IN THE MATTER OF AN INTEREST ARBITRATION
Pursuant to the *Hospital Labour Disputes Arbitration Act*:

Between:

The Participating Hospitals

(The "Hospitals")

-and-

Canadian Union of Public Employees/Ontario Council of Hospital Unions &

Service Employees International Union

(The "Unions")

Board of Arbitration:

Brian Sheehan - Chair
Brett Christen - Hospitals Nominee
Joe Herbert - Unions Nominee

Central Terms-Arbitration

Appearances:

For the Hospitals: Carolyn Kay

For the Unions: Steven Barrett
Simran Prihar

Hearing via Video Conference on December 3, 2021
April 29, June 4, 5, 11, 2022

This Board of Arbitration was duly constituted under the terms of the *Hospital Labour Disputes Arbitration Act* (HLDAA) and the Memorandum of Conditions for Joint Bargaining to resolve the central terms of the respective collective agreements between Participating Hospitals and the Canadian Union of Public Employees/Ontario Council of Hospital Unions (CUPE/OCHU) and the Service Employees International Union (SEIU) (the "Unions").

Background

The Participating Hospitals are comprised of 83 hospitals which are located throughout the province of Ontario. In total, 60% of Ontario public hospitals are part of the Participating Hospitals ("Hospitals"). These hospitals vary in size and nature. Some are small rural hospitals, while others are large urban-based teaching hospitals, as well as multiple hospitals specializing in complex continuing care, rehabilitation, addiction, and mental health.

The Unions represent employees in service and office/clerical bargaining units. This includes Registered Practical Nurses, Personal Support Workers, Dietary Workers, Maintenance and Skilled Trades Workers, Housekeepers, Stores and Warehouse Workers, Cooks, Chefs, Information Technology Workers, Office Workers and Ward Clerks. Approximately 80% of the members of the relevant bargaining units identify as female.

CUPE/OCHU represents 30,823 employees at 53 of the Hospitals, while SEIU represents 14,133 employees at 30 of the Hospitals.

The History of Hospital Central Bargaining

Central bargaining in the hospital sector has been in place in Ontario for over 45 years. Approximately three-quarters of the unionized employees in Ontario hospitals participate in the central bargaining process. The results of central bargaining set out a pattern typically replicated by the nonparticipating hospitals and local unions.

The first round of central bargaining with respect to the Hospitals and CUPE/OCHU and SEIU took place separately in 1976. The current round of bargaining is the 20th and 21st consecutive round of central bargaining between the Hospitals and CUPE/OCHU and SEIU, respectively. And this round is the third round wherein CUPE/OCHU and SEIU have bargained together.

The previous six rounds of bargaining involving the Hospitals and CUPE/OCHU were resolved through a negotiated settlement. Accordingly, this is the first time since 2000 that those parties have needed arbitration to conclude the central terms of their collective agreements. As for the Hospitals and SEIU bargaining units, the last time the parties ended up at arbitration was in relation to the 2011/2012 collective agreement**.**

This Round of Bargaining

The previous CUPE/OCHU collective agreements expired on September 28, 2021, while SEIU collective agreements expired on December 31, 2021. The parties had negotiation sessions on June 21-22, September 13-17 and September 20-23, 2021. The parties then took part in mediation with Arbitrator William Kaplan on September 23-27, 2021, and May 14, 2022.

While the parties were able to resolve some matters during negotiations, a number of issues remain outstanding.

Relevant Arbitral Considerations

The Legislative Context

As part of its deliberations, the Board has duly considered, as it is obligated to do so, the following factors set out in Section 9 of HLDAA:

> Criteria
>
> (1.1) In making a decision or award, the board of arbitration shall take into consideration all factors it considers relevant, including the following criteria:
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> 1. The employer's ability to pay in light of its fiscal situation.
> 2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
> 3. The economic situation in Ontario and in the municipality where the hospital is located.

4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
5. The employer's ability to attract and retain qualified employees. 1996, c. 1, Sched. Q, s.2.

It is noted that the Hospitals did not advance an "ability to pay" argument.

The parties were able to agree on a new two-year term for the new collective agreements. Accordingly, for CUPE/OCHU collective agreements, the term will be from September 29, 2021, to September 28, 2023, while the SEIU collective agreements will have a term of January 1, 2022, to December 31, 2023.

The other relevant legislation that is particularly pertinent to the parties' negotiations and this Board's discretionary authority is the Protecting a Sustainable Public Sector for Future Generations Act, 2019 ("Bill 124"). Bill 124 imposes a moderation period of three years, during which compensation adjustments are limited to a maximum of 1% in each 12-month period. For CUPE/OCHU, the moderation period is from September 29, 2021, to September 28, 2024, and for SEIU, the moderation period is from January 1, 2022, to December 31, 2024. Accordingly, for the two years covered by each of the respective collective agreements, the total entitlement that can be awarded as compensation is 1% for each year.

The Unions along with other public sector unions have initiated a number of constitutional challenges pertaining to Bill 124. In relation to those initiatives, the parties

have agreed to a "wage reopener" provision which would be applicable if the Unions are successful with the constitutional challenges to Bill 124.

With respect to this proceeding, the Unions encouraged this Board to adopt the position that it is not constrained by Bill 124. Alternatively, the Unions submitted that the Board should set out in the Award, the wage increases that it would have awarded but for the application of Bill 124. With respect to the first submission, this Board is bound by the salary and compensation restraints imposed by Bill 124. As to the latter submission, the Unions asserted that absent the compensation restrictions set out in Bill 124, a significant wage increase would have been in order because of the following factors amongst others: (1) the dramatic increase in inflation currently existing in the province that is projected to continue over the life of the two-year period covered by the collective agreements; (2) the strong economic growth in the province; (3) the staffing shortage that is prevalent in the healthcare sector and the related surging demand for healthcare workers; and (4) the increase in funding issued to hospitals by the Province—the Unions asserted that for the years 2021 and 2022, the compound budgeted hospital funding from the province increased by over 14.4%.

Notwithstanding a certain attractiveness of the submissions by the Unions on this point, this Board is of the view that it would not be appropriate to provide a "what if" sort of commentary regarding the awarded wage increases the Unions may have been entitled to absent Bill 124. Given the agreed-to "wage reopener" issue that may be

before this Board if Bill 124 is deemed unconstitutional, it would be inappropriate for this Board, in some manner, to predetermine its deliberation on that issue.

The Principle of Replication

It is a trite but important observation that replication remains the guiding principle that should be at the centre of this Board's review of the proposals of the parties. The importance of the replication principle in interest arbitration was captured by Arbitrator Stout in The Participating Hospitals and Ontario Nurses' Association (June 8, 2020) unreported (Stout):

> The most important and guiding principle applicable to all interest arbitration proceedings is replication. The replication principle is succinctly summarized by Chief Justice Winkler in the case, *University of Toronto v. University of Toronto Faculty Assn. (Salary and benefits Grievance)* (2006), 148 L.A.C. (4th) 193 at paragraph 17, where he states:
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> > There is a single coherent approach suggested by these authorities which may be stated as follows. The replication principle requires the 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.
>
> The application of the replication principle is an objective exercise, driven by the use of objective evidence, to assist in determining what the parties would have achieved in free collective bargaining, The subjective posturing of either party is neither helpful nor relevant to the exercise

> because it is easy for either party to take a hard line and refuse to bargain when there is no threat of a strike or a lockout.
>
> The objective evidence relied upon by boards of arbitration include evidence of relevant comparators, both internal and external, either freely negotiated or imposed by arbitration. Historical patterns are also relevant to the replication exercise. There is much room for debate on the final result, but interest arbitration is not an exact science, and the appropriate outcome is one that falls within a reasonable range of what the parties would have agreed upon in free collective bargaining based on the relevant comparators. As stated by Arbitrator Teplitsky Q.C. in SEIU *and A Group of 46 Hospitals, supra,* …"the goal of compulsory binding arbitration is to ensure that the parties affected by the loss of the right to strike fare as well, although not better than, those parties whose settlements are negotiated within the context of the right to strike."
>
> The terms of the collective agreements between the Hospitals and the other major unions who bargain centrally in the hospital sector are relevant comparators. In the past, agreements affecting nurses in other provinces have also been considered relevant, see *Participating Hospitals and ONA,* March 5, 2007 (Albertyn).

Three recent central awards involving Hospitals and other healthcare sector unions in the province are of particular significance when applying the replication principle to the case at hand. There is the above-referenced decision of the Board of Arbitration chaired by Arbitrator Stout which was followed by a decision of an Arbitration Board chaired by Eli Gedalof involving the same parties—The Participating Hospitals and Ontario Nurses' Association (September 20, 2021) unreported (Gedalof). More recently, there is the decision of the Board of Arbitration chaired by Arbitrator Kaplan—The Participating Hospitals and OPSEU (July 7, 2022) unreported (Kaplan).

Indisputably, the cited Awards are highly relevant objective benchmarks to assess the respective proposals of these parties. Not only do these awards involve the

two other major unions involved in central bargaining in the hospital sector in the province; but the key underlying factual contextualization considerations of the impact of the COVID-19 pandemic and Bill 124 that are relevant to this Board's analysis were also pertinent in those Awards. In terms of outcome, common to all three Awards is the overall limited nature of provisions awarded to either party with respect to non-monetary issues.

The other significant consideration with respect to the application of the replication principle relates to the bargaining history of these parties. As will be outlined later as part of the discussion pertaining to the job security proposals of both parties, weight must be given to the fact that in the case of CUPE/OCHU, in the last six rounds of bargaining, and in the last three rounds of bargaining in the case of SEIU, the parties have reached a negotiated settlement. That is, the parties arrived at a collective agreement without either party opting for arbitration with respect to certain of the proposals it now places before this Board. This is not to suggest that a Board should not necessarily grant a party's proposal at interest arbitration simply because the party has settled previous collective agreements without needing to proceed to arbitration. Collective bargaining is a dynamic process involving each party making an assessment as to its priorities in that particular round of bargaining which can be influenced by a number of different considerations. Achieving results with respect to certain initiatives but not others may be a sensible trade-off that is not worth risking if the parties by proceeding to arbitration in hopes of having another proposal awarded. From a broader labour relations perspective, resolving collective bargaining through negotiated

settlements should be encouraged rather than creating a dynamic whereby a party is of the view that it needs to proceed to arbitration with respect to a particular proposal(s) out of fear that reaching a settlement without that proposal will be prejudicial to the party's interests at a subsequent arbitration proceeding. Those points noted, at a minimum, it remains arguably pertinent that a party was willing to repeatedly settle a collective agreement without having the issues determined at arbitration.

The above analysis relates to another fundamental principle of interest arbitration— that of demonstrated need. While workplaces are dynamic entities the fact that a party may not have challenged the language in question through arbitration over successive rounds of bargaining may question whether there is in fact a demonstrated need to address the purported problem that the proposal seeks to address.

The Assessment of the Parties' Proposals

While the Board has thoroughly considered all of the parties' respective proposals regarding all the issues in dispute, our written analysis will focus on the priorities of the parties.

Non-Monetary Issues

Job Security

Five Months' Notice of an Elimination of a Vacant Position.

The Hospitals seek the removal of the existing collective agreement provision requiring a hospital to give five months' notice to the relevant Union with respect to the elimination of a vacant position. It is suggested that this requirement places excessive and inappropriate restrictions on a hospital's ability to reorganize by eliminating vacant positions that the hospital no longer requires. Furthermore, it was argued the arbitral interpretation of this requirement has mandated that a hospital has to maintain the "status quo" for the length of the notice period, leading hospitals to waste scarce resources to post, fill, and even train a new incumbent in a position no longer needed. In terms of replication, the Hospitals noted that both ONA and UNIFOR voluntarily agreed to the removal of the five months notice requirement with respect to the elimination of a vacant position.

The Reassignment Option

The current language in the collective agreements allows for the possibility of reassigning an employee to a different position as a way of avoiding the need to lay off the employee. The following criteria need to be fully satisfied for the reassignment option to be permitted: (1) the reassignment shall not result in a reduction in hours of work or wage rate; (2) the reassignment must involve the same or a substantially similar shift or shift rotation; and (3) the reassignment must be located at the employee's original work site or at a nearby site. The Hospitals propose to modify that criterion by allowing the option of an employee accepting reassignment, despite not satisfying the current criteria. It was asserted that providing employees with the option of accepting a

reassignment that does not otherwise necessarily satisfy all of the stipulated criteria is in keeping with the overall objective of the provision to reduce unnecessary layoffs by providing an employee with the choice of accepting such a reassignment as opposed to being laid off.

The Unions have proposed to amend the reassignment criteria by stipulating that placing an employee in a lower-rated classification and "red circling" the employee's rate of pay constitutes a reduction in the employee's wage rate; and as such, does not satisfy the "no reduction in wage rate" criterion. Additionally, it was proposed that the provision be amended to require that the job the reassigned employee is placed in has the identical shift/hours or shift rotation of the employee's existing position. The Unions argued that such amendments are needed to eliminate the uncertainty associated with the existing "substantially similar" phraseology.

Early Retirement and Voluntary Exit Offers

The Hospitals propose an amendment to the provisions relating to a hospital's obligation to make offers of early retirement and voluntary exit options to employees prior to issuing notices of layoff. It is proposed that a hospital shall not be required to approve an employee's request to exercise the early retirement or voluntary exit option if approving such a request would not reduce the number of employees required to be laid off pursuant to the provisions of the collective agreement. The existing language, it is opined, casts too broad a net in terms of those who will be offered early retirement and voluntary exit options; thereby requiring the employer to expend resources without

necessarily satisfying the overall intent of the provision which was to reduce the number of employees required to be provided a notice of layoff.

Layoff Options

The Hospitals have proposed amendments to the options available to employees who receive a notice of layoff by: (a) allowing the employee the option to transfer into a vacant position; (b) eliminating the provision that deems a displaced employee as being "laid off"; (c) allowing employees the option of utilizing vacation days, banked "lieu" days or to elect an unpaid leave of absence rather than being laid off in the case of a short-term layoff; and (d) eliminating "chain bumping".

It is the Hospitals' position that the proposed amendments would provide for a more efficient process for addressing the unnecessary costs and disruption for both hospitals and employees caused by a potential reduction in the workforce.

It is the Board's view that none of the parties' respective outlined job security proposals should be accepted. The job security language in question is comprehensive in nature, with a network of integrated and interrelated provisions, which has largely remained untouched for over 25 years. That is, aside from the introduction of the reassignment language by the Board chaired by George Adams in the late 1990s, the language has ostensibly remained intact. Arguably, and more tellingly, both in terms of the principle of replication and demonstrated need, over the last six rounds of bargaining involving CUPE/OCHU, and the last three rounds involving SEIU, the parties

have seen fit to reach a negotiated settlement without obtaining or pursuing through arbitration the same proposed amendments that it now seeks this Board to award.

Consideration has also been given to the fact that these proposals are being sought against the backdrop of the parties' negotiations taking place under the restrictions on compensation associated with Bill 124. In this regard, this Board fully adopts the following reasoning of Arbitrator Gedalof in The Participating Hospitals and Ontario Nurses' Association award:

> The Hospitals' evidence does not establish such a compelling demonstrated need as to overshadow any other considerations. And in our view, the principle of replication in particular must trump any demonstrated need to amend the existing layoff language in the particular circumstances of this case. Whatever the original basis upon which this language was awarded, the fact is that it is now highly valued job security language to the Association's benefit, that has been entrenched in the collective agreements over many rounds of bargaining. The Hospitals seek substantial concessions from the Association but have offered nothing of substance in return to obtain those concessions. And in light of Bill 124, the Hospitals would be highly constrained in doing so in any event. In our view, this is what the Stout board meant when it said that it would not be appropriate to grant job security concessions in times of fiscal restraint. Absent a compelling demonstrated need, the kinds of bargaining concessions the Hospitals seek are generally gained through some form of *quid pro quo*, and here the Hospitals have offered nothing in exchange. Further, while we are clearly in a time of statutorily imposed restraint, the Hospitals have not put forward any comparators to suggest that parties have been bargaining such concessions. The principle of replication therefore militates strongly against awarding the Hospitals' job security proposals.

It is also of some note that the recent OPSEU central award of the Kaplan Board decided to strengthen rather than reduce the job security language of the collective agreement.

Infectious Diseases Safety Measures

The Unions have identified that achieving collective agreement provisions addressing the health and safety of its members in the context of the presence of infectious diseases in the workplace is a priority in this round of bargaining. For the Unions, the need for such provisions was borne out by the frustration they experienced on behalf of their members to obtain the necessary Personal Protective Equipment (PPE) and other health and safety measures to address the deleterious impact of the COVID-19 pandemic.

The Unions' proposals are centred on the acceptance of the "precautionary principle" of not awaiting scientific certainty before adopting reasonable measures to address potential harm caused by an infectious disease. Reliance was placed on the following statement from the Report of the SARS Commission chaired by Justice Archie Campbell:

> ….
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> The importance of the precautionary principle that reasonable efforts to reduce risk need not await scientific proof was demonstrated over and over during SARS. The need to apply it better is noted throughout this report.
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> One example was the debate during SARS over whether SARS was transmitted by large droplets or through airborne particles. The point is not who was right and who was wrong in this debate. When it comes to worker safety in hospitals, we should not be driven by the scientific dogma of yesterday or even the scientific dogma of today. We should be driven by the precautionary principle that reasonable steps to reduce risk should not await scientific certainty.
>
> ….

> If the Commission has one single take-home message it is the precautionary principle that safety comes first, that reasonable efforts to reduce risk need not await scientific proof. Ontario needs to enshrine this principle and to enforce it throughout our entire health system.

The Unions cited their efforts, and those of other health care sector unions, to obtain sufficient N95 respirators for their members during the COVID-19 pandemic as a particular point of frustration. Considerable initiatives were undertaken including lobbying, filing grievances and proceeding with a judicial review application in order to strengthen Directive 5 which was issued by the Chief Medical Officer of Health (CMOH) for the province outlining circumstances that hospitals and other health care sector providers were required to supply workers with appropriate health and safety measures including N95 respirators. It was submitted that despite those efforts, it was not until December 2021, some twenty months after the commencement of the pandemic that Directive 5 was amended to provide non-regulated health care workers with the same access to N95 respirators as regulated health care employees.

The Unions further submitted that a review of produced PPE policies from local hospitals revealed that a number of those policies were not compliant with the requirements of Directive 5, and the majority of those policies did not include any reference to the requirement to follow the precautionary principle. Moreover, it was claimed that the Ministry of Health had to repeatedly remind hospitals throughout the pandemic of their obligation to provide the appropriate PPE to hospital workers.

The proposals of the Unions are constructed upon, but in certain areas go beyond, the language existing in the Participating Hospitals-ONA central collective agreement. That language was initially awarded by an Interest Board chaired by Chris Albertyn in 2005 after SARS, and it was subsequently slightly modified by the Stout and Gedalof Boards in the context of the ongoing COVID-19 pandemic.

The Hospitals recognized and acknowledged the serious adverse health consequences that the COVID-19 pandemic has had on its employees, including the members of the Unions' bargaining units. However, it cautions the Board against relying on an extraordinary event such as the pandemic as a basis for entrenching language into the collective agreement. Moreover, it was submitted that consideration should be given to the existing statutory framework that allows for the health and safety concerns of workers to be addressed. The requirement, it was submitted, set out at Section 25(2)(h) of the Occupational Health and Safety Act (OHSA) is ostensibly the codification of the precautionary principle, in that employers are required to take "every reasonable precaution in the circumstances" for the protection of their workers. Moreover, OHSA Regulation 67/93 requires an employer to consult with worker representatives through the OHSA mandated workplace Joint Health and Safety Committee (JHSC) when developing safety policies, including policies pertaining to PPE. Additionally, it was suggested that an employee could potentially rely on the "work refusal" provisions of OHSA regarding a failure to provide appropriate protective equipment. Against those existing statutory provisions addressing the workplace safety concerns of workers, it

was argued the Unions failed to establish a demonstrated need to incorporate the extensive language being sought into the collective agreement.

Additionally, the Hospitals claimed the fact that the Unions may have been dissatisfied with the manner in which the provincial government followed the precautionary principle during the course of the current pandemic did not establish a demonstrated need for the amendments in question. Furthermore, citing the SARS experience, it was suggested that it was premature to evaluate the relationship between employees having N95 respirators and the risk of Covid transmission. Moreover, it was asserted that it is not appropriate to establish arbitrary central-based rules to apply to all hospitals given the different circumstances that may be associated with a particular infectious disease outbreak.

While appreciating the Hospitals' concerns about not "overreacting" to the impact of the current pandemic, it is this Board’s view, upon reviewing the submissions of the parties and the supporting documentation, that a demonstrated need has been established for collective agreement language to address safety issues arising from the presence of infectious diseases in the workplace. The statistical information provided by the Unions in terms of the impact the pandemic had upon healthcare workers is sobering and undeniably verifies a need for action. Furthermore, the considerable efforts that the Unions had to expend to seek appropriate amendments to Directive 5 in order for N95 respirators to be provided to employees in their bargaining units underscores the limitations of the existing statutory framework. Collective agreement

language codifying the precautionary principle and its application allow the parties at the local level the ability to address the sufficiency of safety measures to deal with the consequences of an infectious disease outbreak at a workplace.

In terms of replication, the existing language in the ONA central collective agreement addressing the health and safety of its members in the context of the presence of infectious diseases provides further support for the inclusion of similar language in the collective agreement of these particular parties. Common sense suggests, and the supporting documentation pertaining to the impact of COVID-19 affirms, that the presence of an infectious disease, especially an airborne transmitted virus at a hospital, is not always a concern exclusive to regulated healthcare employees.

The Board is also of the view that it is not appropriate to await for another infectious disease epidemic to provide collective agreement language addressing the safety concerns associated with the presence of an infectious disease in the workplace. The ONA language was a response to the SARS outbreak with a view to ensuring that appropriate safeguards were in place to address any subsequent infectious disease outbreak, which effectively did not take place until some 14 years later. The Board, therefore, adopts the view that the current ONA language should form the framework for the provisions to be awarded.

The Board is not necessarily convinced, however, as to the necessity of those aspects of the Unions' proposals that extend beyond the language existing in the

Participating Hospitals-ONA collective agreement. Moreover, from a collective perspective, the inclusion of the full breadth of the ONA language in one fell swoop is significant in itself, and also argues against the adoption of the additional provisions being brought forth by the Unions.

Workplace Violence

The parties are *ad idem* that workplace violence in the health care sector in the province is a serious and pervasive problem. Documentation from the Workplace Safety and Insurance Board (WSIB) confirms that hospitals are the number one afflicted industry in the province with respect to incidents of assault, violent acts, and harassment leading to lost time claims. Not only are the number of incidents of violent acts increasing each year dramatically but on an occupational basis in the health care sector, "Assisting Occupations in Support of Health Services" experience more incidents of assault, violent acts, and harassment leading to lost time claims than any other occupational position in the sector, with more than twice as many incidents to the next highest ranked occupational position of "Nurse Supervisors and Registered Nurses".

That the Hospitals recognize the severity of the issue is borne out by the following excerpt from an OHA document presented at an October 2015 OHA conference titled The Workplace Violence Prevention Summit:

- For the health care sector as a whole, it is critical to acknowledge that violence may inadvertently be accepted as a workplace hazard – a perspective that is outdated and unacceptable.

- In Ontario, workplace violence accounted for 11% of lost time injuries in 2014 within the health care sector. A Ministry of Labour press release dated August 12, 2015, stated that this amounts to direct system costs of nearly $23.8 million.

- While other sectors within Ontario have seen decreases in the incidence of workplace violence, health care workplace violence has increased. The health care sector now has among the highest rates of workplace violence in the province of Ontario with nursing services, nursing homes, and hospitals making up 64% of lost time injuries within the health care sector in 2014.

Where the parties part ways is with respect to the Unions' proposals that involve a complete overhaul of the existing central language that pertains to violence in the workplace in both collective agreements. The existing language, which was voluntarily agreed to by the parties in the last round of bargaining, is centred on the local parties determining appropriate solutions to workplace violence against certain specified guideposts. The Unions' proposals focused on moving away from being focused on local parties' solutions to mandating extensive central obligations being placed on hospitals to address workplace violence.

For this Board, the relevant issue is not necessarily whether the Unions have established a demonstrated need to address workplace violence but whether a demonstrated need has been established to effectively jettison the existing language, which was voluntarily agreed to in the last round of bargaining. In our view, it is far too premature to conclude that the existing language will not be effective. It is also of particular significance that the existing language effectively mirrors the language in the ONA central agreement which was awarded by a Board of Arbitration chaired by Chris

Albertyn in 2016, and which has not been amended in the three rounds of bargaining by those parties since the award was issued.

At the same time, however, we are of the view that the existing language needs to be amended to a certain extent to add clarity and to provide for the mandatory inclusion of certain fundamental principles associated with protecting employees from workplace violence.

Monetary Issues

Pursuant to Section 10(1) of Bill 124, the general wage increases for two of the years of the respective collective agreements are set at 1% for each year.

The parties, to their credit, were able to agree on the amounts for the "remainder"—the available funds that can be used for non-salary compensation enhancements pursuant to Section 11(1) of Bill 124. Those amounts are: CUPE/OCHU Year 1- $1,100,521; Year 2 - $1,118,485; SEIU Year 1 - $490,306; Year 2 - $490,628.

There are two issues regarding the application of the available "remainder" funds that need to be addressed:

<u>Use of Benefit Plans Surpluses</u>

The Unions asserted that the improvements that are sought with respect to massage therapy and mental health services can be awarded through the utilization of the existing surpluses in the benefit plans that the hospitals rely upon to provide the existing contracted benefits for members of the relevant bargaining units. While the

Board appreciates the rationale for the argument of the Union, given the restrictions on awarded compensation mandated by Bill 124, the outlined argument has been found not to be persuasive. The argument is problematic for the following reasons: (1) from a jurisdictional perspective, the Board is not convinced it can direct the surplus funds in benefit plans to be used to cover the cost of benefit improvements at a particular hospital; (2) even if that authority theoretically existed, a number of perplexing practical issues regarding its implementation arise, including (i) whether the benefit plans surplus pertaining to a particular benefit plan exclusively relates to the contributions made on behalf of the bargaining unit members of the respective Unions; (ii) the significance of the existence of the surpluses in relation to the ongoing needs of the plans; and (iii) how to address the scenario of a particular hospital not having a surplus or having an insufficient surplus to cover the cost of the awarded benefits improvement?

Additionally, and arguably more importantly, even if it was theoretically and practically feasible to implement the proposals advanced by the Unions, any such awarded benefit improvements would still be relevant for the purposes of the calculation of awarding non-salary compensation entitlements for the purposes of Section 11(1) of Bill 124. Further to this point, the definition of "compensation" set out in Section 2 of the Act deems any payments provided to or on behalf of employees as constituting compensation. Accordingly, in our view, it is immaterial whether an employer makes funds available from an operating account or from an existing surplus; such payments are nonetheless caught by the definition of "compensation" set out in the Act and are

relevant for the calculation of "any incremental increase to compensation entitlements" for the purposes of Section 11(1) of the Act.

Costing-Accrued Benefit Obligation

The Hospitals argued that in calculating the cost of the benefit plan improvements sought by the Unions, the Board should include not only the actual cost of the increased premiums paid by the Hospitals, but also the Accrued Benefit Obligation (ABO) associated with those benefits. The ABO is a Public Sector Accounting Standard utilized by hospitals that represents the value of all future post-retirement benefits, both for current employees and current retirees.

The Unions asserted that the "ongoing" and "one-time liability" costs captured by the ABO concept are not generally included for collective bargaining costing purposes, as such amounts are not current costs but rather associated with meeting future liabilities. It was further submitted that there is an inflationary element inherent in this method of costing benefits, which greatly expands upon the actual current cost of premium increases.

Irrespective of whether the ABO concept should be generally utilized for costing purposes, such amounts are not relevant with respect to the allocation of the remainder under Bill 124. Potential future obligations related to current and retired employees are not "payments" made to or on behalf of employees within the meaning of the definition of "compensation" set out in the Act. Additionally, it would be inappropriate to consider such ABO costs as relevant with respect to the allocation of the remainder when such

costs were not utilized for the purposes of the calculation of total compensation and, as such, the size of the remainder. Support for our findings on this issue is found in the decision of Arbitrator Stout in Independent Electricity System Operator (ISEO) and Society of United Professionals 221 CanLII 137 444 (ON LA) (Stout).

The Allotment of the Remainder

The position of the Unions is that if the argument regarding the use of benefit surpluses is not accepted, then the Board should award the requested Charge Nurse Premium as well as the Temporary Transfer/Responsibility Allowance which are extremely low cost, and then remit the costing of the benefit improvements back to the parties with the direction that deference be given to the Unions' position that all the remaining funds be utilized for their identified priorities of mental health services improvements or massage therapy or some combination of the two.

The Hospitals' position is that the available funds of the "remainder" should be allocated to enhancements of the shift premium and weekend premium provisions of the respective collective agreements.

The Board is of the view that generally given the constraints imposed by Bill 124, in terms of awarding otherwise normative salary increases and non-salary compensation improvements, it is appropriate that deference be given to the manner in which the Unions seek to apply the limited funds available for non-salary compensation improvements. Support of this approach is found in the decision Ryerson University and

Ryerson University Faculty Association, *supra,* wherein, in relation to remitting non-salary compensation items back to the parties, Arbitrator Kaplan opined:

> However, inasmuch as guidance was requested, and it was by both parties, provided the Association's proposed allocations are normative - for example, and the range is wide, improvements to benefits and reimbursement of extraordinary COVID-19 expenditures - they should, in a Bill 124 context, be given substantial deference. However, the Association's proposal to allocate remainder amounts to increase the accrual rate under the YMPE - given possible continuing obligations and other concerns raised by the University - is rejected. That too may be the subject matter of collective bargaining, if the parties wish, when the Association is not constrained by Bill 124.

Similarly, Arbitrator Stout in his ONA central award decision awarded the Association's identified priority of an increase in "call back pay" even though it was not necessarily normative on account of the exceptional bargaining circumstances associated with Bill 124.

Adopting the above perspective, the Board is disposed to give significant deference to the issues identified as priorities by the Unions, provided such proposals are normative in nature and consistent with the wording of Bill 124. Accordingly, the Board is of the view that it is appropriate to award the new Charge Nurse premium provisions requested but at the normative rate of $2 per hour (the current rate under the ONA central collective agreement), instead of the sought-after $4 per hour. Likewise, an increase in the Temporary Transfer/Responsibility Allowance is granted but at a rate of $1 per hour which, while falling short of the relevant rates in the ONA and OPSEU central agreements, represents an almost doubling of the current rate of the allowance

under the CUPE/OCHU and SEIU collective agreements. Those changes are to be made effective the date of the Award.

At this point, given that the first year of the term of the CUPE/OCHU collective agreements has passed, and it is close to the end of the first year of the term of the SEIU collective agreements, it is our view that the allocation of the remainder of the first year of the moderation period should be directed to increases in the shift and weekend premiums. With respect to Year 2 of the moderation period, the remainder should be allocated to costs associated with the Charge Nurse premium and Temporary Transfer/Responsibility Allowance, as well as coverage for up to a maximum of $800 annually for mental health assistance benefits, one of the key priorities identified by the Unions.

The Board is also of the view that it is appropriate to use available remainder funds in Year 2 to address the 10 cent "shortfall" in terms of the SEIU Weekend Premium in comparison to that of the CUPE/OCHU Weekend Premium rate.

Awarded Terms

This Board hereby orders the parties to enter into renewal collective agreements that contain all of the central terms of the predecessor collective agreement as well as the following amendments:

Term: CUPE/OCHU - September 29, 2021, to September 28, 2023,
SEIU - January 1, 2022, to December 31, 2023.

Agreed-to Items: Any previously agreed-to items shall be included in the collective agreement.

Infectious Diseases : New – CUPE/OCHU Article 19.02, SEIU Article 19.05

a) The employer shall take every precaution reasonable in the circumstances for the protection of a worker. [*Occupational Health and Safety Act,* s. 25 (2) (h)].

b) When faced with occupational health and safety decisions, the Hospital will not await full scientific or absolute certainty before taking reasonable action(s) including but not limited to, providing readily accessible personal protective equipment that reduces risk and protects employees.

c) Hospitals will ensure adequate stocks of the N95 respirator or equivalent or better (or such other personal protective equipment as the parties may in writing agree) to be made available to bargaining unit members at short notice in the event that there are reasonable indications of the emergence of a pandemic, epidemic or outbreak of an infectious disease in the community served by the Hospital.

d) A worker who is required by his or her employer to wear or use any protective clothing, equipment or device shall be instructed and trained in its care, use and limitations before wearing or using it for the first time and at regular intervals thereafter and the worker shall participate in such instruction and training. Personal protective equipment that is to be provided, worn or used shall, be properly used and maintained, be a proper fit, be inspected for damage or deterioration and be stored in a convenient, clean and sanitary location when not in use. [*O. Reg. 67/93 – Health Care*].

e) The Hospital agrees to cooperate in providing necessary information and management support to enable the Joint Health and Safety Committee to fulfil its functions. In addition, the Hospital will provide the Committee with access to the Hospital's pandemic plan and related risk assessment, all accident reports, health and safety records, notifications of exposure to an infectious or contagious disease, and any other pertinent information in its possession. The Hospital will also provide the Committee with reports on fit testing compliance

annually and personal protective equipment inventory on a quarterly basis. The Committee shall respect the confidentiality of the information.

f) Pregnant employees may request to be temporarily transferred from their current duties if, in the professional opinion of the employee's physician a risk to the pregnancy and/or unborn child is identified. If a temporary transfer is not feasible, the employee will be granted an unpaid leave of absence before the commencement of the pregnancy leave.

Workplace Violence : Revised – CUPE/OCHU Article 19.03, SEIU Article 19.0

The hospital and the union agree that they have a shared goal of a workplace free of violence.

"Workplace violence" means:

a) The exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker.

b) An attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker, and

c) A statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

The local parties will determine appropriate solutions to promote health and safety in the workplaces, **which shall include the adoption of the following mandatory provisions**:

1. **The Hospital will ensure that employees are properly advised in advance if they are required to interact with patients who the Hospital is aware have exhibited violent behaviour previously or who could otherwise reasonably be considered to pose a danger of exhibiting violent behaviour.**

2. **The Hospital shall give due consideration to whether, in light of all the relevant circumstances, it is appropriate that an employee interacts with a known violent patient alone.**

3. **The Hospital shall notify the Union without undue delay of any incident of an employee being subjected to violence at the workplace. The timing and nature of such notification may be negotiated locally by the parties.**

In addition, the local parties will consider addressing the inclusion of the following additional remedies:

a) Electronic and visual flagging.

b) Properly trained security who can de-escalate, immobilize and detain / restrain.

c) Appropriate personal alarms.

d) Organizational wide risk assessments assessing environment, risk from patient population, acuity, communication, and workflow and individual client assessments; and

e) Training in de-escalation, "break-free" and safe immobilization / detainment / restraint.

Wages

CUPE/OCHU

Effective September 29, 2021, a general wage increase of 1%
Effective September 29, 2022, a general wage increase of 1%

SEIU

Effective January 1, 2022, a general wage increase of 1%
Effective January 1, 2023, a general wage increase of 1%

The Allotment of the Available Remainder

Year 1

Shift/Weekend Premiums

Effective September 29, 2021-CUPE/OCHU, January 1, 2022-SEIU

Increase in Evening Shift Premium by 6 cents per hour

Increase in Night Shift Premium by 6 cents per hour

Increase in Weekend Shift Premium by 7 cents per hour

Year 2

Mental Health Assistance Services

Effective September 29, 2022, for CUPE/OCHU, January 1, 2023, for SEIU

Add to CUPE/OCHU Article 18.01(b) and SEIU Article 22.01(b)
Subject to superior conditions, mental health services by a Psychologist, Registered Psychotherapist or Social Worker (MSW) will be covered up to a maximum of $800 annually.

Charge Nurse Premium:

New - Effective as of the date of the Award for CUPE/OCHU and January 1, 2023, for SEIU

CUPE/OCHU Article 15.10; SEIU Article 17.11

(a) Whenever a nurse is assigned overall responsibility for patient care on the unit, ward, or area, the nurse shall be paid a premium of two dollars ($2.00) per hour in addition to her or his regular salary and applicable premium allowance.

(b) Before assigning a nurse to be in charge of a unit, the nurse will receive orientation to the role of the charge nurse on that unit. It is understood that such nurse may be assigned to any tour as part of the nurse's orientation program, providing such assignment is in accordance with any scheduling

regulations or objectives contained in the Appendix of Local Provisions which forms part of this Collective Agreement.

Temporary Transfer/Responsibility Allowance:

Effective the date of this Award for CUPE and January 1, 2023, for SEIU

CUPE/OCHU Article 15.08, Article SEIU 17.07- increased to $1 per hour worked.

Weekend Premium

SEIU Effective January 1, 2023

Increase in Weekend Shift Premium by 2.75 cents per hour.

Wage Reopener – LOU for both CUPE/OCHU and SEIU

Letter of Understanding re: An Act to implement moderation measures in respect of compensation in Ontario's public sector.

Reopener on monetary proposals in the event that the Unions are granted an exemption, or Bill 124 is declared unconstitutional by a court of competent jurisdiction, or the Bill is otherwise amended or repealed. If the parties are unable to come to an agreement following a reopening of monetary proposals, the parties agree the board of arbitration chaired by Brian Sheehan will remain seized.

Retroactivity

CUPE/OCHU and the Hospitals are directed to negotiate a retroactivity provision as part of their implementation agreement.

The Board remains seized in accordance with subsection 9(2) of HLDAA until the parties sign new collective agreements.

Dated at Mississauga, Ontario this 3rd day of November 2022.

Brian Sheehan-Chair

"partial dissent attached"

Brett Christen - Hospitals Nominee

"partial dissent attached"

Joe Herbert - Unions Nominee

Partial Dissent

I respectfully partially dissent from the Chair's Award.

I agree with the Chair's disposition of several of the issues before the Board. For example, the allocation of the remainder in year one to evening, night, and weekend premiums is a sensible decision that provides a tangible benefit to a large percentage of both bargaining units while at the same time providing some assistance to hospitals in meeting the challenge of staffing what are considered to be less desirable shifts by many employees.

However, I part ways with the Chair on other aspects of his Award and in this dissent will briefly deal with my strong objections around the following two issues:

1. The Chair's analytical approach to the consideration of the issues before the Board; and
2. The Chair's failure to award a single proposal of the hospitals.

The Chair's Analytical Approach

Commencing at page 6 of the Award, under the heading "The Principle of Replication", the Chair discusses the well-recognized interest arbitration concept of "replication". The Chair references Arbitrator Stout's 2020 decision in *The Participating Hospitals and Ontario Nurses' Association* (June 8, 2020) which in turn references Mr. Justice Winkler's frequently quoted analysis in the *University of Toronto v. University of Toronto Faculty Association* (2006), 148 L.A.C. (4th) 193. decision. The point is emphasized by Arbitrator Stout that replication in interest arbitration must be based upon objective comparators such as freely negotiated settlements or settlements imposed by arbitration. Following these decisions, the Chair appropriately assigns "particular significance" to the three recent central hospital awards involving hospitals and other healthcare sector unions in the province.

In the hearing before the Arbitration Board, the unions asserted that the replication doctrine also involved, or should involve, a consideration of the parties' own bargaining history. The unions asserted that the fact that the parties had successfully settled the terms of several prior collective agreements (as is the case here) without resort interest arbitration was a relevant consideration for the Board. The theory, in part, is that a proposal before the Board that was (or could have been) made in a previous round of bargaining, but which was withdrawn or not otherwise pursued to interest arbitration in favour of achieving a negotiated settlement, should somehow now count against the proposing party.

Commencing on page 8 of the award, the Chair discusses the potential relevance of the "bargaining history of these parties" which he says is related to the principle of replication. It is the Chair's analysis of this issue with which I have significant concerns. Although the Chair does go to considerable length to qualify and limit potential use of the parties' bargaining history, he ultimately endorses the notion that the parties' bargaining history could be a relevant consideration for an arbitration Board in some circumstances. Such comments in interest

arbitration awards often become amplified through the echo chamber of subsequent awards and the limitations and qualifications in the analysis of the initial decision maker are often diminished or lost over time through this process. It is therefore important to analyze whether the Chair's analysis of the concept proposed by the unions, even with the expressed limitations, is correct. It is my view that it is not appropriate to expand the principle of replication to include an examination of the parties' own bargaining history and that there is no sound policy, nor practical, reason for doing so.

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At page 8 of the Award, the Chair states that "weight must be given" to the fact that the parties have reached freely negotiated settlements in the last several rounds of bargaining "without either party opting for arbitration with respect to certain of the proposals it now places before" the Board. After highlighting several valid reasons why the parties bargaining history may not be relevant to an interest arbitration board's analysis, the Chair indicates that a party's decision to not proceed to interest arbitration in previous bargaining rounds "remains arguably pertinent" to the Board's analysis (at p.9). The chair also suggests that a party's decision not to proceed to interest arbitration in previous bargaining rounds with respect to a proposal advanced before the Board may also be relevant to the concept of demonstrated need (at p.9).

I would make the following comments on the Chair's analysis about the parties' bargaining history as it relates to the concepts of replication and demonstrated need.

Achieving a recommended settlement through collective bargaining is often highly challenging. This is particularly the case where, as in the hospital sector, the bargaining occurs under the interest arbitration model which, as has been frequently noted, stifles the free collective bargaining process. Where proposals in this process are withdrawn or not pursued by a party to the negotiations, it is often a trade-off to obtain a concession from the other side and is typically expressly done on without prejudice basis. In the hospital sector, mediation with an experienced mediator is also often utilized to narrow issues in dispute or potentially, obtain a settlement. The mediation process is designed to encourage compromise by the parties and uses a variety of tools (confidential discussions between the mediator and the parties, mediator recommendations for settlement, and other means) to achieve a full or partial settlement or otherwise narrow the issues that will be dealt with by the interest arbitration board if no settlement is reached. Again, modifications in positions by the parties are expressly or impliedly made on a without prejudice basis and trade-offs are made in an attempt to reach a deal. I raise all of this simply to highlight that, other than the stark fact that a proposal was not pursued to interest arbitration in a previous bargaining round, an interest arbitration board really has no idea whatsoever as to how, why, where, or in what circumstances, a proposal from a previous round of negotiations was not pursued.

As I believe is recognized by the Chair, it is unsound labour relations policy to dissuade free collective bargaining or mediated settlements which, in my view, is the result that will arise from consideration of the parties bargaining history at interest arbitration. It should also be noted that the interest arbitration process is already a complicated and burdensome process which would

not be improved by adding a forensic examination of the parties' bargaining history, and the inevitable attendant disputes and disagreements as to what actually occurred and why, to the mix.

Focus upon past bargaining history also fails to appropriately recognize that labour relations, the workplace and society generally, are not static. It is to be expected that myriad changes will require a party to perpetually re-evaluate bargaining positions and priorities from one round of bargaining to the next. In the present case, for example, the Union re-evaluated the adequacy of its health and safety language due to the COVID-19 pandemic and pursued revised health and safety language at the negotiations. The fact that the parties have been able to successfully resolve issues in the past but were not able to do so in this round, is confirmation that rapid and significant changes in circumstances can affect a party's bargaining positions and priorities.

It must also be noted that the interest arbitration process is undeniably costly and time-consuming. The outcome of an interest arbitration process with respect to any particular proposal is near impossible to predict and, with respect, the track record of interest arbitrators awarding amendments sought by employers is sadly dismal. In these circumstances, it is fully understandable why an employer may agree to take a less than satisfactory settlement rather than proceed on a quixotic quest to interest arbitration. Reasonable employers often go to great lengths to avoid having their bargaining disputes settled at interest arbitration for these reasons. To hold such valid decisions against them in subsequent interest arbitration proceeding is, as the saying goes, adding insult to injury.

As for the relevance of the parties bargaining history to the doctrine of demonstrated need, it only need be said that demonstrated need, as the name implies, requires that a proposal is supported by sound evidence of need. Where such evidence is provided, there is no basis to discount or question that evidence on the basis that the proposal was not pursued to interest arbitration in the past.

With respect, the Chair's analysis on these points is flawed and, to the extent this analysis influenced his decision, he erred.

The Chair's Failure to Award a Single Proposal of the Hospitals

The Chair awards two non-monetary items to the unions: extensive health and safety language and additional language to the violence provision, which was only added to the central language of the collective agreements in the last round of bargaining. These were identified by the Unions as their "number one" priorities. The health and safety language awarded mirrors the current ONA central language. ONA was only able to achieve these improvements to its existing health and safety language over the course of two rounds of bargaining, both of which were settled by interest arbitration. The additional violence language was added by the Chair notwithstanding the fact that the parties' recently negotiated violence language had not even been utilized by the parties (due to the fact that local bargaining was already underway at the time the central violence language was agreed). The Chair's Awards grants the Unions new violence language

and, all at once, the ONA health and safety language. What did the hospitals receive in return? Nothing.

As the Chair fairly notes, some of the hospitals proposals were supported by replication in the form of freely negotiated comparable settlements. It is plain on the face of the hospitals' proposals that some of them also involved only very modest changes to existing language (eg. notice of elimination to existing position, certain of the proposed reassignment and layoff options). An interest arbitration award should achieve a fair and balanced result. In my respectful view, the Chair's Award fails to do so by not granting any of the hospitals' many justified proposals.

In reaching the Award, the Chair (at p. 9) adopts the reasoning set out in the cited paragraph of Arbitrator Gedalof's Participating Hospitals and Ontario Nurses' Association award. It is unclear to me what Arbitrator Gedalof means when he says that the Hospitals "offered nothing in return" and later "nothing in exchange" for what he describes as substantial concessions sought by the hospitals. Collective bargaining is not interest arbitration and an interest arbitration Board generally has little or no detailed insight as to what may have been offered by one party or the other at the failed bargaining which preceded the interest arbitration process. At interest arbitration, the Board has regard to the relevant statutory and recognized interest arbitration principles in determining their award and should strive for some form of balance, even in periods of statutory compensation restraint.

Further, to the extent that Arbitrator Gedalof is suggesting that non-monetary changes to language are only ever achieved by an employer through the granting of monetary concessions in exchange, I respectfully disagree. Often, an employer obtains improvements in existing language in exchange for agreeing to new non-monetary provisions the union has prioritized. In this case, the Chair's Award granted significant non-monetary amendments to the unions but awarded nothing, not even some of the very modest changes sought by the hospitals, in return. In my view, the Award would have been a fairer and more balanced one had he done so.

dated: November 3, 2022, Toronto

"Brett Christen"

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Nominee of Participating Hospitals

PARTIAL DISSENT

While the award is one that will be of help to employees covered by the award, there are issues where I think a different result was appropriate. I say this while observing that the Chair's approach to the many issues put forward by both parties in this case, has been one of fairness.

First, by way of context, this award concludes the first collective bargaining opportunity for both CUPE/OCHU and SEIU, since the onset of the Coronavirus pandemic in early 2020. These employees, like other hospital sector workers, reported for duty in hospitals at a time when there were no vaccines; when there was confusion and uncertainty about methods of virus transmission, and; when protective equipment was both scarce in supply and inadequate in nature. In those circumstances, these employees placed themselves between the danger of infection and the health of the community. Moreover, they did so without collective agreement protections existing in other hospital sector collective agreements.

It came as no surprise then, when both SEIU and CUPE/OCHU prioritized infectious disease-related protections in their collective bargaining. Hoping to build on the protections that had already been negotiated in ONA and OPSEU collective agreements, and which were absent in these, the two unions sought to supplement those with additional provisions which would guard against income loss as well as which would be sensitive to the differences in bargaining unit composition. There will be, with some reason, disappointment that this award did not go further and augment the otherwise existing protections with additional ones here. At the same time, it is acknowledged that these employees have now been placed on the same footing in respect of protective equipment and collective agreement protections as their colleagues.

Another priority identified by the unions, workplace violence, is also addressed in the award, with significant improvements made. The award includes provision that will require hospitals to give consideration to proper staffing measures, as well as to advise employees who may be in

vulnerable situations in advance. Further, information sharing with the union in the event of incidents is made compulsory.

While the award has addressed those priority issues, it has failed to properly address, at a minimum, one other issue that was before it which should have formed part of the award but doesn't. Specifically, the SEIU sought to obtain the same 'sufficient ability' threshold in its job posting provision that is a prominent feature of the CUPE/OCHU collective agreements. That should have occurred. As arbitrator Burkett remarked in his 2010 *Participating Hospitals and SEIU* award, it is a matter of equity between equivalently-placed groups that requires SEIU collective agreements be improved to reflect the same job posting standard as CUPE/OCHU ones, a result that will allow for the same improved internal mobility. The Chair has noted that interest awards in the Bill 124 era have not contained a large number of non-monetary collective agreement changes, but this was an area that has long required the change that SEIU proposed. That is particularly the case, I would suggest, where a previous central award has specifically pointed to the merits of the change.

Finally, the Chair has noted, properly in my view, that it would not be simultaneously appropriate to remain seized of monetary issues in the event of Bill 124 being overturned, while pronouncing nonetheless on what would otherwise have been awarded. Still, the monetary shortfalls in the award that arise from Bill 124 are not hard to see, and are made clearer by Mr. Stout's recent *Participating Nursing Homes and SEIU* award. There, the easily observed 'Bill 124 effect', in an award covering Homes some affected by Bill 124 and others not, was 2% per year in wages alone in the same two years as these collective agreements. Without taking into account that hospital workers often fare better in collective bargaining than employees in the Homes sector, the ready calculation is at least a cumulative 4% in wages, or about two weeks' pay per year, and on an ongoing basis, has been removed by the Bill from these employees' incomes, over the two-year term of this collective agreement.

Moreover, the Unions sought two specific and inexpensive benefit improvements to bring those benefits to the level of the sector norm. Because of Bill 124 restrictions, only one of these could be granted notwithstanding the strong merits of the case and their relatively inexpensive cost. Thus the Massage Therapy improvement that the Unions sought has been put off to the next collective agreement.

Dated this 3rd day of November 2022

Joe Herbert
Unions' Nominee