

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

BETWEEN

**THE PARTICIPATING HOSPITALS
As represented by the Ontario Hospital Association**

(the “Hospitals”)

and

ONTARIO NURSES’ ASSOCIATION

(the “Union” or “ONA”)

BOARD OF ARBITRATION: **John Stout, Chair**
 Brett Christen, Hospitals’ Nominee
 Phillip Abbink, ONA Nominee

APPEARANCES:

For the Hospitals:

David Brook – O.H.A, V. P., Labour Relations & Chief Negotiations Officer
David McCoy

For ONA:

Kayla Sanger, Legal Counsel
Bernadette Robinson – Interim President
Angela Preocanin
Andrea Kay
Steven Lobsinger
Marilyn Dee
Patricia Carr
Dave Campanella
Kelly Latimer

**HEARING HELD MARCH 13, 2023 AND BY WRITTEN SUBMISSIONS RECEIVED
MARCH 24, 2023 AND AN EXECUTIVE SESSION HELD MARCH 28, 2023**

Background

[1] This Central Board of Arbitration (the “Board”) was appointed by the parties, pursuant to the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990 c.H. 14, as amended (“*HLDAA*”), to resolve the outstanding issues between the parties with respect to a renewal of the central provisions of collective agreements between the Ontario Nurses Association (“ONA”) and 131 Participating Hospitals in Ontario (the “Hospitals”) represented by the Ontario Hospital Association.

[2] Collective Bargaining between the parties was established through a Memorandum of Conditions for Joint Bargaining, which is historically how these parties have engaged in collective bargaining.

[3] The parties met in negotiations on February 10-14, 2020 and February 24-25, 2020. The parties engaged in mediation on February 26-28, 2020.

[4] The parties were unable to reach a voluntary settlement and the remaining issues in dispute were referred to this Board as it was then constituted.¹ A hearing was held on April 19 and 20, 2020 and an award was issued on June 8, 2020, see *Participating Hospitals v. Ontario Nurses Association*, 2020 CanLII 38651 (ON LA) (the “June 8, 2020 Award”).

[5] In our June 8, 2020 Award we indicated that as a result of the parties inability to agree upon the term for the renewal collective agreements, we were awarding central terms that would remain in force for one year from the date of our award, see ss. 10(10) of *HLDAA*. Therefore, the term of the renewal collective agreements was from April 1, 2020 until June 7, 2021.

[6] We also indicated in our June 8, 2020 Award that we were bound by the limitations placed upon us by Provincial wage and compensation restraint legislation, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (“*Bill 124*”). *Bill*

¹ The original Board nominees, Kate Hughes, and Brian O’Byrne are no longer able to act. As a result, Brett Christen and Phillip Abbink were appointed as replacement nominees.

124 limited the amount that an interest arbitration board could award for wages and other compensation. In particular, we were restricted to an annual wage increase of no more than 1% and total compensation of 1% for each of the three years of the *Bill 124* “moderation period.”

[7] We reluctantly awarded a 1% wage increase effective April 1, 2020. The Chair specifically noted in the June 8, 2020 Award that we would have awarded a wage increase of “at least 1.75%” to keep nurses in line with other hospital employees who already settled their collective agreements. We also awarded an additional 1% wage increase effective April 1, 2021. We noted that the second wage increase was to ensure that nurses received their wage increase in a timely manner.

[8] In terms of total compensation, we increased the call-back premium for nurses from time and one-half to double time and we provided 13% in-lieu of benefits for full-time employees beyond age 75. These increases in compensation fell within the 1% total compensation permitted under *Bill 124*.

[9] As is usually the case, we remained seized in accordance with subsection 9(2) of *HLDA* until the parties signed new collective agreements. We also remain seized with respect to a re-opener on monetary proposals in the event that ONA was granted an exemption, or *Bill 124* was declared unconstitutional by a court of competent jurisdiction, or the legislation was otherwise amended or repealed.

[10] On November 29, 2022, Justice Koehnen of the Ontario Superior Court of Justice issued a decision in *Ontario English Catholic Teachers Association et. al. v. His Majesty the King in Right of Ontario*, 2022, ONSC 6658 (the “Koehnen decision”), which addressed ten applications challenging the constitutionality of *Bill 124*. In a well-reasoned decision, Justice Koehnen found that *Bill 124* infringes upon the applicants (including ONA’s) right to freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms* and is not justified under s. 1 of the *Charter*. Justice Koehnen declared *Bill 124* to be void and of no effect. Justice Koehnen remained seized to address remedy and any ancillary issues.

[11] On December 8, 2022, ONA contacted the Chair requesting that the Board be re-established to hear submissions regarding wages and monetary compensation from April 1, 2020 to June 7, 2021. The Chair directed the parties to bargain before re-establishing the Board.

[12] The parties met on February 27, 2023 in an attempt to negotiate a resolution to the dispute. Unfortunately, the parties were unable to resolve their differences.

[13] On February 28, 2023, ONA wrote the Chair requesting that the Board reconvene as soon as practicable. The Chair was also advised that new nominees were selected to replace the nominees from the original Board, who were no longer able to act.

[14] The parties engaged in mediation, with the Board's assistance, on March 13, 2023. Once again, the parties were unable to come to an agreement to resolve the issues remaining in dispute. It was agreed that this Board would determine wages and compensation for the first two years of the *Bill 124* moderation period (April 1, 2020 until March 31, 2022) based on written submissions. It was further agreed that the Board would render their decision based on such written submissions, along with the previous submissions made and relied upon in 2020.

[15] The parties are currently engaged in preparing for an interest arbitration before a central board of arbitration chaired by Arbitrator William Kaplan (the "Kaplan Board") for a renewal collective agreement with a term commencing April 1, 2023. The parties are also preparing for a mediation session with a central board of arbitration chaired by Arbitrator Eli Gedalof on April 2, 2023 (the "Gedalof Board") to determine the wage and compensation increases for the last year of the moderation period (2022). In light of this very tight timeline, the parties agreed that a further hearing was not necessary, and this Board would issue a supplemental award in short order, which may include few, if any, reasons.

[16] Accordingly, this supplemental award addresses the additional compensation that is to be provided to nurses for the first two years of the *Bill 124* moderation period (2020 and 2021).

Analysis

[17] The principles applicable to interest arbitration are well established and we set them out in our June 8, 2020 Award. There is no need to repeat what has already been stated in our earlier award, other than to emphasize the importance of replication as informed by comparability.

[18] Interest arbitration is the last step in collective bargaining for those parties who are not permitted, by statute, to exercise the right to strike or lockout. The interest arbitration board's task is to replicate what the parties would have agreed upon but for *Bill 124*. This means that we are to examine the parties' proposals made at the time in the context of the collective bargaining environment as it then existed when we issued our June 8, 2020 Award. Interest arbitration does not operate in a vacuum, and interest arbitration boards are regularly called upon to consider relevant arbitration or court decisions issued after the hearing but before a final decision is made, the Koehnen decision being a perfect example, see *Participating Nursing Homes and SEIU, Local 1 Canada*, 2022 CanLII 90597. An interest arbitration board also cannot completely ignore subsequent events, particularly when we are being asked to make a decision on issues that we may not have decided in our June 8, 2020 Award but for *Bill 124*.

[19] We also must keep in mind that *Bill 124* undermined the free collective bargaining process between these parties as well as others who were affected by the legislation. *Bill 124* artificially altered the context of collective bargaining on a broad scale with the introduction of wage and compensation restraints in the healthcare sector. One cannot ignore the fact that the settlements and awards involving parties affected by *Bill 124* were artificially deflated when compared to those in the greater economy, including other employees providing essential public services.

[20] Interest arbitration is an artificial exercise by necessity. However, it is informed by objective evidence, including evidence of collective bargaining and the economic environment at the time of the board's award. Interest arbitration becomes even more

artificial when legislative restraint is introduced, which inhibits free collective bargaining and undermines the application of replication. That being said, we must do our best to try and provide the parties with a resolution that is both objectively justified and practically applied to their ongoing relationship.

[21] In their original brief filed in 2020, ONA sought a 2% wage increase in wages, along with a new 15 year step in the wage grid, premium and benefit enhancements. ONA is now seeking higher wage adjustments based on the fact that the retroactive awarding of some of non-wage proposals would be difficult, if not impossible, and essentially rob nurses of what they would have been entitled to in 2020 and 2021.

[22] We disagree with this approach and are of the view that the wage increases ought to be limited to what was proposed at the time of our June 8, 2020 Award. We are of the opinion that there are more practical ways to address the issues arising from retroactive adjustments that may be made with respect to any other compensation that we may award.

[23] In terms of wages, the Chair stated in our June 8, 2020 Award, that we would give “at least 1.75%”. The Hospitals submit that we ought to only provide ONA with an additional 0.75% wage increase in each year. We disagree with this submission.

[24] There is no doubt that we were aware of the negotiated OPSEU wage increase of 1.75% and we acknowledged that the nurses would not have fallen behind other hospital employees. However, we did not in any way limit ourselves to a 1.75% increase in the event that the matter came back before us. OPSEU increases are certainly a strong comparator that provides objective evidence of what the Hospitals may have agreed upon in free collective bargaining with ONA. However, the OPSEU wage increases, and the ONA wage increases have not always been aligned, which we noted in our June 8, 2020 Award. ONA represents a much larger bargaining unit with different needs and desires, and it would be in our view disingenuous to believe that they would just readily accept the same wage increases as provided to other employees in a different context prior to the advent of *Bill 124* and the pandemic.

[25] Replication is not duplication, and interest arbitration boards, particularly central arbitration boards are not required to religiously and slavishly follow other awards or settlements. An interest arbitration board must consider the specific circumstances before them and determine what the parties would have agreed upon if left to freely bargain in the context of the time when the hearing occurs, see *Scarborough Health Network v. CUPE, Local 5852*, 2020 ONSC 4577 (Can LII).

[26] We are of the view that a total wage increase of 1.75% is appropriate for 2020. However, we do not believe that 1.75% is an appropriate wage increase for 2021. In the normal course we would not have awarded any wage adjustment for 2021. Instead, we would have granted the parties the opportunity to freely negotiate the 2021 wage increase in the next round of bargaining as we did with the other 2021 compensation. This is particularly so given the uncertainty at the time, just after the World Health Organization (WHO) declared the COVID-19 global pandemic. We only awarded the additional 1% wage increase because it was a *fait accompli* due to *Bill 124*.

[27] We are now being asked to decide what we would have awarded as wages and compensation for 2021. In our view, we must consider the uncertainty of the pandemic and the economy during this time period. We must also consider the strains being placed on the healthcare system at the time, which were much different than what OPSEU and other unions faced when they settled their collective agreements before the pandemic. ONA raised significant concerns about burn out, recruitment and retention of nurses by the hospitals during what was obviously a very trying period. ONA used the phrase “a crisis within a crisis.” ONA’s concerns were valid, these concerns, coupled with other considerations of the collective bargaining environment and economic uncertainty, lead us to conclude that a higher wage increase is warranted in 2021. Therefore, we find that 2.0% is the appropriate total wage increase for 2021.

[28] The Chair acknowledges that he made comments in *Participating Nursing Homes and ONA 2021 CanLII 107099* (ON LA), which might lead some to believe he endorsed 1.75% as being the appropriate amount that ONA and the Hospitals may have agreed

upon for 2020 and 2021. That certainly was not intended and upon reflection ought to have been more carefully written, although the comment was couched in terms of “most likely” as opposed to being more definitive. The point of the comment in the *Participating Nursing Homes* award, was that in 2021 the nurses in nursing homes would generally not have settled for less than what the nurses in hospitals might have settled for in 2020. We note that wage increases for nurses in nursing homes may closely follow the rates of nurses in hospitals, but they do not automatically adopt it. If anything, nurses in hospitals have generally received slightly higher wage increases and that is why they are paid higher than nurses in nursing homes. ONA has tried on multiple occasions to close this gap, but they have been unsuccessful to date.

[29] The additional step in the wage grid after 15 years ONA seeks is a breakthrough proposal and we are not awarding it. We acknowledge the concerns raised by ONA but are of the view that in the context of the matter before us the proposal is not justified.

[30] ONA originally sought additional non-wage monetary increases, including increase in premiums and benefits. In their most recent submissions, they sought to have an additional 0.5% per year added to the wage grid instead of providing such non-wage monetary increases. The Hospitals are opposed to any additional compensation beyond wage increases of a total of 1.75% per year (i.e. an additional 0.75% for 2020 and 2021).

[31] The Hospitals acknowledged in their original submissions that increases to night and weekend premiums would be appropriate, albeit in the context of *Bill 124*. In addition, the parties have a historical pattern of providing modest increases to premiums. In our view an increase to the night and weekend premiums is appropriate. However, given the awarding of double time for call-backs in the first year (2020), additional premium enhancements should be limited to 2021.² Therefore, we are awarding \$0.10 to each of the night and weekend premiums effective April 1, 2021.

² We note that we are taking the granting of ONA’s most desired proposal for double time payment for call-backs into account when considering the total compensation of our overall award.

[32] In terms of benefits, ONA made a proposal to introduce unlimited mental health services for nurses. In 2018, Arbitrator Kaplan awarded mental health services with a limit of \$800 to nurses working in Hospitals and ONA subsequently negotiated similar entitlements in Homes for the Aged. Unlimited mental health benefits have been awarded to other essential services, including fire, police, and paramedic services across the province before the advent of the COVID-19 pandemic. In our view, the provision of mental health services is an emerging benefit that is finding wide acceptance in collective bargaining for employees who work in stressful environments or may experience violence associated with their work. There is no reason why nurses, who are on the front line treating the most acute and traumatic cases should be denied such a benefit. Frankly, providing the nurses with mental health benefits not only assists the individual nurses, but it also benefits the Hospitals. Nurses face many mental health challenges and that can take a toll, resulting in increased sick leave. The provision of additional mental health benefits provides assistance in coping with such challenges and may result in less absenteeism. Therefore, we are awarding ONA's proposal for unlimited mental health benefits for nurses.

[33] In addition, we are awarding a modest \$50.00 increase in chiropractic, massage, and physiotherapy benefits as proposed by ONA.

[34] We understand that implementation of health and welfare benefits on a retroactive basis is difficult, if not impossible. Therefore, we are awarding these benefits effective the date of our award and they are to be implemented as soon as possible.

[35] We feel empathy for ONA's position that some monetary compensation ought to be awarded for the delay in implementing benefit enhancements. However, we have taken into consideration this fact in making our decision and we are of the view that on balance, a fair and reasonable result is to implement these benefits as soon as possible. While the benefits being awarded are delayed, ONA also benefited from our awarding double time for call-backs in 2020. As this Chair has stated previously, wage and compensation restraint legislation undermines free collective bargaining, and it is not just

the unions and employees who suffer but so too do the employers. Overall, we are of the view that this supplemental award reflects a fair and reasonable result having regard to the difficult situation we are facing.

[36] Finally, the nominees are both dissenting from this award, and they may file written dissents at a later date. The Chair feels he has adequately explained his decision in this supplemental award. However, the parties may request additional reasons if they feel it is necessary or required. The Chair also reserves his right to provide an addendum should any written dissent raise issues that need to be addressed with reasons. It should be noted that generally in interest arbitration the less said the better for future bargaining. Any request for additional reasons is to be made within seven (7) days or we shall deem these reasons to be sufficient for the parties.

SUPPLEMENTAL 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:

- **Wages:**
 - Effective April 1, 2020 – an additional 0.75% (total 1.75%)
 - Effective April 1, 2021 – an additional 1.0% (total 2.0%)
 - Retroactive compensation in accordance with Article 19.10 of the Collective Agreement.

- **Premiums:**
 - Effective April 1, 2021 – an additional \$0.10 on the night shift premium
 - Effective April 1, 2021 – an additional \$0.10 on the weekend shift premium
 - Retroactive compensation in accordance with Article 19.10 of the Collective Agreement.

- **Health and Welfare Benefits:** Effective as soon as possible after the date of this award increase the following benefits:
 - Chiropractic, massage, and physiotherapy increase by \$50.00.
 - Mental health benefits increase to unlimited coverage.

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

[39] In light of the uncertainty in this situation, and in the event that the appeal is allowed at either the Court of Appeal or the Supreme Court of Canada, we will remain seized with respect to a re-opener if the *Bill 124* appeal is successful, or a stay is granted and until our awards are implemented. We also continue to remain seized in accordance with subsection 9(2) of *HLDAA* until the parties have signed new collective agreements.

Dated at Toronto, Ontario this 1st day of April 2023



John Stout – Chair

“I dissent”

Phillip Abbink - ONA Nominee

“I dissent”

Brett Christen – Hospitals Nominee