In The Matter Of An Interest Arbitration

Between:

Participating Hospitals

("the Participating Hospitals")

- and -

Ontario Public Service Employees Union and its participating locals

("OPSEU")

Owen V. Gray, Chair
Roy C. Filion, Employer Nominee
J. Cameron Nelson, Union Nominee

Appearances:

For the Union:
Presenter, June hearings:
Martha Mercer-DeSantis, OPSEU
Presenter, teleconference hearings:
Elizabeth McIntyre, Cavalluzzo Hayes

Moya Beal, OPSEU, Negotiator

HPD Central Negotiating Team:
Yves Shank, Chair
Bryan Mitchell, Vice-Chair
Boris Prus
Sara Labelle
Hervé Cavanaugh
Sandi Blancher
Barbara Barry

For the Employer:
Presenters:
Robert Little, Hicks Morley
Matthew Sutcliffe, OHA
Chanta Baier, OHA

Participating Hospitals Bargaining Committee:
Marie Ormerod, Chair
Deb Ancocik
Danielle Baker
Diane Barbeau
Stephen Exley
Cheryl MacInnes
Jennifer Mclauchlan
Jennifer Miller

Ontario Hospital Association:
Sam Mandelbaum
Caroline Van Kessel
Arlene Papaioannou
David McCoy
Carol Jackson

Hearing conducted in Toronto, Ontario on June 22, 23 and 29, 2009;
Hearing by teleconference July 31, 2009;
Supplementary written submissions August 11 and 18, 2009;
Hearing by teleconference October 7, 2009;
Executive Sessions July 9, 23 and 29 and October 21, 2009.

AWARD

[1] Each of the forty-four participating hospitals is party to a collective agreement with OPSEU or one of its locals (hereafter referred to as "OPSEU") covering technical and paramedical employees. Those collective agreements expired on March 31, 2009. The participating hospitals and OPSEU agreed to engage in central bargaining to settle the terms of a "central agreement" – that is, a set of terms and conditions of employment that the participants have agreed in advance to incorporate into their individual or "local" collective agreements with one another. Issues that the participants have not designated as central issues are left to be resolved "locally," through collective bargaining between the individual hospital and local union parties to each agreement.

[2] The parties' Memorandum of Conditions for Joint Bargaining defined the central bargaining process and identified the sorts of terms about which there could be central bargaining. It provided that if the terms of the central agreement were not resolved by agreement they would be settled by interest arbitration. Having failed to agree on some of the central issues in dispute, the parties have constituted this Board to settle those issues by interest arbitration.

[3] Collective bargaining between hospitals and the unions that represent their employees is governed by the *Hospital Labour Disputes Arbitration Act* ("the HLDAA"),[1] which provides that they cannot resort to a strike or lockout in the course of collective bargaining. Instead, any dispute about the terms of their collective agreement that they cannot resolve through negotiation must be referred to interest arbitration. These proceedings are thus governed by the HLDAA as well as by parties' Memorandum of Conditions for Joint Bargaining.

[4] The bargaining units affected by these proceedings include approximately 8000 full-time and part-time employees in such occupations or classifications as

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1 R.S.O. 1990, c. H.14, as amended.

Audiologist, Psychometrist, MSW, Speech Pathologist, Charge Technologist, Charge Technologist Plus, Dietitian, BSW, Kinesiologist, Occupational Therapist, Physiotherapist, Perfusionist, Pharmacist, Psychologist, Senior Technologist, Senior Technologist Plus, Registered Technologist, Registered Technologist Plus, Technician 1, Technician 2, Technician 3, Technician 4, Technician 5, and others. Registered Technologist is by far the most populous classification. OPSEU and its locals also represent approximately 6900 paramedical employees in 25 other, non-participating hospitals. Similar classifications in other hospitals are represented by a variety of other trade unions.

[5] The collective agreement to be settled here will cover the period April 1, 2009 to March 31, 2011. The most recently expired central agreement, which covered the three year period from April 1, 2006 to March 31, 2009, was the result of central bargaining without resort to interest arbitration. Each of the two agreements prior to that was a two year agreement settled by interest arbitration. In all, before this round of bargaining there have been 16 central agreements between hospitals and OPSEU, seven of which were the result of interest arbitration.

[6] The parties made oral and written submissions over the course of three agreed-upon hearing days in June 2009. Thereafter there were further submissions and hearings by teleconference. The proceedings and rulings after the June hearings, and the reasons for them, are described later in this award.

[7] While what follows does not recite all of the parties' arguments or refer to all of their supporting materials, all of the arguments and supporting materials have been carefully considered in formulating this award.

The Role of an Interest Arbitration Board

[8] It is well settled that the proper function of an interest arbitration board is to adjudicatively replicate the collective agreement that it determines the

parties would have made in free collective bargaining. As the current Chief Justice of Ontario observed[2] when performing this role:

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

[9] It is important to note that the question to be determined by this board is what the parties likely *would have* done and not what, from some perspective or other, it may be thought they *ought to have* done:

> The task of an interest board of arbitration is not to impose terms and conditions that seem attractive or even fair to the board of arbitration. Instead, the task of a board of arbitration is to design a collective agreement that comes as close as possible to what the parties could have expected to achieve if they had been forced to impasse.[3]

As one interest arbitrator put it[4]:

> Interest arbitrators interpret the collective bargaining scene. They do not sit in judgment of its results.

[10] Section 9 of the HLDAA provides that

> 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, ...
>
> (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:
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> 1. The employer's ability to pay in light of its fiscal situation.
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> 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.
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> 3. The economic situation in Ontario and in the municipality where the hospital is located.

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2 *University of Toronto (Governing Council) and University of Toronto Faculty Association* (2006) 148 L.A.C. (4th) 193 (Winkler R.S.J.)

3 *Re Pembroke Professional Fire Fighters' Association, unreported, Knopf.*

4 *Re SEIU and the forty-six Participating Hospitals, unreported, Teplitsky.*

> 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.
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> 5. The employer's ability to attract and retain qualified employees.
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> …
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> (1.3) Nothing in subsection (1.1) affects the powers of the board of arbitration.

The factors expressly identified in subsection 9(1.1) are among the matters that one would expect bargaining parties to consider in bargaining, to whatever extent they are salient the context of their particular negotiations. For that reason and to that extent they are relevant to an assessment of what the outcome would likely have been if bargaining had continued to a conclusion. The statute's express reference to those considerations is not an assignment to interest arbitrators of wage control functions: they do not provide a mandate or impose an obligation to settle wages and benefits at levels other than what the board concludes would likely have been the result of free collective bargaining.

[11] In coming to our conclusions, each of the members of this board has assessed all the relevant and customary considerations raised by the parties, including total cost, applying the replication principle and, as to language issues, the principle of demonstrated need. Reasonable people can differ about the likely result of such a complex activity as collective bargaining, particularly collective bargaining in an unsettled economic climate. This acknowledgement that there can be a range of reasonable results should not be mistaken for an inclination to simply split the difference between the parties' last bargaining positions. That bargaining gap and the reasonable range will not necessarily be either co-extensive or co-centric.

Wages and other Economic Issues

[12] Just a few months before the parties began their bargaining, the global economy entered into a downturn that had a substantial negative impact on the Ontario economy. When the parties' bargaining reached an impasse it was unclear what the extent or duration or full effect of the downturn would

ultimately be, nor when recovery would begin, nor how long recovery would take, nor what the long term effects, particularly the impact on public spending on health care, would be of the downturn or the fiscal measures adopted by governments in response to it. While the downturn affected the outcomes of collective bargaining thereafter, from the information provided by the parties it would have been apparent to them, as it is to us, that the effects of the downturn on employers and employees have varied depending on the nature of the employer's business and the kind of work its employees do for it.

[13] In this context the parties failed to agree on increases in wages and other economic benefits. A major issue before this board was what effect the downturn would have had on the outcome of bargaining if that bargaining had continued to a conclusion. In that connection it was important to consider what effect the downturn appears to have actually had on outcomes of collective bargaining. During the June hearings the parties provided evidence of outcomes of collective bargaining after the downturn began, to the extent such post-downturn outcomes existed at the time.

[14] Comparability of the employment in question is always an important consideration in assessing the relevance of other parties' collective bargaining outcomes, particularly when economic difficulties have uneven effects on different parts of the economy and on different kinds of employment.

[15] A recurring theme in OPSEU's bargaining with hospitals for paramedical employees is the issue of Registered Technologist / Registered Nurse ("RT/RN") parity or comparability. The Registered Technologist classification is by far the most populous occupation in the bargaining units in issue here. In the history of the parties' dealings, there was a period when Registered Technologists ("RT's") and nurses ("RN's") had roughly the same rates of pay.[5] That ended in 1993, when an interest arbitration board determined that increases that had most recently been won by RN's were in part a response to shortages of nurses, and

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[5] The hospitals say this was only at the starting rate and not and other rates. We do not need to resolve that debate.

that because there were no comparable shortages of RT's those increases would not have been matched in collective bargaining for RTs. The differential in wages that thus arose has since been narrowed, but not eliminated.

[16] The participating hospitals argue that whatever may once have been the case, RT/RN parity (that is, pay at the same rates) has not been the outcome of collective bargaining for some time and should not be a determining factor in assessing what the outcome of collective bargaining would have been on this occasion. The union takes the position that even if the comparison does not warrant such parity (which it does not concede, at least for the longer term), RNs are nevertheless the appropriate comparator to RTs for collective bargaining and interest arbitration purposes, having regard to the extent of training required to become an RT and the importance of the work of RTs to patient care.

[17] In February 2008, ONA and 140 participating hospitals entered into a collective agreement covering the period April 1, 2008 to March 31, 2011. It provided for wage increases of 3.25% on April 1, 2008, 3% on April 1, 2009 and 3% on April 1, 2010. By the terms of the agreement, those increases were deemed to be inclusive of any pay equity adjustments. The agreement also provided other economic improvements and substantial signing bonuses for nurses employed at the time of the settlement.

[18] The first year of that ONA central agreement corresponds to the last year of these parties' expired central agreement, under which paramedical employees also received a 3.25% wage increase on April 1, 2008. In these proceedings OPSEU seeks the same increases of 3% on April 1, 2009 and 3% on April 1, 2010 that the ONA central agreement provided for registered nurses. It also seeks some other economic improvements in areas in which ONA achieved improvements, but not the signing bonuses that were provided to nurses under their February 2008 agreement. It is common ground that wage increases

awarded by this board would not be inclusive of pay equity adjustments, which are the subject of a separate process that the parties have not yet completed.[6]

[19] The hospitals argued that whatever comparative value the last two years of their central agreement with ONA might otherwise have had was diminished by the fact that that settlement was made before the downturn began. Anticipating that argument, OPSEU's submissions in our June hearings identified post-downturn settlements in the hospital, health care and other public sectors that provided for increases at or near 3% in each of the two years with which we are concerned here. These included increases that one hospital agreed to for nurses, and another agreed to for radiation therapists represented by ONA, after the downturn began. OPSEU argued that those results were the most pertinent to our enquiry, but also offered information about increases awarded or agreed to for other workers (whom it did not suggest had employment comparable to that of the paramedical employees with whom we are concerned here) to illustrate that wage increases in the health care sector and some other parts of the public sector were not substantially moderated in the months following the economic downturn. The hospitals, on the other hand, referred to the more modest post-downturn settlements in the public service federally and provincially, as well as even more modest post-downturn settlements in portions of the private sector, some of which included no wage increases.

[20] Post-downturn settlements in the public sector to which the parties referred in their submissions in our June hearings included the following, roughly in chronological order of settlement:

November 2008

- Treasury Board and PSAC settled a collective agreement for federal public servants for the period June 21, 2007 to June 20, 2011, with

[6] We are not called upon to determine whether a board of arbitration can deem the increases it awards to include pay equity increases when such increases have not been settled between the parties by agreement or adjudication by the appropriate tribunal.

increases of 2.3%, 1.5%, 1.5% and 1.5% as of June 21st of 2007, 2008, 2009 and 2010 respectively.

- The OSSTF and the OPSBA reached a provincial framework agreement for secondary school teachers providing for 3% in each year of a four year agreement. (This mirrored the wage provisions mandated by the Ontario Government in the summer of 2008. EFTO failed to reach agreement with the OPSBA by the deadline specified in the government's mandate, and later settled for 2% in each of the first two years and 3% in the third and fourth years of a four year agreement.)

December 2008

- ONA and Central Community Care Access Centre settled a first collective agreement expiring March 31, 2011 that provided increases of 3% on April 1st of 2008, 2009 and 2010 for case managers (a classification that includes registered nurses, social workers, occupational therapists and physiotherapists) and allied health care workers.

- The Council of Academic Hospitals of Ontario settled a renewal collective agreement with the Professional Association of Interns and Residents for a three year period ending June 30, 2011, with the following increases: (0% July 1, 2008), 2% January 1, 2009, 1% July 1, 2009, 2% January 1, 2010, 1% July 1, 2010, 2% January 1, 2011.

- An agreement was settled between the Toronto Police Services Board and the Toronto Police Association for roughly 3.3% in each year of a three year collective agreement expiring at the end of 2010. This mirrored without substantial reduction increases that had been agreed upon prior to the economic downturn by other municipalities and their police force unions. Subsequent firefighter agreements in Kitchener and Ottawa for three year periods commencing January 1, 2009 provided for increases of 3% or more in at least the first two years, substantially mirroring pre-downturn police and firefighter outcomes in other municipalities.

Late fall 2008

- The County of Frontenac's settlement with OPSEU Local 462 for ambulance attendants provided for increases of 4.25%, 3% and 3% as of January 1st of 2008, 2009 and 2010 respectively.

January 2009

- The Ontario Government and OPSEU settled a four year agreement covering the Ontario Public Service, with general increases of 1.75%, 2%, 2% and 2% as of January 1st of 2009, 2010, 2011 and 2012 (hereafter "the OPS settlement"). Correctional Officers and Youth Workers received an additional 2% effective January 1, 2009. Probation officers received an additional 1% on January 1st of each of 2009 and 2010. Certain other correctional classifications received an additional 1% as of January 1, 2009.

- Toronto Hydro and CUPE Local 1 settled five year agreements for inside and outside workers, providing for increases of 3% in each year. (Although this is said to include a COLA clause for the last four years, the clause itself is not before us.)

- The Ontario Provincial Police and the Ontario Provincial Police Association settled a three year agreement with increases of 2.34%, 2.25% and 2.0% for 2009, 2010 and 2011, respectively. The agreement gives the OPPA the ability to reopen the wage issue in 2010 for 2011, and provides 1% increases in 2009 and 2010 in PRI allowances for which OPSEU says 80% of that bargaining unit will qualify, thus substantially matching prevailing increases for municipal police forces.

February 2009

- York Central Hospital settled a 35 month collective agreement with an expiry date of March 31, 2011 covering over 800 nurses. It provided for

wage increases of 3.25% as of April 27, 2008, and 3% on each of April 27, 2009 and April 1, 2010.

March 2009

- Ontario Power Generation Inc. and Power Workers Union CUPE Local 1000 settled three year agreements for nuclear and non-nuclear workers providing for increases of 3% on April 1st of 2009, 2010 and 2011, plus a COLA clause providing for an additional increase in the last year if the year over year increase in CPI as of February 2011 exceeds 3%.

April 2009

- University Health Network (Princess Margaret Hospital) settled a 3 year collective agreement with ONA for a unit of Radiation Therapists with increases of 3.25% on January 1, 2008 and 3% on January 1st of 2009 and 2010.

- St. Joseph's Health Care in London settled a three year collective agreement with the CAW covering service workers (registered practical nurses, personal service workers, dietary and housekeeping staff) with increases of 2.75%, 2.8%, and 3% on April 1st of 2009, 2010 and 2011 respectively. The hospitals note that these rates appear to include an element of catch-up relative to the higher existing rates for comparable workers at London Health Sciences Centre.

- In April 2009, the West Parry Sound Health Centre's settlement with OPSEU for ambulance attendants provided for increases of 3% as of January 1, 2008 and January 1, 2009.

- In April 2009, the City of Brampton settled with the Brampton Professional Firefighters Association in April of 2009 for 3% in 2009 and 3% in 2010. (The City of Toronto had settled with the Toronto Professional Firefighters Association in early 2008 with wage percentage increases of 3.5% in both 2008 and 2009.)

Spring 2009

- The County of Lambton EMS settlement with SEIU Local 1 for ambulance attendants provided for increases of 1.5% each on April 1 and December 1 in each of 2009 and 2010.

May 2009

- An interest arbitration board issued a unanimous award for over 360 clerical employees of the Windsor Regional Hospital represented by the IBEW Local 636 covering the period of April 1, 2008 to March 31, 2010. The award provided for increases of 3% as of April 1, 2008, 0.5% as of March 31, 2009, 1% as of April 1, 2009 and 0.75% as of October 1, 2009. The award stated that

  > Additionally, the Board has considered the general economic conditions in Canada and Ontario and the specific economic situation of Windsor. With respect to the latter point in particular we are of the view that the local economic difficulties, and the influence they will have on the funds available to the employer, aside from Provincial funding, must seriously be considered.

  The award did not separately quantify the results of those considerations. The hospitals state that current central CUPE and SEIU agreements, which expire August 2009, together with their prior agreements provided service and clerical workers with increases totalling (arithmetically) 9.35% over the period from April 2006 to August 2009. Under the award and their prior agreement, Windsor Regional Hospital clerical employees will have received 8.5% over the period from April 2006 to September 2009, with a further 0.75% increase for the subsequent six month period that is not yet the subject of a CUPE or SEIU central agreement.

- The Ontario Government and the Association of Management, Administrative and Professional Crown Employees of Ontario settled a three year agreement covering the Ontario Public Service, with general increases of 1.75%, 2% and 2% as of January 1st of 2009, 2010, and 2011.

June 2009

- The Grand River Hospital Corporation and CAW settled a three year collective agreement with CAW covering service and clerical employees, with general increases of 2.1%, 2.1% and 2.25% on April 1st of 2009, 2010 and 2011, respectively. OPSEU observes that this agreement provides averages annual increases of 2.9% for skilled trades.

- The Liquor Control Board of Ontario and OPSEU settled a four year agreement providing for increases of 1.75% as of April 1, 2009 and 2.0% as of April 1st of 2010, 2011 and 2012, plus a signing bonus.

- ONA and 151 participating nursing homes settled a two year agreement covering registered nurses that provided for a 1% increase plus an $0.18 per hour "retention and recruitment adjustment" on each of July 1, 2009, January 1, 2010, July 1, 2010 and January 1, 2011. OPSEU's unchallenged submission was that this added 6.98% to the start rate and 5.97% to the end rate for registered nurses in those homes over the course of the agreement's two year term.

[21] The hospitals expressed concern about what funding they may receive in the latter part of the period in issue. This is always a concern for hospitals in collective bargaining, given that nearly all of their funding comes from the provincial government directly or, more recently, indirectly through 14 Local Health Integrated Networks or LHIN's, and such funding is not generally allocated as far in advance as the commitments that hospitals must make in collective bargaining. The LHIN's are established to determine the allocation of funding locally or regionally among health care facilities in their assigned region, including hospitals, nursing homes and other long-term care facilities, Community Care Access Centres and others. OPSEU observed that the ONA increases that it asks us to replicate were agreed upon centrally in that funding environment, and that while the central ONA agreement was made several months before the downturn began, those increases were replicated in that

funding environment after the downturn began for substantial numbers of employees in hospitals, nursing homes and the Central CCAC.

[22] During the downturn, and perhaps as a result of it, there has been a substantial reduction in inflation as measured by increases in the Consumer Price Index, although this seemed to be largely due to decreases in the cost of gasoline and other forms of energy. When the ONA central agreement was settled in February 2008, the Ontario CPI increase as reported in each of the previous 5 months had been over 2% per annum. The reported rate of inflation moderated considerably in the period leading up to our June hearings.

[23] The parties disagreed about the evidentiary value of the January 2009 settlement in the Ontario Public Service as an indicator of what OPSEU would have agreed to with the hospitals in this economic climate, had their collective bargaining proceeded to a conclusion. These parties had a similar debate in their June 2005 post-hearing submissions to an interest arbitration board on which the present nominees sat with Arbitrator Beck.[7] OPSEU and the Ontario government had just made a tentative settlement ("the 2005 OPS settlement") that provided for general increases of 2%, 2.25%, 2.5% and 3% as of January 1st of 2005, 2006, 2007 and 2008, respectively. After receiving and considering the parties' submissions, that board (Mr. Filion dissenting) observed that the settlement was so different with respect to its constituencies and main issues that it did not impact the board's decision, which provided for a 3% increase as of April 1, 2005 (vs. 2% as at January 1, 2005 in the 2005 OPS settlement).

[24] Our June hearings ended without either party's asking that further evidence or submissions be received thereafter.

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[7] That board settled the terms of the central agreement for the period April 1, 2004 to March 31, 2006.

The Applications to Reopen the Hearing

[25] While the Board was deliberating on the evidence and submissions it had heard in June, a question arose that we posed to the parties by email on July 28th:

> In the board's deliberations the question has arisen of the board's inviting further submissions on any post-hearing developments that either party considers relevant and significant. Having noted that neither party has forwarded unsolicited submissions or requested the opportunity to make them, the threshold question for us is whether the parties have any agreement about our requesting or entertaining submissions. If yes: what is that agreement? If no: do you favour or oppose our requesting or entertaining such further submissions, presumably with a hard end date for the period about which further submissions might be made?

The question posed was not one on which board members all had the same tentative view, but we were unanimous that it was one on which we should seek the parties' submissions.

[26] That message crossed an email message from counsel for the hospitals asking that we reopen our hearing to receive further evidence about quite recent settlements, then tentative, of strikes of municipal workers in Toronto and Windsor. In response, the chair further asked:

> Mr. Little:
>
> Without prejudging the question whether further submissions will be entertained, I would appreciate knowing what hard end date you would propose for the additional period about which we should receive further evidence and submissions with respect to any matter either party considers pertinent that has occurred or been reported subsequent to our June hearings.
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> Ms. Mercer-DeSantis:
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> Without prejudging the question whether further submissions will be entertained, I would appreciate knowing what hard end date the union would propose, should we conclude (or the parties agree) that further submission be entertained.
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> Indeed, if both sides can agree on a process and its limitations, so much the better.

Counsel for the employer responded that "The hard end date the OHA proposes is the date upon which the City of Toronto deal is available to the parties so that

they can make submissions on its relevance." The union opposed our entertaining any further evidence or argument, taking the position that the "hard end date" should be the last day of the June hearings.

[27] A hearing by teleconference was held on July 31st to hear the parties' submissions on the employer's request. Following that teleconference, the parties were informed that

> For reasons to follow in the award on the merits, the board is prepared to receive from either party representations about any event(s) that may have occurred since our hearings in June that the party considers pertinent, provided that such representations are made in writing and delivered in electronic form by email to each of the board members and to the opposite party's representative by no later than 5 p.m. EDT Tuesday, August 11, 2009.
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> Each party shall thereafter have until 5 p.m. EDT Tuesday, August 18th to deliver in the same manner any reply it may wish to make to any representations the opposite party delivers pursuant to this order.

[28] Thereafter the parties delivered submissions and replies thereto in accordance with the timetable set by the board.

[29] One of the allegations in the union's August 11th submissions was that Collingwood General & Marine Hospital, a participating hospital at which OPSEU's collective agreement does not cover some of the paramedical classifications that it represents at other participating hospitals, had recently given a wage increase of 3% retroactive to April 1, 2009 to its non-union paramedical staff. On this point the hospitals' reply said, among other things:

> The information provided by the union is either inaccurate or misleading: **there was no across-the-board 3 percent wage increase** provided to staff as stated.
>
> The wage increases implemented at Collingwood General & Marine Hospital are reflective of a "pay for performance" compensation system applicable to all non-union staff, including a number of non-union paramedical professional classifications. These non-union paramedical professionals have counterparts covered by the Central OPSEU Collective Agreement such as the Respiratory Therapists, Physiotherapists, Dietitians, Pharmacy Technicians, EEG and ECG Technicians.
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> This compensation model applies variable percentage increases to individual employee wage rates within a general range based solely on the results of an annual job performance review.

> In some instances, employees, including those in the non-union paramedical classifications referred to above, received a **0% increase**.

(Boldface and underlining as in the original) In response to this stark factual dispute, the board advised the parties as follows on August 20th:

> In its Supplementary Submission the Union represented that
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> > Collingwood General and Marine Hospital has recently given a wage increase of 3% retroactive to April 1, 2009 for their non union paramedical staff.
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> Although the word "increase" was not expressly accompanied by the words "across the board," the representation is open to that interpretation and would be of limited or no significance if not so interpreted. The participating hospitals, which include the hospital in question, categorically deny that there was an across the board increase in that or (it seems) any amount. Neither party has offered any document to support its position on this issue.
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> In the Board's view, it could give no weight to the union's assertion on this point without hearing viva voce evidence from both parties and concluding that, on balance, the evidence supports the union's assertion. We ask that the union advise the board and the opposite party within one week whether it is requesting that we hear viva voce evidence on this point.

The union responded that it was indeed alleging that there had been an across-the-board increase, adding that this had been the subject of an email message from the hospital's management to its staff. It said that if the participating hospitals persisted in their denial of this and the board felt a *viva voce* hearing was necessary to resolve that dispute, then the Union did indeed request that such a hearing be scheduled. A hearing date of October 21st was set. The board cancelled an executive session that had been planned in the expectation that evidentiary matters would be completed by August 18th.

[30] On September 2nd counsel for the hospitals advised the board of a further request that the hearing be reopened. This time the hospitals wanted to introduce evidence with respect to a tentative central settlement between the Ontario Hospital Association (representing 54 hospitals) and CUPE covering just over 20,000 hospital employees, as well as a tentative central settlement between the Ontario Hospital Association (representing an unspecified number of hospitals) and CAW covering 750 hospital employees. OPSEU opposed the application.

[31] A teleconference was scheduled for and conducted on October 7th to hear the parties' submissions on this dispute. Coincidently, that day the board was provided with the parties' agreement on facts relating to increases awarded by Collingwood General & Marine Hospital to its non-union paramedical staff, making the hearing scheduled for October 21st unnecessary.

[32] By email dated October 21, 2009 the board advised that parties that the hospitals' second request to reopen the hearing was dismissed, for reasons to follow.

Reasons for the Dispositions of the Applications

[33] Although the matter of post-hearing submissions is addressed in some rights arbitration decisions[8], the parties could find no decisions dealing with that issue in an interest arbitration context. It is common ground that interest arbitration boards have sometimes received and considered further submissions of evidence and argument after conducting a hearing and before issuing an award, as a result either of a request by the board itself[9] or a request by one of the parties.[10] Union counsel asserted that interest arbitration boards have received post-hearing submissions at the request of a party only when during the hearing that party had expressly reserved the right to make such further submissions. Employer counsel disputed that assertion. Be that as it may, neither counsel could point to an occasion when an interest arbitration board had had to resolve a dispute about whether it should receive post-hearing submissions.

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8 *Re Ontario (Ministry of Finance) and OPSEU (Cherwonogrodsky)*, 127 L.A.C. (4th) 150 (Gray) at ¶¶11-17, *Re Maple Leaf Consumer Foods, Inc. and Schneiders Employees' Association (Association Grievance)*, [2008] O.L.A.A. No. 80 (Marcotte) at ¶¶29-38, *Re Collingwood General & Marine Hospital and ONA* (2006), 155 L.A.C. (4th) (Roberts) at pp. 168-9.

9 As the board chaired by arbitrator Beck did in the 2005 proceedings between these parties.

10 As in the 2003 proceedings between these parties before the board chaired by Arbitrator Bendel, when an award in proceedings between OPSEU and a non-participating hospital that had been issued about two weeks after the board's hearing ended was considered, we are told, at the request of OPSEU.

[34] In the parties' argument with respect to the first application, it was common ground that the board had a discretion to entertain further relevant evidence and submissions. Counsel for the hospitals argued that we should exercise that discretion so as to receive evidence about the settlement of the Toronto and Windsor municipal strikes because it expected that evidence would be supportive of the hospitals' arguments about the trend of settlements in the public sector. Union counsel argued that the municipal workers affected by the settlements were not comparable to paramedical employees, and that the pertinence of the proposed evidence was not sufficient to outweigh other relevant considerations that favoured our not reopening the hearing, including the need for expedition and finality in the interest arbitration process. She also noted that there had been other developments in the period since the June hearing that it should be permitted to raise if the hearing were reopened.

[35] As noted earlier, this interest arbitration proceeding is governed by the *HLDAA* and by the parties' Memorandum of Conditions for Joint Bargaining.

[36] Although the parties did not expressly address the issue of post-hearing submissions in their Memorandum of Conditions for Joint Bargaining, a shared concern for expedition is evident in the provisions of that agreement. In it, the parties set a deadline of January 21, 2009, for the delivery of proposals. They specified that negotiations would take place January 21-23 and February 2-4. The memorandum expressly contemplated that conciliation, if necessary, would take place on or before February 4, 2009, and that to ensure that timetable a request for conciliation could be made in advance. The parties further agreed that mediation, if necessary, would take place on February 9-12 and February 23-24, 2009. Concerning arbitration, the memorandum provided that

> 1. (c) In the event that the Central Negotiating Committees are unable to achieve a negotiated or mediated settlement on central issues, the parties shall submit to one another the positions that each will be advancing to arbitration by no later than March 2, 2009 and those central issues remaining in dispute shall be submitted to the Board of Arbitration established under Paragraph 3(a). The Board of Arbitration shall convene hearings on dates to be agreed upon between the parties to this Memorandum and the Board.

> ...
>
> 3. (a) In order to ensure the scheduling of central issues arbitration, the parties to this Memorandum shall appoint their nominees to the Central Issue Board of Arbitration no later than September 30, 2008. The parties shall forthwith attempt to agree upon a third member to act as chairperson. Should there be no such agreement by October 30, 2008, then the Minister of Labour shall be requested to make the appointment. The Board of Arbitration shall convene hearings on dates to be agreed upon between the parties to this Memorandum and the Board.

The June hearing dates were dates agreed upon between the parties to the Memorandum and the Board. In her argument on both applications, union counsel noted that at the end of those hearings neither party had claimed to have anything further to say, and that there had been no agreement on any further hearing dates, nor on an extension of the time for decision specified in the HLDAA.

[37] The *HLDAA* sets short time frames for appointment by the parties of their nominees, and appointment by the nominees of the chair.[11] Subsection 6(13.1) directs that hearings are to begin within 30 days after the last member of the board is selected. Subsection 6(16) provides that

> Subject to the other provisions of this section, a board of arbitration shall determine its own procedure but shall give full opportunity to the parties to present their evidence and make their submissions.

Section 9 directs that the board is to issue its decision within 90 days after the last member of the board is selected or such further time as the parties agree.[12] The requirements of section 9 must inform any interpretation of the requirement that parties be given the "full opportunity" described in subsection 6(16). The legislature cannot have intended that the opportunity to present evidence and make submissions be a never-ending one.

[38] Subsection 6(16.1) of the HLDAA provides that

> If the method of arbitration selected by the Minister under subsection (7.1) is mediation-arbitration or mediation-final offer selection, the chair of the board

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[11] *HLDAA*, section 6.

[12] *HLDAA*, subsections 9(4) and (5).

> of arbitration may, after consulting with the parties, set a date after which a party may not submit information to the board unless,
>
> (a) the information was not available prior to the date;
>
> (b) the chair permits the submission of the information; and
>
> (c) the other party is given an opportunity to make submissions concerning the information.

On its face, this only applies when the Minister has determined the method of arbitration, which the Minister can only do if he or she has appointed the chair of the board. That is not the case here. Neither party argued that a board constituted without the intervention of the Minister cannot likewise establish a date after which a party may not submit information without leave. It is not clear whether this could be done by the chair of a board acting alone in the absence of a provision like this.[13] It is hard to imagine why the legislature would have addressed the issue only for boards chaired by Ministerial appointees, but that is a mystery we need not solve. Whatever that reason may have been, the inclusion of this provision underscores the statute's emphasis on expedition and recognizes the consequent need to bring the factual enquiry to an end in order that the interest arbitration board's deliberations can be completed in a timely way.

[39] In deciding to allow further submissions as it did on July 31st, one of the considerations was the novelty of the issue. While we recognized the importance of finality and expedition, it could not be said in the circumstances that the parties had or ought to have had clear expectations with respect to the circumstances in which post-hearing submissions would be entertained. The absence of prior agreement on what we came to describe as a "hard end date" was a consideration that weighed in favour of receiving evidence that would undoubtedly have been received if it had been available at the time of our

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[13] Subsection 6(19) of the *HLDAA* provides that "The chair and the other members of a board of arbitration established under this Act have, respectively, all the powers of a chair and the members of a board of arbitration under the *Labour Relations Act, 1995.*" It is not clear from subsection 48(12) of the latter Act whether the chair of a board of arbitration would have the power alone to do as this subsection contemplates. Here, these matters were dealt with by the full panel.

hearings in June. The attractiveness of having the opportunity to set such a "hard end date" after turning the parties' attention to what it should be, thereby (we thought) limiting any further such applications, also favoured allowing the application on that basis. There was also the very practical consideration that the proposed exchange could (we thought) be completed well before the next date on which the board could meet to continue its deliberations.

[40] We therefore directed that either party could make further submissions by August 11th and that each could reply to the other's submissions by August 18th. Our intention was that August 11th would be the "hard end date" for the introduction of additional issues of fact. It was clear from the parties' submissions on the second application to reopen that both parties had understood that to have been our intention when we gave that direction. Having initially established a "hard end date" (or, from the union's perspective, a new hard end date) our task then became one of determining adjudicatively what collective agreement the parties would have made if their collective bargaining had continued to a successful conclusion on or before that date.

[41] On the second application to reopen the hearing and receive evidence of the most recent settlements, the union argued that having earlier set a "hard end date" we had no jurisdiction to change it.

[42] We did not regard the question as one of jurisdiction. This was a procedural matter. If we had the jurisdiction to allow the first application, as the union had then conceded, there is no reason why we would not have jurisdiction to do so a second time, bearing in mind that we had not issued an award on the merits in the meantime. The question was not one of jurisdiction, but of the appropriate exercise of a discretion. This involved balancing the same competing considerations: the value of knowing more about the context versus the need for expedition and finality. The fact that we had earlier explicitly set a "hard end date" was a very important consideration in striking the appropriate balance.

[43] The union also argued that the proposed evidence about settlements for hospital service workers would not be "relevant," because the duties, responsibilities, qualifications and training of those employees were substantially different from those of the paramedical employees in issue here, and because both as a matter of logic and as a matter of past experience settlements for hospital service workers are not predictive of outcomes for paramedical employees.

[44] Since the question to be decided was, or had become, what settlement the parties would have concluded on or before the August 11th "hard end date," the subsequent settlements could not have been relevant as information that might have influenced the parties in their bargaining. It could not be said that the proposed evidence was wholly irrelevant, however. It would have provided additional data with respect to whether and to what extent the economic downturn was causing collective bargaining outcomes in the public sector to be different from what they might otherwise have been without the downturn. Since the settlements in question involved hospitals, they would have been more salient for this purpose than results for auto manufacturers or municipalities about which we had already heard.

[45] The evidence already before us was clear, however, that the impact of the downturn on collective bargaining outcomes varied with the employer's business or activity and with the nature of the work performed by the employees in that business or activity. There was no prospect of another settlement or settlements persuading us that there was some standard, downturn-induced universally applicable reduction in wage increases relative to pre-downturn norms. Accordingly, the probable influence of the new settlements on our determination depended also on the nature of the jobs performed by the employees covered by them. In that regard we accepted that, apart from the fact that they were performed by hospitals, the job duties of the vast majority of employees covered by the new settlements were not strongly comparable to those of the employees with whom we are concerned here.

[46] The course and outcome of the first application to re-open illustrated the impact such an application and outcome can have on expedition. The mere raising of the issue delayed or truncated planned executive sessions. The opportunity to introduce evidence about some post-hearing events, if granted, had to be coupled with the opportunity to introduce any other allegedly relevant data from the same period and the concomitant time to assemble written submissions in that respect. Both had to be augmented with the opportunity to reply, and the concomitant time to assemble written submissions in reply. This carried with it the usually limited potential for disputes of fact that could only be resolved by conducting a *viva voce* hearing, which would add weeks or months to the process because of the need to work around the participants' existing time commitments.

[47] On the issue of expedition, employer counsel observed in his reply argument that after the board had responded to the hospitals' application with an email message to both parties noting that it would want to know what position the union took, more than three weeks had passed before the union advised the board that it opposed the application. Inappropriate as that unexplained delay seems, it did not substantially alter the critical path of the hearing at that juncture, give the then outstanding factual dispute over what had happened at Collingwood General and Marine Hospital. In any event, it did not substantially affect either the importance of expedition in interest arbitration as a matter of principle or the application of that principle in these circumstances.

[48] In the circumstances of the second application, the need for expedition in and certainty about the interest arbitration process weighed against receiving more post-hearing evidence over the objection of one of the parties, in my view, unless that further evidence would likely be substantially determinative of the question we had to decide. If we had been told that the new evidence concerned an unexpected outbreak of voluntary settlements covering bargaining units of paramedical employees between OPSEU and a number of non-participating

Ontario hospitals, I would have been inclined to receive it since there was no evidence before us of settlements with that degree of comparability. Although evidence about settlements for hospital workers represented by CUPE and the CAW was relevant in a general way, I was not persuaded that it was, by its nature, capable of being so compelling as to be substantially determinative of the question we had to decide. The potential value of the additional evidence, while non-trivial, did not outweigh the need for expedition and finality in, and certainty about, the interest arbitration process.

[49] One of the employer's arguments in favour of our receiving the proposed new evidence was that details of the settlements had been published or would be published on various web sites and were for that reason, and by their nature, highly "public."[14] Although employer counsel did not put the matter quite this way, it might be said that as individuals otherwise engaged on a regular basis in dealing with labour relations matters we could not avoid being told in other contexts something, and perhaps a great deal, about these settlements, before our deliberations in this matter could come to an end.

[50] In so far as their decisions must make turn on specific evidence rather than their general expertise, members of interest arbitration boards are obliged, as are other adjudicators, to decide matters on the evidence properly before them. It is in the nature of the work that the members of this board do that one or more of us may well be exposed to information in one context that we are obliged as adjudicators to ignore in another. There was and is no reason to suppose that any member of this board is unable to handle the challenge that duty may pose in this context. Ameliorating that challenge is not a sufficient reason to turn what the legislature intended to be an expeditious process into one that is potentially never-ending.

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[14] There was no suggestion by counsel that the facts about which the hospitals sought to introduce evidence were facts of which this board could take the arbitral equivalent of judicial notice.

The Additional Evidence

[51] The hospitals' supplemental submissions in August noted that the City of Toronto and two CUPE locals together representing approximately 26,000 employees had agreed on increases of 1.75%, 2.0% and 2.25% as of January 1 of 2009, 2010 and 2011, respectively, and that the City of Windsor and two CUPE locals together representing approximately 2000 employees had agreed on increases of 1.0%, 1.5%, 1.8% and 2.0% as of January 1 of 2009, 2010, 2011 and 2012, respectively. They argued that these settlements demonstrate the impact of the downturn on bargaining by public sector unions. They noted that the bargaining units covered by the City of Toronto settlements included health care employees such as Registered Nurses, Registered Practical Nurses, Paramedics, and Counselors, as well as health care service workers such as Housekeeping Aides, Dietary Aides, and Personal Support Workers that work in Municipal Homes for the Aged.

[52] In reply to those submissions, the union noted that health care workers were a very small percentage of bargaining units dominated by workers whose workwas no more comparable to that of paramedical employees than the work of employees in the Ontario Public Service. The union reminded us of the observations of the chair in the last interest arbitration award between these parties who, after inviting submissions on the post hearing settlement between OPSEU and the Ontario government, said:

> … the settlements are so different with respect to their constituencies and the main issues that, overall, they did not impact on our decision.

[53] OPSEU's own supplementary submissions in August noted that since our June hearings there had been two more ambulance service settlements with OPSEU locals. One, with the City of Kawartha Lakes, provided 3% increases in each of three years. The other, a first agreement with the City of Guelph, provided for increases of 2.8% in the first year, 2.8% in the second year and 2.9% in the third year. Consistent with its earlier submissions, OPSEU did not claim that these workers were comparable, but that the settlements were consistent

with its earlier submissions that post-downturn settlements for workers it broadly characterized as Public Safety Personnel had included increase in the 3% per annum range.

[54] As was noted earlier, OPSEU also alleged that one of the participating hospitals had given it unrepresented paramedical employees a 3% increase and the hospitals vigorously disputed this in their reply. The hospitals later agreed with the union to these facts:

> In 2008 - 2009, a new pay for performance system was designed for Collingwood General and Marine Hospital that covers all managers and non-union employees. This new plan was intended to be implemented starting in the 2008-2009 review year.
>
> For various reasons the plan was not fully implemented, as intended, in 2008-2009. For nonunion, non-management employees, the new pay for performance system was implemented as follows for the 2008-2009 period only:
>
> • All employees and their managers were required to complete their goals and objectives and performance appraisals for 2008 - 2009.
>
> • All employees who had completed at least 4 months of service with the Hospital for the 2008 - 2009 review period were deemed to have met expectations and received a 3% wage increase retroactive to April 1, 2009.
>
> • Employees who had not completed at least 4 months of service with the Hospital for the 2008 - 2009 review received a 0% increase.
>
> **Application for Paramedical Employees**:
>
> • Lab and Diagnostic Imaging are the only paramedical employees represented by OPSEU (approximately 40 employees). This OPSEU bargaining unit participates in the Central Bargaining Process.
>
> • There are approximately 27 non-union paramedical employees at Collingwood General & Marine Hospital.
>
> • 23 of these employees received a 3% increase. Three (3) employees in this group had last received an increase on October 1, 2007; the other 20 had last received an increase on April 1, 2008.
>
> • 4 of these employees received no increases as they had less than 4 months of service.
>
> Going forward, the Pay-for-Performance System as initially designed is intended to be implemented by the Hospital.

Conclusions on the Wage Increase Issue

[55] The correlation between outcomes in bargaining for the Ontario Public Service ("OPS") and outcomes between these parties does not appear to have

been strong and direct historically. That is demonstrated by data originally provided to the Beck board by OPSEU, which showed that increases for paramedical employees of hospitals had sometimes been smaller than those for OPS employees, but more recently had been greater. This remained true of the voluntary agreement these parties later made in late 2006, which provided for increases of 3%, 3% and 3.25% as of April 1st of 2006, 2007, 2008, which were greater than the increases in the earlier OPS settlement of 2.25%, 2.5% and 3% as of January 1st of 2006, 2007 and 2008).

[56] Without necessarily accepting that the comparison warrants equal pay rates ("parity") in the long term, we accept that RN's are the paramedical employees' closest and strongest comparator for purpose of assessing rates of increase of pay. If the economic situation had not changed in the meantime, we would have been inclined to award these workers the rates of wage increase that in February 2008 the RN's negotiated centrally with hospitals for the same two years.

[57] The parties debated whether there is a shortage of paramedical employees that warrants consideration in determining wage increases. All other things being equal, such shortages as there may be would not appear to have warranted narrowing the gap that existed as of March 31, 2009 between RTs and RNs.

[58] The recession that began in the fall of 2008 has clearly had an impact on collective bargaining outcomes. The impact has not been uniform across all sectors of the economy, however, nor across all occupations within a sector. The challenge for this board has been to determine what the impact would have been on bargaining for paramedical employees of hospitals had that bargaining continued to a conclusion. Perhaps surprisingly, the evidence is clear that within the funding system in which hospitals and health care providers must function, some workers have received post-downturn increases at or very near 3% per annum for the period with which we are concerned: although there are other examples, the most notable are nurses at York Central Hospital, nurses under the central nursing homes agreement, workers at the Central Community Care

Access Centre and radiation therapists at UHN. The fact that one of the participating hospitals, Collingwood General & Marine Hospital, could and would give a 3% increase effective April 1, 2009 to the unrepresented portion of its paramedical staff underscores this point. Although this involved a small number of employees and is unaccompanied by any commitment to any later increase, it is some measure of its significance nevertheless that when the OHA's presenters sought information about it someone felt it necessary to dissemble about whether there had been, in essence, an across the board increase.

[59] Although those matters weigh strongly in the balance, the recession cannot be ignored. One of the reasons for wages increases is to offset inflation. The wage increases needed to counter the effects of inflation over the course of an agreement for the period April 2009 to March 2011 would certainly be more modest than might have been thought in February 2008, when the hospitals agreed with ONA to increases of 3% for each of those years. Put another way, the economic value of wage increases awarded in these proceedings will be greater in real dollar terms than they would have seemed in February 2008. This consideration weighs in favour of an outcome in which wage increases are more modest than they might have been if the period in question had been the subject of agreement between these parties in February 2008. Lower wage increases would increase the gap between RTs and RNs at the end of the contract period, however, which OPSEU would have continued to strongly resist in bargaining. The fact is, though, that if the intervening event had been an economic surge accompanied by increases in inflation not anticipated at the time of the nurses' settlement, OPSEU would undoubtedly have sought wage increases higher than those achieved by nurses earlier, arguing that that changed economic situation had to be taken into account.

[60] Having weighed the competing considerations on this item, including our disposition of the other items in dispute and the cost implications of each, we award:

- As of April 1, 2009 – 2.5% across the board wage increase

- As of April 1, 2010 – 2.5% across the board wage increase

[61] Although all of the amendments to which the parties agreed prior to referral to interest arbitration are to be included in the central agreement, we have been asked to note particularly the parties' agreement to the following provision with respect to retroactivity:

> New Article:
>
> Article 33 – Retroactivity of Wages
>
> Current employees on staff, from the date of either ratification of the settlement or interest arbitration award, will be paid retroactivity, within four (4) full pay periods, from the date of ratification of the settlement or date of interest arbitration award, on the basis of hours paid.
>
> Retroactivity shall be paid on wage increases, including any payments based on the wage rate (for example, the percentage in lieu of benefits, vacation pay, and SUB).
>
> The Hospital will contact former employees at their last known address on record with the hospital, within four (4) full pay periods from the date of ratification of settlement or date of interest arbitration award, to advise them of their entitlement to retroactivity.
>
> Former employees will have a period of four (4) full pay periods from the date of the notice to claim such retroactivity and, if they fail to make a claim within the four (4) full pay periods, their claim will be deemed to be abandoned.

Article 15 – Sick Leave and Long Term Disability

HOODIP Redesign

[62] Article 15 of the current agreement provides for Sick Leave and Long-Term Disability coverage based on the 1992 Hospitals of Ontario Disability Insurance Plan ("HOODIP"), with certain improvements. For employees totally disabled due to illness or injury (other than injuries compensable under the WSIA) this provides 100% of regular earnings[15] for the first 15 weeks of absence. For the next 15 weeks the employee has resort to EI sickness benefits, which currently provide the lesser of $447 per week or 55% of regular earnings. LTD

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[15] For employees with less than four years' service, the coverage is: 90% with three years' service, 80% with two years' service, 70% with one year's service, 66⅔% with three months' service.

coverage begins after six months from the beginning of the absence, and provides 66⅔% of regular earnings.[16]

[63] After bargaining had commenced the hospitals introduced a proposal to substitute a new HOODIP that would provide 85% of regular earnings for the first 15 weeks of absence, top up EI benefits to 85% for the next 15 weeks, and provide LTD coverage thereafter at 70% of regular earnings.

[64] The hospitals say that if claims experience remained unchanged the changes they propose would result in little or no change in the costs to them of providing the coverage: that is, the reductions would fund the increases. The hospitals also say they hope there would be a change in claims experience, that the reduction in coverage for the first 15 weeks would "effect a degree of behavioural change among OPSEU employees (reduce the improper use of sick leave)."

[65] The union opposes the reductions in existing sickness and accident benefits. It challenges as unreliable the analysis offered to demonstrate that the changes would be cost neutral, and takes exception to a reduction in initial benefits for all genuinely ill or injured employees as a response to the supposed improper use of sick leave by some. It notes that members of its bargaining unit resort to sick leave considerably less than other hospital employee groups. It suggests that it is contrary to the interests of patients as well as those of employees to create a situation in which an employee with a short-term infectious illness, for example, would have to come to work in order to avoid loss of income.

[66] The degree to which wage loss is indemnified by the plan during various time periods after an absence due to illness or injury begins is a worthy subject for collaborative review by the parties. The same is true of the subject of improper use of sick pay, which adversely affects other employees and the union

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[16] For employees with thirty years service, the coverage is 75%; for employees with twenty years' service the coverage is 70%.

as well as the employer. Having regard to the details and timing of this proposal and the nature of the material offered in support of it, however, we are not persuaded that it would have been among the agreed-upon terms in this round of collective bargaining if that bargaining had proceeded to a conclusion, and we decline to award it.

Article 15.04

[67] Article 15.04 provides:

> 15.04 Employees with four (4) or more years service will be paid at the one hundred percent (100%) benefit level for all incidences of absence covered by HOODIP.

The employer proposes deleting this article, on the basis that it merely describes obligations defined by other provisions of Article 15.[17] The union does not suggest that the article does anything other than describe obligations defined by other provisions of Article 15, but argues that it is "vital" that this language remain in the agreement because it is "the only language in the collective agreement that refers to the method and amount of payment that an individual receives from HOODIP."

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[17] Article 15.01 provides:

> The Hospital shall provide a short-term sick leave plan at least equivalent to that described in the 1992 Hospitals of Ontario Disability Income Plan (HOODIP) brochure.

The 1992 HOODIP brochure says:

> The amount of Sick Pay you receive will be determined by your length of service with your current employer, up to your date of disability. The following service schedule outlines the amounts: …
>
> At least 4 years of service
> 100% of regular earnings

The HOODIP brochure also says that

> No Sick Pay benefit is payable for the first two days of absence for a fourth or subsequent periods of Total Disability in the same calendar year.

But Article 15.03 provides that:

> The Hospital further agrees to pay employees an amount equal to any loss of benefits under HOODIP for the first two days of the fourth and subsequent period of absence in any calendar year.

[68] The language of the article is redundant. The hospitals would be estopped by their representations before us from suggesting that its deletion altered their obligations. Our award in respect of this proposal is that Article 15.04 be deleted.

Article 16 – Hours of Work & Overtime

[69] Paragraph (b) of Article 16.01 provides that the standard work day for part-time employees is 7½ hours, except in those hospitals where agreements already provide a normal or standard work day of less than 7½ hours. The hospitals propose adding a new paragraph (d) to Article 16.01 that would provide as follows:

> (d) Where the Hospital determines that it is necessary to institute shorter shifts, the Hospital may institute shifts that vary from the regular hours of work (described in 16.01 (b)).

The hospitals say that the timing of patient needs, availability of other needed resources and scheduling efficiencies sometimes limit their needs for certain paramedical skills to periods shorter than a full work day.

[70] The union opposes a provision that gives hospitals unbridled authority to change shift lengths to as short as and whenever they see fit, particularly one that fails to address related issues such as rest breaks, meal breaks and the application of the overtime provision when an employee is required to remain at work beyond the scheduled end of a short shift. It argues that no need has been demonstrated that is not adequately met by Article 29.02 of the central agreement, which provides that where a local hospital and union agree, arrangements for flexible scheduling can be made on a local level.

[71] It is common ground that arrangements under Article 29.02 can include arrangements for shifts shorter than 7½ hours. However, the union's position (which the hospitals did not dispute) is that the issue of short shifts does not thereby become a "local issue" in mandatory collective bargaining that can be resolved through local interest arbitration.

[72] The hospitals argue, in effect, that local unions have been insufficiently co-operative under Article 29.02. They give examples of arrangements to which local unions have agreed, and say local unions have rejected proposals other than those. They provide no details, however, of proposals local unions have rejected, nor of the rationales that they or the local unions gave for making or opposing such proposals.

[73] It seems to us that the interests at stake here are better balanced at the local level. One solution to impasses in local negotiations over specific short shift proposals would be to make them amenable to local interest arbitration. It is not clear that we have the jurisdiction to award that result, governed as we are by an agreement of the parties that this was to be a central issue. Certainly the hospitals did not argue that we do.

[74] In the absence of detailed evidence about the local negotiations that have ended in impasse – evidence sufficient to establish that Article 29.02 is or has become an inadequate means of addressing the interests at stake here – we decline to award a change in central language at this time. We recommend that the parties consider making this a local issue that can be resolved by interest arbitration, at least within defined parameters. In any event, local unions will want to ensure going forward that they do not provide the hospitals with evidence of the sort that we have noted was lacking in these proceedings.

Article 17

Standby and Call Back

[75] There are several unresolved issues with respect to standby and call back. The current provisions are these:

> 17.01 Standby
>
> An employee required to standby or remain available for call-back duty on other than regular scheduled hours shall be paid at the rate of three dollars ($3.00) per hour of standby time. Where such standby falls on any of the designated holidays listed in the collective agreement, the employee shall be paid at the rate of three dollars and fifty cents ($3.50) per hour of standby time. Hours worked for call-back shall be deducted from hours for which the

> employee receives standby pay. However, an employee shall be entitled to a minimum of five dollars ($5.00) for each eight hour period on standby even if called back to work.
>
> 17.02 Call Back
>
> An employee who is called to work after leaving the Hospital premises and outside of his regular scheduled hours, shall be paid a minimum of no less than four (4) hours' pay at time and one-half (1½) his regular straight time hourly rate for work performed on each call-in. In the event that such four (4) hour period overlaps and extends into his regular shift he will receive the four (4) hour guarantee payment at time and one half (1½) and his regular hourly rate for the remaining hours of his regular shift. The reference to leaving the Hospital premises referred to above will not be applicable where an employee remains in the Hospital on Standby arrangement with the Hospital.

[76] The parties exchanged proposals with respect to telephone consultations with employees outside their scheduled hours of work. Both parties proposed that there be lesser minimum pay for responding to a call for consultation by telephone than for a call-back to the workplace. Both parties made proposals with the following core language:

> Telephone Consultation
>
> Employees who are required to provide professional services over the telephone while on stand-by (without returning to the hospital) shall be entitled to a minimum of _____ pay at time and one-half times (1½) his or her regular straight time hourly rate, or equivalent time in lieu, per call, regardless of the duration of the call. Any additional time spent on the call over and above fifteen (15) minutes shall be compensated at the same rate but in minimum fifteen (15) minute increments. The employee will complete a record of calls on a form following the period of call.

The union's proposal had "one-half (0.5) hour's" in the blank for the initial minimum pay period, while the employer's proposal had "fifteen (15) minutes". At least one existing local provision on this subject provides for a 30 minute minimum pay period for calls received between 2300 hours and 0700 hours, and 15 minutes otherwise. The employer's proposal added "Any subsequent calls within the fifteen (15) minute minimum will not constitute a second telephone consultation."

[77] The union proposed to amend Article 17.01 by adding "or for telephone consultation" to "for call-back" in the first sentence. The employer proposed to

add "or telephone consultation" to "call-back" in the third sentence of that Article.

[78] The union also proposed to increase the standby rates in Article 17.01 to substitute $3.30 for $3.00 and $4.90 for $3.50, which would give it the standby premiums provided for registered nurses in the current ONA central agreement.

[79] The employer also proposed that these words be added to Article 17.02: "Call back pay entitlement shall be limited to a single occurrence within any 4 hour period for which a call-back premium is claimed." In explaining the need for this change, the hospitals stated that

> OPSEU employees are now entitled to receive the minimum payment of four hours at time and one-half, for the time it took to perform a task (a specific task often completed in less than half an hour), and return home. The Hospital is restricted from keeping them at the Hospital for the full four hours, and so it is possible that once the employee has returned home, they may be asked to return to perform another test within the initial four hours. The employee then receives another minimum payment of four hours at one and one-half times their hourly rate, and now are in a situation where they have worked for much less than the minimum guarantee, traveled twice to the Hospital and back (and been separately compensated for the travel costs), and have received eight hours' pay at one and one-half times their straight time hourly rate, or twelve hours' pay.
>
> … In one extreme situation, a Participating Hospital reported calling an OPSEU employee into work from standby 5 times in 8 hours – totaling [sic] an estimated payment of $1022.40 for 3.25 hours of work, in addition to the compensation for travel costs and standby premium payments for the hours the employee was at home.

The employer's submission noted that while it does not agree that these results should follow from the existing language, they are what it understands to be the implications of arbitrators' interpretations of contract language of the sort in issue.

[80] We award the following with respect to the aforesaid proposals:

> 17.01 Standby
>
> An employee required to standby or remain available for call-back duty or telephone consultation on other than regular scheduled hours shall be paid at the rate of three dollars ($3.00) per hour of standby time. Where such standby falls on any of the designated holidays listed in the collective agreement, the employee shall be paid at the rate of three dollars and fifty

cents ($3.50) per hour of standby time. Hours worked for call-back or telephone consultation shall be deducted from hours for which the employee receives standby pay. However, an employee shall be entitled to a minimum of five dollars ($5.00) for each eight hour period on standby even if called back to work.

Effective April 1, 2010, the $3.00 and $3.50 rates provided for shall be increased to $3.30 and $4.90, respectively.

17.02 Telephone Consultation

Employees who are required to provide professional services over the telephone while on stand-by (without returning to the hospital) shall be entitled to a minimum of

15 minutes' pay for a call received between 0700 hours and 2300 hours, and

30 minutes' pay for a call received between 2300 hours and 0700 hours,

at time and one-half times (1½) his or her regular straight time hourly rate, or equivalent time in lieu, per call, regardless of the duration of the call. Any additional time spent on the call over and above the initial minimum time shall be compensated at the same rate but in minimum fifteen (15) minute increments. The employee will complete a record of calls on a form following the period of call. A call received during a period for which one of the aforesaid minimums is payable as a result of an earlier call will be treated for these purposes as a continuation of that earlier call.

17.03 Call Back

An employee who is called to work after leaving the Hospital premises and outside of his regular scheduled hours shall be paid a minimum of no less than four (4) hours' pay at time and one-half (1½) his regular straight time hourly rate for work performed on each call-in. In the event that the four (4) hour periods for successive call-ins overlap, however, the employee will not be entitled to more than time and one-half (1½) his regular straight time hourly rate in respect of the period(s) of overlap. In the event that such four (4) hour period overlaps and extends into his regular shift he will receive the four (4) hour guarantee payment at time and one half (1½) and his regular hourly rate for the remaining hours of his regular shift. The reference to leaving the Hospital premises referred to above will not be applicable where an employee remains in the Hospital on Standby arrangement with the Hospital.

Subsequent provisions of Article17 are to be renumbered accordingly.[18]

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[18] Although we think the intent and effect of the language added to what is now Article 17.03 are clear, experience teaches that some may claim otherwise. Against that possibility, we offer these illustrative examples:

If an employee is called back at 1 a.m., leaves at 2 a.m., is called again at 3 a.m. and leaves at 5 a.m., the four hour minimum period that begins at 1 a.m. overlaps the first two hours of the four hour minimum period that begins at 3 a.m. The employee is only paid once for the period 3 a.m. to 5 a.m., so the employee is entitled to six hours pay at time and a half for the period 1 a.m. to 7 a.m.

[81] The union also proposed that standby responsibilities be treated as work for the purposes of the current Article 17.04 (b), by adding the following to the end of Article 17.01:

> An employee required to standby or remain available for call-back duty will be considered to have worked a weekend for purposes of Article 17.04 (b).

The current Article 17.04 (b) provides:

> The Hospital will endeavour to provide at least ___ weekend(s) off in ___. If an employee is required to work a ___ consecutive weekend, the employee will be paid at the overtime rate for all hours worked on a ___ consecutive weekend and any subsequent weekend until a weekend is scheduled off, save and except where:
>
> (a) such weekend has been worked by an employee to satisfy specific days off requested by such employee, or
>
> (b) such employee has requested weekend work, or
>
> (c) such weekend is worked as a result of an exchange of shifts with another employee, or
>
> (d) any other reason as negotiated by the local parties and set out in the Local Provisions Appendix.
>
> Note: This section is only applicable to full-time employees. Where the local parties have language that applies to part-time employees then their language will continue to apply to part-time employees.

[82] In *Kincardine and District General Hospital and Ontario Nurses' Association* (April 28, 1992), unreported, Arbitrator Keller found that under similar language a weekend during which an employee is on standby but not called in to work is not a weekend "worked" for purposes of the second sentence of the article. The union's concern is that with the increasing use of standby shifts to minimize costs, a hospital might schedule a worker to either work or be on standby on every weekend for an extended period – and entire summer, for

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> If an employee is called in at 12:15 a.m., leaves at 12:45 a.m., is called in again at 2 a.m., leaves at 2:30 a.m., is called in again at 3:30 a.m. and leaves at 4 a.m., the effect of paying the employee only once for the periods during which the three resulting four hour minimum entitlements overlap is that the employee is entitled to seven and one-quarter hours' pay at time and a half for the period 12:15 a.m. to 7:30 a.m.

In each of these examples it is assumed that the employee is permitted or entitled to leave at the times indicated. These examples are not intended as a ruling or award on the question whether or in what circumstances an employee called in to the workplace can leave the workplace again before the end of the four hour period.

example – in a pattern that avoids the overtime rate disincentive created by article 17.04(b). The hospitals' position is that a hospital could schedule an employee in that manner with that result, subject only to a power in a rights arbitrator to conclude that this was not a reasonable exercise of its rights.

[83] We note that in the aforesaid award arbitrator Keller also found that a weekend during which an employee is on standby but not called in to work is not a weekend "off" for purposes of the first part of the provision there in issue, which read "The Employer shall ensure that each part-time nurse shall receive at least five weekends off in ten." In our view, a weekend during which an employee is on standby but not called in is not a weekend "off" for purposes of the first sentence of current article 17.04(b), nor is it a weekend "scheduled off" for purposes of the second sentence.

[84] On that view, and in the absence of any evidence that hospitals do not take the obligation to "endeavour" seriously, its seems a sufficient response to the union's concern that we award the following clarificatory addition to Article 17.01 with reference to what (as a result of the renumbering referred to at the end of paragraph [80] above) will now be Article 17.05(b):

> For purposes of Article 17.05(b), a weekend on which an employee is required to standby or remain available for call-back duty or telephone consultation is not a weekend "off", a weekend on which an employee is scheduled to standby or remain available for call-back duty or telephone consultation is not a weekend "scheduled off," and a weekend on which an employee is required or scheduled to standby or remain available for call-back duty or telephone consultation but is neither called back nor consulted by telephone is not a weekend "worked."

Shift Premiums

[85] Current Articles 17.03, 17.04 and 17.05 provide for evening, night and weekend premiums of $1.35, $1.60 and $1.75, respectively. The union proposes that these be increased effective April 1, 2009 to $1.60, $1.90 and $2.05, respectively, and effective April 1, 2010 to $1.80, $2.20 and $2.35, respectively, in light of the central ONA agreement.

[86] Our award in respect of this item is the premiums specified in current Articles 17.03, 17.04 and 17.05 be increased effective April 1, 2010 to $1.80, $2.20 and $2.35, respectively.

Article 19 – Vacations

[87] The union proposes vacation improvements that lower the number of years of service required to qualify for 4, 5 and 6 week paid vacations from three to two, from 13 to 12 and from 22 to 20, respectively.

[88] This is a significant cost item. In all the circumstances, we decline to award it.

Article 20 – Health and Welfare Benefits

[89] The employer proposes moving to 80/20 co-payment for benefits that are currently 100% insured.

[90] The union proposes to delete the $50 limitation on reimbursement of the cost of one optometry exam per 24 months, increase the per period cap on other vision costs from $200 to $350 (exclusive of optometry exam), extend dental benefits to employees between 65 and 70 years of age, increase the drug dispensing fee cap by $1.00, double the per period caps on chiropractic, massage therapy, physiotherapy from $300 to $600, and increase the lifetime cap on orthodontics from $1500 to $2000.

[91] The hospitals propose to reduce the percentage of the wage rate paid to part time employees in lieu of benefits by 1%. We note that this same proposal was made to and rejected by the Beck board in 2005.

[92] We award an increase of the vision care maximum from $200.00 to $300.00 and an increase of the optometry exam maximum from $50.00 to $100.00, both effective January 1, 2010. We decline to award other proposed amendments to Article 20.

Articles 22 – Contracting Out

[93] The union proposes that Article 22.01 be amended as follows:

> 22.01 The Hospital shall not contract out or allow to be transferred work currently performed by members of this bargaining unit if, as a result of such contracting out or transfer of work, a layoff of any bargaining unit employees occurs, ~~This clause will not apply in circumstances where the Hospital no longer provides particular services as a result of the rationalization or sharing of services between Hospitals in a particular geographic district, or as a result of the withdrawal of the Hospital's license to perform such services~~ and/or a bargaining unit position is eliminated and/or the employment of any bargaining unit member is jeopardized.

This language has been in the central agreement for some time. Claims that it be changed were rejected in the last two rounds of interest arbitration. In the 2006-2009 voluntary agreement there was no change in this language.

[94] The only supposed evidence of need that was not previously available in is a grievance arbitration award arising out of circumstances in which the arbitrator found (correctly, in our view) that no contracting out had taken place. What the union seems to be seeking is language that would preclude a hospital from ceasing to have employees perform work even if it does not thereafter have any third party do that work for it. Such a provision would be most unusual, and we decline to award it.

Articles 23 – Work of the Bargaining Unit

[95] The union proposes that article 23.01 be amended as follows:

> 23.01 (a) ~~Supervisors or Managers excluded from the bargaining unit shall not perform duties normally performed by members in the bargaining unit which shall directly cause or result in the layoff, loss of seniority or service or reduction in benefits to members in the bargaining unit.~~ No one other than employees represented by OPSEU shall perform duties normally performed by members in the bargaining unit.
>
> (b) The Hospital agrees to provide five (5) months notice to the Union of the planned elimination of a position.

We decline to award these changes.

Agreed Changes / Reservation of Jurisdiction

[96] The expired central agreement shall be renewed with the amendments we have awarded and those on which the parties agreed in bargaining. Except as otherwise noted or agreed by the parties, all changes become effective on the date of this award.

[97] We remain seised with any dispute about the implementation of this award that the parties are unable to resolve themselves.

Dated at Toronto this 4th day of November, 2009

Chair

I concur.

Union Nominee

I concur: see attached addendum.

Hospitals' Nominee

IN THE MATTER OF AN INTEREST ARBITRATION

B E T W E E N:

PARTICIPATING HOSPITALS

- and –

ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND ITS PARTICIPATING LOCALS

ADDENDUM OF ROY C. FILION

It is only with certain reservations that I have concurred with this award.

First, I am of the view that this Board should have exercised its discretion to admit evidence of the CUPE and CAW Central settlements. Notwithstanding the earlier "hard end date" and the importance of expedition, evidence of those settlements, particularly the CUPE Central settlement covering 20,000 service and clerical workers (including RPNs), is highly relevant and sufficiently compelling to favour its admission.

Moreover, it is significant that information concerning the CUPE settlement is in the public domain through the media and published on various websites. There is little doubt that all or most of the stakeholders in this arbitration process, Participating Hospitals and Local Unions alike, will be well aware of that settlement. The parties and the stakeholders would expect an arbitration panel that has expertise in public sector labour relations to be aware of such developments and take them into account.

Second, I believe that insufficient weight has been placed on the large public sector settlements relied upon by the Hospitals. The Treasury Board/PSAC, Ontario Government/OPSEU, Ontario

Government/AMAPCEO, LCBO/OPSEU, City of Toronto/CUPE and City of Windsor/CUPE settlements are all in the 2% per annum range. Collectively, those settlements apply to over 100,000 employees in the public sector, many of whom work in health care related occupations. In particular, the City of Toronto and City of Windsor cases are the best indicators of settlements that would be reached through free collective bargaining in a recessionary environment.

By contrast, I believe that too much weight was given to a few settlements affecting a much smaller number of health care workers (York Central, CCAC, UHN, Collingwood and St. Joseph's, London). While those settlements are certainly relevant, their significance pales by comparison to those larger settlements referred to above.

Third, there are two additional issues that I would have decided differently. In my view, the Hospitals' proposal regarding HOODIP reform should have been given greater consideration. I also would have granted the Hospitals at least some degree of flexibility when they deem it necessary to institute shorter shifts than 7.5 hours.

Roy C. Filion
Hospitals' Nominee