IN THE MATTER OF AN ARBITRATION
PURSUANT TO COLLECTIVE AGREEMENTS
AND A MEMORANDUM OF AGREEMENT DATED APRIL 29, 2020

BETWEEN

PARTICIPATING NURSING HOMES

(the "Homes")

and

ONTARIO NURSES' ASSOCIATION

(the "Union")

COVID-19 POLICY GRIEVANCE
AND GRIEVANCES ATTACHED HERETO AS AN APPENDIX

SOLE ARBITRATOR: John Stout

APPEARANCES:

For the Homes:
John J. Bruce – Hicks Morley LLP
Ian R. Dick – Hicks Morley LLP
Mitchell R. Smith – Hicks Morley LLP
Bob Bass – Bass Associates Pro. Corp.
Mary-Claire Bass – Bass Associates Pro. Corp.

For the Union:
Philip Abbink – Cavalluzzo LLP
Janet Borowy – Cavalluzzo LLP
Danielle Bisnar – Cavalluzzo LLP
Sharan Basran – ONA Sr. Executive Legal
Beverly Mathers – ONA Chief Executive Officer
Pat Carr - ONA Manager II Labour Relations
Nicole Butt – Manager Litigation Team

HEARINGS HELD VIDEO CONFERENCE ON MAY 1, 2 AND 3, 2020

AWARD

INTRODUCTION

[1] I was appointed by the parties pursuant to a Memorandum of Agreement dated April 29, 2020 (the "MOA") to hear all grievances filed by the Ontario Nurses' Association (the "Union" or "ONA") at a number of "Participating Nursing Homes" (the "Homes") relating to health & safety measures arising as a result of the COVID-19 pandemic.

[2] ONA represents the Registered Nurses ("RNs" or "nurses") at many unionized Long-Term Care Homes (LTC homes) in Ontario, including those nurses employed at the Homes.

[3] The parties agreed that all the ONA grievances filed under collective agreements between the Homes and ONA would be consolidated and heard as a "Central Rights Arbitration" case with a bottom line decision issued by me no later than May 10, 2020. Attached to this award are most of the grievances relating to the issues I address in this Award, subject to errors and omissions that I shall resolve if necessary.

[4] I was granted broad powers to control the process and expedite the hearing, including and not limited to receiving evidence by way of affidavits, will says, or statutory declarations, videoconferencing, teleconferences, or alternate means. In order to expedite the hearing and in order to narrow the issues, the parties agreed that I could act as mediator-arbitrator in a manner similar to that provided for under s. 50 of the *Labour Relations Act, 1995* S.O. 1995, c.1 Sched. A (the "*LRA*"). As a result, I was able to identify the material facts necessary to resolve this matter and conclude the hearing in an expedited manner.

THE ISSUES IN DISPUTE

[5] ONA's grievances allege that the Homes violated their respective collective agreements, the *Occupational Health & Safety Act*, R.S.O. 1990. C.O1 ("*OHSA*"), section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), and any other relevant legislation. ONA also asserts that the Homes breached their "duty of care" owed to its employees, including failing to take adequate measures to ensure the safety of RNs and healthcare professionals, failing to provide adequate personal protective equipment ("PPE"), failing to permit employees to self-isolate where merited, failing to follow the "precautionary principle," and failing to take every precaution reasonable in the circumstances arising as a result of the extra-ordinary threat posed by the COVID-19 pandemic.

[6] The Homes deny violating their collective agreements with ONA, *OHSA*, the *Charter* and any other relevant legislation. The Homes submit that they have complied with all legal requirements, including required Directives and any duty of care they have with respect to the nurses ONA represents. The Homes insist that the grievances are really about the appropriate use and allocation of scarce and essential limited medical resources.

BACKGROUND

[7] One need only turn on their television or visit a news website to appreciate the facts giving rise to this matter.

[8] On March 11, 2020 the World Health Organization (WHO) declared a pandemic of the disease COVID-19, which is a new disease caused by the severe acute respiratory syndrome coronavirus 2 (SAR-CoV-2). The pandemic is a global phenomenon that was unforeseen, and the world was caught unprepared.

[9] On March 17, 2020, the Ontario government declared a province-wide state of emergency pursuant to s. 7.01(1) of the *Emergency Management and Civil Protection Act*

("*EMCPA*"). This state of emergency continues to be in effect until May 12, 2020, unless otherwise extended.

[10] COVID-19 has spread throughout the world and infected thousands of people in Ontario. Ontario's LTC homes have been hit particularly hard by this virus. Many residents have contracted the virus and died. The virus has also ravaged the healthcare staff in LTC homes, infecting some 1594; three of whom have paid the ultimate price caring for our most vulnerable citizens. At this point no nurse represented by ONA has died.

[11] This is not the first time a Severe Acute Respiratory Syndrome ("SARs") disease has befallen the citizens of Ontario. In February 2003 an outbreak of SARs occurred in Toronto. The outbreak was most notable in Toronto Hospitals where healthcare workers were infected. Two nurses and one doctor died in their efforts to treat patients infected with the disease.

[12] The 2003 SARs outbreak was also unforeseen, and Ontario was unprepared. But the 2003 SARs outbreak does not compare in size or in the effects we have seen in the present circumstances, most notably with respect to the rate of infection and total deaths. The current situation is truly an unprecedented event in modern history. The last pandemic to affect Canada, and other nations around the globe, on this scale occurred over 100 years ago when the 1918 Spanish influenza pandemic caused the death of millions around the globe.

[13] In response to the COVID-19 pandemic, the Chief Medical Officer of Health for Ontario (CMOH), Dr. David Williams, has issued Directives, including Directive #3 (initially issued on March 22, 2020 and last updated April 15, 2020) and Directive #5 (initially issued for hospitals only on March 30, 2020, then last updated and expanded to LTC homes on April 10, 2020), pertaining to practices and procedures in LTC homes and to supply personal protective equipment ("PPE"), including the N95 respirator masks in LTC homes. These Directives were issued pursuant to the *Health Protection and Promotion Act,* R.S.O. 1999, c.H7 ("*HPPA*"). The CMOH may issue more Directives in the future as the COVID-19 pandemic evolves.

[14] Some of the Homes have experienced outbreaks of various proportions. Many residents and healthcare workers have been infected, including nurses. As ONA puts it, once the virus gets into a LTC home it can spread like wildfire, and it has done so in a number of cases. COVID-19 seems to be spreading easily and sustainably from person-to-person in certain areas. In order to prevent the spread of COVID-19, governments have advised or mandated various measures, including physical distancing and thorough hand hygiene.

[15] ONA has raised a number of legitimate concerns with respect to their members who are working under a very stressful and unprecedented set of circumstances. ONA's concerns range from access to PPE, to communication, testing, cleaning, staffing, cohorting and self-isolation. The Homes also raise legitimate concerns with respect to appropriate use of PPE and to maintaining an adequate supply of PPE, which in some cases disappeared at an alarming rate. There is no evidence of any nurses being responsible for the disappearance of PPE. The Homes are also experiencing a shortage of staff at this critical time and an increased workload. What is readily apparent is that both management and the nurses are also under a tremendous amount of stress trying to cope with this dreadful pandemic, which is wreaking havoc within many of their LTC homes.

[16] It does not surprise me that in these extremely stressful conditions some people may have made mistakes, misjudgements or acted in a regretful way. The fact is that the world was not prepared for the crisis that has unfolded these past few weeks. We really are in unchartered waters and both nurses and management are just trying to keep their heads above water. On the bright side both of these parties and those they represent have a common goal, which is to keep themselves and those they care for healthy and safe.

STATUTORY CONSIDERATIONS AND THE COLLECTIVE AGREEMENTS

[17] This matter involves issues relating to the health and safety of nurses in their workplace. The *OHSA* sets out the rights and duties of all parties in a workplace, as well as procedures for dealing with workplace hazards and any needed enforcement.

[18] Sections 25, 26 and 27 of *OHSA* set out the duties of an employer and supervisors, of particular relevance to this matter is section 25(2)(h) of *OHSA*, which provides:

> **Duties of employers**
> **25** (1) An employer shall ensure that,
> …
>
> **Idem**
> (2) Without limiting the strict duty imposed by subsection (1), an employer shall,
> …
> (h) take every precaution reasonable in the circumstances for the protection of a worker;
> …

[19] Section 28 of OHSA provides that all employees have a duty to comply with *OHSA*.

[20] The Notice requirements under Part VII of *OHSA*.

[21] The collective agreements between ONA and the Homes contain an article entitled “Health and Safety” (Article 6.06) which, provides:

> (i) The Employer shall:
>
> i. Inform employees of any situation relating to their work which may endanger their health and safety, as soon as it learns of the said situation;
>
> ii. Inform employees regarding the risks relating to their work and provide training and supervision so that employees have the skills and knowledge necessary to safely perform the work assigned to them; When faced with occupational health and safety decisions, the Home will not await full scientific or absolute certainty before taking reasonable action(s) that

reduces risk and protects employees.

iii. Ensure that the applicable measures and procedures prescribed in the *Occupational Health and Safety Act* are carried out in the workplace.

[22] Relevant to this matter is the Commission of Inquiry into the 2003 SARs outbreak, chaired by Justice Archie Campbell. Justice Campbell issued a Report, titled *Spring of Fear*, wherein he made the important recommendation that the "precautionary principle" is to be put into action in order to prevent unnecessary illness and death. Justice Campbell explained that this precautionary principle applies where health and safety are threatened even if it cannot be established with scientific certainty that there is a cause and effect relationship between the activity and the harm.

[23] The CMOH issued Directives #3 and #5 in accordance with section 77.7 of the *HPPA*. Section 77.7 of the *HPPA* incorporates the precautionary principle referred to by Justice Campbell, relevant to the matter before me are the following:

Directives to health care providers

77.7 (1) Where the Chief Medical Officer of Health is of the opinion that there exists or there may exist an immediate risk to the health of persons anywhere in Ontario, he or she may issue a directive to any health care provider or health care entity respecting precautions and procedures to be followed to protect the health of persons anywhere in Ontario. 2007, c. 10, Sched. F, s. 15.

Precautionary principle

(2) In issuing a directive under subsection (1), the Chief Medical Officer of Health shall consider the precautionary principle where,

(a) in the opinion of the Chief Medical Officer of Health there exists or may exist an outbreak of an infectious or communicable disease; and

(b) the proposed directive relates to worker health and safety in the use of any protective clothing, equipment or device. 2007, c. 10, Sched. F, s. 15.

Must comply

(3) A health care provider or health care entity that is served with a directive under subsection (1) shall comply with it. 2007, c. 10, Sched. F, s. 15.

No coercion of professionals

(4) For greater certainty, a directive under subsection (1) may not be used to compel regulated health professionals to provide services without their consent. 2007, c. 10, Sched. F, s. 15.

No conflict with OHSA

(5) Despite subsection (1), in the event of a conflict between this section and the *Occupational Health and Safety Act* or a regulation made under it, the *Occupational Health and Safety Act* or the regulation made under it prevails. 2007, c. 10, Sched. F, s. 15.

[24] Schedule 3 of Regulation 82/20(2), which is an Order under 7.02(4) of the *EMCPA*, provides that LTC homes as an essential business shall do the following:

1(1) The person responsible for a place of business that continues to operate shall ensure that the business operates in accordance with all applicable laws, including the *Occupational Health and Safety Act* and the regulations made under it.

(2)The person responsible for a place of business that continues to operate shall operate the business in compliance with the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting.

DECISION

[25] The parties have requested a bottom line decision disposing of the grievances by no later than May 10, 2020. It would be next to impossible to thoroughly review the evidence and make evidentiary decisions in this award in such an expedited process. At this time, given the state of emergency in Ontario and the crisis in the LTC homes, it would also serve no useful labour relations purpose to assign any blame or make hasty judgment of what occurred in the past. Instead, an immediate full and final binding decision is required to provide the parties with guidance to move forward, working together to care for our most vulnerable elderly citizens.

[26] During mediation-arbitration, the parties agreed that certain issues would be better addressed in collective bargaining, which will soon be occurring. Hopefully by that point in time, when the parties meet to bargain, this pandemic will have passed and there

will be an appropriate amount of time for assessment and reflection of what may be needed to better prepare for any similar event that may befall us in the future. Therefore, this Award only addresses issues that require immediate resolution.

[27] In reviewing the voluminous material put before me, the words of Winston Churchill during the London Blitz immediately come to mind; “Never was so much owed by so many to so few”. These words are equally applicable to the sacrifice being made by the mostly diverse female healthcare workers and management working in our LTC homes. We all owe these brave individuals our sincere gratitude for their hard work and dedication. The parties to this matter have also worked extremely hard to ensure that I had the material necessary to resolve the dispute. They have undertaken this while at the same time serving their constituents at a time of crisis.

[28] After spending a number of days with these parties and reviewing all the evidence they provided to me, I am of the view that this Award must provide a path forward in a more positive way so that the parties can work jointly in their struggle to combat this terrible disease and protect our valuable healthcare workers and the Homes’ vulnerable residents. As indicated earlier, the parties share mutual goals.

[29] The parties are in agreement that they must comply with the CMOH Directives applicable to LTC homes, including Directives #3 and #5. They understand that acts of coercion are prohibited under the *HPPA*, as are reprisals under the *OHSA*, see s. 50. There can be no dispute that nurses are entitled to a safe workplace where they are protected in accordance with the Directives, *OHSA* and the collective agreements.

[30] Management has the right to run their operations as they see fit, so long as they do so in a manner consistent with their legal obligations under the collective agreements, statutory or otherwise. Management has the statutory obligation to take all precautions reasonable in the circumstances to address issues of health and safety for both employees and residents. In compliance with their rights and obligations, including compliance with the Directives, the Homes also have the right to implement their own policies, procedures and protocols. The Homes have recently adopted a new COVID-19

Measures protocol, which they have shared with ONA and me. The Homes agree that they will apply their protocol in accordance with my Award.

[31] The Homes have given me their assurances that they will use their best efforts to obtain PPE, including surgical masks, N95 respirators, gowns, gloves and face shields. The Homes have indicated that if fit testing of N95 and other respirators has not already been undertaken then it will be done as soon as possible.

[32] The parties agree to communicate with respect to ways to manage the precious stock of PPE (e.g. using expired N95 respirators for fit testing) to make sure there are sufficient supplies for nurses and other staff when needed. The parties agree that the government has an important role in these endeavours.

[33] The parties also agree that physical distancing in the LTC homes must be adhered to in order to prevent the spread of infection.

[34] The Homes have agreed to follow up and ensure that training relating to infection control, physical distancing, proper use of PPE, including donning and doffing, and disposing has occurred, and where it has not, it will be addressed within seven days of the Award.

[35] The Homes are aware of the need to have a vigilant infectious disease surveillance program. The parties will comply with Public Health and Ministry of Health and Long-Term Care Directives with respect to regular screening and assessments. Currently staff and residents need to be screened or assessed twice daily. The Homes shall support Provincial initiatives for screening and assessing all staff and residents. The parties undertake to review this issue at an appropriate time.

[36] It was agreed by the parties that the Homes will advise staff of residents who test positive so that reasonable and proper safety precautions can be put in place. The Homes have agreed to advise the JHSC of the availability of PPE at the same time as when they advise the government. Upon becoming aware of any workplace hazard, the Home will

identify any such hazard to employees. It is agreed that ONA shall appoint their own representatives to any JHSC positions. If no one is available to act as the ONA JHSC member, then the information will be provided to the ONA Bargaining Unit President (BUP) or if no BUP then the LRO. The Homes acknowledge their obligation to provide notice of occupational illness (based on clinical assessment or positive test results, whichever comes first) to the Ministry of Labour, the JHSC and ONA as required by *OHSA* and its Regulations.

[37] The Homes shall make available to nurses, the JHSC and the local BUP, copies of IPAC, outbreak and pandemic policies at the Homes, as required by the collective agreements (see article 21).

[38] The Homes shall ensure that a functional Internal Responsibility System is in place, including a functioning JHSC which holds regular meetings, and consultations, as required by the collective agreements and *OHSA*. If the JHSC has not met within the past 30 days, then they shall meet within the next 7 days. The JHSC will meet, remotely if necessary, throughout the pandemic.

[39] It is also agreed that in the current situation, enhanced cleaning and disinfection must be maintained, including common areas, doorknobs, door frames, handrails, assistive devices, shared bathrooms and bathing areas. The Homes shall maintain an appropriate hand hygiene program and provide access to facilitate access to point of care hand hygiene agents, consistent with s.229(9) of O.Reg.79/10 General.

[40] The parties agree that employees who test positive should not be working until they receive two consecutive negative specimens at least 24 hours apart or they may return to work 14 days after symptom onset if they are symptom free, whichever is earlier.

[41] The Homes will facilitate an employees' WSIB claim by expeditiously providing any documents, forms or information required by the WSIB.

[42] In order to clarify any issues relating to the use of PPE and cohorting, I have found it appropriate to make Orders to ensure that the parties have clear direction and the ability to resolve any disputes in an expedited manner. The Orders that follow are not made based on any finding of fault. Rather the Orders are issued in order to further peaceful labour relations and to provide for the health and safety of employees, pursuant to the collective agreements, *OHSA* and the Directives. Therefore, after carefully considering the evidence and the parties' submissions, I make the following Orders.

[43] The Homes, including their agents, employees, and those acting under their instruction are ordered to provide nurses working in their respective LTC homes with access to fitted N95 respirators, equivalent or greater protection and other appropriate PPE (appropriate gowns, gloves and face shields) when assessed by a nurse at point of care to be appropriate and required, as set out in Directive #5 issued by the CMOH.

[44] Nurses must perform a point of care risk assessment (PCRA) before all of their resident interactions. If a nurse determines based on the PCRA, and based on their professional and clinical judgement, which is to be exercised reasonably, on a case by case basis, taking into account short term and long term needs, other appropriate health and safety measures, and in accordance with their professional obligations, that they require fitted N95 respirators (or equivalent or greater protection) and other appropriate PPE (gloves, gowns and face shields), the Homes will not deny access to such available PPE. To be clear, nurses are not to be impeded in their reasonable, good faith professional assessment at point of care as to what constitutes appropriate PPE.

[45] In addition, the parties agree that both the Home and nurses must engage in the conservation and stewardship of PPE.

[46] In addition to the above, fitted N95s must be worn whenever aerosol-generating medical procedures ("AGMPs") are performed, are frequent or are

probable. AGMPs include, but are not limited to, the following if applicable to LTC homes:

(a) Intubation and related procedures (e.g. manual ventilation, open endotracheal suctioning)

(b) cardiopulmonary resuscitation during airway management

(c) bronchoscopy

(d) sputum induction

(e) non-invasive ventilation (i.e. BiPAP)

(f) open respiratory/airway suctioning

(g) high frequency oscillatory ventilation

(h) tracheostomy care

(i) nebulized therapy/aerosolized medication administration

(j) high flow heated oxygen therapy devices (e.g. ARVO, optiflow)

(k) autopsy

The nurse may also take into consideration the following when making her/his PCRA:

- The resident may exhibit neuropsychiatric behaviours that result in the expression of body fluids, excretions or aerosols during the course of routine care;

- The resident may exhibit symptoms or behaviours, or have underlying diagnoses that result in the expression of body fluids, excretions or aerosols during the course of routine care; or

- Any other considerations that are appropriate given the then current science, evidence and Directives respecting COVID-19 transmission, N95 masks and PPE and the then current COVID-19 circumstances at the Home.

[47] While the Homes reserve the right to store PPE in secure locations, a sufficient supply of all appropriate sizes of fit-tested N95s will be made readily available, subject to the provisions regarding sufficient supply referenced below.

[48] The Homes will pursue all proper avenues to procure sufficient supply of all PPE, including but not limited to N95s and equivalent or greater protection to meet current and projected usage rates, and will share their efforts with the JHSC.

[49] The nurses who exercise their right to access fitted N95 facial respirators and other appropriate PPE (as noted above) when assessed at point of care to be appropriate and required, shall not be intimidated, threatened or coerced in any way, including but not limited to threatening to impose a penalty or discipline, because the nurse acted in accordance with her/his rights under this Award.

[50] If any nurse is intimidated, threatened or coerced in any way, including but not limited to imposing a penalty or discipline, or being threatened with a penalty or discipline, because the nurse acted in accordance with her/his rights and obligations under this Award, then the matter shall be referred back to me on short notice for an expedited hearing (evening or weekend if necessary), in accordance with the broad powers and jurisdiction granted to me under the MOA.

[51] Management at the Homes retain their rights under the collective agreement to manage performance in appropriate circumstances, or to discipline for just cause, subject to a nurses' right to file a grievance and have it resolved by arbitration.

[52] The Homes are ordered to implement administrative controls such as isolating and cohorting of residents and staff during the COVID-19 crisis and any subsequent waves, as set out in Directives issued by the CMOH, and as covered by this award.

[53] It is acknowledged that cohorting will need to take into consideration the specific site, including physical layout, occupancy, staffing, Public Health guidance, individual resident health impacts and other relevant issues. At the same time, every effort must be made to cohort positive residents in the same area to protect the residents and staff from spread of the virus. Cohorting considerations will include but not be limited to moving residents to vacated rooms, moving residents to common areas that are closed to ensure physical distancing and isolation such as dining rooms and recreation rooms, moving

residents to currently vacated rooms that were used for respite or convalescent care, and where vacant rooms are not available for cohorting residents, the erection of floor to ceiling impermeable physical barriers between positive and negative residents.

[54] Subject to the availability of staff and where practical, the Homes will make all reasonable efforts to cohort staff between suspected or confirmed COVID-19 residents and residents who have not been infected.

[55] Any disagreement with respect to cohorting at a specific Home shall be referred back to me on short notice for an expedited hearing (evening or weekend if necessary), in accordance with the broad powers and jurisdiction granted to me under the MOA.

[56] The grievances before me are resolved in accordance with this award.

[57] My Orders and the parties' agreements shall be in effect until such time as I Order otherwise. In the event that there is a change in circumstances that significantly impacts my Orders, the parties are free to vary my Orders by written agreement to suit their immediate needs, or if they cannot agree, then they may bring the matter before me on short notice. In accordance with the parties' agreement, I remain seized.

Dated at Toronto, Ontario this 4th day of May 2020.

John Stout- Arbitrator