

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

BETWEEN

THE PARTICIPATING NURSING HOMES

(the “Homes”)

and

ONTARIO NURSES’ ASSOCIATION

(the “Union” or “ONA”)

BOARD OF ARBITRATION: **John Stout, Chair**
 Irv Kleiner, Homes’ Nominee
 Kate Hughes, ONA Nominee

APPEARANCES:

For the Homes:

Bob Bass – Bass Associates
Dan McPherson – Bass Associates

For ONA:

Darcel Bullen – Legal Counsel
Diana Kutchaw – Labour Relations Officer (Interest Arbitration)
Vicki McKenna – President
Cathryn Hoy – First Vice President
Beverly Mathers – Chief Executive Officer
Steve Lobsinger – Senior Executive, Chief Negotiator

HEARINGS HELD BY VIDEOCONFERENCE ON JUNE 1 AND 2, 2021

BACKGROUND

[1] This Central Board of Arbitration was appointed by the parties pursuant to a Memorandum of Conditions for Joint Bargaining dated April 15, 2021 (the “MCJB”), made in accordance with the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990 c.H. 14, as amended (“*HLDA*”). Our 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 184 Participating Nursing Homes in Ontario (the “Homes”).

[2] The Homes operate 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 tends to be small with as few as 10-15 RNs and some LTC bargaining units include Nurse Practitioners (NPs), Registered Practical Nurses (RPNs) and Personal Support Workers (PSWs).

[4] The collective agreements between the Homes 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 Homes and ONA have participated in central bargaining since 1991. The results of the central process are as follows:

- **1991-1993:** 47 LTC homes participated and Vince Ready mediated a settlement for two years with a third-year wage re-opener decided by Arbitrator Ready.
- **1994-1995:** 93 LTC homes participated, and a board of arbitration chaired by Tom Joliffe issued an award.

- **1996-1997:** 94 LTC homes participated, and a board of arbitration chaired by William Kaplan issued an award.
- **1998-1999:** 96 LTC homes participated, and the parties settled.
- **1999-2001:** 101 LTC homes participated, and a board of arbitration chaired by Vic Pathe issued an award.
- **2001-2004:** 96 homes participated, and the parties settled.
- **2004-2006:** 124 LTC homes participated, and a board of arbitration chaired by Arbitrator Kaplan issued an award.
- **2006-2009:** 127 LTC homes participated, and the parties settled the central template and local issues were resolved by an award issued by Owen Shime.
- **2009-2011:** 142 LTC homes participated, and the parties settled the central template at mediation and local issues were resolved by Louisa Davie.
- **2011-2014:** 164 LTC homes participated, and a board of arbitration chaired by Douglas Stanley issued an award (the “Stanley Award”).
- **2014-2016:** 173 LTC homes participated, and a board of arbitration chaired by Arbitrator Davie issued an award (the “Davie Award”).
- **2016-2018:** 177 LTC homes participated, and the parties settled.
- **2018-2021:** 199 LTC homes participated, and the parties settled.

[6] The Homes and ONA signed the MCJB on April 15, 2021. The parties met in direct bargaining on April 26- 30, 2021. Mediation with Matthew Wilson occurred on May 17-19, 2021.

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

[8] The list of items agreed upon is as follows:

- The term of the renewal collective agreements will be three years, from July 1, 2021, to June 30, 2024.
- Additional health and safety language related to COVID-19, including a commitment to provide an adequate supply of personal protective equipment (PPE), maintaining a pandemic plan, and sharing information with ONA.
- New language was introduced addressing Black Indigenous, People of Colour (BIPOC) and Lesbian, Gay Bisexual, Transgender, Queer and/or Questioning,

Intersex, Asexual and/or Agender, Two-Spirited and the countless affirmative ways in which people choose to self-identify (LGBTQIA2+).

- Several monetary items were agreed upon including:
 - Standby Pay
 - Bereavement Leave benefit,
 - Meal allowance,
 - Benefits post age 65,

[9] The remaining central issues in dispute proceeded to videoconference hearing on June 1 and 2, 2021. Just prior to the hearing, the parties filed extensive written briefs, including numerous exhibits, presenting their positions on the issues in dispute. At the hearing, the parties supplemented their written material with oral submissions. The Board met in executive session thereafter.

THE ISSUES IN DISPUTE

[10] ONA asserts that the essence of the dispute relates to achieving safe, healthy, and equitable, workplaces for nurses. ONA highlights the “unprecedented” pressure and stress in the LTC sector, which they describe as being in an “absolute crisis”. ONA notes that this matter is being heard in the context of the global COVID-19 pandemic, which they have characterized as a “crisis within a crisis”. ONA’s proposals are based on what they see as systemic gender discrimination that has resulted in lower compensation and workplace standards for the female-dominated profession of nursing. ONA seeks wage and benefit increases that will achieve parity with those nurses who work in Hospitals and Homes for the Aged. ONA seeks a “Human Rights” Salary schedule adjustment as well. In addition, ONA has submitted proposals with respect to the following:

- Increased percentage in lieu for part-time nurses
- Staffing language changes - Article 2.06
- Disability Income Protection Plan
- Increased Premiums
- Increased Health and Welfare Benefits
- Increased Pregnancy and Parental Leave Benefits
- Increased vacation entitlements

- Errors in paycheques
- Professional Practice-Notice re: College of Nurses

[11] The Homes focus their proposals on what they characterize as the removal of barriers to efficiency. The Homes proposals seek to delete Articles 2.04 and 2.06 from the template collective agreement. These two articles provide job security for nurses and union security, which restrict management's right to organize their workplaces. The Homes note that none of the other collective agreements in the LTC nursing home sector or even ONA's Hospital central collective agreement provisions contain such "generous" bargaining unit work protection. The Homes assert that removal of these two provisions will provide management with greater flexibility to determine the appropriate mix of employees necessary to satisfy the residents' care needs.

STATUTORY AND OTHER CONSIDERATIONS

[12] In Ontario, trade unions and employers are required to bargain in good faith and make every reasonable effort to make a collective agreement, see s. 17 of the *Labour Relations Act*, 1995 S.O. 1995, c.1 Sched. A (as amended). In the normal course, parties who cannot agree to the terms of a collective agreement may engage in economic sanctions to press their cause by strike or lock-out.

[13] The legislature has determined that in this case, these nurses provide an essential service and society's need to ensure stable patient care must trump the right to strike and lock-out. Instead, these parties are subject to the *HLDA*, and therefore when they cannot agree upon a voluntary collective agreement, the matters in dispute are referred to interest arbitration.

[14] As a replacement for free collective bargaining, we are tasked with a broad discretionary mandate that is guided by the legislative criteria set out in the *HLDA*, which includes the following:

Criteria

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

1. The employer's ability to pay in light of its fiscal situation.
2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
3. The economic situation in Ontario and in the municipality where the hospital is located.
4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
5. The employer's ability to attract and retain qualified employees. 1996, c. 1, Sched. Q, s. 2.

[15] Interest arbitration is much different from grievance or "rights" arbitration, where an arbitrator is required to interpret a collective agreement, see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 53. Essentially interest arbitration determines the terms of the collective agreement and it is an extension of the collective bargaining process with an arbitrator or interest arbitration board acting as the final decision maker when the parties cannot agree to a voluntary settlement.

[16] The interest arbitration process is not a judicial or adjudicative process guided by one's personal sense of fairness or social justice. Interest arbitrators and arbitration boards do not implement social policy and it is not their task to determine government funding. As stated by Arbitrator Teplitzky 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."

[17] The most important and guiding principle, applicable to all interest arbitration proceedings, is replication. The replication principle is succinctly summarized by former Ontario Chief Justice Warren Winkler in the case, *University of Toronto v. University of Toronto Faculty Assn. (Salary and Benefits Grievance)* (2006), 148 L.A.C. (4th) 193 at paragraph 17, where he states:

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

[18] The statutory criteria found in *HLDA* reflects several factors that are particularly relevant to the collective bargaining process, and they must be considered in the context of applying replication. The statutory criteria are also intrinsically linked to one another. For example, the ability to pay is directly related to the extent to which services may be reduced and a comparison of the terms and conditions of employment of similarly situated employees, see *Toronto (City) and Toronto Professional Firefighters Association, Local 3888*, 2013 CanLII 62276 (ON LA).

[19] In this case, the Homes are not making an "ability to pay" argument. However, they do ask us to take notice of the current funding regime that applies to the LTC sector in Ontario. The Homes point out that the wages and benefits of all employees are paid out of the "Nursing Envelope" that is funded by the province. The Homes assert that lower compensation levels do not affect profit, but instead allow for higher levels of staffing and care.

[20] ONA on the other hand has focused on the homes ability to attract and retain qualified nurses. It is ONA's view that there is a shortage of nurses, which needs to be addressed by increased compensation that may be financed by the Homes making less profit. The Homes claim that ONA has argued about retention and recruitment for many rounds and their concerns have proven to be "overblown."

[21] While we have serious concerns about recruitment and retention, the material before us indicates that the number of RNs in the LTC sector has remained stable and the full-time to part-time ratio has increased between 2004 and 2021. We are cognizant

of the pressures that are related to the current COVID-19 pandemic. We recognize that nurses are providing essential services in the healthcare sector, and they are in high demand. In our view, the pressures related to the current pandemic has us leaning towards granting additional compensation beyond the modest settlements reached prior to March 2020. However, as later discussed, we do not find that the concerns arising from current COVID-19 crisis support granting all of ONA's substantial and costly proposals.

[22] In our view, the most relevant *HLDA* criteria is the current economic situation and comparability as it informs the replication principle.

[23] The application of the replication principle is an objective exercise, driven using objective evidence, to assist in determining what the parties would have achieved in free collective bargaining. The subjective posturing of either party is neither helpful nor relevant to the exercise because it is easy for either party to take a hard line and refuse to bargain when there is no threat of economic sanctions. As stated in the Davie Award, "replication focuses on objective standards rather than notions of "fairness" or "what is just" as these concepts are often too subjective and ambiguous." What is found to be a fair and reasonable result in interest arbitration is determined by examining the market forces and economic realities to determine what the parties would have agreed upon in the absence of interest arbitration being imposed upon them.

[24] The most significant objective evidence relied upon by boards of arbitration includes evidence of relevant comparators, both internal and external, either freely negotiated or imposed by arbitration. These comparators illuminate the market forces at play in the economy, providing a guide as to the total compensation being enjoyed by similarly situated employees, both in terms of existing compensation and achievements made in the current collective bargaining environment. It is comparability that provides the objective evidence needed to apply replication or as Arbitrator Goodfellow has said, "the flesh on the bones" that is required to apply the replication principle, see *Strathroy Middlesex General Hospital and ONA* [2012] O.L.A.A. No. 47.

[25] Historical patterns both in the sector and more specifically between the parties are also relevant to the replication exercise. Arbitrators must consider how the parties have acted in the past when trying to discern what they would do in the current economic circumstances. Where there is a historical pattern of following certain comparators, then greater weight is placed on those comparators, see *Toronto (City) and Toronto Professional Firefighters Association, Local 3888*, supra. Arbitrators also great place weight on previous freely negotiated settlements between the parties to provide additional guidance, see *F.J. Davey Home and ONA*, June 20, 2007 (Devlin).

[26] While the terms and conditions of the collective agreements between the Homes and the other major unions (SEIU, CUPE, Unifor) who bargain in the LTC sector, are certainly relevant comparators, one must also be cognizant of the differences found in the various collective agreements. It must also be noted that those collective agreements were negotiated prior to the COVID-19 global pandemic. It goes without saying that each trade union brings to the bargaining table their own members' wants and needs, which provide priorities for collective bargaining. To this end, it is also important to keep in mind the concept of total compensation as described by Paul Weiler in his June 1981 award between *SEIU and Participating Hospitals*. Parties naturally will try to cherry pick from other collective agreements to find provisions or compensation that support their current desires. However, as indicated by Professor Weiler, sophisticated parties in free collective bargaining look at their settlement as a total compensation package, in which all the improvements 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.

[27] In this case, there are differences in both outcomes and specific provisions found in collective agreements between the Homes and ONA and the other collective bargaining relationships in the sector. ONA has made significant gains through free collective bargaining. ONA represented nurses enjoy some superior language and benefits that are tailored to their members' needs and their bargaining objectives and priorities. There are several examples of such differences, the most notable being the freely bargained bargaining unit protection language found in Articles 2.04 and 2.06 that the Homes seek

to have removed in this proceeding. No other collective agreements in the sector enjoy such generous protections, which restrict management's right to arrange the workplace. In addition, ONA represented nurses enjoy superior health and safety language that ONA recently enforced at arbitration and subsequently enhanced during this round of bargaining, see *Participating Nursing Homes v. ONA*, 2020 CanLII 32055 (ON LA). There can be no doubt that the health and safety language negotiated by ONA on behalf of their members saved lives during the current COVID-19 pandemic. ONA members owe a debt of gratitude to those who had the foresight to negotiate such language on their behalf.

[28] One other arbitral principle requires some comment and that is the concept of a demonstrated need. Once again, the exercise is an objective one that relies primarily on objective evidence of needs and not the subjective desires of one party. It is incumbent upon a party seeking "breakout language" or deviations from the norm to prioritize their demands and establish the required demonstrated need, see *Participating Hospitals and SEIU*, November 10, 2010 (Burkett). 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. Furthermore, demonstrated need is more forcefully applied in cases of compensation or monetary issues than it is for proposals that do not entail monetary consequences and the employer has not demonstrated operational concerns, see *Ajax Professional Fire Fighters Association and Ajax (Town of)*, 2013 ONSC 7361.

[29] There is much room for debate on the final result, but interest arbitration is not an exact science, and the appropriate outcome is one that falls within a reasonable range of what the parties would have agreed upon in free collective bargaining, based on the relevant comparators. As stated by Arbitrator Teplitsky Q.C. in *SEIU and A Group of 46 Hospitals*, supra, ... "the goal of compulsory binding arbitration is to ensure that the parties affected by the loss of the right to strike fare as well, although not better than, those parties whose settlements are negotiated within the context of the right to strike."

ONA SEEKS PARITY WITH HOSPITALS AND HOMES FOR THE AGED

[30] Turning to the matter before us, we begin by addressing ONA's submissions seeking parity with nurses employed in Hospitals and Homes for the Aged. These nurses have not had parity with nurses employed at either Hospitals or Homes for the Aged for the past 30 years, which covers 13 rounds of collective bargaining. Both in terms of mediated and arbitrated results, these nurses have not reached parity with compensation provided to nurses in Homes for the Aged and Hospitals. This is not because ONA never raised the issue of parity. Rather, when the issue was raised in interest arbitration, their proposals were denied on each occasion, including the most recent 2011 Stanley Award and 2015 Davie Award.

[31] The Stanley Award recognized that in free collective bargaining, where parties have the right to strike and lock out, workers do not always achieve the same wages and compensation as other employees performing the same work for different employers.

[32] As noted in the Homes' brief, ONA represented nurses employed by Local Health Integration Networks (LHINs), have the right to strike and have exercised that right in 2015; yet they do not have parity with Hospital wage rates. Furthermore, even though the nurses employed by the LHINs have the right to strike, the Homes' RN maximum rate is still higher at all LHINs, except for Erie St. Clair.

[33] It is also noted that the Homes' maximum wage rate is higher than all home care (VON, Carefor, Para Med, St. Elizabeth) nurse's salaries and all Public Health RN salaries.

[34] In terms of unionized nurses across Canada, the Homes' pay a higher maximum wage rate than those found in every provincial hospital system except Saskatchewan, Alberta, and British Columbia.

[35] We do not wish to suggest that the wages in these other areas of the broader healthcare sector represent the most relevant comparators. However, these differences

in compensation levels demonstrate that there is no homogeneity in the compensation of nurses in the broader healthcare sector in Ontario or across Canada, even in situations where nurses have the right to strike. In other words, the market is fluid and nurses performing similar work are not all compensated in the same way by their various employers.

[36] The Davie Award also addressed a proposal for parity and considered what the parties had done historically as being highly relevant, indicating as follows:

This history shows that the parties themselves have not negotiated Hospitals/Homes for the Aged and Nursing Home parity. It also shows that although the parties may closely follow the rate of change in the Hospitals, they do not automatically adopt it. In addition, it must be noted that throughout their bargaining these parties have bargained other compensation matters including lump sum payments and increases in premiums and other allowances in a manner distinct from how these types of items were negotiated by the Association and the Participating Hospitals.

[37] After the Davie Award, and in the years just prior to this proceeding, the parties freely negotiated two more collective agreements, which were subsequently ratified by ONA's members. In neither of these most recent rounds of collective bargaining did the parties agree to parity with Homes for the Aged and Hospitals.

[38] While we appreciate ONA's submissions and have great sympathy, particularly in the current COVID-19 environment, we do not see a compelling case for deviating from the well-established historical pattern. Therefore, like the Stanley and Davie boards before us, we dismiss ONA's arguments for parity.

ONA SEEKS A HUMAN RIGHTS SALARY SCHEDULE ADJUSTMENT

[39] This brings us to ONA's human rights submission. Although none of the authorities relied upon by ONA specifically address the issue, we accept that we have an obligation to consider the equality rights provided for under the Ontario *Human Rights Code* R.S.O. 1990, c.H. 19 (the "*Code*"). In this regard, our award must comply with the fundamental equality rights protected by the *Code*. The specific language of s. 47 (2) of the *Code* clearly states the primacy of the *Code*, which has been recognized by the

Supreme Court of Canada, see for example *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3. However, we disagree with ONA's submissions with respect to the current wage grid being inconsistent with the *Code*. There is nothing inherently discriminatory in the current wage grid step progression.

[40] We note that only two cases were provided to us by ONA that seem to address the issue of equitable wage structures (or grids) in an interest arbitration proceeding. In our view, both cases are clearly distinguishable based on their facts.

[41] The first case is *University Health Network (Women's Own Withdrawal Management Centre) and CUPE, Local 5001*, 2012 CanLII 29898 (ON LA) (hereinafter "*UHN*"). The context of the *UHN* award was a first collective agreement for a group of employees employed by a hospital in the Women's Own Withdrawal Management Centre. A board of interest arbitration, chaired by Russell Goodfellow, established a wage grid that followed that of an already established classification that was mostly staffed by men in the Men's Detoxification Unit. Like most interest arbitration awards, there is little, if any, analysis found in the decision. However, what is readily apparent is that internal equity and the principle of equal pay for work of equal value under a collective agreement was applied by the board to insure those female employees and male employees in the same classification, performing the same work for the same employer, were paid equally. We agree with the result, as paying employees, working in the same classification for the same employer, different amounts would run afoul of the equal pay for work of equal value principle. Further, in our view, if the only distinction was that the higher paid employees in the classification were male, then the wage scale would run afoul of the *Code* by discriminating on the basis of sex.

[42] The other interest award provided by ONA involving an equitable wage structure is Arbitrator Ready's award in *Re Board of School Trustees, School District No. 39 (Vancouver)* 1993 Carswell 3646. In this case Arbitrator Ready also addressed an internal equity issue among employees performing the same work for the same employer and

he awarded adjustments after being satisfied that both sides had made a serious attempt to deal with pay equity over the past several years. There is no reference in Arbitrator Ready's decision to any pay equity or human rights legislation. But once again, we note that it was internal equities that were at play and the award addressed the issue on the basis of internal equities. Once again, we agree with the result and the principle that employees working in the same classification performing the same work for the same employer ought to be paid the same wage rates.

[43] In this case, ONA is not making an argument about internal equities. There is no evidence before us that male nurses are being paid more than female nurses. In fact, the reality is that the LTC sector overall is female dominated. In addition, wage rates for nurses represented by ONA are the highest wage rates among all the unionized employees in LTC homes. If there was an internal inequity based on sex found in the Homes' and ONA's template wage grid, then there may be a strong argument that such a wage grid violates the *Code*, and we ought to address the issue. However, ONA has not made any argument about internal equity among employees. Rather, ONA's submissions are focused on external comparators and a broader argument about systemic discrimination in compensation. In this regard, we have been provided with no authority where an interest arbitration board entertained and addressed such a broader argument. In our view, at least in Ontario, that is because addressing systemic gender discrimination in compensation experienced by those in female job classes is a matter that is more appropriately addressed under the *Pay Equity Act*, R.S.O. 1990, c.P.7.

[44] These parties currently have a dispute that is before the Pay Equity Hearings Tribunal (the "Tribunal"), which has also included litigation before the courts, see *Ontario Nurses' Association v. Participating Nursing Homes*, 2021 ONCA 148. The matter before the Tribunal involves a dispute with respect to whether the proxy method is to be used in ensuring that pay equity is maintained. The Tribunal did not agree that the proxy method was to be used to maintain pay equity and set out a formula for maintaining pay equity that did not include the proxy method. The Divisional Court concluded that the Tribunal's decision was unreasonable. It held that the *Pay Equity Act* requires ongoing access to

male comparators, as set out in the proxy method, to maintain pay equity. The Court of Appeal agreed with the Divisional Court that the Tribunal's decision was unreasonable, although they reached their decision without relying on *Charter* values. We understand that leave has since been sought by the Homes to the Supreme Court of Canada.

[45] The Court of Appeal accepted that wage parity is not the measure of whether there is inequity in compensation that must be redressed. Rather, the *Pay Equity Act* provides that pay equity is achieved by using one of the three comparison methods and making required adjustments, whether or not that results in parity between different employers.

[46] In our view, what ONA is really seeking is for this interest arbitration board to apply the *Pay Equity Act*. Section 30 of the *Pay Equity Act* provides the Tribunal with exclusive jurisdiction. We are of the view that any questions of pay equity are best resolved at the Tribunal. If there remains an issue of equity in the wage grid after the Tribunal has addressed what, if any, adjustments are required, then such an issue may be properly brought before an interest board who may address the issue on the basis of comparability in the context of applying replication. At this point, while there is a pay equity process already being engaged in by the parties, we believe it would be inappropriate for us to wade into the fray.

[47] ONA asserts that the Tribunal does not have exclusive jurisdiction to apply the *Code* and they cannot make changes to the wage grid, see *C.U.P.E. Local 1999 v. Lakeridge Health Corporation* 2012 ONSC2051 (CanLII). This may well be true. However, like the Pay Equity Tribunal, this central interest arbitration board does not have jurisdiction to generally deal with human rights claims or authority to deal with stand-alone violations of the *Code*. The role of interest arbitration under the *HLDA* is to provide a reasonable alternative to free collective bargaining to those parties who the legislature has deemed too essential to have the right to strike or lock-out. The *HLDA* does not contain a provision similar to s. 48(12)(j) of the *Labour Relations Act, 1995*, which provides rights arbitrators with the power to interpret and apply human rights and other

employment related statutes. Those parties who have the right to strike or lock-out must resolve their human rights claims before a rights arbitrator who has the exclusive jurisdiction to resolve all disputes between the parties arising either expressly or inferentially out of the collective agreement between them, see *Weber v. Ontario Hydro* [1995] 2 SCR 929. In our view the same process of having human rights claims resolved by a rights arbitrator ought to apply to those parties who are required to settle their collective agreement by way of interest arbitration. If ONA or their members have a human rights claim, then those claims ought to be brought before a rights arbitrator with a proper factual record at each of the Homes, See *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324* [2003] 2 SCR 157. We agree with the Homes that interest arbitration is not the appropriate forum to litigate a human rights dispute.

[48] We also note that historically ONA has pursued adding an additional 25 year step to the wage grid, which is what nurses in the Hospitals and Homes for the Aged enjoy. Therefore, a vast majority of Hospitals and Homes for the Aged have longer wage grids with 10 steps and a 25 year maximum step. As pointed out by the Homes, ONA has presented no evidence of negotiating wage grid compression with any Homes for the Aged. In this case, ONA has also only raised one municipal Home for the Aged located in Essex County (Sun Parlour) as a proxy comparator for RNs, which would geographically only capture one of the Homes. The Homes have provided information demonstrating that there is no pay equity gap or gender discrimination for the 31 Toronto area Homes and the City of Toronto Homes for the Aged. In our view, the different geographic comparisons provided by the parties just reinforce our view that any pay equity or human rights claim is better suited to being addressed by the Tribunal or a rights arbitrator.

[49] Therefore, we are dismissing ONA's arguments for a human rights salary schedule adjustment.

CONTEXTUAL CONSIDERATIONS AND DEMONSTRATED NEED

[50] ONA has made substantial submissions with respect to the current COVID-19 pandemic and the impact on LTC in Ontario. We recognize that nurses play a critical role in providing healthcare to the vulnerable residents who reside in LTC nursing homes. These nurses have been on the front line of the battle with COVID-19 and the devastating infection rates and deaths suffered in LTC homes. One nurse, Brian Beattie fell victim to this terrible disease that has plagued the world. The sacrifice of Mr. Beattie and others who worked so hard to care for vulnerable residents cannot be overstated. As indicated earlier, ONA was fortunate to have negotiated very strong health and safety language, which no doubt saved lives. This language has been enhanced during this most recent round of bargaining. The parties are to be commended for their commitment to providing a safe and healthy workplace.

[51] The recent Final Report of Ontario's Long-Term Care COVID-19 Commission Chaired by the Honourable Frank N. Marrocco documents the challenges that the LTC sector has faced and how ill prepared Ontario was for the pandemic. The Final Report highlights the fact that the LTC sector needed reform well before the pandemic and recommendations have been made for the government to address these systemic issues and required reform.

[52] Neither Ontario's Long-Term Care COVID-19 Commission nor the earlier Public Inquiry into Safety and Security of Residents in the Long-Term Care Homes System, chaired by the Honourable Eileen E. Gillese, make any recommendations with respect to interest arbitration. These two very lengthy reports make many other recommendations for reform in the LTC sector, but those recommendations are directed to and must be addressed by the government. It is the government who must initiate public policy by responding to these reports, and they must commit to provide the necessary funding required to implement the many recommendations, see *Chippewa Creek at Bella Care Residence, Park Place Seniors Living v. Healthcare, Office, and Professional Employees' Union, Local 2220, UBCJA*, 2020 CanLII 43467 (Ont. Arb.).

[53] We are not saying that the reports of such commissions and inquiries are irrelevant. They certainly provide context and help frame the dispute in the matter before us. However, as referenced earlier, an interest arbitration board is not empowered to make decisions based on social justice reforms. Our mandate is to replicate free collective bargaining to provide a fair and reasonable resolution to the collective bargaining disputes between parties who do not have the right to strike or lock-out. Many of the proposals that ONA seeks in this matter are related to the need for increased government funding in LTC, to provide four hours of direct hands-on-care and make other necessary systemic improvements to LTC in Ontario. It is not for us to implement these changes; it is for the government to review and act by providing additional funding in the Nursing Envelope.

[54] We now turn to address ONA's submission that there is a demonstrated need to address compensation issues based on a significant recruitment and retention issue that needs to be addressed. As we indicated earlier, we accept that recruitment and retention is an issue in the context of the current COVID-19 pandemic, but the evidence does not support a demonstrated need to provide increases to nurses' compensation at a level that is being proposed by ONA. The list of proposals submitted by ONA amount to a total compensation package that is not even close to what has been agreed to by others in the current economic circumstances, in any part of the broader public sector, let alone healthcare. We agree that some additional adjustments must be made with respect to compensation, but such additional adjustments must be reasonable in the circumstances and related to those being granted in the current marketplace.

WAGE INCREASES

[55] Having found that we will not provide parity with Hospitals and Homes for the Aged and rejecting the human rights arguments of ONA, we now focus on what would be the appropriate wage increases. The Homes propose a 1.5 % general increase for each year. This proposal is based primarily upon the fact the SEIU Master provides a 1.5% general wage increase for each year and ONA freely negotiated such a wage increase for nurses at the Local Health Integration Networks (LHINs), who have the right to strike.

In terms of the SEIU Master, it certainly is a comparator, but it is not determinative and there is no historical pattern of applying the same increase to nurses. The LHINs are also a comparator with a recent history of similar wage increases. However, these other agreements were negotiated in 2019 before the advent of the current COVID-19 global pandemic.

[56] We note that both the Stanley and Davie Awards considered several comparators, including the Hospitals, Public Health as well as the comparators relied upon by the Homes in the matter before us. The Davie award acknowledged that wages closely followed the rate awarded in Hospitals, but with some deviations in certain circumstances. We agree with the approach applied in both the Stanley and Davie Awards, which is to consider all such awards and settlements and have regard to the history between these parties when determining the appropriate wage and other compensation increases.

[57] The last two freely negotiated agreements between these parties were quite modest with general wage increase of 1.5% together with additional premium increases.

[58] The most recent Public Health settlements were in the range of 1.4% and 2.5%, with an average of 1.69%.

[59] The current Hospital rates have been artificially deflated by the application of the Bill 124 compensation restraints. As indicated by Arbitrator Kaplan, in *The Regional Municipality of Niagara Homes for the Aged and ONA 2020* CanLII 83199 (ON LA), but for Bill 124 Hospital nurses would have enjoyed an increase of 1.75%.

[60] Therefore, we find that the appropriate wage increase would be within the range of 1.5% (LHINS and SEIU) and 1.75%, which is the rate the Hospitals (and applied to the Homes for the Aged) would have most likely settled for but for Bill 124.

[61] We have considered the current economic situation and the adverse effects of the COVID-19 pandemic upon the greater economy. There can be no doubt that the

pandemic has caused a deep downturn in the economy generally, requiring increased government spending along with associated borrowing costs. However, not all sectors of the economy have been hit equally. The travel and hospitality sectors of the economy have been devastated by the pandemic. On the other hand, e-commerce and related sectors have seen a surge as consumers are making many more purchases over the internet. In our view, it is speculative to guess how quickly the world economies will recover. We have seen that the stock market seems to lurch between the hope of vaccines providing normalcy and the Delta variant causing a fourth wave. We are concerned about the marked increase in the consumer price index, indicative of inflationary pressures across the economy. In our view, the current economic situation, as considered in the context of the LTC sector, lead us towards the upper end of the range that we believe would have been in play in free collective bargaining.

[62] In terms of demand for LTC in Ontario, the demographics make it certain that as the baby boomer population continues to age and people live longer, there will be a need and a demand for LTC homes. The Homes have not provided us with any evidence to suggest otherwise. In our view, the current economic circumstances, as they affect the LTC sector, have not changed to an extent that we would be inclined to award lesser compensation than what was previously accepted in the marketplace.

[63] Therefore, we find that increases of 1.75% in each year of the agreement are to be awarded and reflect what would have been achieved in free collective bargaining.

THE REMAINING ISSUES IN DISPUTE

[64] We now turn to the remaining issues in dispute, noting that the pattern established before the pandemic included minor adjustments to other compensation. By way of example, the SEIU Master only included one other monetary adjustment with the introduction of a night shift premium. The LHINS and ONA had no additional compensation. We are of the view that in terms of total compensation, additional monetary increases would be modest and focused on premiums and those benefits that are most necessary and desired by all nurses. In normal circumstances we would have

staggered increases to compensation and benefits to reflect the additional year of term. ONA insists that additional compensation is needed immediately. In the unique circumstances of the COVID pandemic we have provided for the introduction of benefits either on the date of award or within a reasonable time after the date of the award. In addition, we have provided greater premium increases in year two and less than we would in year three and provided for an increase in responsibility pay effective date of award. Obviously, this has increased the total compensation. However, we are of the view that the total compensation package reflects what would have been achieved in free collective bargaining.

[65] ONA seeks a disability income protection plan and increase to the part-time pay-in-lieu of benefits. We see these two issues as being connected because the pay-in-lieu represents the agreed upon amount to be paid part-time employees who don't enjoy the benefits provided to full-time employees. In effect, the pay-in-lieu includes an amount payable due to part-time employees for not enjoying a disability income protection plan. There are some part-time employees in this sector who enjoy both a payment in lie and a disability income replacement plan. As a result of an interest arbitration award issued many years ago by Arbitrator Martin Teplitsky Q.C., those employees represented by SEIU enjoy both a payment in lieu and a disability income protection plan. However, Arbitrator Teplitsky's award was cost neutral and achieved by reducing the payment-in-lieu. In the absence of any detailed costing or proposals with respect to such a trade-off, we are not prepared to award either an increase in the percentage in-lieu or a disability income protection plan.

[66] ONA proposes an increase to the premiums paid to nurses. We are of the view that the most desired premiums are the weekend and shift premiums, which the parties have negotiated increases in the past. We have awarded increases to those premiums to keep these nurses in step with those in Hospitals and the Homes for the Aged. In our view, while parity would not have been achieved, the parties would not have allowed these nurses to fall further back. We have also awarded an increase in the responsibility pay under Article 22.06(a). Finally, we are remitting back to the parties ONA's proposal

of a premium to be paid for student supervision and mentorship. We are of the view that this proposal has some merit and further exploration is warranted. We note that if recruitment and retention become an even greater concern due to the on-going pandemic, then supervision and mentorship will take on an even greater importance to providing residents with the care that they deserve.

[67] In terms of health and welfare benefits, ONA seeks several substantial improvements. Most notable is ONA's proposal of introducing unlimited mental health services for nurses. We note that mental health benefits have been freely negotiated and replicated in both fire, police, and paramedic services across the province. In 2018, Arbitrator Kaplan awarded mental health services with a limit of \$800 to nurses working in Hospitals and ONA has negotiated a similar entitlement in Homes for the Aged. In our view, the provision of mental health services is an emerging benefit that is finding wide acceptance in collective bargaining for employees who work in stressful environments or may experience violence associated with their work. Therefore, we are awarding a new mental health benefit for nurses, but we feel that with the unknown cost of ONA's proposal, an \$800 limit is currently more appropriate. We are also of the view that a modest increase in the vision benefit is appropriate. The other increases in benefits sought by ONA are frankly too rich from a total compensation viewpoint.

[68] ONA made several proposals for increases in the vacation entitlement of nurses. We are of the view that an increase of six (6) weeks' vacation after 22 years effective date of award is warranted and would have been achieved in free collective bargaining.

[69] ONA has also made a proposal with respect to errors on paycheques, which we believe ought to be partially granted. In this regard, we are of the view that being underpaid by three and one-quarter (3.25) hours ought to be rectified by a Home within the current time frame of three (3) business days from the date it is notified of the error.

[70] ONA has also made a proposal to add language to the central template that would require the Homes to notify a nurse when it reports them to the College of Nurses and refer them to ONA as a resource. The Homes see this proposal as interfering with the

College of Nurses' investigative process. We disagree with the Homes submissions on this point. We note that the obligation to report a nurse arises when an employer believes a nurse "poses a serious risk to harm to patients" and other serious concerns about a nurses practice. We agree with ONA that as a matter of good labour relations a nurse should be notified of such serious concerns so they may obtain advice and if necessary, seek representation. We would also add that common sense dictates that if such serious concerns arise, then an employer ought to immediately bring such serious concerns to the nurse's attention and seek to rectify the situation to protect the vulnerable residents. The only valid concern that may arise from awarding ONA's proposal is some possible argument that the right to notice may adversely affect the right to reprimand or discipline a nurse. Therefore, we have modified ONA's proposal to make it clear that the new requirement to provide notice and referral is to have no bearing on the Home's right to reprimand and discipline a nurse.

[71] In terms of the Homes' proposal to remove Articles 2.04 and 2.06, and ONA's proposal to add additional language to Article 2.06, we believe that this is not the time to make any changes to what are freely negotiated provisions. We recognize that these provisions tie the Homes' hands to some extent, but the parties freely agreed to these provisions and no doubt there was a price to pay for them. We are also of the view, that at this time, it is best to wait and see how the Ontario government will implement the recommendations found in Ontario's Long-Term Care COVID-19 Commission's Final Report before this issue is addressed. It may well be that the government will follow the recommendations by providing additional funding for the residents' care and the proper mix of such care. If such is the case, then this issue may resolve itself.

[72] While we have not addressed every proposal, we have considered them all and the arguments advanced by the parties. In our view, having regard to the applicable principles, especially replication and total compensation, our award reflects the current collective bargaining landscape, including increases that are in the ballpark when compared to other reasonable comparators. Therefore, unless specifically addressed in

our award, all other outstanding proposals are dismissed without prejudice to future bargaining.

AWARD

[73] After carefully considering the submissions of the parties, we hereby order the parties to enter into a renewal central template that contains all the terms and conditions of the predecessor central template provisions, letters of understanding, and appendices, save and except as amended by this award as follows:

- **Term:** The term of the renewal collective agreements, shall be for a three-year term from July 1, 2021, to June 30, 2024.
- **Agreed to items:** Any previously agreed upon items shall be included in the renewal central template.
- **Wages:**
 - Effective July 1, 2021 – 1.75%
 - Effective July 1, 2022 – 1.75%
 - Effective July 1, 2023 – 1.75%
 - Retroactive compensation to be paid in accordance with Article 22.02.
- **Premiums:**
 - Effective July 1, 2021, increase shift and weekend by **\$0.10**
 - Effective July 1, 2022, increase shift and weekend by **\$0.10**
 - Effective July 1, 2023, increase shift and weekend by **\$0.05**
 - Retroactive compensation to be paid in accordance with Article 22.02.
- **Responsibility Pay:** Effective date of award increase the responsibility pay in Article 22.06 (a) to \$15 per shift and \$22.50 for 12-hour shifts.
- **Student Supervision and Mentorship:** ONA's proposals for Articles 22.06 (b) and (c) are remitted back to the parties and we remain seized to address them if necessary or required.
- **Benefits:**
 - Effective December 1, 2021, introduce a mental health benefit at \$800 per year.
 - Effective December 1, 2021, increase vision benefit \$50.00.

- **Vacation:** Effective date of award, amend to provide those employees who have completed twenty-two (22) years of full-time continuous service shall be entitled to an annual vacation of six (6) weeks at their current rate.
- **Payroll errors:** Effective date of award amend to provide that if an error results in an employee being underpaid by three and one-quarter (3.25) hours or more, the Employer will provide payment for the shortfall within three (3) business days from the date it is notified of the error.
- **Reporting to the College of Nurses of Ontario (new):** Add to article 21 the following language:

The Home, as a good labour relations practice, will notify the nurse when it reports them to the College of Nurses of Ontario and refer them to the Union as a resource.

It is understood that the requirement to notify the nurse when the Home reports them to the College of Nurses of Ontario has no bearing on the Home's right to reprimand or discipline a nurse for just cause. Under no circumstances will a failure or untimely notification provide grounds to nullify any right to reprimand or discipline a nurse.

[74] We remain seized in accordance with subsection 9(2) of *HLDA* until the parties have signed new collective agreements.

Dated at Toronto, Ontario this 25th day of October 2021



John Stout – Chair

Dissent attached
Kate Hughes - ONA Nominee

Dissent attached
Irv Kleiner – Homes Nominee

Dissent of Employer Nominee

This Board was constituted to determine an interest dispute between the parties, *under the Hospital Labour Relations Act*. To be clear, this Board's mandate was to determine outstanding central collective bargaining issues with respect to the renewal of the central template provisions of the collective agreements between ONA and 184 Participating Homes.

In the course of discharging the Board's obligations to determine the outstanding issues in dispute, we must be mindful of the fact that the interest arbitration process is one that is intended to be a replacement for free collective bargaining that otherwise provides parties who are involved in the bargaining process with a right to strike and lockout.

As the Chairman has correctly indicated, the process of interest arbitration is an extension of the collective bargaining process. The objective is to produce an agreement which is intended to replicate as nearly as possible, the result which conventional bargaining would have produced. To be clear, the process is not one that involves an interest arbitration board having to address systemic deficiencies in a sector nor should the process be one that involves an adjudication of "one's personal sense of fairness" nor abstract notions of social justice. Those are matters that should more properly be dealt with by government agencies. As such, reports from Long Term Care Commissions which include recommendations that may also necessarily require some consideration of funding decisions made by government, are not particularly relevant nor helpful to an interest Board of Arbitration. This approach was previously confirmed by Arbitrator Davie in the last Award for these parties when she indicated that "replication focuses on objective standards rather than notions of "fairness" or "what is just" as these concepts are often too subjective and ambiguous".

The task of this Board was to replicate what the parties might have achieved had they been able to resort to the economic sanctions of strike and lockout. It was important for this Board be mindful of the

fact that the Participating Employers have no profit motivation with respect to the compensation position that they advanced during the collective bargaining process. The nurses' bargaining units are funded through the nursing envelope. The Participating Employers are motivated to optimize the care that they provide to long term care residents by maintaining salaries at fair and reasonable levels and at the same time, using the modest funding increases provided by government to improve staffing levels. Any replication process therefore would have to include a consideration of what these employers would have agreed to in a "free and unencumbered collective bargaining process" which would likely have included compensation improvements but not total compensation improvement that would in any way compromise the quality of care that these Employers must be able to deliver to residents.

I would also add that the process of applying traditional replication principles must also involve an assessment of issues that have been resolved between the parties. We heard that during the collective bargaining process, the Union specifically placed a high priority on the Health and Safety issue and the issue of BIPOC and LGBTQIA2+. These high priority Union issues were entirely resolved prior to the arbitration proceeding and this Board ought to have attributed considerable weight to this resolution in the course of determining the issues that remained in dispute and remitted to this Board.

The Employers in this case proposed across the Board wage increases of 1.5% per year during the agreed upon three year term. This position was supported by current settlement and arbitration trends in the long term care sector which in my respectful submission presented this Board with a compelling benchmark to follow. The Jesin Award for the SEIU Master established a settlement at 1.5% extending to September 22, 2022. That Award settled agreements for 97 Long Term Care Facilities but also had an obvious impact on hundreds of settlements and awards that emerged following the date of the release of that Award. An overwhelming number of awards and settlements indicated a 1.5% wage increase pattern and many of those settlements and Awards were concluded notwithstanding the shortage of

PSW's and RPN's during the course of the pandemic. It is pattern setting settlements/awards such as the Jesin SEIU Master Award that ought to have informed this Board with respect to the determination of the wage dispute.

The Chairman made reference to settlements that were achieved by ONA for nurses in Public Health. Indeed at the hearing of this matter, the Employer referred to CCAC care Co-ordinators who are employed by the LHINS and who are registered nurses. ONA represents the Care Co-ordinators in 10 LHINS around the Province. The Employers urged this Board to consider the Settlements reached in the public sector where interest arbitration is not an option and is also not a factor in determining the salary levels that result from free collective bargaining. The LHINS bargain with ONA with both parties having the right to strike or lockout. We were referred to the most recent LHINS and ONA settlement where the parties agreed on a three year settlement with increases of 1.5% per year. The last 1.5% started on April 1, 2021 and coincides with the first year of the term that was before the Chairman. I would submit that the 1.5% increases that were agreed to by ONA in a right to strike/lockout environment provided this Board with a compelling benchmark.

We were also referred to collective bargaining between ONA and the Public Health Units. The nurses in these groups are also entitled to strike and the Health Units can lockout. The wage rates for the nurses in this sector are lower than the nurses wages in the long term care sector and we heard that ONA pursues hospital parity at those bargaining tables. ONA and several Public Health Units reached a settlement into the years that are in dispute in this case. Without providing the full details for each and every one of the settlements for the nurses in each of the Units, it is fair to say that the voluntary settlements do not support the 1.75% increases that have been awarded by this Chairman and are more aligned with what the Participating Employers proposed as compensation improvements. While the

Chairman's Award makes reference to the range of increases that were agreed upon, the Chairman has not afforded this evidence appropriate weight.

We were referred to collective agreements that were negotiated by ONA for Home Care Nurses. The wage rates for Long Term Care nurses is materially higher than the wages for Nurses who work in Home Care Units. ONA pursues hospital compensation levels for the nurses in this sector and there is a right for the parties to strike and lockout. The bargaining outcomes in this sector have not produced extraordinary increases in nurses wages and the rates of pay reflect that the parties have ended up acknowledging that the levels of compensation for these nurses is sufficient.

We also heard that the RN wage rates in Ontario are competitive after the proposed 1.5% wage increases are factored in. The Employer's data indicated that the spectrum of wages for RN's throughout the Province is competitive. Two previously freely negotiated settlements with ONA and the decisions of previous arbitrators would reinforce that conclusion. The last two freely negotiated agreements with ONA were modest and included a general wage increase of 1.5%. Having said that, I must disagree with the Chairman's award with respect to the awarded wage 1.75% per annum wage increases for the subject term. There is certainly a well established trend of 1.5% for the first year of the term of this Award and that ought to have been followed by the Chairman in this case. While I understand the argument in favour of awarding 1.75% increases in years 2 and 3 of the Award, I do not support those increases but recognize that the departure from the 1.5% trend during the last two years of the term is one that is unique to the nurses represented by ONA in this case, and unique in the context of the submissions that were made in relation to the circumstances that this Board considered in relation to those Nurses relative to other employee classifications in bargaining units represented by other bargaining agents.

The Employers urged this Board to delete Articles 2.04 and 2.06 which restrict the flexibility of these Homes to operate and properly staff the facilities. As has been pointed out by the Chairman, no other collective agreements in the sector enjoy such generous protections which restrict the Employers' management rights to arrange their workplace and deploy appropriate staff as they deem appropriate. Counsel for the Employer identified the elimination of the Article 2.06 bargaining position as a "priority issue" for the employers and provided the Board with compelling arguments that should have caused the Board to conclude that the time has come to remove this extraordinary condition. Employer counsel also argued that if Article 2.06 is to remain, Article 2.04 must be removed as the restrictions for changing work assignments in the context of Article 2.06 is too restrictive. I would conclude that these Employer in the current environment, would have endured a lengthy strike in order to achieve changes to these provisions in the Collective Agreement. I would submit that the Chairman ought to have considered the impact of these provisions on the ability of these employers to properly operate their Homes in the current environment and that at the very least he ought to have eliminated the unusual and restrictive language that exists in Article 2.04.

In the context of: (a) the wage adjustments that have been awarded; (b) the Chairman's denial of the Employer's priority issue; (c) the Employer's agreement to resolve the Union's highest priority issue prior to the hearing, I would submit that the total compensation impact of this Award is higher than it ought to have been. I disagree with the Chairman's decision to front end load the shift and weekend premiums as he has in the first two years of the term of the Award. I would have been inclined to increase the premiums at the commencement of the second year of the term in increments of 10 cents for each of those years for a total of 20 cents for the entire term of the Agreement.

I disagree with the timing of the introduction of the improvements in the Benefits in the context of the total compensation impact of this Award. These improvements ought to have been introduced in the second year of the term of the Award.

I must disagree with the Chairman's decision to award the change to the "errors on paycheques" Irv Kleiner, Employer Nominee

and the new requirement for Participating Employers to notify nurses when a report is made to the College of Nurses. Both of these changes would not have been high priority issues in the context of free collective bargaining and neither of the changes was supported by a "demonstrated need for the changes".

Dated this 22nd day of October, 2021

"Irv Kleiner"

DISSENT OF UNION NOMINEE, KATE HUGHES

1. I must dissent as this award is woefully inadequate and out of step with the demonstrated need set out in the evidence before this interest arbitration Board. If the evidence of the acute and chronic severe nursing shortage, unfilled vacancies, overwhelming workload, and untenable stress on the staff, as well as the timely report of the Long-term care Commission recommending wage and staffing improvements for these for-profit long-term care homes, is not “demonstrated need” for significant improvements in the collective agreement then the well-recognized concept of demonstrated need in interest arbitration jurisprudence is meaningless.
2. This Board had the benefit of not just one, but two, recent major reports on long-term care homes in Ontario which shone the light clearly on the need for urgent significant staffing and compensation improvements. This Board heard the evidence not only of the devastating facts of the workplace problems for nurses during the ongoing COVID pandemic but also heard the clear evidence of the chronic crisis of the pre-existing problems in long-term care. The evidence is clear that collective agreement improvements on the HLDAA criteria of recruitment and retainment alone are long overdue.
3. This Board does not have its hands tied by Bill 124 wage restraints in these 184 Ontario Nursing Homes, unlike in the hospitals and in the not-for profit charitable homes. Yet this decision reads like the Board was restrained by wage restraint legislation in its meagre award for these members, flying in the face of the clear demonstrated need.

Free Collective Bargaining Replicates Right to Strike

4. Nurses, and others in the health care field, had their fundamental constitutional right to strike taken away when HLDAA was introduced in Ontario in the 1960s. But the HLDAA interest arbitration process was intended to replace this loss of the fundamental constitution right to free collective bargaining, including replacing the important right to strike. The task for interest arbitration boards under HLDAA is to replicate free collective bargaining as if the health care workers in question had the right to strike. Nurses should not be put in a lesser position by being so essential and in demand. The right to strike should not be seen as having been “trumped”, to use the Chair’s words, but should be replicated through interest arbitration.
5. The evidence in this round is that the working conditions are untenable; nurses are physically and emotionally exhausted by both the chronic staffing neglect in the sector and being so hard hit by the pandemic. There is a nursing shortage that is forcing nurses to work short staffed, do forced overtime and with a staggering workload of caring for very sick vulnerable people. I have no doubt if that they legally could, these Registered Nurses, and others in these bargaining units in these participating long-term care institutions, would go on strike in order to get better compensation, reasonable workloads, and safer working conditions both for the staff and the vulnerable residents. They have been pushed to the limit.
6. Interest arbitration should also not be an exercise where the arbitration board compromises between the two parties’ positions and fashions a remedy somewhere in the middle of the two positions. When there is compelling evidence of demonstrated need, such severe shortage of staff and problems retaining and recruiting sufficient staff, then HLDAA dictates that there needs to be an award that sufficiently addresses that problem. A “compromise” of positions is especially

not appropriate if an employer takes an unreasonable position in bargaining and seeks a clawback in the collective agreement in a round where the evidence is compelling for the need for significant improvements, not regressive proposals.

7. This is just that situation. The employer representative for these 184 for-profit homes came into bargaining, mediation and the interest arbitration process taking the unreasonable position that ONA's claims of staff shortages were "overblown", that this Board should reduce, not increase, staffing by a clawback in the staffing protections in articles 2.04 and 2.06 of the collective agreement. They further said the exhausted Registered Nurses in these 184 homes, who are presently not receiving any pandemic pay from the government and have not since August of 2020, should get a mere 1.5 % increase to their pay that is already well below their counterparts doing exactly the same work in Homes for the Aged. 1.5 % is far below even keeping up with the cost of living. The increased cost of living was 3.6 percent in the month the parties were at mediation and estimated to be at least 2.6 percent for 2021.
8. This position was an insult to the nurses, and the residents they are so valiantly trying to care for under terrible working conditions that put the residents, the staff, and their families at such a high risk. The Chair's award of a mere 1.75 % increase is still very much an insult. Nurses are emotionally and physically exhausted and understandably demoralized. While these nurses are deeply committed to the vulnerable residents they cannot keep working under these intolerable conditions.
9. Long-term care staffing in these homes is in a crisis. Severe long time staff shortages are not an "overblown" position. This is not the "subjective" view of the union. The overwhelming evidence before this Board is that these homes have both chronic and acute staffing problems, and this has been made into a chronic crisis by the years of "neglect" (to quote the Minister of Long-Term Care in the evidence to recent Commission inquiring into Ontario Long-Term Care). This chronic crisis was made into the present acute crisis by the lengthy, and ongoing, COVID pandemic and its variants and how hard it hit the ill prepared long-term care homes. Sadly, ONA's proposals in previous rounds of bargaining raising the issue of the chronic staffing shortage and the recruitment and retention problems in long term homes were ignored; this was unfortunately proven by the tragedy that unfolded in these for-profit long term homes during the COVID pandemic. They should be ignored no longer.
10. For evidence of objective demonstrated need, we need look no further than the two very current reports from two public hearings into long-term care chaired by neutral Ontario Court of Appeal Justices, that were put in evidence before us. The 2020/21 Ontario Long-Term Care Commission chaired by Mr. Justice Frank Marrocco reviewed over 211,000 documents and interviewed over 700 people in long-term care in Ontario including many documents and witnesses from the 184 for-profit homes at issue here. As the Commission concluded in their final report in April 2021, released just before these parties went to mediation in May of 2021, the pre-Covid problems of shortages of skilled staff, the poor wages and benefits that resulted in the homes not being able to attract Registered Nurses and keep Registered Nurses is an extremely serious chronic problem. The long recognition of the chronic staffing shortage included at least twelve other reports noted by the Commission (which were referred to this Board and found in Appendix A of the ONA brief). As Justice Marrocco summarized:

“Staffing at long-term care homes has long been recognized as a significant problem. Constant shortages, excessive workloads, high turnover rates and heavy reliance on part-time workers are common in the sector. This is difficult work and it is largely done by women.”(see pages 5-6 of the Report, provided to this Board as exhibit 8 of ONA’s brief).

11. The Commission also quoted from the 2019 report of the Public Inquiry into Long- Term care, which was also an exhibit before us. It found on the evidence that health care needs of residents in long term care homes in Ontario have changed greatly in the last few decades. Ontario Court of Appeal Justice Gillese concluded that that the health care changes of early release of patients from hospitals and the aging population Ontario now in long term care means “[a]s a result, residents enter long-term care homes at a later stage of their cognitive and physical impairment, when their health is likely to be unstable, they are more physically frail, and their care needs are higher.” Unstable health, comorbidities and higher acuity needs more RNs, not less or even the same staffing, in long-term care. This is important evidence of demonstrated need for both the compensation proposals and staffing proposals at issue before this Board.
12. The 2021 Commission on Long-Term Care, chaired by Justice Marrocco, found that the pre-existing staffing problems before the pandemic was a “chronic crisis” as he repeatedly outlined in his report. He then said that the problems of COVID where there were 15,000 long-term care home residents sick, 4,000 residents died, and 6,700 long-term care home staff sick and 11 deaths (in the first year of this ongoing pandemic), escalated the crisis. He said both residents and staff experienced the most severe consequences of the “failure to resolve the staffing crisis”.

Need for Wage Parity with Nurses in other Long-Term Care Institutions

13. Mr. Justice Marrocco and the other Commissioners strongly recommended in their April 2021 report immediate improvements to working conditions, including to give nurses “wage parity” to the compensation for RNs paid at Ontario hospitals and the not-for-profit long term care sector where RNs have parity (and sometimes better than parity) with hospital RNs. This is set out repeatedly in this important report, including in the following:

A lack of wage parity

In addition to facing a lack of full-time employment opportunities, staff working in long-term care homes typically earn an average hourly wage that is lower than that paid to their counterparts working in hospitals. The lack of full-time employment opportunities exacerbates the issue, as most part-time staff very often do not have benefits to supplement or offset low wages. The Commission heard that this lack of wage parity with hospitals, as well as within the long-term care sector itself, aggravates staffing shortages and creates both recruitment and retention issues. The situation in long-term care is untenable. Immediate steps must be taken to address it. (Exhibit 8, page 42)

14. As did Inquiry Chair Gillese, Mr. Justice Marrocco set out that nurses in long-term care were not staying in that sector and recruitment and retention measures of parity was key to attracting and keeping staff in these homes:

Financial disparity between sectors of the health care system leads to the needless movement of staff who understandably are looking for greater and more stable income. This cannibalization of one sector's workforce for another's does nothing to improve the lives of those needing care. To ensure sufficient staffing for all sectors, the income disparity across the health care sector must be addressed. (Ex 8, page 52)

15. This immediate need to address this staffing "cannibalization" of the long-term care sector, which is growing, cannot be left, as the Chair does, to "government policy". The legislature through *HLDA* has delegated to interest arbitration boards the task set the wage grids, compensation and specifically to award all measures necessary to deal with "recruitment and retainment issues" when the parties reach an impasse in collective bargaining. This power was not taken away by Bill 124 for these homes.
16. In addition to the findings of the two detailed government reports, ONA provided this Board with additional specific evidence from the homes of compelling demonstrable need to address the compensation and staffing issues including:
- i) **Vacancy data:** The homes cannot fill their vacant positions. We heard evidence that at the 184 participating homes there was 260 vacant RN jobs they were trying, and failing, to fill. Often minimal staffing levels from the *Long-Term Care Act* were not met.
 - ii) **Grievances:** 138 grievances on staffing alone were filed, including issues of no RN in the building in violation of the *Long-Term Care Act* requirements, forced overtime for RNs, use of agency RNs due to lack of staff RNs.
 - iii) **Emergency Orders:** Homes had to rely on government Emergency Orders for staff redeployment, forced overtime and cancellations of vacation to provide essential care to the staff.
 - iv) **Military report:** Exhibit 182 before us was the Military report outlining that the situation was so in many of these participating homes that Canadian Military were brought in to provide emergency staff assistance. Their report said lack of skilled and/or trained staff and the inappropriate use of agency nurses meant that resident care was severely compromised and outlined many of the tragedies that occurred Ontario long-term facilities over the last year and a half with resident and nurses' sickness and death far high than the rest of the province or anywhere else in health care;
 - v) **Professional Responsibility Workload Complaint Forms:** we also heard that 632 professional responsibility workload forms were submitted by RNs to these homes setting out specific instances of inadequate staffing on their shifts that was so problematic that the RNs were not in a position of being able to provide safe and quality resident care.

17. The specific evidence before this Board this round, coupled with the major reports on the current problems in Long-Term Care that include staffing issues, are more than compelling evidence for the proposals before us. This included the proposals for increases staffing ratios, compensation parity, as well as the proposals for increase in percentage in lieu of benefits for the many part-time staff who do not get benefits and improvements for Nurse Practitioners. If this is not “demonstrated need”, then the principle of demonstrated need is a sham.
18. The circumstances now are such that, if legally allowed, I believe based on the evidence that these nurses would have exercised their constitutional right to strike to get better staffing levels at these homes. The only way to address the shortages, and what Mr. Justice Maccorro called staff “cannibalization”, is through wage parity. During this round of bargaining, the starting rate for a RN going to a one of these participating homes is \$ 31.13 per hour, \$2.77 difference or more if she took a job at a home for the Aged (in some communities just down the road) or a hospital in her community instead. Each step of the wage grid she will be far behind her nursing counterparts in the same sector. Add to that difference, the impact on her pension and the inferior benefits at these homes and the lifetime earnings loss is huge. The meagre increase of 1.75 %, or 54 cents an hour to a RN, who can have her choice of higher paying nursing jobs due to the nursing shortage all over North America, is not going to be enough to address the shortage of RNs in these homes. Awarding parity would. It would stop the staffing “cannibalism” in long term care staffing Mr. Justice Morocco says must be immediately addressed.

Market forces and Economic Realities

19. The Chair quotes from the former Ontario Chief Justice Warren Winkler, in the often quoted University of Toronto case (148 L.A.C (4th) 193 at para 17). In my respectful view, he does not apply the reasoning from that decision. As set out in the quote cited by the Chair, an interest arbitration board must fashion a remedy that would be likely if the parties continued to “freely bargain’ (and free collective bargaining includes using the important constitutionally protected bargaining tool of the right to strike) given what Mr. Justice Winkler called “the market forces and economic realities”.
20. The “market forces” before this Board is a huge and unsafe shortage of Registered Nurses in long-term care. It is widely recognized that there is worldwide shortage in the market of Registered Nurses; every country, every province, every sector is competing for Registered nurses and without a doubt the Ontario long term care sector is one of the areas hardest hit in terms of a shortage of nurses. This “market force” reality of a severe shortage should result in an increase in compensation in the collective agreement to try to attract nurses into the Homes. If there were a shortage of other workers their compensation would increase, not a mere 1.75 increase to an already substandard pay. We heard evidence of the rich collective agreement interest awards for other front line workers, such as police and firefighters, who also have the right to strike taken away. They have far less educational qualifications than RNs and RNs, no evidence of shortages or problems in recruitment and retainment, and we heard evidence of the high risks’ levels of personal harm to RNs have now reach equivalent levels. Yet in these predominately male workplaces they have much higher compensation and benefits awarded by arbitrators.
21. ONA has been raising the shortage and the link to poor compensation to interest arbitrators for years and it has fallen on deaf ears. ONA was right about the shortage, as the objective evidence establishes. Faced with the evidence both before and after COVID of the crisis problem in long

term care, there is no doubt that was demonstrated need to address in previous rounds, but especially in this round, improvements to compensation, staffing and other working conditions to address the HLDA refers to as the recruitment and retainment criteria. ONA is not seeking improvements based on “fairness”; they are seeking it based on the HLDA criteria and principles such as market forces.

22. As well as “market forces”, Chief Justice Winkler, as he was then, refers to “economic realities”. HLDA also to economic issues such as the employer’s “ability to pay”. As the Chair accurately notes, the 184 for-profit homes did not claim an inability to pay. But in addition, the evidence was these for-profit long-term care homes are very profitable for their corporate owners, directors and high level managers and shareholders. 87% of these homes are owned by a corporation, with the majority by four corporate chains. As set out in exhibits 36-38 before this Board these publicly traded corporate chains, funded by public dollars, pay of hundreds of millions of dollars to shareholders, even during the time of such tragedies to residents and staff during the COVID pandemic. Each of the top three corporations, who own the majority of these homes, actually increased the dividends paid out in 2020 compared to 2019 by dollars in the order of millions (ranging from 37.2 million to 12.6 million) and the top executives and Directors were paid out millions in salary and in bonuses (see exhibits 36, 37 and 38 of the ONA brief).
23. In addition to fees from their residents, these for profit homes receive public funding equivalent to the not for- profit homes, who have better staffing and staff compensation. Moreover, we were provided evidence that in 2019 the government introduced a global per diem which can be used to top up any of the funding envelopes and nursing compensation is not limited to only one envelope of money. The for-profit homes certainly can increase the compensation to staff, they just choose to keep the funds for shareholders and others. The desire for the homes to have profit is not a criteria under HLDA.

Replication

24. The Chair cites the principle of replication in support of award. The impact of his view of replication however distills down to interest arbitrators replicating simply other collective agreements which results in the replication of an inferior status quo, divorced from the particular workplace needs except in only the most minor of ways. Replication is replication of free collective bargaining, not repeating other awards. In a round where the workplace issues are so severe, these Registered Nurses would never have accepted a mere 1.75 percent wage increase and no relief from the short staffing stresses or the cost of living.
25. The Chair speaks of “comparability” and says that the parties “cherry pick” between comparable collective agreements. However, his use of comparators makes no sense. He compares to collective agreement in Long- Term Care from other unions who represent largely PSWs, cleaning staff and others, not Registered Nurses with very different skills, responsibilities, and education. He also compares to the workers in Local Health Initiatives (LHINs), that function as case managers and do not have to be Registered nurses and are not doing hands on nursing. Or he refers to homecare which is very different to the work of Registered Nurses in these long-term care homes. In these participating homes, the RNs are responsible for up to 132, or more, frail residents with multiple health conditions, requiring care where often the RN is the sole regulated health professional on site.

26. He chooses not to compare to the most obvious comparator--other RNs other in similar long-term care institutions run by municipalities or charities, who are doing the identical work as these Registered Nurses, providing the same nursing care to the same vulnerable residents with the same acuity and comorbidities and under the same legislative requirements under the *Long Term Care Act* and the *Regulated Health Professions Act*. Those are obvious comparators. And this comparison would require parity of compensation. This is the right result and is in line with the urgent recommendations of the 2021 LTC Commission report.

Bargaining Patterns

27. The Chair talks about patterns of bargaining and accurately says that ONA has a pattern of making significant gains in the past through free collective bargaining. It then follows that the replication of this pattern for ONA should be the repeat of significant gains.
28. There is no point at looking at other collective agreements in the sector of other unions; first of all, ONA has never bargained comparing to those other unions but has been the leader, as the chair acknowledges. But also, those collective agreements have largely been suppressed due to the wage restraints of Bill 124 for the three year moderation period and/or deal with very different types of workers than a unit that is almost completely RNs or Nurse Practitioners.
29. He also says that “breakout” language or deviation from the norm requires demonstrated need. Leaving aside demonstrated need, which has been established, ONA is not seeking break out language. Seeking compensation increases comparable to other nurses doing similar work is not break out language. Long-term care nurses had parity with home for Aged and hospitals in the 1980s. It is only through the interest arbitration process that they lost parity. As noted by the two long term care reports, much has changed in long term care since the 80s by way of increased acuity and instability of the aging residents with many comorbidities, akin to patients in acute care settings. In other not for profit similar homes parity is the norm. It is time to return to that pattern of parity for these for profit homes doing the exact same work.

Human Rights Proposal: Grid Change

30. The Chair also declined to award a proposal where ONA was seeking a modest one step reduction to the grid steps. The lengthy grid, much longer than those grids for male dominated health care workers and other male dominated front line workers, has the systemic effect of denying nurses in long term care from reaching the top rate for more years than male comparators. ONA proposal was very modest in comparison to the male comparator in the Homes for the Aged which reached the top job rate in five years, as opposed to nine years on the homes current grid. Moreover, this Board had before it evidence that at each step of the grid, RNs in these homes are paid significantly less than RNs and male comparators at the Homes for the Aged or Public Hospitals. The grid was not intentionally created to discriminate against these health care professionals, but intent is irrelevant in a human rights analysis. It has the effect of adversely affecting Registered Nurses who have their salary advancements repressed by the long grid. This Board has both the jurisdiction and demonstrated need to address the issue.
31. The Nurse Practitioners also faced a lengthy grid in comparison to the Homes for the Aged Nurse Practitioners. The Board had evidence before it that NPs are required to work a full eight years before reaching their job rate. This lengthy grid does not make labour relations sense and is

evidence of a violation of the Homes' human rights and pay equity obligations in comparison to the male comparator. A job rate represents the top pay rate at which an employee is proficient in the job. NPs, as an extended class, are required to have a Masters in Nursing and meet rigorous requirements to complete their additional certification. ONA argued that the NP template grid should be reduced to 5 years from the current 8 and that adjustments should be made each step to ensure no wage discrimination exists. The Chair does not grapple with the NP's unique and important role in the long term care homes.

32. The Chair was given Arbitrator Ready's interest arbitration case, *Board of School Trustees, School District No. 39 (Vancouver) and Vancouver Municipal and Regional Employees Union, Re 1993 CarswellBC 3646*. In that case there was a similar argument of systemic gender discrimination in the wage grid. The Union's proposal in that case was to reduce the number of increment steps by three steps and Arbitrator Ready adjusted the wage grid, he did not punt it to another forum.
33. This Chair, rather than deal with the Union's proposal, decides to pass it off to the Pay Equity Tribunal; as he put it he declined to "wade into the fray". There are several problems with his conclusion and reasoning. The first problem with his reasoning is that ONA was relying on the *Human Rights Code*, not the *Pay Equity Act* for this proposal, as their written brief and oral argument made clear. They made a human rights Code-based systemic discrimination argument. This arbitration Board, like all arbitration boards, has the jurisdiction to apply and implement the *Human Rights Code*. Human rights are not merely a "fray". *As the SCC said in District of Parry Sound and OPSEU: "human rights establish a floor beneath which an employer and a union cannot contract"* (Exhibit 25 at paragraph 28). As well, the Pay Equity Hearings Tribunal does not have the exclusive jurisdiction to apply the Human Rights Code and in fact the courts have said that grid changes like those sought by ONA cannot be made by the Pay Equity Tribunal (*see Divisional court decision of CUPE Local 1999 v Lakeridge Health corporation, 2012 ONSC 2015*) They can only deal with narrow issues dealing with the top job rate. Changing the length of a grid in a collective agreement however can, and have been, made by interest arbitrators as set out in the ONA Brief.
34. The Chair also spends much time spelling out that ONA is not relying on an "internal inequity" argument. This need not be spelled out and is not relevant to ONA's argument. In fact, such a reference displays a reliance on a formal equality analysis rather than a substantive equality analysis required to redress systemic discrimination (see for instances *Fraser v Canada (AG) 2020 SCC 28*). Of course, ONA is not relying on an internal inequity argument, as these workplaces are either exclusively or overwhelmingly female dominated without any internal male comparator. In these circumstances, it is entirely appropriate for ONA to refer to external comparators, as the courts have acknowledged.
35. Moreover, in light of the systemic discrimination faced by nurses working in female-dominated workplaces, the Ontario legislature has said that the external comparator for Nursing Homes is the Homes for the Aged. This is set out in Regulation 396/93 of the *Pay Equity Act*, found at exhibit 142 of the ONA brief. This comparator is defined in the Regulation because nurses' wages in the Municipal Homes for the Aged have the benefit of comparison to male wages but the nurses in the other similar long-term care institutions do not have a male comparator. So, there is a legislative determined comparator for pay equity, which this Board should use for the same reason.

36. The Chair also states the parties currently have a dispute before the Pay Equity Hearings Tribunal. ONA was successful at the Ontario Court of Appeal and leave to appeal that decision to the SCC has been denied, so this is a binding decision. This decision says that these female employees can use the proxy method of external comparators in the Homes for the Aged. Put simply, there is no barrier to the Chair relying upon the Homes for the Aged as the appropriate comparator for the nursing homes to rectify both the lengthy wage grid and lower wage rates of the LTC nurses. We need not wait for the Pay Equity Tribunal to make a further order, especially as that tribunal cannot order a compression of the grid. Only the interest arbitrator can do so.
37. I also find it very troubling that we heard evidence of male dominated front-line workers, such as police and firefighters, who have done so much better through the interest arbitration process than Registered Nurses and other regulated Health Professionals, who are predominately women. These male front-line workers also do not have the right to strike but interest arbitrators have awarded them consistent increases in both wages and benefits, and other premiums. For instance, we have heard evidence that some interest arbitrators have recently awarded them unlimited mental health benefits and generous increases and their grids are structures so that the workers get increase above the job rate. While they have long been able to argue that their jobs need to be so well compensated due to the personal risks that may occur in their work, the evidence is that nursing is a very high risk, stressful profession, as COVID pandemic in long-term care has proven. In addition to infectious disease risk; violence risk is very much an issue. The residents in long-term care are often violent, due to the unfortunate effects of their dementia on a significant proportion of residents, as numerous inquests have established and nurses are often hit, punched, scratched and subject to other violence in the course of their duties. Nurses in long term care are also suffering from burnout and trauma from being the only ones to care for so many dying and/or severely demented residents. Registered Nurses have higher educational qualifications and used to be paid more than police officers, who only need high school education. But now their wages, benefits and other compensation has fallen well below those of these male front line comparators. The interest arbitration process that rewards these male dominated front-line workers and does not give similar interest awards for female health care professionals working similar long 24/7 shifts, with risks of the level of violence equivalent to those male workers and much higher risk of infectious diseases, is more than troubling. The Human Rights Code proposal of ONA to compress the grid is a small step to addressing this disparity and should have been awarded.

Other Proposals

38. I would have awarded the proposals for wage and compensation parity, for the reasons above. I would have also awarded improvements to the staffing language in article 2.06. The employers here took an unreasonable position to reduce the staffing language by deleting both article 2.04 and 2.06 of the collective agreement. This was an untenable position of a take- away from the collective agreement and flies in the face of the evidence, including the findings of Mr. Justice Marrocco and Madame Justice Gillese, and the many reports on long-term care in Ontario found in Appendix A of ONA's brief. In light of the clear staffing problems in long-term care, the burnout and the growing health care needs of these homes' residents, more staffing is clearly needed. Mr. Justice Marrocco, for instance, after carefully reviewing both the for-profit homes and the not for profit (Municipal Homes for the Aged and Charitable homes) in his Report (Exhibit 8) concluded that the staffing in these homes were in a chronic crisis and highlighted the problems especially in for-profit homes repeatedly, including as follows:

Numerous studies and system reviews over the past two decades have highlighted the variations in quality of care and resident outcomes between for-profit, not-for-profit and municipal homes, including:

- **Staffing:** For-profit homes tend to offer lower wages and benefits to their staff, have higher staff turnover, and have lower staffing levels and staff-skill mix (i.e., the mix of medical and non-medical staff).

39. ONA provided this Board with proposals based on demonstrated need to improve these lower staffing levels. The Chair denies both staffing proposals; replication of free collective bargaining does not simply amount to the parties cancelling out proposals, especially in the face of demonstrated need. HLDAA criteria of considering issues of retainment and recruitment also demands better staffing in the homes, as the Registered Nurses are clearly stressed and burned out and are not coming to work at these homes, or staying, in sufficient numbers needed.
40. The Chair properly awarded the mental health benefits, but \$800.00 of counselling is not going to sufficiently address the stress of RN who has to on an ongoing basis constantly care for 68 to 132 or more residents, with no physician on site except for occasional visits (and rarely a NP), and without sufficient numbers of other RNs and other skilled health care professionals and more staff also caring for the residents. This is an untenable workload and staffing changes have to be made above and beyond 800.00 of counselling. The only way to attract and retain sufficient numbers of regulated health professionals to properly care for these increasingly ill residents is through proper staff levels, as the two public hearings in LTC confirmed. To do this the solution returns again to parity of wages and benefits and appropriate staffing provisions in the collective agreement. We heard evidence that some similar long-term care homes outside of this group of participating for-profit homes, such as the Sun Parlour Home in Leamington Ontario or H.J McFarlane Home in Picton Ontario pay higher than parity to hospital nurse compensation to be able to sufficiently recruit and retain RNs.
41. I would have also awarded the proposal dealing with part-time members' pay-in-lieu of benefits increase. Mr. Justice Marrocco and others note the overreliance on part-time workers at these homes and that was clear in the evidence we had before us.
42. I would have increased other benefits, beyond the Chair's modest increase in vision, as these benefits are continuing to fall behind appropriate comparators and would help in attracting staff to these workplaces.
43. The Chair also does not award the request modest improvements to the Pregnancy and Parental leave Top up provisions of the collective agreement. This provision has not been updated for 23 years and is well overdue. If these long-term care homes are going to attract the younger nurses, they will have to have reasonable pregnancy and parental leave provisions as an incentive to work in these homes, instead going to the municipal or charitable homes, or the hospitals, that all have better top up pay for RNs having children and requiring leaves.
44. Similarly, the Chair does not order the proposal for student supervision and mentorship but sends it back to the parties. The government has announced funding for nursing educational programs

specifically to try to address the recognized nursing shortage. However, as the Long-Term Care Inquiry in 2019 noted nursing students are not attracted to placements in long-term care homes and when they go to such homes as new nurses they tend not to stay when they realize how often they are the only RN for large numbers of residents. With proper mentorship and supervision from other RNs there is a much higher chance of recruiting and retaining these sought after graduates and new nurses to the participating long-term homes. Not awarding this is a missed opportunity. The Chair inexplicably sends the issue back to the parties to negotiate. They have engaged in both negotiation and mediation on this proposal and there is no indication that the outcome will be different than at previous bargaining. This is likely to be a waste of time. It would make more sense to send back the human rights proposal to the parties and remain seized, given the new changed circumstances since bargaining and mediation of the SCC turning down the employers leave to appeal application on October 14 2021.

45. The Chair relies on his view of “replication” repeatedly in his award. However, it is not normative to give such a low increase to evening, night, and weekend premiums when comparators receive higher premiums. The RNs working on those shifts are often working alone and the workload for so many unstable residents is grueling with such lean staffing. I note, as well, that ONA has agreed to a longer period of the collective agreement, three years and normally in free collective bargaining in return for a longer collective agreement this extra year or years has to be “bought” by the employer to get this longer labour stability. The Chair however awards little extra in the third year contrary to such labour relations principles. For instance, in the third year the bargaining unit employees get a mere nickel more for premiums, a decrease in the third year for updating the premiums and nothing in the way of other improvements for this third year. This is not normative.
46. The award also does not appropriately address Nurse Practitioners. NP are very important to the staffing in LTC, as unlike hospitals there are no doctors on site and NPs have an extended scope of practice, including ability to prescribe medications. Yet there is nothing in here to attract NP to LTC homes and the “market forces” are such that they are in high demand.
47. For all these reasons I must dissent.

Kate Hughes