IN THE MATTER OF AN INTEREST ARBITRATION
PURSUANT TO SECTION 40 OF THE *LABOUR RELATIONS ACT, 1995* AND A MEMORANDUM OF CONDITIONS FOR JOINT BARGAINING DATED MARCH 24, 2023

BETWEEN

THE VICTORIAN ORDER OF NURSES CANADA - ONTARIO BRANCH
(the "VON")

and

ONTARIO NURSES' ASSOCIATION
(the "Union" or "ONA")

BOARD OF ARBITRATION: **John Stout, Chair**
Irv Kleiner, VON Nominee
Phillip Abbink, ONA Nominee

APPEARANCES:

For the VON:
Ryan Wood, Bass Associates
Donna Walrond, Bass Associates
Wendy Steele
Jeffrey Wood
Sabrina DiManno

For ONA:
Simran Prihar, Goldblatt Partners
Kayla Sanger, Legal Counsel
Lorna Thompson
Tammy Bertrand
Lucja Masoom
Erin Ariss
Angela Preocanin
Andrea Kay
Steven Lobsinger
David Cheslock
Marilyn Dee
Patricia Carr
Victoria Romaniuk
Tam Gallagher
Shelly Spenser
Dave Campanella
Ryan Fitzgerald

HEARING HELD JUNE 26, 2023 IN TORONTO, ONTARIO AND AN EXECUTIVE SESSION HELD NOVEMBER 7, 2023

INTRODUCTION

[1] This Board of Arbitration (the "Board") was appointed by the parties, in accordance with section 40 of the *Labour Relations Act, 1995* to resolve the outstanding issues between the parties with respect to a renewal central collective agreement between the Ontario Nurses Association ("ONA") and the Victorian Order of Nurses Canada – Ontario Branch ("VON").

[2] The collective bargaining relationship between the parties is mature and at some sites has been in place for over 30 years. The most recent central collective agreement was imposed by interest arbitration, 2021 CanLII 63762 (ON LA), and expired on March 31, 2023.

[3] The current round of collective bargaining between the parties was established through a voluntary Memorandum of Conditions for Joint Bargaining signed March 24, 2023 (the "Memorandum").

[4] Central negotiations took place on March 28, 29 and 30, 2023. The parties engaged in mediation on May 17 and 18, 2023, with the assistance of Arbitrator Matthew Wilson.

[5] The parties agreed to a number of items in agreements dated March 28 and June 8, 2023. These items will be included in the renewal collective agreement. The parties were unable to resolve all the issue in dispute and reach a voluntary settlement. Those issues remaining in dispute were referred to this Board for resolution.

[6] The parties filed extensive written briefs and a hearing was held on June 26, 2023. Additional written submissions were filed, and the Board met in executive session on November 7, 2023

BACKGROUND

[7] The VON was established in 1897 and it is a national not-for-profit charitable organization. The VON operates a number of sites in Ontario. The VON offers services

from their sites involving “home care” to people of all ages, in the home, workplace, schools and other community settings.

[8] Publicly funded home care in Ontario falls under the jurisdiction of the Ministry of Health & Long-term Care (MOHLTC). The MOHLTC provides stewardship of the healthcare system and local health services are planned and funded by Home and Community Care Support Services (HCCSS) (formerly the Local Health Integration Network “LHIN”). Approximately 99% of the services provided by the VON are publicly funded.

[9] ONA is the largest union representing nurses in Ontario, representing 68,000 Registered Nurses (RNs) of which 216 are employed by the VON.

[10] The sites covered by these central terms are as follows:

- VON Brant, Haldimond, Norfolk
- VON Chatham-Kent
- VON Durham
- VON North Bay
- VON Peterborough, Victoria & Haliburton
- VON Porcupine Site- Highway 11 and the City of Timmins
- VON Sarnia-Lambton
- VON Thunder Bay and District
- VON Toronto/York Peel
- VON Perth-Huron was closed May 7, 2021and ONA was given notice on March 9, 2021.

[11] These nurses provide essential and necessary care to patients in their homes. The work is very demanding and involves significant travel.

[12] ONA has made proposals that they characterize as “modest and normative” to improve and modernize existing language. ONA asserts that VON nurse compensation has fallen behind other nurses in hospitals and has led to staff shortages, increased use of agency nurses and made it difficult to recruit and retain nurses.

[13] The VON claims an inability to pay for the proposals requested by ONA in this set of negotiations. VON describes their financial situation as “extremely dire” as the VON

experienced a recent credit protection application in 2015 and they claim that their financial position has not recovered. The VON insists that its dire financial position is related to what it describes as its “extremely high labour costs”, which they advise make up 80% of all expenditures.

[14] The VON also points to the fact that ONA and several other trade unions have filed a grievance with respect to the pension plan, claiming retroactive payments from 2006-2021.

[15] ONA challenges the VON inability to pay claim, maintaining that the VON has not provided the evidence required to demonstrate that they have an inability to pay.

ANALYSIS

[16] This is a voluntary interest arbitration pursuant to section 40 of the *Labour Relations Act, 1995*. The *Labour Relations Act, 1995* does not set out the factors to be considered by an arbitrator or board of arbitration to resolve the issues in dispute. In addition, the parties have not agreed in the Memorandum to the factors we are to consider in making our award. Therefore this Board is of the view that we are free to exercise our broad discretion to resolve the issues in dispute by having regard to the well-established principles applicable to all interest arbitrations found in the jurisprudence.

[17] The interest arbitration process is not a judicial or adjudicative process guided by one’s personal sense of fairness or social justice. Interest arbitrators (or arbitration boards) do not implement social policy and it is not their task to determine government funding. As stated by Arbitrator Martin Teplitsky Q.C. in his August 31, 1982, award between *SEIU and a Group of 46 Participating Hospitals*, “Interest arbitrators attempt to emulate the results of free collective bargaining…Interest arbitrators interpret the collective bargaining scene. They do not sit in judgment of its results.” The collective bargaining scene includes both comparable freely negotiated settlements and awards, which are themselves based on relevant comparators.

[18] Arbitrator Burkett addresses the importance of the replication principle in his decision *Bruce Power LP and Society of Energy Professionals* (2004), 126 L.A.C. (4th) 144 at paragraph 19 where he stated:

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

[19] 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 or consequences. 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.

[20] 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.

[21] The comparators commonly examined in interest arbitration include the terms and conditions of employment negotiated by parties in the same industry or sector, facing a similar economic and labour market environment and bargaining relationship. The most relevant comparators involve situations that closely mirror the situation before the board of arbitration. Collective agreements negotiated by either party for a similar period of time involving similar employees providing similar services in similar communities would be relevant to the decision maker. That being said the relevance of any given comparator is diminished the further away you move from the facts before the board of arbitration.

[22] The application of replication as informed by comparability does not mean that an interest arbitrator (or arbitration board) is required to follow other awards and settlements religiously and slavishly. The replication principle does not equate to "duplication" of other outcomes without consideration of the specific circumstances. There can be no predetermined result based on precedent in interest arbitration. As stated by the Ontario Divisional Court in *Scarborough Health Network v. Canadian Union of Public Employees, Local 5852,* 2020 ONSC 4577 (CanLII), previous awards have a role to play in applying the replication principle, but the arbitrator (or arbitration board) must also consider the specific circumstances of the parties and consider the market and other conditions confronting the parties.

[23] 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 place great weight on previous freely negotiated settlements between the parties to provide additional guidance, see *F.J. Davey Home and ONA*, June 20, 2007 (Devlin).

[24] In this case, ONA argues that the most appropriate comparators are ONA represented nurses in the Hospital and Long-Term care (LTC) sectors. ONA points out that these nurses provide similar primary care to patients in the community.

[25] We do not accept ONA's submission on the appropriate comparators. We note that nurses in hospitals and in the LTC sector are not compensated the same. In fact, for years ONA has unsuccessfully attempted to gain parity between the hospitals and nursing homes. As this chair noted in *Participating Nursing Homes and ONA*, 2021 CanLII 107099, there is no homogeneity in the compensation of nurses in the broader healthcare sector, even in cases where nurses have the right to strike. The market is fluid and nurses performing similar work are not all compensated the same.

[26] In *Participating Nursing Homes and SEIU, Local 1*, 2022 CanLII 90597 (ON LA), this chair noted that there is no historical pattern of home care settlements being the most relevant or compelling comparator with LTC homes. In that matter the Participating Nursing Homes wanted to rely on a very recent home care settlement involving the same union to support an argument for lower wage increases. The Participating Homes referenced an earlier award between the same parties issued on September 27, 2012 by Arbitrator Teplitsky that referred to a home care settlement as a "compelling comparator."

[27] This chair acknowledged that employees in the home care sector have the right strike, which may lead one to believe that they are a highly relevant comparator. However, the right to strike in the home care sector has been said to be "somewhat illusionary", see *Participating Homes and SEIU, Local 1, Canada*, unreported award dated September 8, 2011 (Weatherill). While employees in home care have the right to strike, the reality is that the right to strike is meaningless because of the working environment. Employees in home care do not work in one location. Rather they travel to individual patient's homes and provide care pursuant to a contract between the employer and another agency. If a union and an employer reach an impasse, then the agency makes alternative care arrangements and patients are provided care by other providers. This unique workplace dynamic makes it difficult, if not impossible, for employees in home care to exercise their right to strike and impose economic consequences upon an employer.

[28] The unique working environment of home care has resulted in these nurses, and other similarly situated employees, being compensated at a rate less than those working in hospitals and LTC facilities. We have great sympathy for these hard working nurses

who provide such valuable care in our communities. However, it is not this Board's function to correct what may seem to be an injustice to these nurses. Home care settlements and awards are not compelling comparators for LTC and hospital interest arbitrations. At the same time hospital and LTC settlements and awards are not compelling comparators for home care.

[29] In our view, the most relevant and appropriate comparators are other unionized home care nurses. It is these relevant comparators that represent the baseline normative increases that are the starting point for our deliberations.

[30] We have carefully reviewed the comparative data provided by the parties in their briefs. We note that a majority of the settlements were pre-inflation and generally the wage increases for 2023 have ranged between 1% and 1.5%, while 2024 wage increases average between 1% and 2%. The higher increases generally being the more recently negotiated or awarded increases, see *Paramed and SEIU, Local 1 (10 Collective Agreements)*, 2022 CanLII 237 (Kaplan) and the October 26, 2022 settlement between ONA and Paramed.[1] Most settlements and awards also include other additional increases in compensation, most notably for mileage.

[31] We acknowledge that these settlements are less than what has been awarded in other sectors of the economy and particularly in the broader healthcare sector. This reflects the reality of the home care sector and the illusionary right to strike we have referenced earlier.

[32] We note that these nurses represented by ONA at the VON enjoy substantially superior compensation to other nurses in the home care sector. In this regard we are of the view that in free collective bargaining the focus would be on wages and mileage as opposed to the other forms of compensation increases that ONA seeks in their submissions. This is despite the fact that the VON nurses wage rates and transportation

[1] A recent Memorandum of Settlement between CarePartners Niagara and Norfolk County and OPSEU was brought to the Board's attention. We did not rely on this award but note that the wage increases were within the normative home care sector range.

allowance are at the higher end of their home care comparators. Therefore, we are not awarding any of ONA's other compensation proposals. Instead, we are only prepared to grant a general wage increases and a modest increase to the transportation allowance. We are also of the view that given the current entrenched inflation in the economy, the wage increase ought to be at the higher end of the normative range.

[33] The VON takes the position that they have an inability to pay, and they have provided financial information that demonstrates their difficult financial circumstances. We have considered this information and the economic viability of the VON. We note that the VON has been granted previous financial relief in regard to these nurses and they do not appear to be in as dire a situation now as they were during the last round of bargaining. The evidence provided by the VON does not convince us that their financial predicament is so dire that these nurses cannot be given normative wage increases. Moreover, we find that the evidence does not disclose an inability to pay normative increases or that normative increases would affect the viability of the VON to continue operating. In addition, the viability of the VON is not entirely measured by its finances. We must take into consideration the fact that if these nurses are not appropriately compensated then they will leave the VON, which will affect the ability of the VON to provide services to agencies and their patients. ONA has provided evidence of recruitment and retention issues, and these issues must be considered in making our award.

[34] We appreciate that the VON is engaged in litigation with several unions involving the pension plan. However, the pension litigation is a contingent liability that may never be realized. Based on the recent financial information the pension plan appears to be healthy and in a surplus. In our view, the pension issue is a separate matter and one that ought not, at this time, affect our decision to award normative wage increases.

[35] However, given the financial difficulties that the VON is still experiencing, we believe that a trade-off is warranted to grant some relief for the wage increases. Therefore, we have granted the proposal to change the existing sick plan to an integrated EI/Weekly Indemnity Plan, with an employer paid top-up. ONA has agreed to such plans

in other bargaining units in the health care sector. We are of the view that this proposal will provide some financial relief to the VON and off-set a portion of the wage increase.

[36] We anticipate that the parties will both be disappointed with this award. The VON will view the award as being too rich and ONA will view it as providing too little. However, it is our view that the award reflects what the parties would have achieved in free collective bargaining; replication. Unlike parties in the hospital and LTC sector, these parties have the right to strike and lock out. If the parties are dissatisfied with the interest arbitration process they have the means to exercise their rights and let the chips fall where they may.

AWARD

[37] After carefully considering the submissions of the parties, we hereby order and award the following changes to the central terms of the collective agreements:

- **Term:** Two years from April 1, 2023 until March 31, 2025.
- **Agreed to items:** All items agreed upon by the parties prior to date of award.
- **Wages:**
    - Effective April 1, 2023 - 1.5%
    - Effective April 1, 2024 - 2.0%
    - Retroactive compensation based on all paid hours for current and former employees paid within ninety (90) days of the award by separate deposit. VON to contact former employees at their last known address on record, with a copy to the bargaining unit, within thirty (30) days of the award to advise the former employee of their entitlement. Former employees will have sixty (60) days from the date of the notice to claim such retroactivity and, if they fail to make a claim within the sixty (60) days period then their claim will be deemed abandoned.
- **Transportation allowance:** Effective date of award increase to $0.47 per km.
- **Sick Leave:** Effective April 1, 2024 delete existing sick leave plan and replace with Employer proposed plan. We remit the details of determining how to implement the employer's proposal to the parties and remain seized.

- **Letters of Understanding:** We remit this to the parties and remain seized to address any issues the parties cannot resolve.

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

[39] We also continue to remain seized until the parties have signed new collective agreements.

Dated at Toronto, Ontario this 14th day of December 2023

John Stout – Chair

Dissent attached
Phillip Abbink - ONA Nominee

Dissent attached
Irv Kleiner – VON Nominee

DISSENT OF EMPLOYER NOMINEE

I am in agreement with the Chairman's observations that "arbitrators must consider how the parties have acted in the past when trying to discern what they would do in the current economic circumstances".

The Board heard that ONA has previously entered into freely negotiated settlements with VON that acknowledged and reflected the VON's financial position. In the latter part of 2019, the VON and ONA voluntarily concluded an agreement that was based upon wage increases of 1% in each year of 2018, 2019 and 2020. For the most recent expired collective agreement, an interest arbitration board chaired by Arbitrator Mathew Wilson awarded increases of .7% in each year of 2021 and 2022. No other monetary items were agreed upon nor awarded.

In this proceeding, I would have been more inclined to award wage increases which were more closely aligned with the wage increases that were awarded by the Wilson Board of Arbitration and which were in turn more closely aligned with the voluntary settlement that these parties achieved in the round of bargaining immediately preceding that award.

Dated this 12th day of December, 2023.

"Irv Kleiner"

Employer Nominee

Dissent of Union Nominee:

I am disappointed by the Chair's decision with respect to compensation. This award will be extremely disheartening for the RN's working at the VON. Having provided the employer with relief in the last round, due to financial concerns, the real value of these nurses' wages continues to decline.

Interest arbitrators are required to consider multiple factors in crafting an award, all of which should be considered and balanced. In his decision, the Chair appears to rely almost exclusively on comparability, even though in my view, that would still not lead to this result.

There was not any real dispute that the VON faces challenges with recruiting and retaining RNs. There also cannot be any reasonable dispute that the overwhelming economic reality at present is inflation. The most recent collective agreement provided for only a 1.4% increase in wages over the two-year term. During the same period, inflation was approximately 10.22% according to the Bank of Canada. The result was a significant decline in the purchasing power of these RN's wages. Completely aside from predictions about future inflation, this factor alone should have supported a far more significant increase in wages, simply to keep pace with economic reality.

On the other hand, the VON plead poverty, which is precisely the same argument made in the last round, and for which the employer was given obvious relief. Because arguing an inability to pay requires evidence of an employer's finances, we were provided with audited financial statements. Those statements reveal a surplus in the order of millions of dollars. Even assuming that an inability to pay argument can reasonably be made with respect to employees providing publicly funded and incredibly valuable services in what is essentially the public sector, there was clear evidence that the VON could have easily borne much more significant monetary increases. There are only just of 101.5 FTE RNs employed by VON in these bargaining units, and a total of 216. Most are at the lower end of the pay grid. The VON could have easily borne a much more significant increase in compensation given the surplus evidenced in their financial statements.

And, even if one assumes that comparability should trump all other considerations, the Chair's award remains inadequate. ONA argued persuasively that RNs employed in Ontario Hospitals are a relevant comparator. The idea that RNs should be generally compared to other RNs with respect to their terms and conditions of employment is gaining traction in the jurisprudence. Most recently, an arbitrator awarded the Hospital Central grid for RNs working in corrections (See *Ontario (Treasury Board Secretariat) v OPSEU*, 2023 CanLII 114519 (ON LA)). This reflects a welcome trend towards recognizing that all employers of RNs are competing for the same pool of RNs in the context of a significant nursing shortage. It also recognizes that where there are significant recruitment and retention problems, they ought to be addressed by improving compensation so that it is comparable to Hospital RNs.

Even if one does not accept that Hospital RNs are an appropriate comparator, other homecare RNs have done much better than this Chair's awards in recent voluntary settlements. The Chair was made aware of a settlement that was agreed and ratified this fall between ONA and another homecare provider, which provided for significantly greater increases than are being awarded here. Importantly, the clear trend in the settlements or awards relied on as comparators is that the older they are, the more modest the increases, and inversely the more recent they are the more generous the increases. This clearly makes sense in the economic context of significant inflation which has now been baked into the cost of goods and services.

Given the clear trend in settlements and awards across all sectors, compensation increases should have been significantly higher to account for inflation as well as recruitment and retention issues.

Philip Abbink, ONA Nominee