

**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 CHARITABLE NURSING HOMES

(the “Charitable Homes”)

and

ONTARIO NURSES’ ASSOCIATION

(the “Union” or “ONA”)

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

APPEARANCES:

For The Charitable 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

HEARING HELD BY VIDEOCONFERENCE ON JULY 5, 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, 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 issues between the parties with respect to the renewal of collective agreements between the Ontario Nurses Association (“*ONA*”) and participating not-for-profit (or charitable) nursing homes in Ontario (“*Charitable Homes*”).

[2] The *Charitable Homes* operate for non-profit long-term care (*LTC*) homes across the province of Ontario.

[3] *ONA* represents approximately 68,000 Registered Nurses (*RNs*) and other allied health-care professionals employed and providing care at hospitals, long-term care facilities, public health, the community, industry, and clinics. *ONA* represents the majority of *RNs* employed by Ontario *LTC* nursing homes. The size of the bargaining units tends to be small with a few as 10-15 *RNs* and in some *LTC* bargaining units include Nurse Practitioners (*NPs*), Registered Practical Nurses (*RPNs*) and Personal Support Workers (*PSWs*).

[4] The collective agreements between the *Charitable Homes* and *ONA* include the central template provisions and individual “local” provisions. This award only addresses the parties’ dispute with respect to central template provisions.

[5] This dispute arises within the context of the on-going COVID-19 pandemic. COVID-19 has spread throughout the world and infected thousands of people in Ontario. Ontario’s healthcare sector has been under extreme pressure trying to cope with the pandemic and those who have been infected. The *LTC* nursing home sector has been particularly hard hit by COVID-19. The virus has ravaged residents and healthcare staff in *LTC* homes. Many residents and staff paid the ultimate price and lost their lives, including a member of *ONA*, Brian Beattie, who worked in London, Ontario. The parties

to these proceedings agree that those working in LTC are heroes. However, they are at an impasse as how the nurses working in LTC nursing homes should be compensated.

[6] The issue of compensation is further complicated by legislation introduced by the current provincial government before the COVID-19 global pandemic, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (“*Bill 124*”). *Bill 124* imposes a 1% total compensation cap in each year of a three-year moderation period. *Bill 124* applies to every licensee under the *Long-Term Care Homes Act, 2007*, other than a licensee that carries on its activities for the purpose of gain or profit to its members or shareholders. Accordingly, *Bill 124* does not apply to those PNH that operate for profit. However, *Bill 124* does apply to the Charitable Homes.

[7] Historically, the Charitable Homes participated with other “Participating Nursing Homes” (PNH) in central bargaining with ONA. ONA and PNH have participated in central bargaining since 1991. *Bill 124* has made it impossible for all of the PNH to bargain together for the first time in 30 years. Frankly, we are at a loss why an exemption was not granted to these Charitable Homes in order to preserve the long-standing bargaining relationship.

[8] The PNH and ONA signed a Memorandum of Conditions for Joint Bargaining on April 15, 2021. At the same time, recognizing the different circumstances that exist for the Charitable Homes, the parties agreed to a separate Memorandum of Conditions for Joint Bargaining applicable to the Charitable Homes.

[9] The parties met in direct bargaining on April 26-30, 2021. Mediation with Matthew Wilson occurred on May 17-19, 2021.

[10] The parties were able to agree on a number of items during bargaining and in mediation. Those non-monetary issues previously agreed upon shall be included in the renewal central template.

[11] 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 (LBGTQIA2+).

[12] The PNH hearing proceeded on June 1 and 2, 2021. A separate award has been issued for the central template to be utilized between ONA and those for profit LTC nursing homes (the “*PNH and ONA Award*”). In the *PNH and ONA Award*, we have explained the principles of interest arbitration as applied under *HLDA* and addressed the proposals that mirror the proposals made in this matter. In the *PNH and ONA Award*, we note that interest arbitration is an extension of free collective bargaining and the most important guiding principle applicable to all interest arbitration proceedings is replication, see *University of Toronto v. University of Toronto Faculty Assn. (Salary and benefits Grievance)* (2006), 148 L.A.C. (4th) 193 (Winkler). Unfortunately, *Bill 124* interferes with free collective bargaining by imposing a 1% cap on total compensation. In addition, *Bill 124* specifically limits the right of this interest arbitration board from inquiring into or deciding “on whether a provision of this Act, a regulation or an order made under subsection 26(1) is constitutionally valid or is in conflict with the *Human Rights Code*, see ss. 29(2). In the absence of *Bill 124*, the Charitable Homes would have been subject to the *PNH and ONA Award* and received all the same compensation increases.

[13] ONA and other trade unions have filed a constitutional *Charter* challenge to *Bill 124* in Superior Court. Seeking to overturn the legislation on the grounds that it violates s.2(d) (freedom of association) and s.15 (equality rights) under the *Charter*. ONA has also sought an exemption but has not been granted such exemption. ONA also asks us to disregard *Bill 124*, as it is in their view unconstitutional and inconsistent with this Central Board of Arbitration’s broad mandate provided for under *HLDA*.

[14] The applicability of *Bill 124* to interest arbitration boards created under *HLDA* is addressed by Arbitrator Gedalof in *Mon Sheong Home for the Aged v. ONA*, 2020 CanLII 8770 (ON LA). Arbitrator Gedalof found that essentially an interest arbitration board's hands are tied, and they have no jurisdiction to award any monetary compensation outside the parameters of *Bill 124*. Interest arbitration boards have subsequently followed *Mon Sheong*, and we adopt Arbitrator Gedalof's reasons as well. In addition, we find it appropriate to adopt the re-opener that has been commonly accepted for substantially the same reasons. Therefore, in the event that ONA is successful in having *Bill 124* declared unconstitutional by a court of competent jurisdiction, or if the legislation is amended, repealed or if ONA is granted an exemption, the parties shall have an opportunity to address how this board of arbitration should exercise their discretion in light of any such legislative changes. Therefore, we shall remain seized of all monetary proposals.

[15] The issues remaining in dispute proceeded to videoconference hearing on July 5, 2020. At the hearing the parties filed extensive written briefs, with numerous exhibits, presenting their positions on the issues in dispute. The Board met in executive session thereafter.

[16] We adopt the all the reasons in the *PNH and ONA Award* for the purposes of this award, including but not limited to our reasons for dismissing ONA's *Human Rights Code* proposal to compress the wage grid. We have awarded all the non-monetary amendments that we awarded in the *PNH and ONA Award*. In terms of compensation, we have regrettably been forced to comply with *Bill 124*.

AWARD

[17] After carefully considering the submissions of the parties, we hereby order the parties to enter into a renewal collective agreement that contains all the terms and conditions of the predecessor collective agreement 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%
 - Effective July 1, 2022 – 1%
 - Effective July 1, 2023 – 1%
 - Retroactive compensation to be paid in accordance with Article 22.02.
- **Premiums:**
 - Effective July 1, 2021, increase weekend premium by \$0.10
 - Effective July 1, 2022, increase shift premium by \$0.05
 - Effective July 1, 2023, increase shift premium by \$0.05
 - Retroactive compensation to be paid in accordance with Article 22.02.
- **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.

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

[19] We remain seized in accordance with subsection 9(2) of *HLDA* until the parties have signed new collective agreements. We also remain seized with respect to a re-

opener on monetary proposals in the event that ONA is granted an exemption, or *Bill 124* is declared unconstitutional by a court of competent jurisdiction, or the Bill is otherwise amended or repealed.

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



John Stout – Chair

Dissent attached

Kate Hughes - ONA Nominee

Dissenting in part

Irv Kleiner – Charitable Homes Nominee

DISSENT OF UNION NOMINEE, KATE HUGHES

1. This Interest Arbitration Board, as numerous arbitrators have said, has had its “hands tied” by Bill 124 by taking away the ability to replicate free collective bargaining. These long-term care homes need significant wage, benefit, and premium increases but the effect of Bill 124 is to make that impossible for this Board to do. I agree with the Chair on that point. The 1% increase in salary and little else is an insult to these hardworking nurses on the front line of the COVID pandemic. It is less than even the cost of living increases and I am embarrassed to have to send out such a paltry demoralizing award to these nurses. On this issue we have no choice, given the wording of the government’s draconian wage suppression legislation.
2. The Chair however concluded: “In the absence of Bill 124, the Charitable Homes would have been subject to the PNH and ONA Award and received the same compensation increases”. The PNH is what is called the Participating Nursing Homes, a group of for-profit homes owned mainly by corporate chains. This group, which has traditionally paid lesser compensation to the RNs in terms of wages, benefits, and premiums, has never been the comparator to these charitable homes so I disagree with the Chair on this point. While I agree that Bill 124 prevented normative and needed increases to these RNs’ compensation, I disagree that absent Bill 124 these RNs should have received “the same compensation increase” as awarded in the PNH group, which I believe is too low as set out in my dissent in that award (dated October 25, 2021). These RNs in the charitable homes should receive compensation increases keeping them comparable to the Home for the Aged, as they have received prior to when Bill 124 divided up the long-term care sector in a nonsensical way.
3. The Charitable homes in ONA collective bargaining have always been compared to the municipal Homes for the Aged and both have bargained compensation parity with ONA hospital RN rates. Both Charitable Homes and Homes for the Aged (and hospital) RN collective agreements have, at least since the 1980s, always had better compensation and staffing than the for-profit homes, who pay dividends to shareholders and bonuses to their Directors and Senior corporate Officers. The inferior wages, benefits and other compensation and poor staffing levels and problems of higher turnover of the for-profit homes has been objectively confirmed in the 2021 report of the 2021 Ontario’s Long-Term Care COVID 19 Commission, chaired by Mr. Justice Frank Marrocco of the Ontario Court of Appeal, which ONA put into evidence as Exhibit 8 these proceedings. There is no reason that absent Bill 124 the charitable comparator would now become the for-profit homes, which pay less to workers and instead pay dividends to shareholders and bonuses to corporate officers and directors.
4. These RNs, and others in the bargaining unit, are under extreme stress and working untenable workloads. This is not just because of the devastating effects of COVID on these homes. Mr. Justice Marrocco found that the crisis of chronic under-staffing shortage in long-term care in Ontario pre-existed the COVID pandemic and was a significant factor in the tragedies of COVID. The demonstrated need, including the market forces of a nursing shortage, and the vacancies that cannot be filled, should have result in significant increases to both compensation and staffing levels.
5. While Bill 124 ties our hands with respect to compensation increases, it does not tie our hands with respect to applying the *Human Rights Code*: see section 28 of Bill 124 that expressly says that Bill 124 does not oust the *Human Rights Code*. Despite this, the Chair declined to award a proposal

where ONA was seeking a small changes to the grid under their *Human Rights Code* argument. ONA argued that the grid 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.

6. 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. We had the jurisdiction and evidence so we should have looked at this proposal carefully and make the necessary adjustments in recognition of the systemic adverse effects of the grids, instead of declining the proposal out of hand.
7. RNs, like police and firefighters, are all deemed by legislation "First Responders". Yet these female front-line workers are treated very differently from the male dominated front line workers. All of these front-line workers have had the right to strike taken away and replaced by an interest arbitration process. I 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 RNs, particularly RNs in long-term care. For instance, we have heard evidence that some interest arbitrators have recently awarded many police and firefighter collective agreement improvements of very high, and sometimes unlimited mental health benefits. They have long awarded police and firefighters generous increases and their grids are structured so that the workers get increase above the job rate by rewarding them for long-term experience. While police and firefighters have long been able to argue that their jobs need to be well compensated due to the personal risks that may occur in their work, the evidence is that nursing is also very high risk, stressful profession, as COVID pandemic in long-term care has proven. In addition, the behaviors of some residents in long-term care are often violent, due to the effects of dementia, as numerous inquests have established. Staff in these workplaces are often hit, punched 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 with so little support. Added to that is the fact that Registered Nurses have higher educational qualifications than police officers, who only need high school education. Registered Nurses used to be paid more than police, 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 also working long 24/7 shifts, in workplaces with high personal risks of the level of violence 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. It should be addressed.
8. The Chair remains seized with respect to another proposal yet does not either determine or remain seized of the human rights proposal. Since the parties were in negotiations the SCC has denied the Participating Homes application for leave to appeal from the union's win at the Court of Appeal (see *Ontario Nurses' association v. Participating Nursing Homes* 2021 ONCA 148; leave to appeal to SCC denied). The adverse effect on women in the grid is a matter of serious concern and should not have been dismissed out of hand. I would have sent it back to the parties for more negotiations on this important issue and remained seized.

9. I would have also awarded improvements to the staffing language in article 2.06. In light of the clear, compelling and overwhelming evidence of the chronic and acute staffing problems in long-term care homes, the burnout and the growing health care needs of these homes' residents, more nurses are clearly needed. It is unfathomable that more demonstrated than before this Board in this round could be required.

Kate Hughes
Union Nominee