In the Matter of an Interest Arbitration
Under the *Hospital Labour Disputes Arbitration Act*

BETWEEN:

THE PARTICIPATING HOSPITALS

(the "Hospitals")

AND

ONTARIO NURSES ASSOCIATION

(the "Association")

(Bill 124 Reopener)

Before:

Eli A. Gedalof, Chair
Brett Christen, Hospitals Nominee
Philip Abbink, Association Nominee

Heard by Written Submissions Filed on April 12, 2023.

Executive Session Held on April 17, 2023.

AWARD

INTRODUCTION AND BACKGROUND

1. This board of interest arbitration, differently constituted, issued an award on September 9, 2021, settling the central terms of the collective agreements between the Ontario Nurses Association and 131 Participating Hospitals for the period June 7, 2021 to March 31, 2023 (*Participating Hospitals v. Ontario Nurses Association,* 2021 CanLII 88531 (ON LA) (the "prior award")). These collective agreements were all subject to the compensation restraint provisions of the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, referred to as "Bill 124". Bill 124 imposed a 3-year "moderation period" during which parties and boards were required to restrict any increases to wages or total compensation to 1% per year.

2. At that time, the Association, together with other bargaining agents in the broader public sector, filed a constitutional challenge seeking to overturn Bill 124. Having regard to the outstanding constitutional challenge, the board, as had become common for parties and boards of interest arbitration under the *Hospital Labour Disputes Arbitration Act* ("*HLDAA*"), and as was unopposed by the Hospitals in this case, awarded the following reopener provision:

> We remain seized with respect to reopener on monetary proposals in the event that ONA is granted an exemption, or Bill 124 is declared unconstitutional by a court of competent jurisdiction, or the Bill is otherwise amended or repealed.

3. By decision dated November 29, 2022, the Ontario Superior Court of Justice found that Bill 124 was contrary to s.2(d) of the Charter, not justified under s.1 of the Charter, and declared the Act to be void and of no effect (*Ontario English Catholic Teachers Assoc. et al. v. His Majesty*, 2022, 2022 ONSC 6658 (CanLII) at paras. 362-363)). The Association thereafter requested that the board reconvene to hear and determine the reopener. As the parties' original nominees were no longer available to act, the parties reconstituted this board.

4. Some background, in addition to that which is set out in our prior award, is in order to properly explain the scope of this board's mandate.

5. The term of the collective agreements arising from this board's awards run from June 8, 2021 to March 31, 2023, i.e., almost two years of the three-year moderation period under Bill 124. Our task on the reopener, however, is effectively limited to the last year of the moderation period (April 1, 2022 to March 31, 2023).[1]

[1] As explained in the prior award, the Stout Board that preceded us, in settling the terms of the collective agreements for the period April 1, 2020 until June 7, 2021 (i.e. expiring one year from the date of the Stout award), had already awarded the maximum allowable general wage increases under Bill 124 for the first and second years of the moderation period (*Participating Hospitals (Ontario Hospital Association*) v Ontario Nurses' Association, 2020 CanLII 38651 (ON LA)(the "prior Stout award"). Our board, as it was then constituted, was therefore already restricted for year two of the moderation period to awarding the residual monetary improvements permitted under Bill 124 (a $0.23 increase to the night premium), in addition to all non-monetary matters for that year and all issues related to the third year of the moderation period (including a 1% general wage increase and a $0.24 increase to the weekend premium, which were the maximum monetary improvements permitted under Bill 124). Further, before proceeding with the reopener before this board, the parties first addressed the reopener before the Stout board and agreed that the Stout board would determine all the outstanding monetary issues for year two of the moderation period. Thus, while this board remains seized with the implementation of its prior award for the period June 8, 2021 to March 31, 2023, and while the term of the collective agreement arising from this

6. Following the Court's decision overturning Bill 124, the parties met on February 27, 2023, and attempted to negotiate a settlement of this reopener and the one for the previous period, but were unsuccessful. They then met with this board on April 2, 2023 (the day after the previous board issued its decision on the first part of the reopener) for a day of mediation, but were again unable to reach an agreement. The parties then filed written submissions on April 12, 2023 and this board met in executive session on April 17, 2023. The parties have requested that this Board issue its decision on an expedited basis, as they are scheduled to soon appear before a board of arbitration chaired by Arbitrator Kaplan to arbitrate the next collective agreement (one not subject to any prior award, settlement or reopener).

7. The record before this board therefore consists of the materials filed with the Board as previously constituted and addressed in our September 9, 2021 award, and the supplementary materials filed in support of the Bill 124 reopener filed on April 12, 2023. We have carefully reviewed and considered all of these materials in reaching our decision below.

Position of the Parties

8. In terms of the substantive issues in dispute, the parties each take a fundamentally different perspective on what this Board is required to do in the absence of the Bill 124 restrictions.

9. From the Hospitals' perspective, the Board ought to strictly limit its assessment to the information and collective bargaining landscape as it existed up to September 2021. In the Hospital's submission, there was an established bargaining pattern, set prior to the implementation of Bill 124 and followed in other contexts thereafter, that ought to restrict any general wage increases to 1.75% (i.e., an additional 0.75%). Further, having regard to the various other monetary improvements ordered by the Stout Board and by this board in our prior award, the Hospitals maintain that it would not be appropriate to award any further monetary improvements.

10. From the Association's perspective, an additional 0.75% does not begin to reflect the proper application of the *HLDAA* criteria, replicate free collective

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and our previous award is June 8, 2021 to March 31, 2023, we are only here dealing with the reopener for the period April 1, 2022 to March 31, 2023. We note in this regard that to the extent that the Association has sought retroactive compensatory increases from this board that reach back into the prior year, we do not consider it appropriate to do so as the Stout board has already awarded total compensation for that year.

bargaining, or unwind the unconstitutional impact of Bill 124. The Association, argues that there was already a "Nursing Crisis within a Crisis" in 2021, characterized by staffing shortages and widespread burnout, that warranted substantial increases and compression of wage grid. Since that time, the continuing staffing crisis and extreme inflation during the period of this collective agreement has only exacerbated the inadequacy of the artificially deflated compensation increases awarded up to 2021.

11. Accordingly, the Association maintains that this Board cannot be willfully blind to these extreme pressures in applying the guiding principles of interest arbitration. The Association proposes a 3% general wage increase, together with substantial compression of the wage grid for RNs and a long service pay adjustment, which would provide nurses with immediate and substantial additional wage increases of varying amounts depending on the nurse's current place on the grid.[2] The Association also proposes standardization and compression of the wage grid for NPs, resulting in further and substantial wage increases, and several additional and substantial benefit improvements.

ANALYSIS AND AWARD

The Scope of this Reopener

12. Before addressing the parties' specific proposals, it is necessary to address the parties' submissions on the nature and scope of the Bill 124 reopener that was awarded in our September 29, 2021 decision. The parties' submissions raise two related issues that warrant careful consideration. The first is the extent to which the Bill 124 re-opener should be restricted to ensuring that "established bargaining patterns" are not disrupted. The second is the extent to which this Board should consider information that became available after the date of our prior award in determining the outcome of the reopener. We will address these issues in turn.

Disruption to Established Patterns

13. The Hospitals argue that the role of this Board on the reopener is to restore previously established bargaining patterns that were already in place at the time of our prior award (September 2021), but which were disrupted by Bill 124. In support of this position, the Hospitals rely on a partial quote from our prior award, which in turn originates from this Chair's decision in *Mon Sheong Home for the Aged v Ontario Nurses' Association,* 2020 CanLII (ON

[2] For example, for a nurse at the 3 Year step, the Association's proposal would result in an additional wage increase of approximately 14%.

LA)("*Mon Sheong*"), and assert that the purpose of the reopener is "to protect against the potential disruption to established bargaining patterns in the event that Bill 124 is ultimately overturned by the courts or otherwise found to be inapplicable" (at para. 25 of both our prior award and *Mon Sheong*). In our view, there are several reasons that the reopener should not be so narrowly construed.

14. First, the purpose of the reopener was more broadly articulated than the Hospitals argue here. Paragraph 25 of the *Mon Sheong* award articulates that purpose as follows:

> The inclusion of a re-opener will allow this Board to issue its award in a timely manner, while ensuring that once the constitutional issue has been determined by a court of competent jurisdiction, depending on the outcome, both parties will have an opportunity to address how this Board ought to exercise its own jurisdiction in light of any changes to that legislative landscape.

The Stout board, in its prior award, articulated the scope of the re-opener in similarly broad terms providing that "both parties shall have the opportunity to address how this board of arbitration should exercise their discretion in light of any such legislative changes (at para. 41).

15. That broadly articulated purpose is then reflected in the terms of the re-openers, which do not specify any pre-determined outcome based on any "established pattern". Rather, the boards simply granted a re-opener on "compensatory proposals" (as in *Mon Sheong*) or "monetary proposals" (as in our prior award) in the event that Bill 124 was struck down.

16. In a case like *Mon Sheong*, addressing a pre-pandemic, pre-inflation collective agreement expiring in 2020, with a 25-year history of following sectoral comparators that had already been consistently decided, a focus on disruption to existing patterns makes sense. The circumstances before this board are very different. The Central Hospital Agreement for nurses is a lead agreement that does not follow in lock step with any other pattern agreement. This status is reflected in the many awards and settlements included and referenced in the parties' materials. As the Hospitals acknowledge at page 7 of their brief (albeit in support of the argument that we ought to follow certain outcomes outside the hospital sector), "[a]s of the date of this Chair's award, September 20, 2021, none of the centrally participating unions in the hospital sector had established a wage increase for the 2022 contract year. As such, as of the time of bargaining for the relevant renewal collective agreement, these parties were establishing a new pattern for the hospital sector specifically." Indeed, as of that date there was only a very small handful of

agreements in the long-term care sector for 2022, none of which were with the Association. As such, as of the time of bargaining for the relevant renewal collective agreement, these parties were establishing a new pattern for the hospital sector specifically.

17. It is also necessary to consider that by September 2021, Bill 124 had been in effect for almost 2 years. The legislation represented an extraordinary intervention that fundamentally altered the collective bargaining landscape in the healthcare sector and the broader public sector more generally. We cannot assume that its impact was limited to those employers to whom it directly applied, particularly in regard to the long-term care sector and nursing, where outcomes for nurses are heavily influenced by outcomes in the hospital sector more so than the other way around.

18. Bill 124's intervention into the field of collective bargaining has now been found to have violated the constitutional rights of the Association's members. It is incumbent on this Board to ensure that in seeking to replicate free collective bargaining, it is not simply re-entrenching collective bargaining outcomes that arose from that very breach.

19. Finally, in addressing the context for this reopener we cannot ignore the extraordinary impact that the Covid-19 pandemic has had on nurses in hospitals. In our initial hearing in this matter, we received substantial material and submissions from the Association emphasising what it described as a "crisis within a crisis" in nursing. There was, in the fall of 2021, an especially acute and growing need to attract and retain nurses in Ontario hospitals, in the face of extremely difficult working conditions. We cannot simply assume that bargaining outcomes from outside the hospital sector, that arose in 2019, prior to the pandemic, or those that followed in the early days and months of the pandemic, would have dictated how these parties would have settled the monetary provisions of their collective agreement, bargaining in the fall of 2021, for the year 2022/23, let alone now.

20. In our initial award, after referencing the guiding principles of interest arbitration, including the *HLDAA* criteria, we noted that the application of Bill 124 was a threshold issue that significantly limited what it was even possible for this Board to consider. We found that the Bill effectively rendered the application of the established principles of interest arbitration academic (at para 20). This Board, in the absence of Bill 124, is now able to properly assess these considerations and to give them their due weight. Our role under HLDAA, and the criteria set out therein, requires us to do so, and the terms of the Bill 124 re-opener have been crafted to permit us to now carry out our statutory role as intended.

Post Initial Hearing Events

21. The second issue that warrants careful consideration is whether this board ought to base its assessment of the parties' proposals only on information that was available in the fall of 2021.

Hospital Submissions

22. The Hospitals emphasize that this is not a hearing *de novo,* and that the Board's jurisdiction is limited to "making a determination as to what would have been the outcome on only the monetary proposals if Bill 124 had not existed at the time of its award". It is important to bear in mind, argue the Hospitals, that because of Bill 124, they have not had a full opportunity to pursue their own bargaining objectives, such as the kinds of non-monetary offsets they would be seeking in exchange for monetary improvements outside the Bill 124 envelope. As the reopener is limited to monetary items, it is now impossible for them to achieve those gains in this arbitration.

23. The Hospitals also argue that in the normal course, these parties bargain and arbitrate their collective agreements early, often before the expiry of the prior collective agreement. Settlements routinely include wage increases for future years absent specific knowledge of what will happen in those years. In this case, the bargaining process began with disclosure in March 2021 and the Hospitals argue that it culminated with our prior award in September 2021. In the Hospital's submission, to consider events that post-date September 2021 would not serve the replication principle and would confuse future rounds of bargaining which would typically be looking back at the same events.

24. Instead, the Hospitals argue that the replication principle requires that an identifiable, relevant, and clear pattern should be followed absent a material change that occurs "during the course of bargaining". The Hospital acknowledges that interest arbitration boards routinely consider new information, such as additional awards that are released after the hearing but before a final decision. But the Hospitals distinguish those circumstances, which are properly understood as part of the "continuum of collective bargaining", from the re-opener at issue here.

25. In support of their position, the Hospitals rely on *Board of Governors of the University of Calgary v Academic Staff Association of the University of Calgary* (2020) CanLII 67214 (Sims) ("*University of Calgary*"), *Covenant Health (St. Theresa's Villa) v Alberta Union of Provincial Employees (2020)* CanLII 91845 (Smith) ("*Covenant Health*"). The Hospital's also rely on *Council of Academic Hospitals of Ontario and The Professional Association of*

Residents, unreported, June 11, 2018 (Kaplan) for the proposition that if the reopener was intended to be determined based on collective bargaining trends at the time the reopener was heard, it would have said so.

26. The Hospitals also rely on *Participating Hospitals and OPSEU*, unreported, November 4, 2009 (Gray) (the "*Gray Award*"), for the proposition that even where boards of interest arbitration have considered post-hearing evidence, it should be cut off after a couple of months to allow for finality in the process.

Association Submissions

27. The Association argues that it is incumbent on the Board to consider the impact of skyrocketing inflation, and resultant settlements and awards, beyond the point in time when the initial submissions were made to this board. *HLDAA* requires this Board to consider the "economic situation in Ontario and in the municipality where the hospital is located". Inflation is a critical component of this consideration which, while "not determinative" is nonetheless a "very relevant factor" (see *University of Toronto and University of Toronto Faculty* Association, unreported, July 1, 2010 (Teplitsky). The failure to consider inflation in favour of following a pattern established before that inflation took hold, it argues, would result in nurses taking an effective pay cut, in circumstances where improvements are warranted.

28. The Association emphasizes that the notion that interest arbitrators should consider economic realities at the time of their decision making, including on this reopener, is one that cuts both ways. In *65 Participating Hospitals and CUPE, Re*, 1981 CarswellOnt 3551 (Weiler) (the "*Weiler Award*"), for example, the board ordered greater increases than were provided in an unratified settlement—a settlement that would normally be highly influential in an arbitrated outcome—because inflation had substantially increased in the interim. Conversely, in the *Gray Award*, the board departed from established bargaining patterns to award a smaller general wage increase, because by the time of its award there had been an economic downturn and a decrease in inflation. The Association emphasizes that in this case, to award the 0.75% supplementary increase proposed by the Hospitals would produce a ratio between wages and inflation that is completely out of step with the parties historical bargaining patterns.

29. In support of its argument that the Board ought to look to all of the evidence and comparators that are available for 2022, the Association also notes that the comparator data put forward by the Hospitals is "conspicuously lacking" for the year 2022. In contrast, there are a growing number of settlements and awards for the year 2022 that post-date our original award

in this matter, set out in a memorandum included in the Association's materials, that specifically account for rising inflation, and provide for general wage increases well above 1.75%.

30. The Association relies in particular on *Homewood Health Centre Inc. v United Food and Commercial Workers, Local 75* 2022 CanLII 49154 (ON LA) (Hayes)("*Homewood Health*"), in which the board rejected the notion that it ought to ignore the impact of inflation simply because the parties would not have been aware of its impact at the bargaining table. In the result, the board awarded 3% general wage increases for 2021, instead of 1.75%.

31. The Association also emphasizes the outcome in *Shouldice Hospital Limited and ONA*, unreported, June 29, 2022 (Kaplan). Shouldice is a private hospital that typically follows the ONA central hospital annual increases, and the board, on June 29, 2022, ordered general wage increases of 2%, 2.5% and 3% effective April 1 of 2020, 2021 and 2022 respectively, together with a substantial increase to employer contributions to the Group RRSP plan. The Association notes that the wages at Shouldice were already higher than the Hospitals', but the award nonetheless awarded increases that, at least implicitly, accounted for the impact of inflation.

Analysis

32. Having carefully considered the parties submissions, we have concluded that it is both appropriate and necessary to consider all of the information that is before us with respect to "the economic situation in Ontario" (s.9(1.1)3 *HLDAA*), including the impact of inflation. We have also concluded that it is appropriate to consider all of the settlements and awards before us in comparing the terms and conditions of nurses under the central hospital agreement to public and private comparators, as per s.9(1.1)4 of *HLDAA*.

33. In reaching our conclusion, we note that our jurisdiction under *HLDAA* is broadly framed, and clearly provides this Board with the jurisdiction to consider all information it considers relevant:

> **Duty of board**
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> 9 (1) The board of arbitration shall examine into and decide on matters that are in dispute and any other matters that appear to the board necessary to be decided in order to conclude a collective agreement between the parties, but the board shall not decide any matters that come within the jurisdiction of the Ontario Labour Relations Board.
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> **Criteria**

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

1. The employer's ability to pay in light of its fiscal situation.

2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.

3. The economic situation in Ontario and in the municipality where the hospital is located.

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

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

34. Notably, *HLDAA* stands in contrast to s.101 of the Alberta *Labour Relations Code*, referenced in *University of Calgary* and *Covenant Health*, which limits consideration of comparators and economic conditions "for the period with respect to which the award will apply".

35. Fundamental to the Hospitals' argument on this issue is the notion that this Board's decision on the reopener does not constitute, as in a typical interest arbitration, the end point of the "continuum of collective bargaining", and that we are effectively frozen in time in the fall of 2021. As is evident in many of the authorities cited by the parties, the decision in *Shouldice* being just one example, arbitrators under *HLDAA* routinely make decisions that are backward looking, awarding collective agreements with terms that either have or are soon to expire. As the Hospitals appropriately acknowledge, arbitrators in those cases routinely look to outcomes that occurred well after the parties ceased bargaining directly with each other and remitted the matter to interest arbitration.

36. In most of these cases, where comparator bargaining patterns have previously been well established, there is little or no reason to depart from those patterns. But where there have been significant intervening events (in this case a global pandemic, a staffing crisis in nursing, soaring inflation, and freely bargained and awarded outcomes that depart from the asserted pattern) arbitrators exercising their jurisdiction under *HLDAA* will have regard to those considerations (see, e.g., the *Weiler Award*, the *Gray Award*, *Homewood* and *Shouldice*). It is in addressing this well-grounded approach to interest arbitration that the Hospitals seek to distinguish this reopener as no longer part of the "continuum of collective bargaining".

37. The problem we find with the Hospitals' argument is that it does not account for the fact that by virtue of the unconstitutional intervention of Bill 124, the first opportunity that these parties had to engage in meaningful collective bargaining was after November 29, 2022, when the Court issued its decision striking down the Bill. As the Association put forward in its original presentation, it pursued bargaining proposals that fell outside of the Bill 124 envelope. But the Hospitals, not unreasonably at the time, refused to engage on those proposals because they could not agree to anything beyond what was permitted under Bill 124. That was the beginning and the end of monetary "bargaining", subject to discussions around how to allocate the residual of the annual 1% increase to total compensation (in our case to premiums), until the Court decided the constitutional issue.

38. After the Court's decision, however, the parties did meet to bargain the reopener on February 27, 2023, and again on April 2, 2023. This was the first time the parties were able to bargain monetary compensation unhindered by unconstitutional legislation. While this bargaining took place, for reasons that were beyond either party's control, later in the collective agreement cycle than these parties typically bargain, one cannot describe this as anything other than the continuation of collective bargaining. And that bargaining took place in the context of high inflation over the period leading up to and covered by this award, a nursing staffing crisis that was already apparent in 2021, and in circumstances where more recent outcomes for the period covered by this award in the health care sector, broader public sector and private sector, do not reflect an established pattern of 1.75%. The parties were not able to reach an agreement on April 2, 2023, they moved expeditiously to litigate their differences, and this Board is moving expeditiously to decide the issue. This is not a case like in the *Gray Award*, where the parties are seeking to make additional post hearing submissions such as to preclude any finality to the process.

39. We do, however, wish to acknowledge the Hospitals' argument that in the normal course it could seek to extract non-monetary concessions in exchange for monetary improvements, and that the terms of the monetary re-opener preclude it from doing so here. The absence of any such *quid pro quo* is clearly a factor we must take into consideration in assessing the parties' proposals and making our award. But the absence of such *quid pro quo* is not a reason to ignore evidence that speaks directly to the application of the guiding principles of interest arbitration.

40. Neither do we accept that in accounting for inflation and bargaining outcomes that post-date our prior award we are confusing issues for future bargaining. Parties and boards of arbitration are always cognizant of and

account for the outcome of the parties' prior agreements and awards, which form the basis upon which they bargain in subsequent rounds. Both parties are able to account for everything we do here in addressing what ought to happen next. Having now gotten through the upheaval of Bill 124's imposition and then retraction, the parties are free to return to their historical practice of bargaining early agreements, and that is what they are doing. It is not this Board's decision to consider all of the evidence before it that disrupted the parties' typical approach to bargaining; it was Bill 124.

41. Finally, in reaching our decision we do not take issue with the assertion that interest arbitrators are, in the usual course, "followers and not leaders", as articulated in the *TTC* award. In that case, however, the parties had long-established and agreed-upon comparators that invariably resolved their collective agreements. The board found that there was nothing before it to warrant departing from those dispositive outcomes. That is a very different conclusion from that which the Hospitals urge upon us here, which is that even in circumstances where the sectoral pattern has never been established outside of the constraints of Bill 124, and even if there are outcomes before us that warrant a departure from prior awards and settlements, we should nonetheless ignore them because they were not available to us in September 2021. Such an approach would not, in our view, replicate real-world free collective bargaining.

The Parties' Proposals

42. The Hospitals propose that this Board order a 1.75% general wage increase (i.e., an additional 0.75%), and nothing more. The Association proposes that the Board order a 3% general wage increase (i.e., an additional 2.0%). This proposal is made in conjunction with its proposal to compress the 25-year RN grid at both the top and the bottom, resulting in immediate and differential increases for nurses, depending on where they sit on the grid, but exceeding double digits, retroactive to June 8, 2021. It also proposes the introduction of a standardized and similarly compressed wage grid for NPs. Further, the Association proposes benefit improvements to Pregnancy and Parental Leave, Shift Premiums, Meal Allowance, Extended Health Care Benefits, Vacations, and the introduction of an isolation pay benefit. Finally, the Association proposes the introduction of a 10-year long service pay adjustment outside of the grid.

43. In arriving at our award, we have had regard to the well-established principles of interest arbitration and all of the *HLDAA* criteria, always with the overarching goal of arriving at an outcome that best replicates what these parties would have done in free collective bargaining.

Across the Board Increases

44. The comparators put forward by the parties, including those settlements and awards at 1.75% and those both above and below it all merit weight in our consideration, allowing also for the fact that the Central Hospital Agreement for nurses is not one that follows in lockstep with any other. On the facts of this case, however, there are two *HLDAA* criteria that we find warrant significant weight.

45. The first is the economic conditions in the province, and in particular the high rate of inflation leading up to and over the term of this collective agreement. As noted in the awards cited above, inflation is not on its own a determinative factor, and in periods of high inflation, parties cannot generally expect to immediately and fully recover from the erosion of their wages that results. But it is both an economic factor that this Board is required to consider, and one that drives the real-world collective bargaining outcomes that we are seeking to replicate. In 2021 there were already signs that the economy was moving in this direction and subsequent events, awards and settlements have borne out the need to address this consideration.

46. The second is the indisputable staffing crises in nursing, dealt with at length in the Association's materials, that has broadly impacted nursing in Ontario's hospitals. Recruitment and retention are critical considerations that we cannot ignore in rendering our award.

47. In applying these considerations, however, we must also be mindful of the principle of total compensation and the incremental nature of collective bargaining. As the Hospitals argue, when our prior award and the previous board's awards are considered in their totality, the Association has already obtained substantial benefit improvements for its members, including benefits that exceed other hospital comparators, such as double time for callback and unlimited mental health. The Association has not identified significant comparators for the period of this award that would warrant our making additional benefit improvements at this time, particularly in light of what we find it is appropriate to order on wages.

48. Where we find that the Association has made a compelling case is with respect to the award of a 3% general wage increase, and with respect to grid compression, albeit to a more modest extent than proposed by the Association.

49. It bears emphasising that even were we to limit our consideration to the information available in 2021, it is clear that a 1.75% increase for hospital nurses would not have been sufficient. Such an increase would not have

addressed the staffing crisis or reflected the demand that existed for nurses outside of the artificial constraints of Bill 124, even at that time. But this award is for the period April 1, 2022 to April 2023. The staffing crisis continues and the rate of inflation leading up to and over the course of this term is nonetheless substantially higher than it was in September 2021. It is in an entirely different realm than it was prior to and in the earlier stages of the pandemic when parties were bargaining annual wage increases of less than 2%.

50. In our view, the award in *Shouldice* is particularly instructive in identifying what a replicated outcome looks like here. Obviously, we do not suggest that a single private hospital is a determinative comparator for nurses across the Participating Hospitals. But as an agreement outside of Bill 124 that covers nurses for the full Bill 124 moderation period applied to the instant parties, it is nonetheless telling. In that case, the board found that there was no issue with respect to recruitment and retention and that wages already exceeded the wages for nurses in the public system. Nonetheless, having regard especially to job market forces and the fact that the board was not constrained by Bill 124, the Board applied the normal principles of interest arbitration and ordered general wage increases that exceeded those awarded by the Stout board for the years 2020 and 2021, and of 3% for the 2022 year that is the subject of our award. It also awarded improvements to the retirement plan by both substantially increasing and making mandatory employer contributions to the group RRSP.

51. The award in *Homewood*, also a private hospital outside the ambit of Bill 124, is also instructive, both as a relevant arbitrated outcome, but also because it then gave rise to a voluntary settlement with the Association for nurses. In that case, the Board was dealing with a collective agreement for the period July 17, 2020 to July 16, 2022, roughly corresponding with the two years prior to the year we are awarding here. Decided in June of 2022, the Board explicitly held that while it would otherwise have ordered 1.75% for year two of the agreement, having regard to the extraordinary impact of inflation it was appropriate to order an increase of 3.0% effective July 17, 2021. Following this award, the Association bargained for nurses at Homewood for the one-year period commencing April 1, 2022, and the parties voluntarily agreed to 3.0% across the board wages increases effective April 1, 2022.

52. While we have highlighted these two awards, we note that the Association has included in its materials what is clearly a growing number of outcomes, including in the broader healthcare sector, exceeding, in a variety of ways, the 1.75% increase sought by the Hospitals, and awarding general wage increases of 3% or more. In our view, in all the circumstances, including

having regard to inflation and the market forces impacting nurses in particular, and the need to recruit and retain nurses in Ontario's hospitals, we find it appropriate to grant the Association's proposal for a 3% general wage increase (i.e., an additional 2% above what this board has already ordered), retroactive to April 1, 2022.

The RN Wage Grid

53. We also find that the Association's proposal to compress its 25-year RN wage grid is well-founded. The 25-year grid is an extreme outlier in the Ontario hospital sector. Historically, a 25 Year rate did not form part of the RN grid. It was awarded at interest arbitration in 2005, in an agreement covering the period April 1, 2004 to March 31, 2006 (*Participating Hospitals and Ontario Nurses' Association*, unreported, September 8, 2005 (Keller) and Supplemental Award dated November 14, 2005). The Keller board found, at page 8, that there was a legitimate recruitment and retention problem at that time, including a need to retain senior nurses, and that factors such as wages, allowances, and benefits, while not a silver bullet, were part of the solution and one of the few solutions that could be addressed through interest arbitration. In addition to awarding two years of 3.0% general wage increases, described as at the high end of outcomes at the time, the board also awarded an additional 2% increase for nurses with 25 or more years' experience. This aspect of the award was then specifically articulated as a 25 Year step on the grid in the November 14, 2005 Supplemental Award. We note that as a result of a subsequent interest award, the differential between the 8 Year and 25 Year steps was reduced to 1.75%, as it currently exists, but the step has remained in the grid since.

54. As addressed in the Association's materials, neither party had proposed to create a 25 Year step on the grid in 2005. In fact, the Hospitals had proposed to compress the 8-year grid to 6 years. The Association rejected this proposal at the time because of the way it was to be implemented, in favour of pursuing a *status quo* grid with greater (5%) across the board increases.

55. What strikes this board, is that as a means of promoting the retention of experienced and highly valued nurses, the inclusion of a 25 Year step, which serves as an incentive for only the most senior nurses, does not address the current staffing crisis. It was implemented some 18 years ago, and even nurses who were beginning their careers at that time, let alone the many now experienced nurses who followed them, will not see its benefit for years to come. In our view, the Association has made a compelling case that more is now required.

56. The Association also argues for compression of the grid at the bottom end, effectively eliminating the first three rates, making the current 3-year rate the new start rate, followed by six annual steps to the top rate at six years. However, in addressing the Association's proposals for grid compression, we must account for the total compensation in our award. We must also be mindful that while this is not a one-year collective agreement, we are effectively determining the appropriate monetary increases for a single year.

57. In a mature bargaining relationship such as this one, collective bargaining is generally an incremental process. Thus, while the Association's proposal for grid compression is well-grounded, we must find the outcome that best reflects what these parties would have freely bargained for the year under consideration. In doing so, we must recognize the principles of total compensation, incrementalism and comparability, while also meaningfully addressing the problem of recruitment and retention. Balancing these considerations, we find it most likely that the parties would begin by targeting the most anomalous aspect of the grid. To this end, we find it appropriate to compress the grid at the top end, by merging the 25 Year rate into the 8 Year rate and eliminating the 25 Year rate. This change will provide an immediate benefit to a substantial portion of the bargaining unit—those who have more than 8 but less than 25 years of service—while also providing a meaningful retention incentive for those nurses with less than 8 years of service who will see the benefit much earlier in their careers.

58. The board is aware that there may be some wage grids in local appendices that are subject to Article 19.01(d), which refers to the maintenance of "differentials in the wage rates". As the board has not been provided with these grids and we are amending the central wage grid, and out of an abundance of caution, we remain seized in the event that there is any dispute between the parties as to whether the merger of the 25 Year step into the 8 Year step should impact those rates.

59. In our view, with these changes, we have exhausted the total compensation available in this single year. Any further compression of the grid, changes to the complex landscape of highly differential NP grids across the different hospitals, introduction of other forms of retention bonus or benefit improvements must be addressed by the parties in future rounds of bargaining.

Terms Awarded

For all of these reasons, we award the following terms:

- Retroactive to April 1, 2022, amend RN wage grid to merge 25 Year Rate into 8 Year Rate and eliminate 25 Year Rate.

- Retroactive to April 1, 2022, apply a 3% across the board wage increase (i.e., an additional 2% on top of the 1% increase provided for in our prior award).

60. We remain seized in accordance with subsection 9(2) of *HLDAA*.

Dated at Toronto, Ontario, this 25th day of April 2023

"*Eli Gedalof*"

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Eli A. Gedalof, Chair

"*I dissent*"

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Brett Christen, Hospitals Nominee

"*I dissent*"

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Philip Abbink, Association Nominee

Ontario Nurses' Association & Participating Hospitals
Bill 124 Re-opener for April 1, 2022 to March 31, 2023
Dissent of ONA Nominee

1. I agree entirely with the Chair's decision regarding the scope of the reopener and the appropriateness of considering evidence and information about events after the initial hearing of this matter in 2021. I disagree, however, that, "… with these changes, we have exhausted the total compensation available in this single year." (para 58).

2. Nurses continue to lose money as their wages and compensation fail to remotely keep pace with inflation. Arbitrator Stout awarded a total of 2% in wage increases for the period of April 1, 2021, to March 31, 2022. Inflation was slightly under 3.8% for that period of time. The result is that the purchasing power of nurses' wages decreased over that year.

3. Similarly, the compensation awarded by the Chair in respect of 2022-2023 does not even remotely keep pace with inflation. I agree that it was appropriate to provide an across the board increase of 3%, which is what ONA proposed. I also acknowledge that compressing the grid by removing the 25-year step, and merging it with the 8-year step, provides additional increases to those nurses between 8 years and 25 years. But even for those nurses, facing inflation in the order of slightly less than 7% over this period of time, the value of their wages in real terms has declined as a result of this award.

4. It would have been entirely appropriate to make further adjustments to the grid, and provide other increases in compensation, in this economic climate. Virtually all of the statutory criteria favour a more significant increase in compensation.

5. As the Chair has observed, we are bound to decide this matter based on the HLDAA criteria. There is no argument that the employer is unable to pay. There was no argument that more significant increases to compensation would result in a reduction in services. To the contrary, the evidence indicated that with a dire nursing shortage, if Hospitals are unable to recruit and retain nurses, there is a risk that services will be reduced or at the very least the quality of those services will be undermined by chronic staffing shortages. Beds do not care for patients, nurses do. There is immense competition for nurses both within Ontario, but also across this country between provinces, and with other jurisdictions such as the United States.

6. The overwhelming economic context is the highest inflation seen in a generation. There is no economic consideration tilting the balance in the other direction. This is the economic reality facing nurses today and over the past year. Their wages are worth less.

7. The most relevant comparators point to the trend of increasing compensation to account for inflation. I agree with the Chair that *Shouldice*[3], *Homewood*[4], and ONA's subsequent agreement with the Homewood, support a 3% increase. I do note that in addition to that increase, nurses at *Shouldice* were also awarded a very significant increase in the employers' contribution to their RRSPs, meaning that total compensation was approximately 5% in the third year.

8. The core concern, which does not appear to be disputed by the parties, is the need to recruit and retain nurses.

9. All of the HLDAA criteria which apply to the present case weigh heavily in favour of a very significant increase in compensation. I acknowledge that the Chair has made significant steps in this regard, but he has simply not gone nearly far enough.

10. In terms of replicating free collective bargaining, it is clear that with respect to the professional services of Registered Nurses, it is a seller's market. In free collective bargaining, what drives agreements are the economic and human resourcing realities. IN the present matter, the strongest driving factors would likely be the need to recruit and retain staff, massive inflationary pressures on incomes, and the fact that nurses can object with their feet, which they are doing already. Ontario nurses are some of the poorest paid in the country, with some of the highest nurse to patient ratios. They can, and are, going elsewhere, or they are quitting.

<u>Recruitment & Retention; Maintaining Services:</u>

11. These two HLDAA criteria are intertwined in this case. If Hospitals cannot find sufficient staff, there will be an impact on services. This is precisely what was seen over the course of the pandemic with increasing wait times, hallway medicine and surgical backlogs. Rather than increased compensation risking a reduction in services, it is precisely a meaningful increase in compensation which is required to protect those services.

12. The *Ontario Health Sector: Spending Plan Review*, from the Financial Accountability Office of Ontario considers the impact of demographic changes and population growth, and the government's plan to build new capacity in the system. The conclusion is that, "These vacancies are a result of the number of positions in the health sector growing faster than the number of workers."

13. The OHA's own publication, "Practical Solutions to Maximize Health Human Resources" concludes that there is a need for recruitment and retention:

> Given the efficient staffing model that was the norm prior to the pandemic, any vacancies now need to be filled in real-time to ensure that there are no service delivery gaps. An increase in turnover coupled with the need to fill net new positions in a competitive environment poses a real challenge to providing care.

[3] *Shouldice Hospital Limited v ONA*, (Kaplan) 2022 CanLII 56317 (ON LA)

[4] *Homewood Health Centre Inc. v United Food and Commercial Workers, Local 75*, 2022 CanLII 46392 (ON LA)

> Moreover, this has a large impact on the day-to-day workload of existing health care workers who grapple with these demands. Providing immediate funding to bolster staffing models would create more manageable workloads for staff, help increase retention rates, and allow hospitals to better respond to patient needs.
>
> At a minimum, as there are new investments in capacity in the near term, there also needs to be corresponding attention paid to the human resource needs to staff these new beds. Ontario's hospitals are grateful for the recent government support for the creation of 3,100 additional beds as well as additional announcements for capacity increases, which will translate into the need for additional health care workers over and above existing staffing levels. However, Ontario already has the lowest nurses per capita in the country and there is a need to immediately bolster staffing models to create more manageable workloads for staff, help increase retention rates, and allow hospitals to better respond to patient needs. To respond to recent and announced capacity increases and to develop more resilient staffing models, the OHA is recommending funding and government policy support to enable the hiring of at least an additional 10,000 registered nurses and 3,500 registered practical nurses as well as other critical health care workers over the next five years as an immediate step forward at this time.

14. This publication carries on to lament the impact of Bill 124, and comment that, "it has been raised as a significant concern impacting health care worker morale and potentially one of several factors leading to health care worker recruitment and retention challenges."

15. I agree entirely with the Chair that, "It is incumbent on this Board to ensure that in seeking to replicate free collective bargaining, it is not simply re-entrenching collective bargaining outcomes that arose from that very breach." Very unfortunately, despite acknowledging that recruitment and retention remains an issue, the OHA's position essentially seeks to rely on patterns established before the pandemic, prior to rampant inflation, and in the context of unconstitutional wage restraint legislation. Also unfortunately, it is hard to understand how awarding increases which are a fraction of inflation will meaningfully address these problems.

16. The evidence in this hearing clearly demonstrated that difficulties with staffing have undermined the provision of healthcare services. Both of these criteria weigh strongly in favour if significant increases in compensation.

<u>The Economic Context:</u>

17. The real economic impact of Arbitrator Stout's award, and the present award, are that in terms of real purchasing power, nurses' wages are shrinking. Because of

inflation, real wages have been declining[5]. This is a reality to which any resident of Ontario can attest – everything is becoming more expensive but wages are not keeping up. This is the undisputed reality of the economic situation in Ontario, and should have been the driving force in determining the appropriate increases to compensation. I strenuously disagree with the OHA's argument that there is anything radical or non-normative in significant increases given this context. In real terms, an increase in compensation of around 4% in 2021-2022, and around 7% in 2022-2023, would have simply ensured that compensation kept pace with inflation.

18. I do not necessarily disagree that compensation is likely only one of the tools available to improve recruitment and retention, and a somewhat imperfect tool, but the fundamental fact remains that people go to work because they get paid, and will ultimately decide whether their compensation is sufficient to engage in a profession, or remain in it.

19. The importance of inflation in respect of determining compensation is discussed in a number of the awards referenced by the parties. In 1981, Arbitrator Weiler was faced with deciding an interest arbitration after membership failed to ratify the agreement[6]. The Chair observed[7]:

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

20. Not only has inflation been high, this has also been accompanied by a strong economic rebound from the pandemic, with Ontario's GDP growing around 3.7% in 2022. In the context of high inflation, Arbitrator Weiler also explained why lock-step deference to comparators is inappropriate[8]:

> … The fact is that all of these negotiations are conducted under the shadow of binding arbitration as the ultimate mechanism for impasse resolution. For arbitrators to religiously follow precedents within that sector would be a rather incestuous reasoning process, since these precedents are themselves fashioned by arbitrators, or by negotiators who are anticipating what an arbitrator might do to

[5] See ONA's Exhibit 15, "Pressure Cooker: Declining real wages and rising inflation in Canada during the pandemic, 2020-2022".

[6] *65 Participating Hospitals and CUPE, Re*, (Weiler) 1981 CarswellOnt 3551.

[7] *65 Participating Hospitals and CUPE*, at para 8.

[8] *65 Participating Hospitals and CUPE*, at para 12.

> them. Thus, the parameters of change in the Hospital system as a whole must be drawn from and be compatible with the external world of collective bargaining in the Province.

21. The arbitrator went on to note that at the time the parties negotiated, inflation was around 10.7%, but that at the time of the hearing, had risen to over 12%. He considered that to be a significant increase, and he awarded additional increases above what had been agreed in order to offset inflation, and very close to the rate of inflation at the time[9].

22. A similar situation arose for Arbitrator Gray in respect of the recession in 2009, and the questions was what impact the downturn would have had on bargaining had negotiations continued rather than proceeding to interest arbitration[10]. The Board determined that the recession was indeed relevant to compensation because one of the reasons for wage increases was to offset inflation, and in the context of a recession, that meant that more modest increases were warranted given lower inflation[11].

23. As stated by Arbitrator Shime in relation to university academics: "In that regard I need only briefly repeat what I have said in another context, that is, public sector employees should not be required to subsidize the community by accepting substandard wages and working conditions."[12] This logic applies with even more force to nurses who have just endured a pandemic, been called heroes, and had their wages frozen by the government.

24. This observation was endorsed by Arbitrator Teplitsky in an award relating to the University of Toronto[13], who then issued an award consistent with inflation.

Comparison:

25. The most relevant recent comparators are indeed *Shouldice* and the Homewood (including both Arbitrator Hayes' decision and ONA's voluntary agreement). But, those establish a floor, rather than a ceiling. While inflation was high, the durability of high inflation was unknown. There was no significant evidence of issues with recruitment and retention in respect of either Hospital.

26. In the *Shouldice* decision, a significant increase in RRSP contributions was also awarded, with the result that the increase in total compensation was well above 3% for 2022-2023. Prior to the award, the employer contributed 5% up to $2,500 annually, and after the award it was 7% up to $5,000. At the very least, this is an additional 2% for a total of 5% in the third year of that contract. And, that was on top of what were already more significant increases in the first two years than what was achieved with respect to the Participating Hospitals, when wages at *Shouldice*

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[9] *65 Participating Hospitals and CUPE*, at para 34.
[10] *Participating Hospitals and OPSEU*, (Gray), November 4, 2009 (unreported).
[11] *Participating Hospitals and OPSEU*, (Gray), at para 59).
[12] McMaster University v. McMaster University Faculty Association, (Shime), July 4, 1990 (unreported).
[13] *University of Toronto v. University of Toronto Faculty Association*, (Teplitsky), October 5, 2010 (unreported).

were already higher than those in the central agreement. Over the life of the agreement, nurses at *Shouldice* achieved 2%, 2.5% and 5% increases in total compensation, totalling 9.5% over those three years. In the first two years of the ONA central agreement subject to the reopener, the increases were 1.75% and 2%, plus unlimited mental health benefits at the very end. The present award provides for an additional 3% in wages, and approximately 0.68% by compressing the grid. This is significantly less than what was awarded for ONA RN's at Shouldice.

27. In the *Homewood* decision, Arbitrator Hayes also noted that because it is a private Hospital, there are also inflationary impacts for the employer (para 30), which tempered how far he was willing to go in respect of increasing wages due to inflation. There is no such balancing here, where the Participating Hospitals are publicly funded, and inflation is likely to increase government revenues, in combination with a strong economic rebound from the pandemic.

28. As a result, comparators also strongly support significant increases to compensation, and increases above what has been awarded.

Preferred Disposition:

29. I agree with the Chair's decision to provide the general wage increase proposed by ONA based on the above discussion.

30. I also agree with the Chair's decision to compress the grid, merging the 25-year step into the 8-year step. I will add, in respect of compressing the grid, that inter-provincial comparators do not appear to be entirely consistent. But, with respect to other comparable positions covered by agreements between the Participating Hospitals and other unions, the comparators are almost perfectly consistent in that a 25-year step is almost unheard of outside of RN's.

31. This, however did not go far enough. It does go some way to address issues of retention for those with between eight and twenty-five years of seniority. I would have also provided for some amount of long-service bonuses similar to those enjoyed by male-dominated professionals such as firefighters and police, to ensure an incentive for nurses to remain throughout their careers.

32. Only adjusting the top end of the grid, however, does little to resolve the issues of recruitment. That issue must also be addressed, and that requires significant adjustments to the bottom end of the grid. It is essential that not only is nursing generally a financially attractive profession, but that working in public sector Hospitals is an attractive nursing practice. The same logic applies to providing improvements to pregnancy and parental leave, so that nurses can both have a family, and pursue their careers with out penalty.

33. No doubt wages and compensation are not the only way to address recruitment and retention. That can also be dealt with by way of improved benefits and

improving work-life balance. Improvements to vacations, as proposed by ONA, would improve work-life balance.

34. While we do welcome the recent award of unlimited mental health coverage, this has only been in place since Arbitrator Stout's most recent award. In effect, nurses have had very limited increases to health and welfare benefits from 2020 until the present, and in those circumstances, additional improvements are warranted.

35. Because there are so few NP's in comparison to the number of RN's covered by this agreement, the increase in total compensation by awarding a standardized grid at the highest rates would have been very small, in the order of 0.10%. All other RN classifications found in Local Appendices are pegged against the central RN grid by virtue of Article 19.01(d). As a result, the NP classification appears to be the only one covered by this agreement that is not centralized either directly or indirectly.

36. In respect of isolation pay, it is hard to imagine a stronger case of demonstrated need following the pandemic. Awarding that provision would have improved the life of nurses, protected patients, and likely improved staffing outcomes in the long-run. Although there is a theoretical cost to this, as the impact of the pandemic declines, it is less likely to be accessed. It would be incredibly unfortunate if we were to face another pandemic in the future without providing income replacement to those who are required to stay away from work for the health and safety of their colleagues and patients. This issue simply cannot be deferred until it is again a problem. It needs to be addressed before it is again a problem, and should have been done now.

37. Perhaps the criticism of this dissent will be that everything cannot be done in a single round and that incremental changes are the norm. While it may not be possible to do everything in a single year, vastly more could have been done, and should have been done, based on the statutory criteria. The problem with incrementalism is that it punishes employees and provides employers with an unjustifiable windfall through delay. Over the past several years, there was nothing incremental about the reality of the pandemic or inflation. Nurses faced those challenges in real time. Incrementalism demands that they continue to subsidize the public and the public purse, at the expense of their pocketbooks and their welfare, while providing the very services that are so essential.

April 25, 2023

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Dissent

I respectfully dissent from the Chair's Award and the reasoning and analysis that led to the items awarded.

In my view, the items awarded by the Chair are excessive. This is particularly the case given a bargaining context in which the hospitals had no opportunity to bargain non-monetary priorities in exchange for the monetary gains achieved, having regard to the monetary and non-monetary improvements achieved by the union in the original Stout and Gedalof awards, the significant gains made by the union pursuant to the recent award of Arbitrator Stout, and where the award is a one-year settlement.

As noted by the chair, rising inflation, was one key factor he considered in reaching his award. The Chair's award was also very clearly the product of several specific factors unique to nurses.

In addition, the Chair's award is also clearly motivated by the ongoing shortage of nurses in the hospitals (the Chair repeatedly references "staffing crisis" and "recruitment and retention" throughout the award, including at paragraph 46).

While these were valid issues for the Chair to have considered, his analysis and reasoning that led to the excessive award are deeply flawed.

As noted in the Award at paragraph 6, the parties have requested that the Board's award be provided on a highly expedited basis. As such, this dissent addresses only some of my many concerns with the Chair's Award and outlines these concerns in a summary manner only.

The Award is being issued 19 months after the prior award was issued. I disagree with the Chair's reasoning that led him to dismiss the Hospitals' argument that this Board should limit its review to facts in existence at or about the time of the prior award. The crux of the Chair's reasoning is found at paragraph 37 where he finds that "the first opportunity that **these parties** had to engage in meaningful collective bargaining was after November 29, 2022 (emphasis added)" when Bill 124 was struck down. This is a complete fiction. The Hospitals had no such opportunity. The re-opener language was for monetary issues only. Unions do not generally give monetary

concessions to obtain other monetary gains. Rather to achieve significant monetary gains, they give non-monetary concessions. Here, where the re-opener was for monetary issues only, the hospitals had no ability to advance any non-monetary items in the subsequent bargaining. Accordingly, there was no "meaningful" opportunity for the Hospitals to bargain as stated by the Chair and, in fact, no meaningful bargaining occurred. The Union simply maintained its lengthy roster of monetary items and proceeded to arbitration.

Further, even if the Chair thought it appropriate to consider events subsequent to the prior award and up to the present, he was obligated to consider all relevant circumstances that arose during this period. These include the waning of the pandemic over the period in question, the increase in the availability of effective vaccines for both nurses and the public, the creation of effective COVID treatments, the downward trend in inflation during the first quarter of 2023 (a period covered by the Award), and the $5000 retention payment received by full-time nurses in 2022. None of these factors are given any weight by the Chair.

I also disagree with the Chair's suggestion at paragraph 17 that outcomes for nurses not covered by Bill 124 were negatively impacted by Bill 124 notwithstanding that the legislation had no application to them. The Chair makes this comment as a means of diminishing the relevance of awards from 2020 and 2021 which supported the Hospitals' position. If the Chair was correct, one would have expected the Boards deciding these cases to have expressly stated that the existence of Bill 124 caused them to award a lesser wage increase than they otherwise would have. The Chair did not cite any award where a Board made such a statement and as far as I am aware, none did so. The Chair's comments in this paragraph are simply conjecture.

Throughout the Award, the Chair examines the impact of Bill 124, and the subsequent declaration that it was unconstitutional, upon the Union. The Chair fails to recognize, however, that the Hospitals have been negatively impacted by these events and also that arbitrators have been unable or unwilling to do anything to alleviate those negative impacts. When Bill 124 was in effect, the Hospitals' monetary and non-monetary demands were not considered at all by interest arbitration boards. When Bill 124 was overturned, the re-opener processes did not enable the Hospitals to advance any non-monetary items. These facts should have been

considered and factored into the Award to a much greater extent than they apparently were (there is a reference at paragraph 39 to the Hospitals' inability in the re-opener process to advance non-monetary proposals) in the same manner that their impact on the union was analyzed. In effect, there have been three years where the union has made significant gains at arbitration while the Hospitals' proposals have not even been reviewed or considered.

The compression of the wage grid was awarded by the Chair to address recruitment and retention. There was no empirical data before the Board which indicated that retention was particularly an issue among nurses in the 8 to 25 year category. Despite this lack of evidence, the 25 year rate is being revoked and instituted as a new 8 year rate at significant cost to the Hospitals. The change is not incremental and should not have been awarded.

Over the years, the Hospitals have also sought amendments to the collective agreement to improve recruitment and retention, including the elimination of severance packages for nurses not subject to layoff and the modification of antiquated work assignment restrictions. Similar to the Chair's award, these recruitment and retention proposals should be given serious consideration by future arbitration boards.

April 25, 2023

"*Brett Christen*"

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Brett Christen, Hospitals Nominee