies of interest arbitration. I have set out the essential assertions made by both sides in their briefs and their oral presentation. But this was just one of two dozen issues canvassed at the hearings, and left me with no confidence that I could make an informed judgment about which is the more accurate picture, especially since it is likely that the workload situation varies markedly from hospital to hospital.

72 In any event, the Hospitals went on to argue that this is a matter which is beyond the jurisdiction of collective bargaining, because discretion over staffing is exclusively delegated under the Public Hospitals Act to the Board and Officars of each hospital. This may very well be true, insofar as the focus of the problem or of any contract revision is on patient safety (and admitiedly this was true of much of the argument made by the Union). But insofar as the thrust of the Union's concern is the impact of staffing levels on employee workload — on the pace, strain, and hazard at work — suraly this is precisely the kind of issue which is grist for the collectiva bargaining mill; and thence of interest arbitration which has replaced the strike as the means of resolving an impasse in hospital labour negotiations.

73 On the other hand, CUPE has asked us to impose across the entire Ontario hospital sector a new provision which would allocate to lay arbitration boards a judgment which would be inherently be difficult to make, and giving them little or nothing in the way of guidelines. We are not satisfied by the material before us that there should be introduced this radical innovation of a Work-loading Committee (or even the more moderate alternative, the Professional Responsibility clause gleaned from the Ontario Nurses agreement). In the first place, this is another issue which was completely dropped at the negotiating table

when the memorandum of settlement was signed (and was not even one of the initial priorities of the Union in bargaining in this round, as is evidenced by its own literature to its members). Second, there is inside the standard collective agreement a Joint Labour-Management Committee provision. It seems to the Board that this is the proper vehicle to which new, emerging employee concerns such as this one should *first* be taken. If there are tangible complaints in individual hospitals, these will be brought out into the open and perhaps they would be remedied without needing the ambitious new procedure such as is proposed here. That would be the ideal result. But even if they were not satisfactorily dealt with in this forum, the Union and its members would have made the claim to the management officials on the scene, both sides would have aired their conflicting views, and each would have had an opportunity to document its position about the complaint. If sufficient such complaints of serious and persistently excessive workloads were validated but left unremedied in a variety of Ontario Hospitals, then the Union could return to the bargaining table (and perhaps the arbitration forum) in the next bargaining round, armed with a great deal more material with which to substantiate the bare assertions which it has made to us this year.

XIII

74 The final issue, with which we must deal returns us to the special feature of this case with which we began: the illegal strike. The Union and its striking members violated the Hospital Labour Disputes Arbitration Act, disobeyed an injunction obtained by the Attorney General of Ontario, contravened an order granted the Hospitals by the Ontario Labour Relations Board and filed in the Ontario Supreme Court, and ignored the obligation they owed to their immediate Hospital employer under their collective agreement. As a result, the Attorney General is now pursuing contempt of court charges against certain Union leaders, the Hospitals as a group are seeking extraordinary remedies from the Ontario Labour Relations Board, and individual hospitals have meted out discipline to their own employees who were involved in the strike: 36 discharges, 4,000 suspensions ranging from 1/2 to 25 days, and thousands more letters of reprimand put in personnel files.

75 As a result, the last request made by CUPE by this Arbitration Board was that we award a "no-reprisals" clause, one which would be inserted in the collective agreements of each of the Hospitals. This would ban, retroactively, all discipline of any kind for any employee involved in the illegal strike, and would also require withdrawal of all judicial, quasi-judicial, and similar legal proceedings. Presumably the latter clause is intended to cover only those matters in which the Hospitals were involved, because it is clear that there could be no bar to legal action by the Attorney General flowing from an interest arbitration award.

76 Essentially, the theory of the Union is that a no-reprisal clause is standard fare at the end of any emotion-laden strike, that the only reason why none was agreed to here is that the weight of the law ended their strike, and thus this Board — whose mandate is to reproduce the results of free collective bargaining — should impose the provision on the Hospitals. This argument has something of a strange flavour to it: i.e., that legal pressure against the Union's strike unfairly prevented the letter securing immunity from discipline, when the discipline was meted out precisely because the strike was illegal from the outset. In any event, I am not persuaded by the Union's claim that its members are entitled to full immunity for their illegal course of conduct. Even besides the obvious concern to maintain the incentive to comply with the law generally, a hospital strike can be a dangerous experience for the patients whose health is risked as a result. As those who are familiar with my own published writings will know, I am not an avid fan of the policy which bans bargaining strikes and replaces them with compulsory arbitration. But even if interest arbitration were removed from the Hospital scene in Ontario (which would not be an unmixed blessing for the trade union in that sector, whatever they may now believe), surely the Legislature would not leave the exercise of the right to strike entirely uncontrolled. There would be an effective mechanism for designating and monitoring the performance of truly essential services. In an illegal work stoppage, such as the one that occurred here, such a mechanism cannot realistically be available. Thus, whatever everyone's views about the relative merits of the policy embodied in the Hospital Labour Disputes Arbitration Act, it is terribly important that this system be respected while it still remains the law.

77 For this reason, total immunity from any form of discipline would be a mistake in a case such as this. That does not imply that there should be no limits to the scope of discipline; and, in particular, that the ultimate employment sanction of discharge is the appropriate measure. There is a natural tendency in such an emotional, highly-publicized conflict for the employer to over-react. Even worse, in a multi-employer context, some employers will be restrained but others will not be. This leaves the individual's fate up to the chance of who is in charge of the particular hospital in which he worked, and what that person's disciplinary philosophy happens to be. In this case, for example, of the seven members of the Union's Provincial Negotiating

Committee, a body which clearly played a senior role in development of the strike action, every person received a different form of discipline from their respective hospital employer; ranging from a pure reprimand, to suspensions of two to seventeen days, up to a single discharge. No particular explanation has been offered for this widely varying treatment. Frankly, my initial inclination after hearing the case was to issue an award which placed an upper limit on the scope of discipline in this situation, a limit which would permit lengthy suspensions where these were appropriate, but would preclude discharge (for reasons which I have elaborated on in detail as Chairman of the B.C. Labour Relations Board in the case of *Alcan Smelters and Chemicals Co. and CASAW, Local 1, Re* (1976), [1977] 1 Can. L.R.B.R. 157 (B.C. L.R.B.). However, after carefully reviewing the legal arguments made by the Hospitals, I am not persuaded that this interest arbitration Board does have jurisdiction to deal with the reprisals issue in the first place. Thus, while I believe there is some force in the points made by CUPE, I believe these concerns are going to have to be addressed in the grievance arbitration system to which many of these discharges are not enrouts.

XIV

78 In conclusion, our award confirms the matters agreed to by these parties in the memorandum of settlement of September 1980, except to the extent specified already in this decision. We reject all further demands made by the parties. The new collective agreement will run from September 29, 1980 through September 28, 1982. The new wage rates and the higher payments in lieu of benefits for part-time employees are to be retroactive to September 29, 1980, in the amounts specified. These retroactive increases are to be paid in respect of all work done within the unit since that date. As to employees who have terminated their employment since September 29, 1980, notice should be given by their respective hospital to the last known address, and the employee in question should have 30 days within which to claim the retroactivity payment. As is customarily the case under the Act, this Board remains seized of the case until a collective agreement has been drafted and put into effect, in order to deal with any disputes which may arise under this award.

***S.E. Dinsdale Member*:**

79 I am in substantial agreement with the Award as written by the Chairman and wish to make it clear at the outset that I have not been moved to make the few comments which follow by any real sense of dissatisfaction with the result the Chairman has reached. I concur in Professor Weiler's observation in the Award that "The ideal towards which interest arbitration aims is to replicate the results which would be reached in a freely-negotiated settlement" and I believe the Award reflects a genuine effort by the Chairman to do that. There are specific items in the Award with which one or other of the parties will not be entirely happy but as Mr. Tirrell, my colleague on the Board has commented, that is "perhaps an ultimate test of the propriety of the final result".

80 However, the Chairman in his endeavour to replicate the result which would result in a freely negotiated settlement has departed from a settlement reached in precisely that manner and it is regarding this departure that I direct my comments.

81 The Board had available to it a Memorandum of Agreement which was signed by the negotiators for the Union and the Hospitals on September 26th, 1980. As the Chairman states, this settlement was the result of a lengthy series of negotiations by skilled and experienced representatives of both parties and embodied the compromises in position which those representatives saw fit to make. As such, it would appear that this settlement should be regarded as the most accurate indicator of the result that would have been reached had the negotiations taken place as part of a completely free collective bargaining process. For this reason alone I would have preferred to see the Award parallel the terms of the settlement, notwithstanding its rejection by a majority of the hospital employees affected.

82 There is a further reason for adopting this view. As the majority Award points out arbitral authority on this issue consistently supports the view that the terms of a memorandum of settlement should be adopted by a Board of Arbitration even in the face of a rejection by the employees or the Employer. In my opinion, one of the greatest obstacles to the acceptability of the process of interest arbitration by those who are required to participate in it, is its unpredictability and uncertainty, or at least the unpredictability and uncertainty that is perceived to exist by the participants. The parties regard themselves as having no real control over the result which will be imposed by an Arbitrator who is a stranger to their relationship and to the unique problems in that relationship. The arbitral authority which has been referred to fully by the Chairman has recognized this problem and has

endorsed negotiated settlements that the parties themselves have reached in that part of the process over which they themselves have control.

83 There are compelling reasons for Boards of Arbitration to continue to follow the lead of this authority. The negotiators involved in the private stage of the process should be permitted the assurance and confidence that any memorandum of settlement they reach will be respected at the arbitration stage. Otherwise, there may be a reluctance to compromise on any given issue as fully as possible, for fear that an arbitration board may extend the parties beyond the limits they have set themselves. As a result, negotiated settlements that might otherwise have been attained through free negotiation may not be achieved. In other words both parties can end up "holding something back" for the arbitration stage. In addition to that, if an Arbitrator varies a negotiated settlement after rejection by the principals of either side, the negotiators lose face and the confidence of the principals for either accepting too little or giving away too much. It is self evident that such a result is not a good one for the health of the collective bargaining process. Most Employers and Unions (and there are exceptions to every rule) will do their utmost to make a negotiated settlement "stick" and it is usual that any variations subsequently negotiated in a free collective bargaining atmosphere relate to detail and not matters of principal or changes in overall cost of the settlement.

84 In the present case, it can be said that the Award closely parallels the terms of the memorandum of settlement which the parties reached in September of 1980. I would like to comment on two of the deviations from those terms which the Chairman has made. The first observation relates to the quantum of wage increase awarded. I fully understand the Chairman's motivation in making the changes he did and the logic which he ascribes to it. The cost-of-living has perhaps increased more dramatically in recent months than could have been anticipated by the parties in September of last year. However, I would hasten to add that in any free collective bargaining process where prospective wage increases are negotiated, the parties involved are faced with attempting to predict or estimate the economic trends that will ocour over the life of the agreement and in setting the rates to apply, a gamble is taken that the predictions made will prove to be accurate. Our responsibility as a Board of Arbitration is to make every effort to replicate the result that would be reached in a free collective bargaining context and we should not apply the hind-sight available to us which was not available to the principals at the time the agreement was made. The next round of negotiations is never far away and if errors have been made that is the time to seek to correct them.

85 Secondly, I wish to briefly address the Chairman's disposition of the Hospitals of Ontario Disability Income Plan (HOODIP) issue. As I have indicated above, I recognize the Chairman's motivation in altering the quantum of wages which had been agreed to by the parties. However, I fail to see any justification for the Chairman's rejection of the parties' agreement to replace the sick leave credit scheme with HOODIP. It is all the more puzzling in light of the Chairman's statement that there can be no doubt that HOODIP is a much superior approach. To my mind, this is clearly an issue where an attempt to replicate a free collective bargaining result demands adoption of the agreement made by the negotiators.

86 One final comment. As far as the question of disciplinary reprisals is concerned, I would agree with the Chairman's conclusion that this Board does not have jurisdiction to address this issue. Given such a conclusion, I find it unfortunate that the Chairman saw fit to make the comments he did on this subject. By joining in this Award, I do not wish to be taken as agreeing in any way with the Chairman's inference that discipline has been meted out in an arbitrary and disciminatory way. I would prefer to wait until the parties have had an opportunity to put forward the facts of particular cases and make full and complete argument on those facts before making any judgments as to the propriety of the penalties imposed. It may well be that the different disciplinary sanctions which were imposed are fully justified. In any event, in my respectful view, any disucssion of this issue before hearing the evidence and argument is premature.

87 I wish to reiterate, notwithstanding the above comments, that I consider the Chairman's Award to be an excellent one given the very difficult circumstances under which the matter arose and came before the Board. The Award reflects the Chairman's well recognized clear and comprehensive understanding of the collective bargaining and interest arbitration process.

88 All of which is respectfully submitted.

***A.S. Tirrell Member*:**

89 As noted in the body of the Award I am in agreement with this Award. In the context of this dispute I consider this Award to be a good one and this Board has indeed attempted to replicate the kind of result which would issue out of a collective bargaining process not constrained by a requirement of ultimate submission to compulsory and binding arbitration. One is, of course, always able to nit pick about some specific items but that is generally a matter of opinion rather than substance.

90 Undoubtedly this Award will engender displeasure from either side with regard to the disposition of particular issues or items but that is usually inherent in any result produced through collective bargaining. It is perhaps an ultimate test of the propriety of the final result.

91 The Chairman has presented deliberative analyses of the main problems and issues confronting this Board and has thoroughly articulated this Board's reasons for deciding as it has. I hope these may prove to have utility in the future as well as now. There are some observations and comments I wish to make, however, which the Chairman has not considered essential to the presentation of this Award. I am in the unusual position of having been appointed by the Minister of Labour to represent the Union on this Board. This has led me to give considerable thought to some questions which might, under other circumstances, not have been the case.

92 First, I would like to say that the Canadian Union of Public Employees is a good union; one which represents the interests of its members not only vigorously and well but with dedication to their causes. It would be unfortunate, indeed, if the unfolding of events surrounding this recent dispute and the media reporting of them caused the emergence of a different perception of this Union. A Union is an association of workers who are joined together of their own free will and consequently they are not, nor cannot be, regimented by their leaders. In a dispute such as that which produced the recent strike of the hospital workers emotions can become highly charged. It is also inevitable that various divergent views and interests vie for the allegiance of the members. It is an inevitable possibility, in such a context, that the members may be manipulated by the protagonists of the contending forces to a degree where confusion rather than a disciplined order results.

93 The Canadian Union of Public Employees (as do other Unions) tenaclously holds to the belief that hospital workers are inhibited in the practice of collective bargaining because of the restrictions placed upon them by the Hospital Labour Disputes Arbitration Act which denies them the right to strike as a technique for final determination of an impasse in the collective bargaining process. That stance, in itself, can serve to generate much emotional heat during times when bargaining difficulties are encountered. It is worthy of some examination.

94 While it is true that in the private sector the right to strike is universal, and even in areas of the public sector, it is nevertheless true that hospital workers are not alone in confronting a denial of that right. Two realities confront the hospital Unions in this respect. The first is that hospitals, above all other enterprises, are perceived as institutions of great essentiality. It is doubtful whether any other establishment which provides a service to the general public is perceived to be quite as essential. The second is that because of that perception governments respond to it by providing either restrictions or a complete ban on the right to strike in such institutions. Even in jurisdictions where the right for hospital workers to strike exists it is not without specific restrictions. All of this is by way of leading me to say that it seems to me the Union would be better advised, no matter how apparently frustrating, to pursue efforts to try to improve the criteria of the arbitration process rather than encourage its members to engage in the futile gestures of strikes which, in this jurisdiction, will produce only the kinds of distress which have resulted from the recent withdrawal of service. It is my view the hospital Unions in Ontario face inordinate obstacles to achievement of an unrestricted right to strike the hospitals and if they were to achieve such a right to strike but with specific restrictions they may well find that something less than an unalloyed blessing. I fully appreciate that large sections of this Union may consider this suggestion gratuitous but it is offered out of a full appreciation of the realities it confronts and, moreover, with the utmost sympathy.

95 Secondly, I want to address the question of disciplinary measures administered by the hospitals, an issue which engaged the attention of this Board. The Chairman, in the Award, has already commented on the uneven hand with which disciplinary penalties were meted.

96 While I agree that on the evidence before this Board it does not have jurisdiction to provide a resolution of this issue it nevertheless is an issue which, in my view, warrants additional comment. The Union is right in its claim that in the private sector a strike, much more often than not even an illegal strike, is generally settled with an understanding between the parties that everything returns to normal, all employees return to work, and no penalties will be imposed as a result of the strike activity. This is because there is a general appreclation for the necessity to bind wounds and reconstitute good relations.

97 Such an appreciation does not seem to have permeated the situation in this case. While there have been some notable exceptions, in general the attitude of the hospitals has been one of rigourously punitive response. That does not bode well for future relationships and, I suggest, warrants a close reconsideration on the part of the Ontario Hospital Association. One unavoidably has the feeling that ingrained local animosities and frustrations have been allowed full sway rather than a judicious consideration of all the implications.

98 One can appreciate the feeling of the hospitals who felt betrayed by the employees' rejection of the bargain which had been laboriously worked out by their negotiators. The hospitals ought to recognize, however, that the Union's negotiators also arrived at the bargain in good faith and with the best of intentions and the rejection was no less traumatic for them. More importantly, because of the nature of the Union's structure, they then immediataly confronted certain crucial political risks not prevalent to anything like the same degree in the employer's ranks. Rejection by the Union member-ship is not too uncommon in recent times and although unquestionably unsettling to all those who hammered out the bargain it ought not to be a cause for a feeling that the Union has operated frivolously, without integrity, and with intent to embarrass the employer.

99 To the extent that this Board has been unable to act on this matter of disciplinary penalties it obviously fails to replicate the kind of result that generally would be produced out there in the rest of the collective bargaining world. This, too, is a matter for some consideration not only by the parties but for those who determine the scope of arbitrable matters.

100 Finally, I believe that the Government of Ontario is not entirely blameless in the events which transpired. It commissioned an examination of this industry (the Johnston Commission) which produced a number of recommendations which were generally well received by the constituents of this industry. The Government, however, has by and large not taken measures to implement those recommendations. It has, in my view, frittered away a useful opportunity to smooth relations in this industry.

101 It has not taken the necessary steps to insure the provision of the recommended facility for the parties to have common access to reliable, well researched, comparative pay data. The result is that the parties still approach arbitration using data which, as often as not, serves poorly to enlighten the arbitrators. More importantly, the arbitrators themselves are left without recourse to the data such a facility was intended to provide.

102 The Government has not proceeded with the necessary effort to bring about the establishment of a job evaluation procedure for the hospitals which would assist not only in determining the appropriateness of internal relativities but would facilitate external comparisons as well. Much needless pressure is generated in the collective bargaining process because of pervasive beliefs by the workers in this industry that they are not being equitably paid relative to others in the economy.

103 The Government has not proceeded energetically to encourage, recommend, and expedite co-ordinated bargaining in this industry which would tend to mitigate the occurrence of events such as the recent strike. It has done so for the construction industry, and, it seems to me, it is failing in this area where public concerns are, surely, of greater anxiety.

104 Certainly the Government has a responsibility to administer legislation intended to foster and protect the general interests of the citizens. It is my view, however, that it has other responsibilities as well. It would be well advised to give thoughtful consideration to the creation and nurturing of an industrial relations climate in this industry where the sort of eruption that preceded the proceedings of this Board would be very much less likely to occur.

105 Stripping away any remaining mythology to the contrary it is the Government, as the Chairman has pointed out, that is the ultimate paymaster. It is also the authority that has legislated that hospital workers may not have recourse to the strike as a means to resolve any ultimate collective bargaining impasse. It has done so, presumably, because these workers are considered

so essential that any withdrawal of their services would be a peril to the citizenry. It has, therefore, considerable responsibility to ensure that the hospital workers are equitably paid relative to others, not only within this industry, but to others in the economy as a whole.

106 It follows also, it seems to me, that it carries a greater onus than simply to bring the weight of the state to bear upon any one who transgresses legislative or regulatory measures pertaining to this industry.

TAB 3

IN THE MATTER OF AN INTEREST ARBITRATION PURSUANT TO THE *FIRE PROTECTION AND PREVENTION ACT, 1997*

BETWEEN

Corporation of the City of Waterloo

("City")

and

Waterloo Professional Fire Fighters Association Local 791, International Association of Fire Fighters

("Association")

BEFORE

James Hayes, Chair
Harold Ball, City Nominee
Jeffrey Sack, Q.C., Association Nominee

APPEARANCES

FOR THE ASSOCIATION
Colin Hunter, Advocate, IAFF/OPFFA
Mike Palachik, Assistant Advocate, IAFF/OPFFA
Dean Good, President
Brett Gibson, Vice-President
Steve Mayer, Secretary
Chris Hicknell, 2nd Vice-President

FOR THE CITY
John Saunders, Counsel
Anna Karimian, Counsel
Richard Hepditch, Fire Chief
Ryan Schubert, Deputy Fire Chief
Karen Boa, Director, Human Resources
Anne Kircos, Manager of Labour Relations and Recruitment
Cameron Rapp, Commissioner, Integrated Planning & Public Works
Mark Dykstra, Commissioner of Community Services

Mediation was held on April 10, 2017 followed by an arbitration hearing on June 28, 2017.

AWARD

Introduction

1. This interest arbitration relates to the renewal of the Collective Agreement that expired on December 31, 2014. The bargaining unit consists of 118 full time firefighters who work in the Fire Suppression and Fire Prevention Divisions. Waterloo has a population of more than 98, 780.[1] It is located in Waterloo Region that includes the neighbouring cities of Kitchener and Cambridge.

2. The parties exchanged summary proposals on November 12, 2015 and met on several occasions prior to conciliation that was conducted on March 24, 2016. Mediation with this Board took place on April 10, 2017 with an arbitration hearing on June 28, 2017.

3. The renewal Collective Agreement will consist of all matters agreed to by the parties and the following terms and conditions. Any proposals not referred to below are dismissed.

4. In determining the outstanding matters, we have been guided by the criteria identified in Subsection 50.5(2) of the *Fire Protection and Prevention Act, 1997* (*"FPPA"*). *FPPA* criteria include the following in addition to "all factors the board considers relevant":

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 if current funding and taxation levels are not increased.
3. The economic situation in Ontario and in the municipality.

[1] 2011 census data

4. The comparison, as between the firefighters 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 firefighters.

5. Applying the foregoing principles and having considered the submissions and material filed by the parties, the renewal Collective Agreement will include the following terms and conditions. With respect to wages and other proposals we have considered generally accepted principles of replication having regard to police and other fire service comparators.

Term

6. January 1, 2015 to December 31, 2017

Salaries

7. First Class Firefighters:

January 1, 2015	$92,834
January 1, 2016	$94,551
July 1, 2016	$95,140
January 1, 2017	$96,757
July 1, 2017	$97,290

8. All other classifications to be adjusted accordingly.

9. Retroactive wages to be paid within 60 days to current employees and within 90 days to those who have left the bargaining unit.

Rank Differentials

10. Platoon Chief: 128%
Senior Acting Platoon Chief: 118%
Chief Fire Prevention Officer: 128%
Captain: 118%

Benefits

11. Article 8.10 denominator changed to 4

12. Psychology, psychiatrist, registered counselor: $1,500

13. Orthodontic: $3,000

Generic Drugs

14. Generic drug substitution unless no generic drugs are available or the physician directs that a generic substitute is not allowed by writing "no substitution" on the prescription.

Vacations

15. 5 weeks after 16 years

Clothing

16. Referred to committee

Health Spending Account

17. We express no opinion as to the merits of such a proposal given the insufficiency of cost information.

Overtime

18. Bank time off in lieu at a rate of time and a half, including for attendance at meetings and training events, to a maximum of 96 hours.

Staffing

19. The Board lacks *viva voce* information concerning safety and/or workload issues to address this Association proposal.

Implementation

20. All changes to be effective within 60 days, or a reasonable period thereafter, except as specified above.

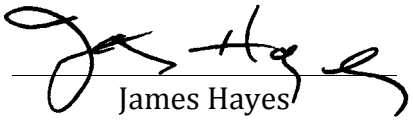
Letters of Understanding

21. The parties are requested to advise the Board forthwith, with an explanation in writing, if there is any issue between them concerning the renewal of existing Letters of Understanding. In the absence of any objection, we direct their renewal.

Board To Remain Seized

22. The Board will remain seized until the parties enter into a formal Collective Agreement.

Dated at Toronto, this 6th day of September, 2017.



James Hayes

"See attached"
Harold Ball

"See attached"
Jeffrey Sack, Q.C.

Dissent of Employer Nominee

I respectfully dissent for the following reasons.

In order to produce outcomes that are fair, reasonable and that otherwise balance the interests of both parties, including those of City taxpayers, this Board must consider a number of fundamental principles:

- A board of arbitration must seek to replicate the results that the parties would have achieved in the context of free collective bargaining;

- Consider whether the party seeking to change the collective agreement has shown a demonstrated need for the proposed change;

- Consider whether there is evidence from comparable employers to justify the change;

- The principle of total compensation must guide the board of arbitration's analysis of the parties' respective proposals; and finally,

- The Board must also acknowledge the importance of statutory criteria in determining the issues in the proceeding.

Unfortunately, in my view, and upon any objective analysis, this Board has failed to apply these principles, and consider the above criteria in an appropriate manner given the evidence before us when fashioning this award.

Specifically:

- The Association has not demonstrated a need for the majority of changes it had proposed, and in particular those that are set out below.

- In the vast majority of instances the comparator data relied upon by the Association, does not support an argument that its proposals are "normative and pervasive" in the sector, thereby resulting in an award that is inconsistent with what the parties would likely have achieved through free collective bargaining.

- Little or no regard has been given to the principle of total compensation, because while excessive and unreasonable costs have been imposed upon the taxpayers of the City of Waterloo, virtually all of the City's proposals that would have resulted in a modest level of cost abatement and/or containment have been rejected, and

- While the Board has stated that: "*In determining the outstanding matters, we have been guided by the criteria identified in Subsection 50.5(2) of the Fire Protection and Prevention Act, 1997 ("FPPA"). FPPA criteria include the following in addition to "all factors the board considers relevant"* in my respectful opinion, this award clearly falls short in this regard, and in particular with respect to criteria number 4 which states:

  "A comparison, as between the firefighters and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed."

Wage Rates:

The Association has sought to depart from, what for these parties has historically been a direct line of comparison between Waterloo Fire and Waterloo Police.

With respect, the Association has failed to clearly demonstrate that there are any compelling factors, or emerging trends that would provide sufficient justification to deviate from the well-established comparators and bargaining trends between these parties.

For these reasons I would have awarded the rates as proposed by the City.

Rank Differentials:

Increase Captain Differential from 116% to 118%

The Associations arguments in no way support its assertion that such an increase is "normative and pervasive" in the sector.

The data provided by both the City and the Association clearly shows that at 116%, the differential is perfectly aligned with the comparator groups submitted by both parties, and therefore no increase whatsoever is warranted.

Psychology, Psychiatrist, Registered Counsellor:

Increase from $300 to $1,500

Upon reviewing the Associations own comparator data, it simply does not support increasing the current benefit by a factor of 500%.

Not only is the amount awarded not "normative and pervasive" in the sector, it is clearly excessive, and the Association has not shown that there is a demonstrated need that would warrant an increase of this magnitude.

Orthodontic Coverage:

Increase from $2500 to $3000

The Board has awarded an increase amounting to 20%, which in and of itself is excessive, and certainly not normative.

A review of the direct comparator data, and in particular that which was provided by the Association, clearly demonstrates that the current benefit is on par with these comparators and as such, there is no justifiable reason or need, to increase this benefit.

Overtime for Training and Meetings:

Overtime to be Banked at Time and One Half Rather than Straight Time

The comparator data clearly shows that there would appear to be no "norm" in this sector, and because the Association was unable to demonstrate a need for this proposal, the agreement should remain unchanged.

In addition, because the majority of these banked hours are paid out, rather than taken as time in lieu, there will be additional costs incurred by the City to replace those absent employees.

Conclusion

In summary, when viewing this award in it's totality, by significantly increasing the costs to the City and it's Taxpayers with respect to wage rates, classification differentials and benefits, and by failing to award virtually any of the corresponding cost abatement and/or containment measures as requested by the City, the Board has clearly failed to apply the above noted fundamental principles and statutory criteria, resulting in an award that is fundamentally unbalanced and unfair.

In my view, the most important obligation that we as a Board have, is to adhere to the aforementioned principles and criteria, and by doing so, fashion a collective agreement that would, to the fullest extent possible, mirror or replicate what the parties would have likely achieved had they been engaged in free collective bargaining under sanction of strike or lockout.

It is my considered opinion that in this instance, the Board has fallen well short of its obligation in this regard.

Regarding the Association nominees partial dissent, I must respectfully disagree with his comments that I have "a misunderstanding of the principles of interest arbitration in the fire sector" and that with regard to the principle of total compensation, my "explanation of its meaning is, with respect, misconceived."

In certain respects my understanding of the principles of interest arbitration in this sector are not fundamentally at odds with those of the Association nominee, but where we obviously disagree is how those principles were applied in this case, given the evidence before us.

For example with respect to total compensation, while the salaries mirror those recently awarded to firefighters in the City of Guelph, this award goes much further, and produces a result that from a total compensation standpoint, clearly exceeds the sum total of the Guelph award.

The application of these principles to the facts before us would not, as I have already stated, mirror or replicate what the parties would have likely achieved had they been engaged in free collective bargaining under sanction of strike or lockout.

Therefore I do not agree with the Association nominee that this award does in fact accommodate the interests of both the firefighters and the City, pursuant to the criteria in the *Fire Protection and Prevention Act.*

All of which is respectfully submitted,

"Harold Ball"

Nominee for the City of Waterloo

Partial Dissent of Association Nominee

All interest arbitrators in Ontario are agreed that, when setting wage rates for firefighters, consideration should be given to the wage rates of local police and comparable firefighter groups. However, in my view, more weight should be given to comparable firefighters where, as in the 2015-2017 period, firefighters in an appreciable number of municipalities across Ontario have settled ahead of police.

As the Chair has noted elsewhere, while relevant police agreements serve as points of comparison, any conclusion that fire should always follow police is not supportable. If that were true, collective bargaining in the fire sector would be effectively eliminated. The FPPA guarantees a role for principals in the sector, and that role is protected by access to unfettered interest arbitration subject only to legislated principles.

As for the City nominee's dissent, I wish to make it clear that I cannot agree with his comments, which are based on what I respectfully submit is a misunderstanding of the principles of interest arbitration in the fire sector.

First, the requirement to show a demonstrated need for a change in the collective agreement applies primarily to those situations where the issue involves an emerging trend or a matter which is not addressed in the collective agreement; it does not apply, or is far less applicable, to situations where the change is justified by comparability, i.e. the practice in comparator municipalities: see *Ajax Professional Firefighters' Association v. Town of Ajax*, 2013 ONSC 7361 (Ontario Divisional Court).

With regard to the question of demonstrated need, which the Court noted is generally required where the outstanding issue is determined to be a "breakthrough" issue, the Court set out the "proper approach" in interest arbitration as "requir[ing] that the two factors of demonstrated need and comparability be addressed concurrently by the arbitrator and weighted according to the force of the evidence." In this regard, the Court emphasized that the weaker the comparator data, the more

demonstrated need should be taken into account, and, conversely, the stronger the comparator data, the more comparability should be weighted as a factor. Applying this approach to the facts, the Court reasoned:

> [T]he board could reasonably have regard to comparator data, provided such data exists, to support the Association's proposal in the absence of evidence that establishes a demonstrated need. The issue therefore becomes the weight to be accorded the comparator data in evidence before the board. … [T]he easier it is to characterize a 24-hour shift schedule as the norm, the more comparability ought to take on greater significance in the consideration of the proposal, given the overriding principle of replication. Conversely, the harder it is to characterize a 24-hour shift schedule as the norm, the more demonstrated need ought to take on a greater significance.
>
> Given the evidence before the board regarding the extent of implementation of a 24-hour shift in municipalities in Ontario, and elsewhere, especially in municipalities comparable in size to the Town, … the board could reasonably decide the arbitration by applying comparability as the best guide to implementation of the replication principle.

Second, there is no requirement, in applying the factor of comparability, that a practice must be "normative and pervasive." This may be the case, and the issue of comparability may thereby be easily resolved, but it is not a threshold condition. If it were, no new benefit, indeed no advance of any kind, would ever be awarded; the "normative and pervasive" formula, applied as a threshold, is a prescription for paralysis. In most cases, the justification for change in the terms of collective agreements is that the change sought has been negotiated or awarded in comparable municipalities or that there is a demonstrated need and/or a trend that lights the path to progress.

Third, the concept of total compensation is a valuable one, but the City nominee's explanation of its meaning is, with respect, misconceived. It is of course correct that, in calculating the value of changes to a collective agreement, one should take into account both salary and benefit changes, and increases as well as reductions in cost, but the purpose of this calculation is to determine whether a settlement or award results in more or less compensation than a comparable fire group receives. In this case, there was no attempt by the employer to compare the total compensation generated by the Award with the total compensation agreed to or awarded in any other municipality.

Nor was there a serious claim of inability to pay. In this regard, Waterloo is in no different economic position than Kitchener; moreover, its unemployment rate is among the lowest in the province, 5.9% vs 6.4%, and the property tax rate increase (2015) was less than the core rate of inflation (1.53% vs 2.2%).

Fourth, the City nominee's suggestion that comparability had not been taken into account by the Award is belied by the facts. Addressing the issues listed in the City nominee's dissent, I make the following observations:

Wages:

With respect to wages, the City's nominee suggests that Waterloo firefighters should receive the same wage rates as Waterloo police. However, this ignores the fact that parity with local police has at the same time maintained the relative relationship that Waterloo firefighters have had with comparable firefighters, i.e. firefighters in comparable municipalities. This is no longer the case since firefighters in an appreciable number of municipalities in Ontario have, in the 2015-2017 period, settled ahead of police.

Moreover, firefighters in Waterloo have traditionally looked to firefighters in Kitchener, Cambridge, and Guelph, as much as to Waterloo police. As Arbitrator Steinberg stated in his 2014 Award in Waterloo:

> In 2011 the salary of a first-class firefighter in Waterloo was $83,156, the same rate as for first-class firefighters in Cambridge and Guelph. Guelph reached a voluntary settlement for 2012, and the same increase was awarded in 2012 to Cambridge firefighters by Arbitrator Kevin Burkett. Subsequently, the Guelph firefighters reached a voluntary settlement with the City of Guelph for the 2013-2014 period, and we award the same amounts…

Rank Differentials:

This is a good example of the difference between patterns and trends. While in one of three comparators (Kitchener) the Captain is paid 116.6%, and in a second (Cambridge) the issue of the Captain's differential is proceeding to arbitration, in a third (Guelph), where the issue was most recently addressed, the differential was increased to 118%. The board should follow the trend.

Psychology:

The City nominee complains of an increase from $300 to $1,500, and asserts that the $1,500 figure is not "normative and pervasive." However, three of the four direct comparators (Guelph, Kitchener, and Waterloo police) pay $1,500 to $4,000. A figure of $1,500 is clearly in line with the trend.

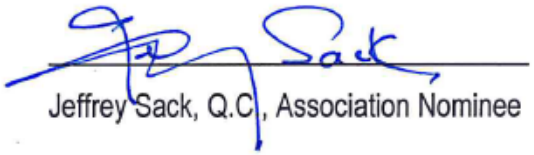
Orthodontics:

Direct comparators show a movement from $2,800 (Guelph) to $3,000 (Waterloo police). Cambridge is at arbitration. An increase from $2,500 to $3,000 simply tracks the trend.

Overtime:

Both Guelph and Kitchener firefighters receive time and a half, not just straight time, for all overtime, including meetings and training. Why should Waterloo firefighters not receive the same? The City nominee gives no reason.

In short, as in other Awards which the Chair has recently issued (Thunder Bay, Sudbury, Brampton, Oakville, Guelph) I would have put greater weight on comparable firefighter salaries. However, while I would have awarded additional and in some respects different monetary and non-monetary changes, it must be acknowledged that the Chair has sought to balance and accommodate the interests of both the firefighters and the City, in light of the criteria in the *Fire Protection and Prevention Act.*



Jeffrey Sack, Q.C., Association Nominee

TAB 4

CITATION: Ajax Professional Fire Fighters Association v. Ajax (Town of), 2013 ONSC 7361
DIVISIONAL COURT FILE NO.: 246/13
DATE: 2013-12-20

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

A.C.J.S.C. MARROCCO, WILTON-SIEGEL, GORDON JJ.

BETWEEN:	)	
	)	
AJAX PROFESSIONAL FIREFIGHTERS ASSOCIATION (Local 1092, International Association of Fire Fighters)	)	*Frank Cesario* and *Elisha Jamieson*, for the Applicant
Applicant	)	
– and –	)	
CORPORATION OF THE TOWN OF AJAX	)	*Sean P. McManus*, for the Respondent
Respondent	)	
	)	**HEARD:** November 27, 2013

THE COURT

[1] The applicant, the Corporation of the Town of Ajax (the "Town"), seeks an order quashing the portion of an interest arbitration award dated April 4, 2013 (the "Award") under section 50.5 of the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4 (the "Act") that ordered the Town to implement a 24-hour shift schedule for the Town's firefighters for a two-year period on a trial basis.

Background

[2] The Town and the respondent, Ajax Professional Fire Fighters Association, Local 1092 (the "Association"), are parties to a collective agreement. Under the Act, if the parties have outstanding bargaining issues between them arising from their attempt to negotiate a collective agreement, those issues are referred to an interest arbitration board comprised of three persons.

In this case, an interest arbitration board (the "Board") was appointed with respect to a number of outstanding bargaining issues between the parties, including the Association's proposal to move to a 24-hour shift for its firefighters for a two-year trial period. Ajax firefighters currently work on a four platoon system working 10-hour day shifts and 14-hour night shifts, to an average of 42 hours per week. The Association's proposal for the trial period is to have its firefighters work on a four platoon system working a 24-hour shift, to the same average of 42 hours per week. The Town opposed the proposal at the interest arbitration.

[3] In the Award, a majority of the Board determined that this was an appropriate case in which to order the parties to implement a 24-hour shift schedule on a two-year trial basis. In order to do so, the Board also determined that the parties should strike a joint committee to shape the terms of the trial 24-hour shift schedule and to put in place a mechanism to study the operation of the 24-hour shift to determine if it is safe and how its operation might compare to the current 10/14 hour shift in terms of health and safety, employer operational concerns, work life balance and employee preference. The Town nominee to the Board dissented in respect of the Award.

The Award

[4] The Board provided extensive reasons in respect of the Award. After stating the issue before it, the Board addressed the principal arguments of each of the parties and the evidence upon which they relied. In the case of the Association, the Board regarded the principal argument to be comparability and replication. In the case of the Town, the Board considered the following arguments.

[5] First, the Town argued that it is a presumptive management right for an employer to determine the hours of work of its employees. It says that, therefore, arbitrators should not interfere with shift schedules implemented by management in the absence of contractual or statutory restrictions or evidence of bad faith. For the same reason, the Town argued that the Association should bear the onus of establishing a compelling reason for changing the existing shift schedule.

[6] Second, the Town submitted that, based on the conclusions of an earlier joint committee, there were no tangible operational benefits and significant operational concerns regarding the administration of a 24-hour shift schedule in a fire department of the size of that of the Town of Ajax. The Town has a population of approximately 110,000 and a fire department of approximately 105 full-time firefighters in the bargaining unit.

[7] Third, the Town argued that the Association bore the onus of demonstrating need, which in this case required that the Association establish that the *status quo* raises serious safety concerns for firefighters. The Town submits that the Board's jurisdiction was limited to a consideration of firefighter safety and excluded considerations of personal preference or improvements to the level of public service that might result from a 24-hour shift.

[8] Fourth, consistent with this position, the Town also argued that the principle of comparability should be given very little, or no, weight when considering implementation of a 24-hour schedule, given the associated issues of firefighter safety and operational concerns. The Town submitted that comparator data should only be relevant if the Association could establish with compelling evidence that the 24-hour shift adopted by the comparators was fundamentally better in terms of firefighter safety, which it says was lacking.

[9] Alternatively, the Town argued that, if the Board viewed comparator evidence as relevant, the comparator data that existed did not support the Association's proposal, either in terms of the number of firefighters or fire departments operating on a 24-hour shift schedule, in terms of recent interest arbitration awards, or in terms of local comparator fire departments relied upon by the parties in terms of monetary issues.

[10] Sixth, the Town submitted that a 24-hour shift would generate health and safety risks for individual firefighters as well as for the public. The Town retained Dr. Stephen Lockley, of the Division of Sleep Medicine at Harvard Medical School, to provide expert evidence as an expert regarding sleep and circadian rhythm biology.

[11] Finally, the Town raised the issue of potential civil and criminal liability of the Town in the event accidents arose as a result of firefighters suffering from fatigue on 24-hour shifts, in view of the Town's statutory obligation to take reasonable steps to provide a safe and healthy workplace.

[12] The Board's conclusions in respect of these arguments are addressed below. We note at this stage that, in particular, the Board concluded that the evidence of Dr. Lockley was not sufficient to establish that a 24-hour shift for firefighters presents greater health and safety risks to firefighters and the public than a 10/14-hour shift.

[13] The Board then set out its conclusion regarding the Association's proposal at page 40 of the Award as follows:

> This leaves us to consider the parties' arguments concerning the factors of employee preference, demonstrated need, and comparability and replication. In my view the Association has made a persuasive argument for the inclusion of an order that the 24-hour shift be implemented for a trial period on the basis of the factors of comparability and replication.

[14] In the next paragraph, the Board also summarized the Award in the following terms before addressing implementation of the 24-hour shift:

> After concluding that the expert evidence provided by the employer does not establish that the 24-hour shift is more hazardous than the 10/14-hour shift schedule or that it represents a threat to the health and safety of firefighters, and considering all of the remaining evidence concerning demonstrated need, employee preference, comparability

and replication, we have determined that this is an appropriate case in which to order that the parties implement the 24-hour shift on a two-year trial basis.

Standard of Review

[15] The application is brought by way of judicial review of the Award. The parties agree that the standard of review is reasonableness. In this regard, this court has held that interest arbitrators have specialized knowledge of labour relations and, accordingly, their decisions warrant deference: see *Religious Hospitaliers of Saint Joseph of the Hotel Dieu Hospital of Kingston v. OPSEU, Local 465* (2009), 256 O.A.C. 167 (Div. Ct.), at paras. 27, 30.

Analysis and Conclusions

[16] Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process. The reasons of the Board in reaching its Award amply satisfy this requirement. However, the Town argues that the Award does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law and is therefore unreasonable on this ground.

[17] The Town has identified four aspects of the Board's decision-making that it says render the Award unreasonable. First, the Town submits that the Board improperly disregarded Dr. Lockley's expert evidence on the health and safety issue, as well as the Town's statutory responsibilities and consequential exposure to potential civil and criminal liability. Second, the Town says that the comparator data does not support the Award. Third, the Town submits that the Board improperly placed the onus on the Town to demonstrate that a 24-hour shift is more hazardous than a 10/14-hour shift. Fourth, the Town argues that the Board improperly took employee preference into consideration as a factor supporting its decision. We will address each issue in turn.

The Expert Evidence of the Town

[18] The Town argues that the Board should have relied upon the scientific expert evidence of Dr. Lockley regarding the health and safety dangers inherent in a 24-hour shift, having regard to the Town's statutory responsibilities under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, to "take every precaution reasonable in the circumstances for the protection of a worker". The Town says that, instead, the Board unreasonably discounted the expert evidence presented by the Town in favour of unscientific evidence relied on by the Association and therefore failed to pay appropriate attention to the Town's statutory responsibilities.

[19] The evidence of Dr. Lockley, and his testimony on cross-examination, was set out in considerable detail. After an extensive review of Dr. Lockley's evidence, however, the Board concluded, as mentioned, that it was unable to find that the Town had established that a 24-hour shift presents greater health and safety risks to firefighters and those whom they serve than a 10/14-hour shift schedule. The Board rejected Dr. Lockley's advice on four principal grounds.

[20] First, it concluded that there are important differences between the duties and schedules of firefighters and the occupations of medical residents or truckers that formed the basis of the studies upon which Dr. Lockley relied. These differences included both the expectation that firefighters would sleep at some point during a 24-hour shift and a significantly reduced average number of hours worked per week. Second, as a related matter, the Board considered that Dr. Lockley's criticism of the studies produced by the Association as unscientific was inconsistent with the force of his personal conviction that the scientific studies upon which he relied applied equally in the firefighting context despite the differences between the subjects studied. Third, the Board concluded that it could not discount entirely the studies put forward by the Association, at least in terms of providing anecdotal evidence of the experience of firefighters under various shifts. These studies, while acknowledged by the Board not to be determinative, were supportive of a 24-hour shift schedule. Fourth, the Board relied on the absence of any evidence of negative consequences in terms of health and safety and operational concerns in other communities that have adopted a 24-hour schedule, despite long-standing and, more recently, extensive experience with a 24-hour schedule.

[21] The Town argues that the Board's rejection of Dr. Lockley's opinion was unreasonable in four respects. In our opinion, the manner and extent to which the Board assessed his evidence was reasonable as discussed below.

Reliance on Other Arbitration Awards

[22] The Town says that the Board relied on other arbitration decisions rather than its own, misapprehending the question addressed in the decision of *City of Airdrie v. Airdrie Professional Fire Fighters Association, IAFF Local 4778* (February 28, 2012) (unreported) (Tettensor), in so doing. However, although the Board excerpts a significant passage from the *Airdrie* decision, the Board does not merely adopt the conclusions in that decision. The Board went on to provide its own detailed analysis and conclusions regarding Dr. Lockley's evidence.

The Relevance of the Studies upon Which the Expert Testimony Was Based

[23] The Town says that the Board erred in rejecting Dr. Lockley's evidence on the basis that he did not take into consideration the expectation that firefighters have the ability to obtain some sleep in the course of a 24-hour shift. It says his studies are therefore meaningful, even if they are not specifically related to firefighters.

[24] Dr. Lockley's evidence addressed the issue of whether a 24-hour shift increased health and safety risks to firefighters and the public. However, the fundamental issue that the Board addressed is whether any material risk would arise from the switch between shift schedules. Because Dr. Lockley's evidence does not specifically address the actual working experience of a 24-hour shift schedule for firefighters, the Board could reasonably find that the studies relied upon by Dr. Lockley are not conclusive on this issue.

[25] Moreover, whether or not scheduled, it cannot be denied that firefighters do, as a practical matter, obtain sleep during a 24-hour shift. Any study that purports to address the materiality of any incremental risks to health and safety resulting from a 24-hour shift schedule must necessarily take the actual experience, including availability of sleep, into consideration, even if sleep time is not specifically scheduled. In short, Dr. Lockley's explanation for why his research would apply equally to firefighters – because "human beings are human beings" – while accurate, is not responsive to the specific issue that the Board had to address.

The Absence of a Negative Experience in Other Communities

[26] The Town says the Board erred in referring to the absence of any experience of increased risks to health and safety in the communities in which a 24-hour shift has been implemented. It says there is no evidence of the actual experience of those communities.

[27] We do not agree. The Board commented that "[b]asic logic would lead one to believe that, if there were negative effects of the type suggested by the employer, both in terms of health and safety and operational needs, statistics and evidence would have been gathered on those negative effects during these trial periods in numerous municipalities." We see no reason to disagree with this observation.

[28] Relevant metrics, particularly in respect of health and safety concerns, would appear to be objective and easily gathered, if not already collected by other municipalities for other purposes (for example, insurance purposes). Inertia and the suggestion that the information rests with the firefighters who have an incentive not to report incidents of health and safety concerns is not a satisfactory explanation for the absence of actual data demonstrating either increased risks in respect of the health and safety of firefighters and the public or of operational concerns.

[29] Accordingly, we consider that it was reasonable for the Board to take into consideration the absence of any information reflecting a negative experience in other municipalities that have implemented a 24-hour shift schedule in assessing Dr. Lockley's evidence.

The Evidence Produced by the Town

[30] The Town also submits that it was unreasonable for the Board to have given any weight to the evidence on the health and safety issue produced by the Association. It characterizes this evidence as anecdotal and unscientific. We do not disagree that the Association's evidence lacked the scientific rigour of Dr. Lockley's evidence. However, the Board itself indicated clearly that it did not place any significant reliance on this evidence, even if it did not totally discount it. The Board expressly stated that, given this evidence lacked scientific rigour and the integrity of peer-reviewed academic studies, it was neither conclusive nor determinative evidence of the superiority of a 24-hour shift schedule over a 10/14-hour shift schedule in terms of health and safety and other psychological benefits.

Conclusion Regarding the Board's Determination Regarding the Evidence on the Health and Safety Issue

[31] Viewing the issues raised by the Town, collectively, we conclude that the Board could reasonably reach the conclusion it did regarding the health and safety issues raised by the Town in this arbitration. We are not persuaded that the Board's conclusion regarding the weight to be attached to Dr. Lockley's evidence was unreasonable. Nor do we think that it was unreasonable for the Board to conclude that, on the evidence before it, the Town had failed to establish that the 24-hour shift presented greater health and safety risks to fire fighters and the public than a 10/14-hour shift.

The Town's Statutory Responsibilities

[32] We are also satisfied that the Board gave appropriate consideration to the Town's statutory obligations under the *Criminal Code* and occupational health and safety legislation, in view of the illegality of 24-hour shifts in other occupations in Ontario. The Board observed that the express permission of a 24-hour shift in section 43 of the Act belies the Town's argument regarding its statutory responsibilities. We are of the view that the Board could reasonably infer from this provision that the Legislature does not agree with the Town on the hazards of a 24-hour shift and could conclude, for the purposes of its statutory responsibilities, that a 24-hour shift does not present undue health and safety risks provided the 24-hour off-duty requirement of section 43 is complied with. The Board's reliance on the longstanding and widespread experience of a 24-hour shift schedule described below, as further evidence that a 24-hour shift does not present the risks suggested by the Town in terms of civil or criminal liability, was also reasonable.

Comparability

[33] The Town says the evidence on comparability is, at best, mixed or neutral and, at worst, points against awarding a 24-hour shift trial. Accordingly, the Town argues that the Board placed undue weight on the factor of comparability and unduly discounted the factor of demonstrated need as addressed below. The Town submits that the Board reached its decision based on a "recent trend" toward 24-hour shifts which is not supported in the evidence before it. It says the Board relied on statistics proposed by the Association that 73% of all firefighters in Ontario and 70% of firefighters in the United States are working on some form of a 24-hour shift. The Town suggests that the proper comparator is the absence of a 24-hour shift schedule in the other municipalities comprising the Regional Municipality of Durham.

[34] We do not agree. Based on the evidence before it, the Board could reasonably conclude that the principle of comparability supported the Association's proposal for the following reasons, among others.

[35] First, some form of a 24-hour shift schedule is currently being worked by firefighters in Toronto, Mississauga, Kingston, Richmond Hill, Oakville, Ottawa, Peterborough, Hamilton, Ottawa Airport, Barrie and Guelph. While the Town argues that the relevant comparator data should be limited to the other communities comprising the Regional Municipality of Durham, it failed to offer any compelling reason why the health and safety experience, and the operational

aspects, of a 24-hour shift in these other communities should be disregarded, apart from the operational experience of Toronto and possibly Mississauga which have substantially larger fire departments.

[36] Second, while we accept that the experience of Toronto firefighters may not be comparable in terms of wage settlements, there is no necessary reason why comparability should be limited to the other communities comprising the Regional Municipality of Durham when the issue is the 24-hour shift schedule. The Town failed to provide an adequate reason for excluding the experience of the firefighters of Toronto, Mississauga and Hamilton in respect of health and safety concerns. While the Town suggested that operational issues rendered its experience qualitatively different from these other municipalities, it was also unable to offer any concrete example, apart from a general reference to scheduling difficulties.

[37] Third, whether or not the existence of a 24-hour shift in the United States results from different historical and cultural factors, that experience is also relevant in the context of assessing safety concerns.

[38] Lastly, the interest arbitrations in respect of Hamilton, Cambridge and Kingston cannot be discounted solely on the basis of the identity of the arbitrator. Each of these arbitrations found in favour of some form of a 24-hour shift schedule.

The Onus of Proof

[39] The Town submits that the Board improperly reversed the onus of proof in this case. It says that instead of requiring the Association to prove a demonstrated need on the basis of health and safety concerns, the Board required the Town to demonstrate that a 24-hour shift was more hazardous than a 10/14-hour shift.

[40] In making this argument, the Town appears to be conflating two separate issues: (1) the requirement that the Town establish, on a balance of probabilities, that a 24-hour shift is more hazardous than a 10/14-hour shift for purposes of its own argument; and (2) the onus of establishing a demonstrated need in respect of a proposal to change the *status quo* under a collective agreement. We will address each issue in turn.

The Standard of Proof

[41] First, in finding that the Town had failed to establish that a 24-hour shift schedule was not more hazardous than a 10/14-hour shift schedule, the Board did no more than make a determination regarding the evidence before it.

[42] The Board assessed the evidence presented to it against the standard of whether or not the evidence supported the Town's assertion that a 24-hour shift would present greater health and safety risks to firefighters and the public than a 10/14-hour shift. It concluded it did not. In reaching this determination, the Board did not address, implicitly or otherwise, the issue of whether the Association was required to prove a demonstrated need in order to succeed on the

arbitration. That is an entirely separate issue which is addressed below. It was the Town, not the Association, that sought to establish health and safety concerns associated with a 24-hour schedule. The Town was not obligated to adduce evidence to this effect. On the Town's argument, it did not need to adduce evidence on the health and safety issue; it would have been sufficient to establish the absence of a demonstrated need. However, it chose to adduce evidence on the risks of a 24-hour shift and to urge the Board to make a finding that a 24-hour shift schedule entailed health and safety concerns. In doing so, it had to satisfy the balance of probabilities standard, which is a standard of proof not an onus. The Board's finding was simply that the Town had failed to prove that a 24-hour schedule was more hazardous on a balance of probabilities standard.

The Onus of Proof

[43] The second issue is more complex. The Town argues that the Association had the onus of establishing a demonstrated need and that, having failed to satisfy this onus, the Board should have denied the Association's proposal. The Town grounds this onus on two separate bases which we will address in turn.

[44] First, the Town argues that its presumptive right of management to determine hours of work and shift schedules should place an onus of establishing demonstrated need on the Association.

[45] The Board rejected this argument, stating that the Town's position would undermine the role of a board of interest arbitration as a mechanism which is instituted to replace the use of economic sanctions where the parties involved in collective bargaining reach an impasse. It rejected the suggestion that an issue of hours of work is qualitatively different from issues such as compensation for purposes of the interest arbitration process and the criteria used to assess and decide upon the proposals of the parties on such issues. In support of this conclusion, the Board referred to provisions in the current collective agreement dealing with hours and shift schedules, as well as other recent interest arbitration awards in Ontario and elsewhere which considered 24-hour shift schedules without reference to the alleged presumptive management right.

[46] We are satisfied that this conclusion is reasonable in the present circumstances.

[47] Second, the Town argues that demonstrated need is a requirement in respect of any "breakthrough" issue as between the parties. The Town submits that a 24-hour shift would be a "breakthrough" issue as between the Town and the Association, even if it is widely established elsewhere. It says the Board erred in reaching its Award in the absence of compelling reasons establishing a demonstrated need.

[48] The Town's position assumes that: (1) the Association's proposal raised a "breakthrough" issue; (2) establishment of demonstrated need is a requirement for a "breakthrough" issue; (3) the onus of proof of the existence of a demonstrated need rests with the

party making the proposal; and (4) comparator data cannot be taken into consideration in respect of a "breakthrough" issue.

[49] The parties do not dispute the second proposition that establishment of demonstrated need is a requirement for a "breakthrough" issue. Issues (3) and (4) raise the question of the proper approach to be followed by a board of interest arbitration in taking into consideration the factors of demonstrated need and comparability. As this is the more fundamental issue, we will address this question before considering the remaining question of whether the association's proposal constitutes a "breakthrough" issue.

The Approach to Consideration of Demonstrated Need and Comparability

[50] The parties agree that the starting point in any interest arbitration is the replication principle – the interest arbitration board must attempt to discern what the parties to the collective agreement would likely have achieved in a free strike/lockout bargaining environment given all of the prevailing circumstances. In this exercise, an interest arbitration board can have regard to a number of factors including demonstrated need and comparability.

[51] In respect of demonstrated need, the Town relies on the following observations in *Brant Centre Long-Term Care Residence* v. *Ontario Federation of Health Care Workers*, L.I.U.N.A., *Local 110*, 2011 CanLII 81923 (ON LA) at para. 9:

> [I]t is generally accepted in interest arbitration that a party seeking to change provisions of a collective agreement should come forward to demonstrate a need for the change, as there is a presumption that such need will be a significant force in driving the bargaining agenda where the strike/lockout weapon is otherwise available. Without such "demonstrated need", however, there is little urgency moving the parties to maintain a position leading to or continuing a strike/lockout situation.

[52] We note, however, that in that decision, the arbitration board relied on demonstrated need to determine only one of the issues before it and it did so in the absence of any comparator data.

[53] The Town also relies on the decision in *Durham Regional Police Association* v. *Durham Regional Police Services Board*, 2007 CanLII 45400 (ON LA), in which the arbitrator denied the police services board's proposal to remove the minimum staffing and two-officer unit requirements in a current collective agreement on the basis of a failure to establish a demonstrated need. In this case, however, there was also no comparator data.

[54] Third, the Town referred to a statement in *Richmond (City)* v. *Richmond Fire Fighters Assn., International Assn. of Fire Fighters, Local 1286 (Wages Grievance)*, [2009] B.C.C.A.A.A. No. 106, at para. 7, in which the arbitrator quoted with approval a passage in another decision to the effect that "arbitrators are loathe to make fundamental changes to the parties' collective bargaining relationship by way of their awards" and at para. 6 stated that "interest arbitration is essentially a "conservative" exercise". In para. 8, the arbitrator went on to

state that "innovative steps" require "significant and compelling reasons for doing so". In the same decision cited with approval at para. 7, however, the arbitrator also commented that "two over-arching principles [are] applicable to interest arbitration – the replication principle and ensuring awards are fair and reasonable".

[55] Lastly, the Town relied on the following statement in *Independent Electricity System Operator* v. *Society of Energy Professionals,* 2013 CanLII 3773 (ON LA), at para. 25:

> I also note that generally interest arbitration is a conservative exercise whereby arbitrators are reluctant to award "breakthrough" measures or provisions unless a demonstrated need has been shown. As indicated by Arbitrator Michel Picher in the last award between these two parties: "It is considered that such measures, if they are to be achieved, are best achieved through the give and take of bargaining between the parties rather than through the order of a third party".

[56] Having regard to this jurisprudence, we conclude that the proper approach in interest arbitration requires that the two factors of demonstrated need and comparability be addressed concurrently by the arbitrator and weighted according to the force of the evidence before the arbitrator. In this regard, the observation of the arbitrator in *Strathroy Middlesex General Hospital v. Ontario Nurses Association (Collective Agreement Grievance),* [2012] O.L.A.A. No. 47 (Goodfellow), at para. 17, is relevant. The arbitrator observed that the influence of demonstrated need as a factor is to be regarded as "inversely proportionate to the strength of the norm". That is, the easier it is to characterize a situation as the norm, the more comparability takes on greater significance as a guide to replication and the less demonstrated need, while not moot or irrelevant, is of significance.

[57] We also note that section 50.5(2) of the Act provides that, in making its decision under section 50.5(1), a board of arbitration shall "take into consideration all factors the board considers relevant ...". There is no basis in the language of this provision for a limited focus on demonstrated need in respect of "breakthrough" or other issues to the exclusion of other factors including comparability.

[58] We also observe that, as evidenced by the *Richmond* and *IESO* decisions, the principle of demonstrated need is more forcefully applied in cases of compensation or other monetary issues. Where a proposal does not entail monetary consequences to an employer and the employer has not demonstrated other operational concerns, the absence of evidence supporting a demonstrated need is not determinative even if an issue is characterized as a "breakthrough" issue.

[59] Returning then to the Award, it is not suggested that the Association has established a demonstrated need to adopt a 24-hour shift schedule. The Town's position is that, in these circumstances, the Board ought to have placed an onus on the Association to establish a demonstrated need in terms of health and safety concerns. Given that the Association had failed to establish a demonstrated need on this basis, the Town says that it was unreasonable for the Board to allow the proposal. The Board rejected the Town's position that the Association bore

the onus of establishing a demonstrated need. Instead, the Board based its decision on the principles of comparability and replication, given the existence of norms and the comparator data, as set out below.

[60] Based on the foregoing review of the jurisprudence, however, we are satisfied that the Board could reasonably have regard to comparator data, provided such data exists, to support the Association's proposal in the absence of evidence that establishes a demonstrated need. The issue therefore becomes the weight to be accorded the comparator data in evidence before the Board. On the basis of the approach in *Strathroy Middlesex General Hospital*, the easier it is to characterize a 24-hour shift schedule as the norm, the more comparability ought to take on greater significance in the consideration of the proposal, given the overriding principle of replication. Conversely, the harder it is to characterize a 24-hour shift schedule as the norm, the more demonstrated need ought to take on a greater significance.

[61] Given the evidence before the Board regarding the extent of implementation of a 24-hour shift in municipalities in Ontario, and elsewhere, especially in municipalities comparable in size to the Town, we are satisfied that the Board could reasonably decide the arbitration by applying comparability as the best guide to implementation of the replication principle.

Is This a "Breakthrough" Issue?

[62] As mentioned, the Town argues that the Association's proposal constitutes a "breakthrough" issue as between the parties and, as such, should only be awarded if the Association establishes a genuine need. It says that comparator data cannot be considered in the determination of whether an issue is a "breakthrough" issue. It argues that taking comparator data into consideration in determining whether an issue is a "breakthrough" issue and in considering the application of the comparability principle entails an improper "double counting" of comparator data.

[63] The Association argues that a "breakthrough" issue is one which establishes a new norm in a particular industry, rather than as between the parties themselves. It says that the Town's argument that a party to a collective agreement must establish a demonstrated need in order to change the *status quo* cannot be correct. Such an approach, it says, would negate the operation of the comparability principle, which is the best guide to implementing the objective of replication.

[64] We note that the Board did not address whether or not the Association's proposal constituted a "breakthrough" issue. It is also unnecessary for this Court to resolve the issue between the parties regarding the definition of a "breakthrough" issue. However, a necessary corollary of the analysis of the proper approach to consideration of the factors of demonstrated need and comparability is that we do not agree that comparator data is "double counted" under that approach. To repeat, the weaker the comparator data, the more demonstrated need should be recognized as a significant factor in any arbitration award, given the objective of replication;

conversely, the stronger the comparator data, the more comparability should be accorded weight in the decision-making process, again given the objective of replication.

The Factor of Employee Preference

[65] In its factum, the Town submits that the Board unreasonably relied on a principle of "employee preference" which it says is not a recognized principle of interest arbitration. It did not, however, pursue this argument at the hearing.

[66] In any event, in our view, this is not an accurate characterization of the Board's decision-making process, notwithstanding its reference to employee preference as a factor that was argued before it. The Board's conclusion at page 40 of the Award has been set out above. While the Board refers to the fact that the parties adduced evidence, and made arguments regarding a number of factors including demonstrated need, comparability and replication and employee preference, the Board based the Award on the principal factors of comparability and replication.

Conclusion

[67] Based on the foregoing, we conclude that the Award falls within a range of possible, acceptable outcomes which are defensible in respect of the facts of this arbitration and the law pertaining to interest arbitrations. Accordingly, we find the Award to be reasonable. The application is therefore denied. Costs in the amount of $3,750 are awarded in favour of the Association in accordance with the agreement between the parties.

A.C.J.S.C. Marrocco

Wilton-Siegel J.

Gordon J.

Released: December 20, 2013

CITATION: Ajax Professional Fire Fighters Association v. Ajax (Town of), 2013 ONSC 7361
DIVISIONAL COURT FILE NO.: 246/13

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

A.C.J.S.C. MARROCCO, WILTON-SIEGEL, GORDON JJ.

BETWEEN:

AJAX PROFESSIONAL FIREFIGHTERS ASSOCIATION (Local 1092, International Association of Fire Fighters)

Applicant

– and –

CORPORATION OF THE TOWN OF AJAX

Respondent

REASONS FOR JUDGMENT

The Court

Released: December 20, 2013

TAB 5

IN THE MATTER OF AN INTEREST ARBITRATION

BETWEEN

INDEPENDENT ELECTRICITY SYSTEM OPERATOR

(the "IESO")

and

THE SOCIETY OF UNITED PROFESSIONALS

(the "Society")

SOLE MEDIATOR/ARBITRATOR: John Stout

APPEARANCES:

For the IESO:
Richard J. Charney, Norton Rose Fulbright Canada LLP
Josh Hoffman, Norton Rose Fulbright Canada LLP
John Hodgkinson - Sr. Manager, Human Resources Employee and Labour Relations

For the Society:
Michael D. Wright, Wright Henry LLP
Nora Parker, Wright Henry LLP
Martin Hastings, Local Vice President

MEDIATION-ARBITRATION HEARINGS HELD BY VIDEOCONFERENCE ON NOVEMBER 16 AND DECEMBER 15, 2022.

Introduction

[1] I was appointed by the parties as mediator-arbitrator to resolve the issues remaining in dispute between them with respect to a renewal collective agreement.

[2] The parties have freely agreed to forego their right to strike and lockout by agreeing to an interest arbitration process to resolve their differences and effect a renewal collective agreement.

[3] The parties filed extensive and well organized briefs presenting their positions on the issues remaining in dispute. Mediation took place on November 16, 2022. Unfortunately, the parties were unable to resolve all their differences during mediation. The arbitration hearing was held on December 15, 2022, at which time counsel made oral submissions to supplement their written material.

Background

[4] The IESO is a non-profit Ontario Hydro legacy entity responsible for controlling Ontario's bulk electricity system and operating the competitive wholesale market. The IESO operates the Ontario power grid and is also responsible for electricity policy and innovation, planning, monitoring, and forecasting, market assessment and compliance, and conservation.

[5] The revenues of the IESO are primarily from usage fees charged on each megawatt of energy transacted in the Ontario electricity system. The usage fees are established by the Ontario Energy Board (OEB) and the IESO does not receive funding from the public purse.

[6] The Society represents approximately 8,700 employees. Most of the Society's members are employed by successor companies of the former Ontario Hydro, which was restructured in 1999 pursuant to the *Energy Competition Act*. The Society represents professional employees in both public and private electrical energy sector employers, including Ontario Power Generation (OPG), Bruce Power, Hydro One, the

Electrical Safety Authority (ESA), New Horizons System Solutions, Nuclear Safety Solutions, Nuclear Waste Management Organization, Inergi, Kinectrics, Toronto Hydro, Brookfield Power, the OEB, Legal Aid Ontario, Community Legal Clinics, and the National Judicial Institute.

[7] The IESO employs approximately 900 employees at three locations within the Greater Toronto Area. The Society represents approximately 700 of the IESO's employees. The remaining employees are either represented by another trade union, the Power Workers Union (PWU), or management employees excluded from collective bargaining.

[8] The Society represented employees who work for the IESO are professional and highly skilled knowledge workers responsible for overseeing the Ontario power grid and the electricity wholesale market. The Society represented employees are system engineers, IT professionals, economists, customer relations specialists, administrative coordinators, financial analysts, training instructors and market development advertisers. Many Society represented employees also work in the control room at the IESO, which operates 24 hours per day, 7 days per week. A majority of Society members have an engineering background and many combine engineering and IT expertise. While not required, a significant number of Society members have post graduate degrees.

[9] There is no dispute that the IESO relies on the highly qualified members of the Society and has historically been successful in attracting and retaining the best candidates with the required skills.

[10] The parties have a mature collective bargaining relationship. The current collective agreement between the parties was awarded by interest arbitration and is for a one year period expiring on December 31, 2022. The terms of the current collective agreement are found in the prior collective agreement expiring December 31, 2021 as amended by three interest arbitration awards dated December 31, 2021, January 23, 2022 and February 10, 2022.

[11] Bargaining for a renewal collective agreement began in early November 2022. The parties were able to reach an agreement on a number of proposals during collective bargaining and mediation, including agreeing to a settlement regarding the use of temporary employees. The terms of the parties' settlement will be incorporated into the renewal collective agreement, along with all other agreed upon items.

[12] The IESO is subject to the wage and compensation restrictions found in the *Protecting a Sustainable Public Sector for Generations Act, 2019* (*Bill 124*). *Bill 124* imposes a "moderation period" of three years. During the moderation period, 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 each year.

[13] The first year of the three year moderation period has already occurred under the term of the current collective agreement. The second and third years of the moderation period shall run from January 1, 2023 until December 31, 2024.

[14] The Society, along with other trade unions challenged the constitutionality of *Bill 124* before the Courts. *Bill 124* prohibits me from making any inquiry as to the validity of the legislation. However, it is now widely accepted that an interest arbitration board or arbitrator will remain seized to reopen compensation issues should the constitutional challenges prove successful or should *Bill 124* be otherwise modified, repealed or no longer be legally relevant.

[15] 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*, including the Society's application. Justice Koehnen addressed the application of *Bill 124* to the

IESO at paragraphs 307-312 of his decision. In a well-reasoned decision, Justice Koehnen found that *Bill 124* infringes upon the applicants (including the Society's) right to freedom of association under 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.

[16] On December 29, 2022, the Attorney General of Ontario served a notice of appeal with respect to Justice Koehnen's decision. At this point in time no motion has been brought seeking a stay of the Koehnen decision.

[17] The parties agreed to proceed with this arbitration on the basis as if *Bill 124* was still in effect. The agreement to proceed in this manner was made without prejudice to either party's ability to seek to return to me at any time after December 15, 2022, if *Bill 124* is of no force and effect and to seek further items based on a "reopener" provision in my December 31, 2021 award and any similar provision in this award.

[18] Subsequent to the November 16, 2022 mediation, I issued an interim award, dated November 29, 2022, wherein I ordered the IESO to implement a 1% general wage increase effective January 1, 2023. I accepted the costing of a number of the Society's benefit proposals, but I did not make any decision with respect to the acceptance of any of the proposals. I directed the parties to provide me with additional submissions on the costing of the remaining outstanding benefit proposals.

[19] On December 2, 2023, I issued a second interim award determining the costing of the outstanding Society benefit proposals. I accepted some of the Society's costing but denied others. I accepted the IESO's position with respect to the costing of the Society's proposals for coverage for reasonable and customary at 150% and dental codes. My reasons were brief, and I indicted that I would provide more fulsome reasons if requested by either party. The Society has requested more fulsome reasons and those shall be provided in the analysis section of this award.

Analysis

[20] As indicated at the outset, my appointment is pursuant to the parties' agreement and not under any statutory mandate. As I have noted in my earlier awards between these parties, it is important to remember that they have freely agreed to forego their right to engage in a strike or lock-out and voluntarily agreed to have a collective agreement imposed upon them according to specific criteria applied by a mediator-arbitrator.

[21] It is well accepted that a distinction must be drawn between the interest arbitration process, which settles the terms of a collective agreement and a grievance or rights arbitration, which involves the interpretation of rights and obligations under a collective agreement, see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539. The interest arbitration process is not an adjudicative fact-finding process.

[22] While there is an adjudicative component to interest arbitration, it is not a judicial decision with a process guided by one's personal sense of fairness or social justice. The decision making process in interest arbitration is exercised in the context of collective bargaining, utilizing objective evidence and applying arbitral principles.

[23] As stated by Arbitrator Martin 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."

[24] In this matter, the interest arbitration process and my jurisdiction is found in Addendum 4, attached to the current collective agreement, which provides as follows:

> Future contract negotiations disputes shall be resolved by binding arbitration.
>
> The dispute resolution process shall be mediation-arbitration using the same individual as both mediator and arbitrator.

> 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) The IESO need to retain, motivate and recruit qualified staff;
> c) The cost of changes and their impact on total compensation;
> d) The financial soundness of the IESO and its ability to pay.
>
> A mediator-arbitrator shall have the power to settle or decide such matters as are referred to mediation-arbitration in any way he/she deems fair and reasonable based on the evidence presented by representatives of the IESO or The Society in light of the criteria and items (a) to (d) and his/her decision shall be final and binding.

[25] The criteria found in Addendum 4 provides general guidance, including considerations that reflect the market forces and realities of the collective bargaining landscape. These considerations provide context for free collective bargaining and the application of replication in its absence. In other words, parties who freely bargain or interest arbitrators applying replication consider internal and external relativities (comparators) and economic conditions. They also consider an organization's need to retain, motivate and recruit qualified staff, as well as the cost and financial soundness of an organization.

[26] However, the Addendum 4 criteria are neither exhaustive nor limiting to the mediator-arbitrator's wide discretion to consider all other relevant factors to resolve the issues in dispute in a fair and reasonable manner, see *OPG and Society of United Professionals*, 2018 CanLII 129030 (ON LA).

[27] In addition to the criteria provided in Addendum 4, there are general arbitral principles, which govern any interest arbitration. One of the most important guiding principles found in the arbitral jurisprudence is replication. The replication principle requires an interest arbitrator to replicate, to the extent possible, the bargain that the parties would have reached had they been left to freely negotiate a collective agreement.

[28] Arbitrator Burkett addresses the importance of replication, while considering language similar to the language before me, in his decision *Bruce Power LP and Society of Energy Professionals* (2004), 126 L.A.C. (4th) 144 at paragraph 19 where he stated:

> "One of the guiding principles of interest arbitration, whether public or private sector, is replication. It is accepted that an interest arbitrator ought to attempt to replicate the result that would most likely flow from free collective bargaining. It follows from all of the foregoing that when the subject matter of an interest arbitration is a private sector dispute, as here, the financial wellbeing and economic viability of the employer are relevant considerations. This is not to say that normative increases are to be ignored. Rather, normative increases form a base line from which deliberations commence. The decision as to whether or not to adopt or to deviate from the baseline is thus made, in part, on the basis of the economic viability of the enterprise, both real and projected."

[29] The application of the replication principle is an objective exercise involving the analysis of objective evidence found in relevant comparators, either freely negotiated or imposed by interest arbitration. 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."

[30] In this case, the Addendum 4 criteria requires consideration of relevant comparators, both internal and external. The internal comparators include the IESO's collective agreement with the PWU and the compensation provided to non-unionized employees. The external comparators include legacy Ontario Hydro companies and other electrical sector collective bargaining regimes such as OPG, Hydro One and Bruce Power, see *Independent Electricity System Operator and the Society of United Professionals* 2019 CanLII 41256 (ON LA).

[31] These comparators need to be carefully considered in context and no one comparator is determinative. The weight given to any comparator may vary based on the surrounding circumstances, such as the state of the economy. Interest arbitration is not an exact science, the goal is to arrive at an award that falls within the range of

fair and reasonable outcomes that reflects what the parties would have likely agreed upon if left to their own devices.

[32] Another general principle applicable to interest arbitration is the acceptance that interest arbitration is a somewhat conservative exercise whereby arbitrators are reluctant to be creative by awarding “radical changes” or “breakthrough” measures or provisions. Arbitrators, quite rightly, are generally of the view that creativity and breakthrough measures are best left to the parties to craft through the give and take of collective bargaining, *see Independent Electricity System Operator and The Society of Energy Professionals*, unreported award of M. Picher dated December 17, 2019.

[33] The conservative approach to interest arbitration does not mean that arbitrators will not make any changes to the *status quo*. Rather, a party seeking change must show a “demonstrated need” based on objective evidence, as opposed to their subjective wants and desires. Demonstrated need is examined in the context of replication and comparability. In this respect, the easier it is to characterize a proposal as the norm, then the more relevant comparability becomes and the less a party will be required to establish a demonstrated need. However, deviation from the norm makes establishing a demonstrated need that much more relevant and necessary for the party seeking such change, see *Ajax Professional Firefighters Association and Ajax (Town of)*, 2013 ONSC 7361.

[34] As stated earlier, the parties have agreed to proceed on the basis that the wage and compensation restraints found in *Bill 124* apply and are binding. I have set out the *Bill 124* restraints, for reference, below:

> **Maximum increases in salary rates**
> **10** (1) No collective agreement or arbitration award may provide for an increase in a salary rate applicable to a position or class of positions during the applicable moderation period that is greater than one per cent for each 12-month period of the moderation period, but they may provide for increases that are lower.
>
> **Exception, certain increases**

2) Subsection (1) does not prohibit an employee's salary rate from increasing in recognition of the following matters, if the increase is authorized under a collective agreement:

1. The employee's length of time in employment.
2. An assessment of performance.
3. The employee's successful completion of a program or course of professional or technical education.

Maximum increases in compensation

11 (1) 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.

Same

(2) For greater certainty, an increase in a salary rate under subsection 10 (1) is an increase to compensation entitlements for the purposes of subsection (1).

Effect of cost increases

(3) If the employer's cost of providing a benefit as it existed on the day before the beginning of the moderation period increases during the moderation period, the increase in the employer's cost does not constitute an increase in compensation entitlements for the purposes of subsection (1).

[35] The wage and compensation constraints found in *Bill 124* directly conflict with the parties' agreed upon monetary criteria found in Addendum 4. Any renewal collective agreement in this matter will include at least one and perhaps two years of moderation imposed by *Bill 124*. Therefore, while I must consider the enumerated criteria in Addendum 4 and try to apply the normative principles, including replication, my hands are essential tied by *Bill 124*.

[36] The Society submits that *Bill 124* provides employers with a "guaranteed win" in that it artificially suppresses salary and compensation increases well below what would be negotiated in a free collective bargaining. I disagree with this submission. While it is true that *Bill 124* provides employers, such as the IESO, with significant

savings, it comes at the cost of undermining the ability to negotiate other changes to collective agreements that may provide employer's with greater operational flexibility. Prior to the advent of *Bill 124*, these parties engaged in meaningful collective bargaining. Certainly most rounds of collective bargaining ended with an interest arbitration, but many issues were either resolved in bargaining or at mediation. Significantly, the parties were able to freely negotiate meaningful changes in 2016. The past two rounds in contrast have been mired in debate over costing and the application of *Bill 124*. In my respectful view, neither party can claim a victory.

[37] Turning to the issues before me, the Society seeks a two year term. The IESO seeks a one year term, which would ensure that the Article 22 "escalator clause" would not be triggered under the existing language found in the collective agreement. In the alternative, the IESO seeks to have me either remove or suspend the escalator clause because it would run afoul of the compensation restrictions found in *Bill 124*.

[38] Article 22 contains the escalator clause, which provides for a cost of living allowance (COLA) pursuant to a prescribed formula that is triggered when there is a 3% increase in the Consumer Price Index (CPI) for Ontario. Article 22.1 indicates that the COLA escalator clause only becomes part of a collective agreement if it is negotiated for a term of more than one year. Therefore, the escalator clause was not applicable to the current collective agreement. Previously (since at least 2007), Article 22 was suspended, although that was during a time of low inflation near the Bank of Canada's goal of 2%.

[39] I am awarding a two year collective agreement because a two year term appears to be the normative term in the current collective bargaining environment. Arbitrator Kaplan recently awarded a two year collective agreement between the Society and OPG, see 2021 CanLII 124010 (ON LA). The Society also negotiated a two year collective agreement with Hydro One in 2021. More recently, the PWU freely negotiated a settlement with Bruce Power for a two year collective agreement. In my view, despite the IESO's submissions otherwise, a two year term would have been agreed upon in free collective bargaining.

[40] In addition, a two year term takes into account the last two years of *Bill 124*, which will mean only two awards will be affected if the Koehnen decision is not quashed on appeal. In this regard, it will be easier to address the issue of additional compensation if the Koehnen decision is upheld on appeal and the parties bring the issue of compensation back before me.

[41] In the current economic environment it is my view that no union would agree to a term that would exclude the application of a COLA clause or agree to suspend or remove an escalator clause. In the past decade inflation has remained relatively constant hovering at 1-3% and generally below the Bank of Canada target of 2%. Even if Article 22 was not previously suspended, it would not have been triggered in the past decade. Currently, inflation is at a level that has not been seen since the 1980s. Inflation has now become persistent and entrenched in the economy. CPI has increased from 3-4% in the summer of 2021 to between 6-8%. Inflation has not only adversely affected Canada, but it has also taken hold across the globe much like COVID-19. Wage increases have risen along with inflation. Most telling is that a memorandum of agreement between Bruce Power and the PWU was twice rejected and only ratified with modification to the COLA clause to provide COLA increases in both years.

[42] The IESO submits that the 2021 OPG and Society award of Arbitrator Kaplan, is the most relevant comparator. I disagree as the context for that award was prior to inflation becoming persistent and includes non-particularized additional agreements “Shaping the Future” and “Agreed to List of Global Proposal items.” In my view, the more recent freely negotiated Bruce Power and PWU agreement is more relevant and provides the best objective evidence of free collective bargaining in the electrical sector during the current economy.

[43] The parties disagree about whether a collective agreement containing Article 22 would violate *Bill 124*. Therefore, it is necessary for me to consider the provisions of *Bill 124* and determine whether I ought to suspend the applicability of Article 22. In considering the provisions of *Bill 124*, I am mindful of the guidance provided by the

Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd*. [1998] 1 S.C.R. 27 where they endorsed the modern principle of statutory interpretation, which is as follows:

> Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[44] *Bill 124* defines compensation very broadly and limits increases to "salary rates" to no more than one percent for each 12-month period of the moderation period. Section 10 of *Bill 124* addresses the maximum increases in salary rates permitted under the legislation. Subsection 10(1) of *Bill 124* clearly prohibits a "collective agreement or arbitration award" from providing salary rate increases greater than one percent. Section 10(2) provides the only exceptions for certain increases in an employee's salary rate. Article 22 does not fall into any of these specified exceptions, which preserve the right to move along existing salary grids or obtain an increase based on existing performance standards, see *Participating Hospitals (OHA) and ONA*, 2020 CanLII 38651 (ON LA). Article 22, if not suspended would be triggered in the current economic environment and provide for upward adjustment of salary rates above the 1% limitation.

[45] The Society argues that Article 22 represents an "existing benefit" and therefore is an exception provided for in ss. 11(3). I disagree with this submission.

[46] Section 11 of Bill 124 addresses the maximum increases to compensation permitted under the legislation. The limitation to all compensation is limited to one percent for each moderation year. Subsection 11(2) makes it clear that an increase in salary rate under 10(1) is an increase in compensation for the purposes of subsection 11(1). In other words any increase in salary needs to be taken into account for the purposes calculating the 1% limitation in compensation. The exception in ss. 11(3) does not apply to salary rates, which is what the escalator clause addresses. Article 11(3) provides an exception for increases in "benefits" as they existed on the day

before the beginning of the moderation period. Any increase in the "cost" to providing the existing benefit does not constitute an increase in compensation.

[47] The exception in ss. 11(3) only applies to benefits, and it does not apply to salary rates, which are specifically addressed in s. 10 of *Bill 124*. While the term "benefits" is not defined in *Bill 124*, they are commonly understood to be compensation offered to employees on top of their salary or wages. I find that the intention was to provide an exception for increased costs associated with providing benefits, other than salary increases that are addressed in s. 10.

[48] Arbitrator Kaplan addressed the interpretation of ss. 11(3) in *Hospital for Sick Children v. CUPE, Local 2816.01*, 2020 CanLII 77150 (ON LA) where he indicated that the intention of s. 11(3) was to exclude cost increases to pre-existing benefits that are "out of the control of the parties." Arbitrator Kaplan then references the "obvious example" of increased insurance premiums for pre-existing benefits. I agree with Arbitrator Kaplan and note that the inclusion of the escalator clause in this case is not out of the parties' control.

[49] In addition, it is my view that the specific provision addressing salary rates in s. 10 takes precedence over the general provision addressing compensation in s. 11. Therefore, the escalator clause, which when triggered increases salary rates, would violate s. 10(1) of *Bill 124*.

[50] Even if Article 22 could somehow be classified as a "benefit" under *Bill 124*, it is not an existing benefit, and the increased cost is clearly within the control of the parties or an arbitrator. Article 22 is a provision that is only included in a renewal collective agreement by negotiation or awarded by an arbitrator. Article 22, was suspended until December 31, 2021, see Article 22.3. While the language in the article currently exists in the collective agreement, it does not apply since the current collective agreement is only for one year. The inclusion of Article 22 in any renewal collective agreement is in the hands of the parties, or in this case an arbitrator. The article does not exist in a vacuum, and it must be examined in the context of collective bargaining.

While the escalator clause language certainly exists, it is not an existing benefit provided to employees under the current collective agreement.

[51] I agree with the IESO that including the escalator clause in the renewal collective agreement would contravene *Bill 124*, unless it was suspended or removed. There is no justification for removing the language. However, since the parties have asked me to decide this issue assuming that *Bill 124* applies, I am suspending Article 22 for the period of time when *Bill 124* is of legal force and binding. In other words, if a stay of the Koehnen decision is not granted, then the escalator clause will not be suspended.

[52] I now turn to the Society's proposals for benefit enhancements.

[53] I addressed the costing of the Society's benefit proposals in my two previous awards. The Society has requested more fulsome reasons with respect to my second interim award, which I take as a request for additional reasons for rejecting some of their costing submissions.

[54] Before providing my additional reasons, I wish to make note that the majority of interest arbitrators provide very brief reasons. This is particularly true when the interest arbitrator is applying replication and following established patterns or comparators. In the case of peripheral issues between the parties, an interest arbitrator may not provide any reasons at all, see *St. Gabriel's Villa of Sudbury v. Ontario Nurses' Association,* 2015 ONSC 3459 (Div. Crt.) In most cases, where reasons are provided, the only explanation the parties might need is for an interest arbitrator to indicate that the objective comparative evidence did not support the proposal or there is no evidence of demonstrated need. Providing a more fulsome explanation may only cause greater unrest or additional unnecessary disputes in future collective bargaining. In most cases it is best to say little or nothing and allow the parties to keep their powder dry for the next round of bargaining. Therefore, unless requested, providing more fulsome reasons should generally be avoided.

[55] There are very good policy reasons for providing brief reasons. First of all, the nature of interest arbitration is an expedited resolution of collective bargaining disputes, applying legislative or agreed upon criteria and the principle of replication. The parties do not provide reasons when they freely bargain. The results of free collective bargaining generally speak for themselves. In addition, collective bargaining is a fluid exercise and part of an ongoing relationship. An interest award settles only one collective agreement at one point in time. Collective agreements are constantly being renegotiated and circumstances are always evolving. The context is different each time the parties bargain.

[56] An interest arbitration award does not create a precedent that somehow can prevent a party from raising an issue in subsequent rounds of bargaining. An interest award may be used as a comparator when applying replication and other arbitral principles, see *Participating Nursing Homes and SEIU Local 1 Canada,* 2022, CanLII 63787 (ON LA). However, all proposals are dismissed without prejudice to future bargaining, and it is not an abuse of process to raise such proposals in future bargaining. At best, an interest arbitration award reflects what the arbitrator has determined to be the agreement the parties would have made at any given point in time having regard to the objective evidence submitted.

[57] In this case, I am providing additional reasons because they have been requested by one of the parties. Therefore, I now turn to the requested additional reasons.

[58] I accepted the Society's costing for Continuous Glucose Monitors (CGMs) based on their extensive evidence and the available government funding, the Assisted Devices Program (ADP). I rejected the Society costing as it pertained to a what I viewed as the Society's proposal to cover "all diabetic supplies". The Society's proposal was to alter well established limits and provide *carte blanche* coverage for all diabetic supplies, which would include Flash Glucose Monitors (FGM) and any other new devices or supplies. I was not satisfied that no cost would attach to such an unusual proposal, which had no reasonable comparator. There were just too many unknowns.

I also note that the only evidence of demonstrated need was with respect to the CGM use, which is now subsidized under the Ontario ADP.

[59] My reasons for rejecting the Society's occupational therapist (OT) costing was fully explained in my view. The Society's costing was based on flawed reasoning that OTs provided a "comparable service" to Physiotherapists (PT). That is simply not the case. While there is some overlap in education, PTs and OT provide services for different purposes. Providing coverage for an OT is a different and new benefit. I cannot accept that no cost would attach to providing such a different and new benefit, that was not previously provided to employees. I also do not accept that an employee may go to an OT as a replacement for a PT. There is simply no evidence to support such a hypothesis or claim.

[60] I rejected the Society's proposal for costing reasonable and customary at 150%. I accept the IESO's explanation that Canada Life refused to provide them with costing for this extremely unusual proposal, which has no comparator either inside or outside of the electrical sector. I also accept the IESO explanation with respect to the administrative costs and difficulties that would be associated with implementing such a unique proposal if it was awarded. I accept the IESO's submissions with respect to the potential for abuse and fraud, which is not unusual in the area of benefits. There have been numerous cases of benefits fraud involving orthotics, eyeglasses and other benefits, see for example *Toronto Transit Commission and ATU, 113 (Smith)* 2020 CanLII 71739. I accept the IESO's submissions with respect to the unprecedented nature of the Society's proposal. The Society has provided no evidence of any comparators. I also do not accept the Society's evidence of Mr. Hasting's experience (paying $2.83 out-of-pocket for a massage) as creating a demonstrated need to reimburse employees at a rate that 150% of the insurer's reasonable and customary rates for all services and supplies. Most benefit plans contain limits, including "reasonable and customary" for reimbursement of benefit costs. As stated by the Divisional Court in *Ajax Professional Firefighters Association and Ajax (Town of),* supra*,* where a proposal is not normative, then the evidence demonstrated need must

be more substantial. The Society's proposal is an unprecedented proposal without any comparators and without any evidence of demonstrated need. The Society's proposal does not have any rational justification and the costing is extremely speculative and at best a guess.

[61] The Society's dental code/services costing was rejected mainly on the basis that the collective agreement provided a process that had not been utilized since 2009. Generally, a party should not come to interest arbitration seeking change to existing language, in this case existing for over a decade, without evidence of a demonstrated need for the change or evidence of relevant normative comparators.

[62] I agree with the IESO that the Society's request to cost these approximately 200 additional dental codes and services is unreasonable, involving a significant amount of time and effort for a proposal that really has no reasonable basis. The Society provided no evidence as to why the collective agreement process was not followed for over a decade and why it should now be removed and replaced by a blanket coverage of all dental codes. Based on the lack of evidence of any reasonable claims being denied or coverage not being provided for a suitable alternative, I see no reason to put the IESO to the time and effort required to cost this proposal. I note that the Society has conceded that most uncovered codes have a nearly identical code that is covered, it may well be that the parties did not utilize the collective agreement process because there was no need to do so. In these circumstances, where no relevant comparator has been identified and no demonstrated need has been established, I see no basis for accepting the Society's speculative costing. I also see no reason why I should require the IESO to spend resources costing such an unusual proposal that lacks merit. I also accept the IESO's submissions on the difficulty of implementing the Society's proposal and the additional administrative costs that would be associated.

[63] I now turn to the other additional benefit enhancements sought by the Society.

[64] The Society's approach to their benefit proposals is based on a viewpoint that they have an "allowance" for any change or enhancement that they may desire so long as it falls within the restrictions of *Bill 124*. The Society takes the position that "[u]nder Bill 124 it is the union, not the employer, that determines the allocation of the 1% budget." With all due respect, the Society's position is not supported by the wording of *Bill 124*.

[65] There can be no doubt that *Bill 124* has, in effect, created a "new norm" that interferes with free collective bargaining by imposing limitations on wages and total compensation. Those limitations must be respected as long as they are the law of the land. However, s. 3 of *Bill 124* provides that subject to the other provisions of *Bill 124*, the right to bargain collectively is continued. In my view, this provision permits an interest arbitrator to award normative or other proposals that are found to be 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 an interest arbitrator is constrained with respect to the three-year moderation period, they are not prohibited from awarding what would have otherwise been awarded so long as there is compliance with the one-percent total compensation limitation provided for in *Bill 124*. In this case, I am constrained by *Bill 124* (upon the agreement of the parties), but I still must do my best to apply the Addendum 4 criteria and general arbitral principles. The analysis is not based on the IESO saving money during this round so I must give the Society whatever they demand. The Society's proposals must still be justified by comparative evidence or demonstrated need and not merely subjectively desired.

[66] I acknowledge my *Participating Hospitals and ONA*, 2020 CanLII 38651 (ON LA) award, where I awarded ONA's request for a non-normative benefit increase (double time on a call-back). However, I also noted in that award that other relevant external comparators enjoyed such a benefit, and the employer had the ability to contain the costs associated with the increase sought by the union. In other words, there was a justification for granting the increase. My *Participating Hospitals and ONA*,

supra, award does not stand for the proposition that the union gets to determine the allocation of the 1% budget. Rather, in the context of *Bill 124* and the scarce amount of compensation provided, the desires of the union are certainly relevant, but not determinative. The awarding of any proposal by an interest arbitrator must still be justified applying the relevant criteria and arbitral principles.

[67] I have carefully reviewed the parties' submissions and note that there is some overlap. I am of the view that the overlap reflects what the parties would have agreed upon in free collective bargaining and provides a basis for awarding a number of increases to the benefits plan.

[68] The following increases are added for **2023**:

- Cover all psychotherapists and social workers = **$0**
- Add coverage for CGMs, subject to ADP subsidization = **$0**
- Increase Class B dental coverage from 85% to 100% = **$11,353**
- Increase chiropractic coverage by $300 = **$2,075**
- Increase vision coverage by $25 = **$2,641**
- Increase orthotics coverage by $50 = **$400**
- Increase laser eye surgery coverage $00 = **$8,861**
- Increase paramedical coverage from 50% to 65% = **$28,749**
- **Total = $54,079 (remaining $10,525)**

[69] The following increases are awarded for **2024**:

- Increase vision coverage by $50 = **$5,282**
- Increase orthotics coverage by $50 = **$400**
- Increase paramedical to 80% = **$28,749**
- Increase corrective eye surgery by $400 = **$3,940**
- Increase orthodontic coverage to 80% = **$5,000**
- Add new coverage for Occupational therapists = **$16,800**
- **Total = $60,171 (remaining amount $11,287)**

[70] The IESO strongly objected to the Society's proposal for out-of-Ontario/Country personal travel insurance. I accept the submissions of the IESO that

the Society's proposal would exceed management's plan in respect to post-retirement benefits. In addition, the Society provided no comparative evidence or established a demonstrated need for their proposal. Therefore, I am dismissing the Society's proposal.

[71] The Society proposes to increase meal allowances to conform with the National Joint Council's (NJC), July 1, 2017 Travel Directive. I acknowledge that the parties negotiated a settlement relating to meal allowances in 2017. However, in the 2017 settlement the parties did not amend the collective agreement, they only clarified the allowances and the criteria for reimbursing amounts over and above the allowance. The Society quite rightly points out that inflation has drastically increased the costs of food items. In my view, there is some evidence of a demonstrated need to adjust the meal allowance to take into consideration the recent economic environment. However, I have difficulty with the Society's proposal because it does not have any comparative evidence. I am remitting this issue back to the parties and shall remain seized.

[72] I recognize that the total compensation awarded in this award is below the one-percent amount permitted under *Bill 124*. The Society is entitled to have the entire allowance allocated to increased benefits. Therefore, I am remitting the issue of how to allocate the remaining amount back to the parties to allow them an opportunity to agree upon how to allocate this amount. In coming to an agreement, they may adjust the amounts I have awarded above, so long as the adjustments comply with *Bill 124*. If the parties cannot agree, then they may file brief written submissions and I will resolve the dispute.

[73] I now turn to the Society's other proposals and the IESO's proposals.

[74] The Society has a proposal to change the existing promotion and job re-classification language. The current language was negotiated by the parties in 2016. As indicated by the Society in their brief, the existing language was a compromise. There is a dispute with respect to what, if any, additional cost may be associated with the Society's proposal. In the context of *Bill 124*, I am not inclined to award a proposal

that may provide for additional compensation. In addition, I am not convinced that there is a demonstrated need to alter freely negotiated language and I have not been provided with any objective comparative evidence. Therefore, I am dismissing the proposal.

[75] The Society has proposed that all non-hospital drugs be automatically added to the drug formulary. There is no evidence of any employee being denied coverage for any drug or a demonstrated need to alter the current language. I have also not been provided with any objective comparative evidence. Therefore the proposal is dismissed.

[76] The Society has proposals seeking disclosure information relating to "prior authorization of drugs and annual benefits claims, employee attraction, retention, vacancies and dental codes." I have not been provided with any objective comparative evidence or evidence of a demonstrated need to alter the *status quo* with respect to disclosure of information. Therefore the proposal is dismissed.

[77] The Society seeks to remove the $50,000 cap on the Life Insurance "Living Benefit" and update the beneficiary language to reflect legislative changes. I am granting the update to the beneficiary language because I consider such an amendment to be housekeeping. I am denying the request to remove the $50,000 cap because I have not been provided with any objective comparative evidence or evidence of a demonstrated need to alter the *status quo*.

[78] Finally, the Society seeks to add an "employment continuity provision" to the collective agreement for the duration of *Bill 124*. The Society concedes that this is their "lowest priority" and they have not provided any evidence of demonstrated need. Therefore, the proposal is dismissed.

[79] The IESO has made three proposals:

- Eliminate the accelerated steps provision (article 23.1.4);

- Reduce sick leave provided to temporary employees (Articles 8.2 and 8.3); and
- Assign the management of the drug formulary to the insurance carrier.

[80] As I noted in my December 31, 2021 award, in the absence of any trade-off or demonstrated need, it is highly unlikely that the parties would agree, or an arbitrator would award any concessions sought by an employer in the context of wage and compensation restraint legislation being imposed by *Bill 124*. I am dismissing the IESO's proposals because I see no natural trade off.

[81] I acknowledge the parties have a rights dispute with respect to the accelerated steps provision. However the mere existence of a dispute does not equate with a demonstrated need. The parties negotiated the language in 2016 and if they want to change the language then they ought to attempt to reach a compromise or trade-off as opposed to my granting the employer a concession during a time of wage and compensation constraint.

[82] Therefore, having carefully considered the parties submissions and having regard to the above analysis, I hereby award as follows:

AWARD

[83] I direct the parties to enter into a renewal Collective Agreement for a two year term, commencing January 1, 2023, and ending December 31, 2024, that contains all the terms and conditions of the predecessor collective agreement, save and except that it is amended to incorporate the following:

- **Agreed items**: All items agreed upon by the parties.
- **Wages**: Across the board salary increases applicable to all salary schedules of 1%, effective January 1, 2023 and 1% effective January 1, 2024 as per my earlier interim award.
- **Article 22 escalator clause:** The clause is suspended during any period of time when *Bill 124* is in effect and binding.
- **Benefits:**

- The following increases are added for 2023:
  - Cover all psychotherapists and social workers = **$0**
  - Add coverage for CGMs, subject to ADP subsidization = **$0**
  - Increase Class B dental coverage from 85% to 100% = **$11,353**
  - Increase chiropractic coverage by $300 = **$2,075**
  - Increase vision coverage by $25 = **$2,641**
  - Increase orthotics coverage by $50 = **$400**
  - Increase laser eye surgery coverage $00 = **$8,861**
  - Increase paramedical coverage from 50% to 65% = **$28,749**
  - **Total = $54,079 (remaining $10,525)**

- The following increases are added for 2024:
  - Increase vision coverage by $50 = **$5,282**
  - Increase orthotics coverage by $50 = **$400**
  - Increase paramedical to 80% = **$28,749**
  - Increase corrective eye surgery by $400 = **$3,940**
  - Increase orthodontic coverage to 80% = **$5,000**
  - Add new coverage for Occupational therapists = **$16,800**
  - **Total = $60,171 (remaining amount $11,287)**

[84] I am remitting back to the parties the issue of allocating the remaining amounts of the 1% compensation for each of the remaining two moderation periods and the Society's meal allowance proposal.

[85] Unless specifically addressed in this award, all outstanding proposals are dismissed without prejudice to future bargaining.

[86] I remain seized until the parties enter into a renewal collective agreement to address the outstanding benefit proposals as well as to address any errors or omissions and the implementation of this award. I also remain seized with respect to a re-opener on monetary proposals in the event that *Bill 124* is declared unconstitutional by a court of competent jurisdiction, or it is otherwise amended, repealed or no longer be legally relevant.

Dated at Toronto, Ontario this 16th day of January 2023.

"John Stout"
John Stout – Mediator/Arbitrator