IN THE MATTER OF AN INTEREST ARBITRATION
PURSUANT TO THE HOSPITAL LABOUR DISPUTES ARBITRATION ACT

AND

A MEMORANDUM OF CONDITIONS FOR JOINT BARGAINING
DATED JUNE 16, 2014

BETWEEN:

THE PARTICIPATING HOMES
(as listed in Appendix “A” to the Memorandum of Conditions for Joint Bargaining)
(“Employer”)

And

ONTARIO NURSES’ ASSOCIATION
(“Association”)

Board of Arbitration

Louisa M. Davie, Chair

Elizabeth McIntyre, Association Nominee

Irv Kleiner, Employer Nominee
Award

This interest board of arbitration was consensually constituted under the Hospital Labour Disputes Arbitrations Act to decide outstanding issues affecting 173 Long Term Care facilities (hereafter "Nursing Homes" or "the Employer") and the Ontario Nurses Association (hereafter "the Association"). Our award herein covers approximately 3152 Registered Nurses (RN) and Allied Health Professionals employed in various bargaining units by the Nursing Homes.

The Employer and the Association have participated in a centralized bargaining process since the expiration of the December 31, 1990 collective agreement. Since that time there have been ten rounds of bargaining between these parties. In six of those rounds the parties were unable to agree upon all matters in dispute and proceeded to arbitration. In the other four rounds the parties freely negotiated their collective agreement. It can therefore be said that this is a mature bargaining relationship. We note at the outset that this is a factor we have considered in rendering this award. In our view bargaining history --- what the parties themselves have negotiated in the past when they voluntarily settled their collective agreement as well as the outcomes of past arbitrated awards--- is a highly relevant factor to consider. In this regard we note also that the number of long-term care facilities participating in the central process has steadily increased over the years. It is evident that the central process has worked to the mutual satisfaction of both parties.

This is the eleventh round of bargaining. Although a number of matters were agreed upon the parties remained far apart on significant issues including monetary issues and the scope of bargaining unit work.
At the commencement of the hearing the parties agreed this Board was properly seized and did not raise any issues with respect to our jurisdiction. Prior to the hearing the parties provided voluminous written briefs in support of their respective submissions. Oral submissions supplementing these written briefs together with oral reply submissions were made to the panel at hearings conducted in Toronto on October 22 and 23, 2014. The Board met in executive session on December 16, 2014.

We do not intend to set out in great detail the submissions of the parties or the substantial amount of material upon which each relied. Although we have reviewed the material thoroughly, both on its own and in context of the oral submissions of the parties, little can be gained by setting it out in great detail in this award.

We also see little value in setting out the various interest awards to which we were referred which set out in the prevailing principles applicable to interest arbitration generally, or those awards which specifically pertain to these parties. Instead we note that there are criteria set out in the Hospital Labour Disputes Arbitration Act which we have considered and applied in arriving at our award herein. These criteria are found in section 9 (1.1) of the Hospital Labour Disputes Arbitration Act which states:

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

1. The Employer’s ability to pay in light of its fiscal situation.

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

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

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

5. The Employer’s ability to attract and retain qualified employees.
As has been noted by other arbitrators this list is not exhaustive. Neither does the statute set out what weight is to be attributed to any one of these criteria or whether one criteria has a higher priority than another.

In addition to these statutory criteria, over the years boards of arbitration have developed a number of principles applicable to interest arbitrations. Summarized these may be referred to in shorthand form as "replication" "comparability” "demonstrated need" and "total compensation".

Replication is one of the primary principles of interest arbitration and one which we have considered. The replication principle stands for the proposition that since interest arbitration is a substitute for free collective bargaining the award of an interest board of arbitration should replicate, as best it can, the agreement the parties would have made if they had recourse to the economic sanctions of strike/lockout which are available in free collective bargaining. It has often been said that replication is not an exact science. Some arbitrators have also suggested that the notion of replication is somewhat artificial in an environment where free market pressures do not apply, and where comparisons are inevitably made to other employees whose terms and conditions of employment were also established through interest arbitration. Nevertheless the replication principle does require us to examine and weigh objective criteria such as those set out in the Hospital Labour Disputes Arbitration Act and includes market forces and the economic realities which parties must consider when engaged in free collective bargaining. Replication focuses on objective standards rather than notions of "fairness" or "what is just" as these concepts are often too subjective and ambiguous.

Another principle expressly reflected in section 9 (1.1) of the Hospital Labour Disputes Arbitration Act is the criteria of comparability. Again that requires us to assess and weigh objective data of the terms and conditions of employment of "other comparable
employees in the public and private sectors." In our view the most relevant comparators are other employees employed in the broader healthcare sector, and in particular nurses.

The principle of "demonstrated need" indicates that arbitral changes to existingnegotiated (or even imposed) language typically requires some specific demonstrated need. That does not mean we must slavishly adhere to maintaining the status quo. Instead the concept of demonstrated need requires us to closely examine the proposals put forth by a party in context of the existing provisions of the collective agreement and determine whether a demonstrated need for the proposal has been established. Some examples of demonstrated need include collective agreement language that is not functioning as the parties intended it to, existing language which has given rise to multiple disputes, or may cause inordinate or undue disagreement in the future etc. This is not meant as an exhaustive list but is indicative of the types of factors which might be considered and addressed under the "demonstrated need" rubric. Long-standing or freely negotiated language should not be changed for the sake of change. Absent some demonstrated need it is important to recognize the bargains which the parties themselves have achieved.

Finally in rendering our award we have considered the principle of total compensation. That principle is self-explanatory and so well-established in the jurisprudence that we consider it unnecessary to say anymore about it.

We direct that the matters agreed upon by the parties be incorporated into the collective agreement settled by this award. In the result that collective agreement has a term from July 1, 2014 to June 30, 2016. It should consist of the terms of the expired collective agreement, the agreed-upon items and the matters dealt with in this award.
Wages

The parties were far apart on the appropriate wage increase. The Employer proposed a 0.7% increase for each of the two years of the collective agreement.

The Association proposed parity with RNs employed in Homes for the Aged and Hospitals in the first year, and a 1.4% increase for the second year. In addition the Association sought the introduction of a twenty-five (25) year rate for RNs. We note that the percentage increases to achieve the parity which the Association seeks vary for each step of the grid. It ranges from 11.20% at the start to 4.32% at the eight (8) year step. In this regard the Association points out that the demographics of the bargaining units at the Nursing Homes is such that a vast majority of RNs are at step 8 of the grid so that the parity which the Association seeks is not as costly as the Nursing Homes think.

The Association also proposed significant wage increases for the Allied Health Employees it represents in some of the Nursing Homes, and proposes that the RPN rate at all those Nursing Homes be increased to $25.76 in the first year of the collective agreement, and $26.12 in the second year.

For the Association parity with RNs working in Homes for the Aged and the Hospitals has long been a bargaining objective. The Association argued that at different times (before this central bargaining process) parity between RNs working in Nursing Homes and Hospitals or Homes for the Aged was a fact. That parity was broken when arbitrator Ready failed to award the same across-the-board increases achieved by Hospital RNs in the wage reopener of the third year (January 1, 1993 - December 31, 1993) of the 1991-1993 collective agreement between the Employer and the Association. The Association submits that RNs in Nursing Homes and Homes for the Aged and the
Hospitals are comparable as they have the same professional qualifications, scope of practice and responsibility, and perform comparable duties. From the Association's perspective the statutory criteria which direct us to compare the terms and conditions of employment and the nature of the work performed to "other comparable employees in the public and private sectors" dictates the comparison of RNs in Nursing Homes to RNs employed by the Hospitals and Homes for the Aged.

The Employer submits that the bargaining history between the parties shows that parity with Homes for the Aged and Hospitals has not been achieved by the Association either when collective agreements between the parties have been arbitrated or negotiated. To award the increases sought by the Association therefore would not replicate bargaining. The Employer points instead to the rate of change increases in this sector and the economic context within which this award is rendered, and other awards and settlements (i.e. the AMAPCEO settlement which provides for four years of net zero increases, the CUPE and SEIU Hospital settlements which provided for .7% lump sums and a .7% across the board increase in each year of a four year agreement which spans 2013-2017) in support of its position for more moderate increases. The Employer asserts that a moderate increase would be consistent with the statutory criteria and would replicate bargaining.

We have reviewed the most recent award between the parties rendered by arbitrator Stanley on October 31, 2011. In that award arbitrator Stanley stated:

Free collective bargaining, where parties have the right to strike lock-out, does not always result in workers doing the same work for two different employers getting the same wage rate. There is nothing inherent in the arbitration process under HLDA which would suggest that these anomalies could not also arise and persist under this regime. Article 9 (1.1) 4 of HLDA does not turn the Act into prescriptive, normative wage setting legislation.

We can easily understand from the nurses perspective that logic would dictate that they should be paid what Hospital nurses are paid and it is a logical and
legitimate bargaining objective. However, these are different employers, funded differently and with different working environments. The bargaining history and the economic context of this bargaining round does not suggest that Hospital parity would have been achieved if the parties were free to strike/lockout. The bargaining history suggests that this group follows fairly closely the rate of change in the broader health care environment as reflected by the Hospital Nurses rate of change.

We adopt these statements and have also concluded that the parity sought by the Association would not have been achieved if these parties were free to strike/lockout. The current economic and fiscal circumstances and challenges are such that it is improbable that the parties would have voluntarily negotiated the type of increases necessary to achieve the parity which the Association seeks.

We note that at times the parties have reduced the wage gap between RNs employed in Nursing Homes and RNs employed in Hospitals and Homes for the Aged. The gap was reduced as a result of the voluntary settlements negotiated by the parties for the 2001 – 2004 collective agreement, and again as a result of their voluntary settlement for the 2006 – 2009 collective agreement. On both those occasions these parties voluntarily negotiated across-the-board (ATB) increases which were greater than those voluntarily negotiated by the Participating Hospitals and the Association (in the case of the 2001 – 2004 collective agreement) or imposed by an interest arbitrator (in the case of the 2006 – 2009 collective agreement when arbitrator Albertyn awarded a smaller ATB increase to the RNs in the Participating Hospitals than the ATB increase which had been agreed upon by these parties). Conversely, in their 2009 – 2011 settlement these parties negotiated less favourable ATB increases than those reached in the voluntary settlement applicable to RNs in the Participating Hospitals.

We have referred to this history of voluntary settlements in some detail as we consider what the parties themselves have done in the past as highly relevant. This history shows that the parties themselves have not negotiated Hospital/Homes for the Aged
and Nursing Home parity. It also shows that although the parties may closely follow the rate of change in the Hospitals they do not automatically adopt it. In addition it must be noted that throughout their bargaining these parties have bargained other compensation matters including lump sum payments and increases to premiums and allowances in a manner that was distinct from how these types of items were negotiated by the Association and the Participating Hospitals.

In the result we have had particular regard to the rate of change in the broader healthcare environment. We have considered the April 30, 2014 award of arbitrator Kaplan for RNs in the Participating Hospitals (which awarded ATB increases of 1.4% effective April 1, 2014 and April 1, 2015), the November 21, 2014 award of arbitrator Teplitsky for the SEIU Nursing Homes Master Group (which on a re-opener for the third year awarded a 1.5% ATB increase) and the Participating Hospitals SEIU and CUPE settlements which resulted in .7% increases and .7% lump sums for 2013-2017 (although these groups did not experience 2 years of zero increases as did the RNs covered by this award) as well as a number of other awards and settlements involving RNs employed in other Nursing Homes, in Public Health and in CCACs across the province etc. With those awards and settlements in mind, and having regard to the history of collective bargaining between these parties, we have determined to award the following ATB increases for all employees in all classification in the bargaining units:

Effective July 1, 2014  1.5%
Effective July 1, 2015  1.4%

**Staffing**

A second major area of dispute between the parties involves the staffing language of the collective agreement. The Employer proposed to delete both articles 2.04 and 2.06 of the collective agreement, or alternatively to delete only article 2.06 while maintaining the bargaining unit work protections for the Association found in article 2.04. As a result
of the minimum RN staffing required by statute we note that from a practical perspective the Employer’s proposal to delete article 2.06 will not have any impact on approximately one-third of the Nursing Homes.

The Association also seeks changes to article 2.06 and maintains those changes are necessary to ensure clarity.

We note at the outset that article 2.04 has been part of the collective agreement between these parties since at least the mid-1990s and that this bargaining relationship has also been governed by agreements with respect to staffing levels and/or staffing complements for a long time. Initially staffing was governed by a staffing letter which did not form part of the collective agreement but which nevertheless addressed staffing complement issues. In 2009, when it was apparent that the staffing letter was no longer reflective of actual staffing in many nursing homes, and faced with different funding and different circumstances than those of 1997 when the letter was first agreed to, the parties negotiated article 2.06 into the collective agreement. The Association views these provisions as a “cornerstone” of the agreement and “fundamental to its bargaining relationship with the Employers and the integrity of its nursing profession.” From the Association’s perspective these provisions protect not only the integrity of its bargaining units but also ensure appropriate resident care. From the Employer’s perspective these provisions fetter its ability to manage its operations and serve to inhibit the Employer from maximizing its resources to provide the most appropriate resident care.

Changes to the staffing provision of the collective agreement were also before the Stanley Board. At that time the Board noted:

This is a new article agreed to in the last round of negotiations and we feel it would be premature to remove it in an immediate subsequent arbitration. We therefore maintain the status quo with respect to article 2.06. We note in
particular that there was no suggestion that the arbitration mechanism open to the Employer has been tried and found wanting as a means of relief from what the Employer considers an overly restrictive provision in the agreement.

In our view those comments continue to apply and neither party has satisfied us that there is a demonstrable need either for the deletion of these provisions or for the language changes proposed by the Association. There is simply not sufficient evidence before us to demonstrate the need submitted by the Employer that article 2.06 must be deleted or else the Nursing Homes do not have the requisite flexibility to deliver the most appropriate care using the most appropriate mix of employees. Neither has the Association demonstrated a need for the language changes which it has proposed.

It is significant that, as was the case before arbitrator Stanley, there is no evidence before us to suggest that the arbitration mechanism available to the parties under article 2.06 has been tried and found wanting and therefore demonstrates a need for either deletion or changes to the language which the parties freely negotiated in their 2009 – 2011 collective agreement. Indeed we were advised that there is one outstanding dispute involving RAI co-ordinator hours at a nursing home, but that in all other disputes between the parties involving the opening words of article 2.06 (i.e. "The Employer will assign at least the same number of total bargaining unit RN hours that are equal to those hours that were scheduled in the last week ending prior to June 30, 2009 or June 30, 2011 as applicable") the parties have been able to discuss and ultimately resolve their disputes on mutually acceptable terms.

Similarly, with respect to disputes which engage the remainder of the language of article 2.06 we were advised that only one arbitration is outstanding and that an award with respect to the language addressing the respective concerns of the parties as expressed in their briefs has not been rendered. In all other cases involving a grievance about article 2.06 (b) – (f) the parties have been able to discuss and ultimately resolve their
disputes on mutually acceptable terms. In light of this, when considering the respective submissions of the parties about article 2.06, we contemplated adding to that article a provision similar to paragraph 4 of the 1997 Letter of Understanding. At this time we have decided not to tinker with the language however, as the parties continue to discuss and resolve the issues with respect to the application and interpretation of article 2.06 which they have raised in their briefs and oral submissions, the parties themselves may want to consider this option.

For all of these reasons we award status quo save that we direct that article 2.06 form part of the collective agreement between the Association and those nursing homes who have entered the group since the last round of bargaining. For these Employers the date in article 2.06 (a) will be June 30, 2014 and not June 30, 2009 or June 30, 2011.

The parties have both made a number of proposals which address changes to health and welfare benefits, sick leave, vacation, premiums (including shift premiums) etc. as well as a number of proposals specific to certain nursing homes. We have considered and reviewed their proposals and have determined to dismiss all other proposals except for the following:

**Time Off In Lieu**

The Association seeks to add standardized language to the collective agreement to provide employees the option of the equivalent time off at premium rates in lieu of premium pay. It notes this proposal is of no cost to the Nursing Homes. There are currently thirty-five (35) nursing homes that have some provision giving employees the option of equivalent time off in lieu of overtime.
The Employer opposes the proposal noting that the bargaining units in the nursing homes are generally small and that the addition of this type of central standardized language will add more complexity to scheduling in the nursing homes. It is administratively easier to simply pay over time rather than undertaking the task of tracking lieu time and arranging for lieu time off to be taken.

We direct that all language of a similar nature in the collective agreement be deleted or amended as necessary with the following new language:

16.13 An employee shall have the option of selecting compensating time off in lieu of overtime premium payment. Time off shall be at the appropriate premium rate (i.e. 1.5 hours off for each hour of premium overtime worked). Full-time employees may accumulate up to a maximum of two (2) lieu days in any year. Accumulated lieu days shall not be used for the purpose of extending vacation. Unless the Employer agrees otherwise, accumulated lieu time must be taken between January 6th and November 30th of the year in which it is accumulated failing which it will be paid out. Employees who wish to utilize a lieu day shall make their request in writing at least one week in advance of the next posting of the schedule. The scheduling of lieu days shall be finally determined by the Employer giving due consideration for the safe and efficient operation of the nursing home. Such requests shall not be unreasonably denied.

Blackader

Amend article 9.01 (b) and 9.18 of the collective agreement to reflect eighteen hundred (1800) paid hours rather than fifteen hundred (1500) paid hours.
Dated at Mississauga, this 4th day of February, 2015

Louisa Davie
Louisa M. Davie

I dissent/I concur
dissent attached
Elizabeth McIntyre

I dissent/I concur
dissent attached
Irv Kleiner
IN THE MATTER OF AN INTEREST ARBITRATION
UNDER THE HOSPITAL LABOUR DISPUTES ARBITRATION ACT

BETWEEN:

ONTARIO NURSES’ ASSOCIATION

(the “Union”)

- and -

PARTICIPATING NURSING HOMES

(the “Employer”)

DISSENT

I am in disagreement with the award of the Chair with respect to monetary issues.

My primary dissent is on the issue of wages. The Union’s proposal would have brought the hourly rates of these nurses in line with the market rate paid for Registered Nurses in other long-term care facilities and in hospitals. The Union proposed increases in the salary rates to eliminate the gap that currently exists between these nurses and their counterparts in other long term care homes. The Union proposed to completely close the gap in the first year of the renewal so that the homes grid and the 25 year rate payable at other homes would apply to these members. In the second year of the collective agreement the Union proposed the normative increase of 1.4%. The Employer proposed a 0.7% increase in each of the two years. In my view, it is was a reasonable expectation of these nurses that they be paid the market rate for their skills and qualifications. This award should have significantly closed, if not entirely eliminated, the gap. The result of the Chair’s decision will be to close the existing gap by 0.1%. While this is a move in the right direction it is not sufficient. The reasons that support a closure of the gap include the following:

1. The qualifications and skills possessed by Registered Nurses are distinct and identifiable. As found by Arbitrator McKechnie in the Rideaucrest award, Registered Nurses constitute a specific segment of the health care human resources market for which there is a market rate. Given that a very significant proportion of this labour market is made up of Registered Nurses who work within hospitals, the wage rates established in that employment setting are overwhelming evidence of the appropriate wage rates to be paid to Registered
Nurses generally in the health care human resources marketplace. These are the rates that are paid to Registered Nurses in long term care homes run by charities and municipalities (with a very few exceptions) and are the rates that should be paid to the nurses subject to this dispute: those employed by for-profit homes. The Union provided the Board with evidence that 17 nursing homes, that are affiliated with hospitals, pay the standard market rates for their nurses. So too do 5 additional homes with nursing home licences. This establishes that such homes can pay market rates for their nurses.

2. The Hospital Labour Dispute Arbitration Act (s.9(1.1)) directs interest arbitrators to take into account, amongst other things, “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”. While in some interest disputes, the comparability factor may be difficult to apply, that is not the case with respect to Registered Nurses employed in long-term care. There is a 100% overlap in the duties and responsibilities, i.e. the nature of the work performed, as between nurses working in homes for the aged and those working in nursing homes; there appears to be no dispute between the parties on this point. Furthermore the funding formula which is applied by the province to all long term care homes is identical except to the extent that for-profit homes receive supplemental funding from the province. For example, they receive funding for payment of municipal taxes. Indeed the employers in this case in no way rely on an inability to pay to justify the differential in wages.

The evidence before this Board is that nurses working in homes for the aged (as well as some nursing homes) have wage parity with hospital nurses. While in the past there had been some gaps between wages paid to nurses in homes for the aged and those in hospitals, those gaps have been eliminated; there is no longer any disparity in the wages. Historically, distinctions have been drawn between the “homes for the aged sector” and the “nursing home sector” both in terms of nomenclature and funding models. However, with the proclamation of the Long-Term Care Act, those distinctions no longer exist. There is now a completely integrated long-term care sector; any claim that there should remain two distinct sectors (one being nursing homes and the other being homes for the aged) for purposes of bargaining outcomes is completely artificial. With the legislative elimination of any distinction, so too should there be an elimination of any distinction in the wage rates. The only remaining distinction is that the homes that are the employers in this dispute are run by private enterprise on a for-profit basis. This is a distinction which cannot justify paying equal pay for equal work.

3. The Union provided unrefuted evidence that, in every other province in the country (except perhaps Quebec), nurses working in the long-term care sector are paid the same rate of pay as their hospital counterparts. The exception to this is Newfoundland where, as the result of a recent job evaluation process, nurses
working in long term care receive a $4,000 wage adjustment over their hospital counterparts. Equal pay in the other provinces is the case whether the nurses are covered by one collective agreement or many. Many of the very same chains participating in this arbitration also have homes in other provinces where they already pay the same rates as hospitals. I agree with the Union that there is no justification for a lower standard for nurses working in these long term care homes in Ontario.

4. The Union provided a costing of its wage proposal, which took into account the increases, weighted by the actual numbers of nurses at each level of the grid. The Union costed their proposal at 5.47% to achieve the market rate in the first year and then 1.4% in the second year to match the increases in other homes. The 5.47% estimate would bring nurses at all steps of the grid to market rates as well as adding the 25 year rate to the grid; the cost of bringing the first 9 steps of the grid to the market rate would be much less. The existing gap at the 8 year job rate is 2.8%. Any increases of this measure would certainly be well within the increases that have been awarded by other arbitrators even in the context of the Restraint Program announced in the Ontario Budget of 2010. The Union provided evidence that increases significantly greater than those proposed here have recently been awarded by a series of arbitrators in first agreement arbitrations. Furthermore, the 2.8% increase necessary to provide an equal grid in the first year of the contract (without the 25 year rate) is substantially in line with the increase in CPI in the relevant period.

5. The Chair has relied heavily upon replication as the overriding guiding principle in her award. Even if the illusive pursuit of “replication” in a sector which has never had free collective bargaining should be determinative of the outcome, the result reached in this case is very disputable. The evidence provided to the Board with respect to the history of bargaining between these parties does not demonstrate a precise replication of the hospital result. Quite to the contrary, the parties have by no means slavishly followed either the arbitrated or negotiated results in the hospitals. In fact, based on evidence presented by the Union, what they have done is slowly, but steadily, closed the gap in the percentage differential between hospital rates and those in the nursing homes. The differential in the “job rate” which reached a high of 15.32% as of May 1, 1999 has gradually been reduced to 2.86% as of January 1, 2011. This gap was maintained by the Stanley award and is now only marginally reduced by this award.

Overall, a much more significant move to close the gap in the compensation package paid to registered nurses in these facilities as compared with their colleagues in other long term care facilities and hospitals was justified in this round. It is to be hoped that, in further rounds of bargaining, these nurses can continue to progress towards the achievement of equal pay for equal work which is a completely justifiable and laudable goal. Nurses working in the very challenging roles within nursing homes are well
deserving of equitable terms and conditions of employment. While it is unfortunate that the opportunity for achieving true comparability was denied in this round of bargaining it is hoped that it can be achieved in future rounds.

February 3, 2015

“Elizabeth J. McIntyre”

Elizabeth J. McIntyre
Union Nominee
DISSENT OF EMPLOYER NOMINEE

While I am in complete agreement with the Chairperson Davie’s decision to once again reject the hospital parity position that was advanced by the Association in this proceeding (as it has been by ONA for more than 20 years), I would not have been inclined to award the 1.5% wage increase effective July 1, 2014.

That is not to say however, that I am in agreement with 1.4% per year wage increases for these nurses in July of 2015, as I would maintain that the Employers Representative presented a compelling case for more modest wage increases than those that have been awarded in each of the two years during the subject term. I simply wish to articulate the view that the 1.5% increase in the first year of the term is higher than what was warranted in the circumstances presented to this Board and, that the awarded rates of increase would not likely have been agreed upon by these Employers in free collective bargaining, especially while also having due regard to the Chairperson’s disposition of the Article 2.06, Staffing issue that was raised by the Employers.

Chairperson Davie also referred to the recent Award of Arbitrator Teplitsky with respect to the SEIU Master group of nursing homes. I acknowledge and agree that the SEIU Master Award is indeed part of the labour relations landscape for the long term care and that Mr. Teplitsky’s Award was highly relevant to the determination of this interest dispute. The SEIU Master Agreement, like most collective agreements in the nursing home sector, does not however include an equivalent to the Article 2.06 provision that exists in the expired ONA collective agreement that is before this Board. I would submit that this is a compelling reason for this Board to have awarded more moderate wage increases that are more closely aligned with what the Employers were proposing in this proceeding.

The staffing issue, was indeed a high priority issue for this group of Employers. The Employer approached this round of bargaining with the objective of deleting Articles 2.04 (the bargaining unit work protection provision) and 2.06 (the Staffing provision) or at the very least, deleting the staffing provision in Article 2.06. While the Chairperson appears to have placed considerable emphasis upon there not being a “demonstrable need” to delete Article 2.06, I cannot agree with that assessment for a number of reasons.

I would begin by stating that there was indeed a demonstrated need that was established by the Employers to delete Article 2.06. Having said that, I would also observe that in the course of replicating free collective bargaining, interest boards do not necessarily confine themselves to only assessing whether or not there is a “demonstrated need” for what a party is seeking through interest arbitration. By way of example, when the trade union movement identified the necessity of having collective agreement provisions which limited an employer’s ability to contract out bargaining unit work, I think it is fair to say that in virtually all of those cases in which this was advanced as an issue, the argument that was presented in support of the proposed language was not “need based” in the traditional sense. Unions argued that the provision was necessary so as to “ensure” employees’ job security. In those cases, Boards were generally not presented with evidence of actual contracting out nor with evidence of an employer’s plan to actually contract out bargaining unit work. Trade unions argued that this was a provision that was required “in the event” that contracting out ever became a viable option for an employer to pursue. Interest boards have generally been persuaded that job security is a high priority issue for employees and as such, boards have been inclined to award limitations on contracting out without there being an
established demonstrated need. Similarly, an Employer’s ability to properly manage its enterprise by deploying appropriate staff for the duties and responsibilities involved, is also a “high priority” issue for any organization and is a cornerstone for employers in the course of managing their businesses. There must be a balancing of interests however, between the right of an Employer to manage its enterprise and the right for employees to enjoy some level of job security. Article 2.06 is not a job security related provision, while Article 2.04 provides the Nurses with considerable job security.

Article 2.06 is a provision that in effect protects ONA’s nursing franchise. Article 2.04 is an expansive provision which more than effectively protects the Nurses’ jobs and with that provision already in place, Article 2.06 indeed constitutes a significant encroachment on the Employers’ ability to properly and efficiently manage their enterprises while also having to do so with increasingly less in the way of additional funding from government.

Article 2.06 removes the flexibility that the Employers require in order to operate and staff a nursing home as they deem appropriate. The Employers provide direct care to nursing home residents with funding that comes out of a nursing and personal care envelope which is established by the Ministry of Health and Long Term Care. All of that money must be allocated to resident care.

The difficulty is that Article 2.06 prevents these Employers from deciding how best to staff within the nursing department when faced with a budget restriction. Article 2.06 of the agreement sets out the maintenance of a specific number of RN bargaining unit hours in each of the Homes. To the extent that there can be a reduction in the number of RN hours, the Employers must come to ONA with cap in hand and attempt to persuade the Union that one of the very limited specific factors which would warrant a reduction in RN hours that are referred to in the language, exists. Any time that a decision is made by a Home to change the number of RN hours for legitimate operationally based reasons, we heard that ONA has challenged the decision. We also heard that some of the participating Homes have indeed faced a need to reduce the RN hours below the level that is referred to in Article 2.06 but that this has been met with resistance from ONA in virtually every case.

The Employers’ interest is simply to make best use of the Nursing and Personal Care envelope funding and to change staffing in order to improve resident care with the funding that is received from the Government. This has nothing to do with profit. By changing the staffing mix, the Employers derive no monetary advantage because the funding must remain within the envelope and used for direct care or, it must be returned to the Government. The only motive for the Employers in wishing to change the staffing complement and not be locked into using RN’s exclusively for a prescribed number of hours, is to provide a better level of resident care with the financial resources available. It is the Nursing and Personal Care envelope that funds staff salaries and other compensation for ALL employees in the nursing department, and nursing equipment and supplies. The classifications that are funded by this envelope include: the RN’s, Directors and Assistant Directors of Care, RPNs, Health Care Aides, and Activity Aides. But for the restrictions set out in Article 2.06, the Employers would be able to create a staffing model comprised of all of the classifications which is responsive to the needs of the residents within the Facility while also recognizing the funding limitations in the course of providing resident care.
While the Chairperson has considered the impact of the recent Central Hospital Award in determining the rate of increase in wages, I would observe that the Hospital collective agreement does not have an equivalent to Article 2.06. In my mind, the two issues must go hand in hand. It is not reasonable to conclude that these Employers would have agreed to the awarded wage increases while also retaining Article 2.06 in its current form. It is also not reasonable to expect that these Employers in a right to strike/lockout regime would have to take on the additional expense of the awarded wage improvements to the nurses without being able to respond operationally and reconcile their finances by utilizing a proper deployment of employees in different classifications who are all an integral part of the provision of resident care.

The Employer cited examples of what would trigger a different deployment of staffing which would also necessarily include a reduction in the number of RN hours. Those examples included: increases in WSIB premiums, an unanticipated and more costly HLDAA compensation award, Health and Welfare Benefit premium increases, increases to statutory benefit contributions, and any other unexpected increase in operational costs. These are all unanticipated expenses that are clearly beyond the control of the employers and which must also be reconciled with the limited funding that is received from the Ministry. Article 2.06 prevents the Employers from managing their enterprise as they should be able to when faced with unanticipated operating costs.

I began my analysis by observing that Article 2.06 is not an employee job security related provision. It is Article 2.04 that protects the Nurses’ jobs. Article 2.06 requires the Homes to fill every RN vacancy with RN hours in order to maintain the prescribed staffing number for nurses. To make matters worse, the current staffing numbers that are restricted by Article 2.06 include all RN bargaining unit hours. Some of these hours relate to positions that are not even direct resident care hours (such as for example, the RAI coordinator, Assistant Director of Care, nurse manager, or clinical coordinators), but yet they are all counted as RN hours as part of the Employers’ maintenance obligations.

One of the difficulties also arises out of the Employers’ inability to use RPNs in situations in which an RN voluntarily leaves the Employer or, an RN position is vacated for any other reason. Registered Nurses do not exclusively own all of the work which they do. We heard that RPNs are competent to perform and actually do perform many of the same job duties that are performed by the RN’s. The real underlying issue that this Board ought to have resolved in favour of the Employers relates to determination of employee complement. The Employers should not be prohibited from changing the complement of RNs, RPNs and PSWs as they see fit (which right is already subject to prescribed legislative restrictions with respect to the scheduling of nurses hours in long term care facilities, and, other collective agreement provisions such as the Professional Responsibility provision).

The operators of these Nursing Homes have considerable expertise and also employ highly qualified senior managerial personnel who are equipped to determine and assess the appropriate deployment of employees in the face of increasingly more scarce government funding. That is precisely why the Employers have secured the express management right to “plan, direct, and control the work and direction of employees and the operation of the Facility……and the increases or reduction of personnel in a particular area or on the whole”. It is imperative to have that right (as it is articulated in Article 3.01 of the Collective Agreement), as well as the ability to meaningfully exercise it. Unfortunately, that right to manage employee deployment is diluted and undermined as a result of Article 2.06, at a time when the ability to fully exercise that
right could not be any more important. In this economic environment and with the funding limitations that these Employers must contend with, I think it is fair to conclude that in a right to strike/lockout environment, these Employers would not have been prepared to resolve a collective agreement that continued to include Article 2.06 in its current form while also providing the kinds of wage improvements that are indicated by the Chair.

Finally, I am persuaded that Article 2.06 creates labour relations imbalance in the context of free collective bargaining. The Chairperson’s decision to retain this Article in turn creates an imbalanced bargaining outcome that is characterized as an outcome that these parties would have agreed to on their own.

Seasoned union negotiators fully comprehend that receiving extraordinary compensation improvements that cannot be financially sustained by an employer will attract consequences (such as layoffs, reductions in hours, and, redeployment of duties to less expensively paid employees). In this environment (where mandatory interest arbitration is the prescribed process for resolving a bargaining impasse), the Employers are entirely in the hands of an interest arbitration board which will determine compensation improvements. What is particularly troublesome is the fact that regardless of what is awarded by any interest board and, of how unaffordable the improvement may be, the Employer is prevented from adjusting staff complements so as to reconcile an onerous award with the available funding that it receives from the provincial government. ONA effectively has a license to propose just about anything it wants (including hospital parity) with the knowledge that RN hours cannot be affected because of the existence of the Article 2.06 obligations. That is not fair……….it is not balanced…………and most importantly, in this round of bargaining, it would not have been achieved with these Employers with the economic sanctions of strike and lockout looming in the background.

As such, I would suggest that the decision to retain this Article 2.06 in conjunction with the awarded wage increases do not represent a replicated collective bargaining outcome. At the very least, I would submit that the Chairperson ought to have modified Article 2.06 so as to relieve an individual home within a chain of having to maintain the prescribed Article 2.06 hours thresholds when such RN hours are not warranted within that Home.

The 1997 letter of understanding that the Chairperson refers to in her Award contained such a modification which at least afforded a chain some modest flexibility so as to allow the Employers to staff homes within their respective chains in a manner that was more responsive to the resident needs within the individual home. Part of that model then would allow a chain employer to shift the RN hours to another home within that chain where the RN hours were indeed required, but allowed the Employers to remain compliant with the staffing obligations that were in the Staffing Letter of Understanding. At least in that way, nursing and personal care dollars are being spent judiciously and where actually needed as opposed to having to spend the dollars solely for the purpose of remaining slavishly compliant with Article 2.06.

Dated this 3rd day of February, 2015.

Irv Kleiner
Employer Nominee