A W A R D

Introduction

1. This Board of Arbitration was established pursuant to a Settlement Agreement reached on 25 April 2012 between the Nova Scotia Government and General Employees Union ['NSGEU'/'the Union'] and the Capital District Health Authority ['CDHA'/ 'the Employer'] comprising a "full and final settlement of all outstanding issues" between them. Once ratified, the Settlement Agreement was to be incorporated into a renewal Collective Agreement for the CDHA Health Care Bargaining Unit for which NSGEU Local 42 holds bargaining rights, with a three-year term, effective 01 November 2011 to 31October 2014.

2. The health care bargaining unit embraces approximately 3800 employees engaged at eleven health care facilities within the CDHA, principally at the Queen Elizabeth II Health Sciences Centre [QE II], the work site of some 80% of the bargaining unit. Another 12% work at either the Nova Scotia Hospital for the treatment of mental disorders or the Dartmouth General Hospital; the remainder employed at smaller facilities in the District. Apart from nurses who are organized within their own single-profession bargaining unit in the CDHA, and indeed similarly throughout the Province, the employees in this bargaining unit provide acute health care services across the entire spectrum of licensed and unlicensed professional classifications within the health care sector.

3. On several fronts, CDHA itself is the largest health authority in the Province: in the number of employees there engaged; in the size of its budget – in 2012-13 in excess of $810 million, thereby accounting for more than 20% of provincial health care expenditures; and in the size of its client base, servicing as it does, more than 40% of the population of Nova Scotia, and providing as well secondary, tertiary and quaternary acute care services for patients drawn from across Atlantic Canada. The driving engine of this vibrant health care District is the QE II. Affiliated with Dalhousie University's Faculty of Medicine and the Health Professions, it is a world-class health care institution which integrates within its walls, first, sophisticated and innovative research activities; second, cutting-edge acute care initiatives which draw upon that research; third, a cadre of clinicians second to none across the entire spectrum of medical specialties; and fourth, a seedbed for the teaching and training of successive cohorts of new entrants into the medical and other health professions.

Background to these Arbitration Proceedings

4. Direct bargaining between the parties had been of only a few days duration in early February 2012, the conciliation process even shorter, and by mid-April the Union had served notice on the Employer of strike action to commence at 12:01am on 25 April. That notice prompted the Employer to take precautionary steps to ameliorate the effects such strike action

would have on the delivery of health care services, by the cancellation of many elective procedures and the gearing down of much of its operation. As provided for under the terms of article 6.03 of the expired Collective Agreement, the parties had jointly determined the level of emergency services to be maintained in the event of a strike – approximately 30% of the bargaining unit to continue to provide essential health care services in the public interest.

5. As one would expect, the prospect of a strike by members of the largest health care bargaining unit in the Province, employed at facilities within the largest provincial District Health Authority, principally at the QE II, the premier health care complex in Atlantic Canada, was a matter of grave public concern. For apart from its primary impact, the secondary effects of such a strike would ripple through the entire health care system of the Province and beyond throughout the Atlantic Region, with unforeseeable consequences for the citizenry whose access to such first-class state-of-the-art acute health care services would be compromised.

6. Government was sensitive to that reality. Several days before the strike date deadline, the Minister of Labour and Workforce Development, acting pursuant to the Preventive Mediation provisions of the *Trade Union Act* [s.40(1)], appointed Bruce Outhouse, QC as Mediation Officer to assist the parties to settle the matters in dispute between them, and so avert imminent strike action by members of the bargaining unit. With the steady mediatory assistance of Mr. Outhouse, an arbitrator and mediator of national renown, the parties spent five days in intensive closed-door discussion – the Union postponing the original strike deadline so as to allow talks to continue – and on 25 April they entered into the Settlement Agreement which brought an end to their dispute. Members of the public breathed a sigh of relief when news of the settlement broke. But not only these. Members of the bargaining unit too were relieved, as was the Employer. For the Board is well aware that no one whose career is devoted to the health care of others takes lightly the impact which a withdrawal of services would have upon the lives of so many.

7. Now, despite their best efforts during the mediation process, the parties were unable to reach agreement on wages. However, both had come to the realization, under the mediatory guidance of Mr. Outhouse, that it would be not only in their own interest, but more importantly in the general public interest, to resolve their dispute without needless recourse to disruptive strike action. And so, they agreed to have that one outstanding issue – wages - determined by way of voluntary binding interest arbitration. The parties set the terms of that process, which stipulated in relevant part as follows:

> **Arbitration Agreement**
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> NSGEU and Capital Health agree to submit the issue of increases in the rates of pay to final and binding arbitration by a Board of Arbitration.
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> NSGEU and Capital Health will both name a nominee to the Board of Arbitration and provide the other party with the names of three qualified persons who are acceptable to serve as Chair of the Board of Arbitration by April 30, 2012.

> The Chair of the Board of Arbitration shall be a person who is generally acceptable as a labour arbitrator and who is available to conduct the arbitration hearing by June 3, 2012 and to render a decision by June 15, 2012.
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> …
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> NSGEU and Capital Health shall provide written submissions and documentary evidence to the Board of Arbitration at least seven days before the hearing by the Board; the hearing shall be limited to oral submissions from the parties.
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> The Board of Arbitration shall issue an award which determines the rates of increases in pay of all employees in the bargaining unit during the renewed Collective Agreement over a term of three years starting on Nov.1, 2011; the rates of increases in the award shall not be less than a total uncompounded percentage increase of 6.5 per cent nor greater than a total uncompounded percentage increase of 9.05 per cent.
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> At the conclusion of mediation, Capital Health's last offer for a wage increase was:
> November 1, 2011 – 2%
> November 1, 2012 – 2%
> November 1, 2013 – 2.5
>
> At the conclusion of mediation, NSGEU's last offer for a wage increase was:
> November 1, 2011 – 2.9%
> November 1, 2012 – 2.9%
> November 1, 2013 – 3.25%
>
> The Board of Arbitration shall use its best efforts to render a final and binding decision on the issues by June 15, 2012.

8. The Board of Arbitration panel was struck in the first week of May, and on agreement of the parties the hearing set to take place in Halifax NS on the weekend of 02-03 June, submissions to be exchanged and forwarded to members of the Board earlier that week in soft copy, and to be formally filed on the first day of hearing. As referenced above, the terms of the Arbitration Agreement had stipulated that the Board was to issue an award setting "the rates of increases in pay of all employees in the bargaining unit", *ie* across the board increases [ATB] during the three-year term of the renewal Collective Agreement commencing 01 November 2011. But the Board's discretion in doing so was limited, for its award was to fall within the framework of the final offers of each of the parties at the conclusion of mediation with Mr. Outhouse: no less than the total increase of 6.5% which the Employer had put on the table; no more than the total increase of 9.05% which the Union had put on the table. That framework represented a snapshot in time of the bargaining positions of the parties as of 25 April. On the side of the Employer the offer of 6.5% over three years reflected the outer limit of the mandate given to it by the funding agency – the Government of Nova Scotia, as of that date.

9. But time is fluid, not static, and nowhere is this more evident than in the dynamic of collective bargaining. So it was here, for between 25 April, when these parties ceased bargaining directly with each other in favour of voluntary binding interest arbitration, and 02 June when the hearing process formally commenced, the Employer's mandate had been significantly, although indirectly, increased. Eight sister District Health Authorities across the Province, which had been engaged in bargaining within the same time-frame as the parties here, reached a common

settlement but with a different bargaining agent - the Canadian Union of Public Employees [CUPE], which represents employees in health care bargaining units within those Districts engaged for the most part in identical or nearly identical job classifications as those here. By the terms of the common settlement, Renewal Collective Agreements covering 2455 employees in seven healthcare bargaining units were penned, each for a three-year term commencing 01 November 2011 and terminating 31 October 2014, with wage increases totalling **7.5%** :

2% effective 01 November 2011;
2.5% effective 01 November 2012; and
3.0% effective 01 November 2013.

Identical wage terms covering 2025 employees in five clerical and six service units in those District Health Authorities were reached with CUPE in that settlement.

10. That cluster of settlements was reached in early May, prior to the date set by the parties for the filing of their written submissions, and so addressed by each of them in those submissions as well as orally at the 02-03 June hearing. In late May, the Canadian Auto Workers [CAW-Canada] reached a common settlement on the same terms with three more Health Authorities: three renewal Collective Agreements, each of a three-year term covering *inter alia*, bargaining units of health care employees engaged in identical or nearly identical job classifications as those here, with wage increases identical to those in the CUPE settlement totalling 7.5%. That common settlement was reached after the filing of written submissions by the parties, and so was only addressed in oral submissions at the hearing.

11. With these two settlement 'clusters', covering some 22 bargaining units, the collective bargaining landscape of the provincial health care sector has been altered. For the Government of Nova Scotia implicitly increased thereby the wage offer mandate of the CDHA to mirror that which led to the multi-unit settlements with CUPE and CAW-Canada. The Board accepts the written submission of the Union that the CUPE settlement with wage increases totalling 7.5% "effectively raises the floor for the wage increase that is to be determined by this arbitration." The Employer too, acknowledged in its written submission that "the CUPE settlement will be very persuasive to this Board." That said, the Board now turns to the governing principles applicable in this matter.

Governing Principles: General

12. The process of collective bargaining takes place within the context of principles over which there is consensus amongst labour, management, labour boards, and the courts; principles subsumed under the rubric of 'good faith' and its underpinnings of 'rationality' and the 'collective bargaining climate'. Similarly, the process of binding interest arbitration takes place within the context of principles over which there is consensus amongst labour, management, arbitrators and the courts. These principles too are subsumed under a rubric: 'replication' and its underpinnings of 'rationality' and 'comparability'. There is no dispute between the parties that

these are the general principles applicable, although there is disagreement as to their application in the setting of this particular bargaining relationship. That said, the Board adopts here the articulation of these principles by the unanimous Board of Arbitration in *Health PEI and UPSE*, [unreported Award issued 15 October 2010] as follows:

> 5. In their formal written submissions, both parties referenced inter alia an arbitral award penned by the Chair in the within matter which set out the general principles of replication and reasonableness which are understood to inform the interest arbitration process: *Halifax (Regional Municipality) and I.A.F.F. Local 268* (1978), 71 L.A.C. (4th)129. The arbitrator is to fashion the terms of a collective agreement which to the extent possible replicate what would have been the outcome had the parties engaged in free collective bargaining where the option of economic duress remains open to them, ie the strike or lockout. Bargaining itself being a rational process, reasonableness should be a touchstone of the arbitral award as it is the duty to bargain in good faith.
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> 6. In seeking the somewhat elusive goal of replication arbitrators have articulated several criteria to take into account, the most salient of which for our purposes here are comparability and the general economic climate in which the public employer functions. It is a truism that this is a time of economic restraint, and it was understood by both parties that in fashioning an award the Board would be guided by the pattern of recent settlements and arbitral awards in the provincial public sector. As to comparability, the parties both acknowledged that the appropriate comparator group was health care employees engaged in the public sector in the Atlantic Provinces. This has been the comparator group historically taken into account throughout the region both by parties in bargaining and by interest arbitrators. The underlying principle which validates the comparability factor is that it is only fair and just that employees be paid wages comparable to those paid to other employees who perform the same type of work, possess equivalent qualifications and exercise the same skills and abilities under similar circumstances.
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> 7. In a recent arbitral award governing the cognate IUOE Local 942 bargaining unit, one alongside which the employees here work, the Chair of the within matter addressed both the principle of replication and that of comparability, each of which must be understood to be nuanced in their application. There, he wrote:
>
> > Two principles are said to be paramount in the interest arbitration process. The first is replication, ie. that as nearly as possible, interest arbitration should yield the same outcomes as would recourse to economic sanction through the strike or lockout. The second is comparability,ie. that like work should be compensated by like wages. Both are more easily stated than applied, for in the case of each there are nuances and singularities rooted in the particulars of each collective bargaining relationship, not only its history alone, but that history as it intersects with other bargaining relationships, those with the same employer, and those with other employers. This is particularly so in the public sector where, absent some overwhelming countervailing circumstances, both the practice of the parties and arbitral jurisprudence accept that an established pattern of relationships should be maintained. Such a pattern cannot be static – there will always be variance, rooted both in disagreements between parties as to the actual contours of the pattern, and in external, largely economic factors which may lead occasionally to deviation in the pattern. [*PEI Health and IUOE 942*, unreported award dated 12 June 2010, at p.3]

13. The Board of Arbitration there went on to note that replication is a hypothetical concept. That being so, in the arbitral forum the interest arbitration board places great reliance on the evidence advanced by the parties before it as to the applicable factors each submits to be determinative: applicable wage pattern settlements, internal and external comparators, established patterns of relationships, here on the wage issue. We would add as well, established

patterns in a history of interest arbitration awards binding on the Employer and the Union, other bargaining agents, for the same or cognate bargaining units. Here, both parties prepared extensive written submissions buttressed by voluminous supporting materials which addressed these and other issues. These were of great assistance to the Board in crafting its Award.

Governing Principles: Particular

14. Here, three principles apply. One is unique to this particular Employer and the Unions which hold bargaining rights for employees engaged at its facilities: that the wages paid to employees engaged in providing acute health care services at CDHA should lead in Atlantic Canada and be in the middle of the Canadian 'pack'. This principle has been articulated and implemented consistently by interest arbitrators called upon to resolve bargaining disputes between CDHA and NSGEU. We endorse the principle, the development of which we discuss below under the rubric 'First in Atlantic Canada'. The second principle is that of standardization of public sector wage increases: that throughout the public sector across-the-board wage increases in any bargaining cycle should be uniform. We endorse the principle which we discuss below under the rubric 'Pattern Wage Increases'. The third principle is as old as the labour movement itself: that employees who perform the same type of work, possess equivalent qualifications and exercise the same skills and abilities under similar circumstances should be paid the same wages. We endorse the principle which we discuss below under the rubric 'Wage Parity'.

i. <u>First in Atlantic Canada</u>

15. The principle that the wages paid to health care employees at CDHA should place them in the lead in Atlantic Canada was first articulated in the mandatory Final Offer Selection Award of Arbitrator Susan Ashley which set the wage rates for Registered Nurses [RNs], Licensed Practical Nurses [LPNs], and other Health Care Employees for Collective Agreements of three-year terms, effective 01 November 2000 to October 31 2003 [unreported Award issued 13 August 2001, Joint Book of Authorities, Vol. I, Tab 4]. There she selected the final offer of the Unions for RNs which would place them "at first place in Atlantic Canada and the middle of the Canadian pack"[at p.21], on the basis that this would address a recruitment and retention challenge. In the case of the LPN's Arbitrator Ashley saw no recruitment or retention issue, and selected the Employer's final offer which "places them in a competitive wage position at fifth or sixth in the country, leading in Atlantic Canada based on current figures."[at p.25] In the case of the Health Care bargaining unit, Arbitrator Ashley rejected the Union submission of serious recruitment and retention issues across the entire unit, and considered across-the- board increases to be an inappropriate mechanism to resolve such issues that affected select classifications only. She selected the Employer's final offer[at p.30].

16. In the next round of bargaining following termination of the FOS Collective Agreements on 31 October 2003, NSGEU and CDHA agreed to voluntary binding interest arbitration to settle the unresolved terms of the Health Care Bargaining Unit Collective Agreement, principally wages. In an Award issued 18 August 2004 [unreported, Joint Book of Authorities, Vol. I, Tab 7], Arbitrator William Kaplan accepted the 'First in Atlantic Canada' principle, but significantly not as one moored to the recruitment and retention issue at all. Rather, he found it anchored in

the unique status of the CDHA as the leading health care employer in Atlantic Canada. "Whatever may be said for other rationales advanced by the parties", he wrote, "this Board"

> has been guided by the following operating principle. On the facts presented to us, we are persuaded that these bargaining unit employees employed by *the* leading health care employer in Atlantic Canada could reasonably expect, in free collective bargaining, that their compensation should be located at the forefront of wages paid for equivalent work performed in Atlantic Canada and in the middle of the Canadian "pack." Mention must be made of the fact that Arbitrator Ashley, last time round, directed outcomes that, significantly, recognized that employees of this employer should lead in the region and fall in the middle when compared to the rest of the country. It is noteworthy that the core of the previous employer, Victoria General Hospital, led health care wages in the province. Other arbitrators, directing outcomes at the predecessor hospitals, invariably considered both regional and national collective bargaining results. [at p.5]
> …
>
> To state the point again, this Board accepts that the claim to first in Atlantic Canada has more than arguable legitimacy given both the value of the work, as reflected in comparable collective bargaining outcomes in the region and the country, and the institution where that work is being performed.[at p.6]

17. The position of both parties had been that the Award should be framed in terms of equal across-the-board percentage increases for all classifications in a Collective Agreement of three years' duration, effective 01 November 2003. The parties had always bargained across-the-board wage increases. Arbitrator Kaplan crafted an Award of quite a different profile. In it he accepted what he considered the Employer's across-the-board 'pattern wage increase' of 2.9% at the 01 November commencement date of each year of the Collective Agreement [termed by him the 'normative' increase. To that, he wedded, in the same three-year term, staged wage catch-up increases of 2.1% effective annually on 01 May, *but awarded only to such classifications which on annual review were determined not to be leading in Atlantic Canada.* Arbitrator Kaplan realized that even then, there would be some classifications which would not achieve the 'leading in Atlantic Canada' objective given the catch-up cap, other factors having been applied "to moderate the result."[at p.8]. He determined that to reach the objective of 'leading in Atlantic Canada' by way of weighted average increase for the group as a whole would be in excess of the Award, which had to be tempered by the 'an appreciation of fiscal realities in Nova Scotia, Atlantic Canada and the rest of the country."[at p.7]. The Employer Nominee, John Plowman issued a strong dissent

18. Implementation of the Award was problematic, given the large number of classifications [over 200] which the parties had to jointly assess on a rolling basis during the three year term of the Collective Agreement, over many of which they differed as to whether or not they were leading in Atlantic Canada. The Board had remained seized for purposes of implementation, and issued a Supplemental Award seven months later [unreported decision, 07 March 2005, Joint Book of Authorities, Vol. I, Tab 8] which provided for an adjudicative dispute resolution mechanism should the parties disagree on classifications meriting the award of 'catch-up' increases so as to achieve the 'leading in Atlantic Canada' objective.

19. What one can term 'the Kaplan rationale' has since been accepted by two arbitrators of national stature. The late Innis Christie, in an Award issued 27 September 2005 for the NSGEU RN Bargaining Unit at CDHA [unreported decision, Joint Book of Authorities, Vol. I, Tab 9], adopted the approach developed by Arbitrator Kaplan. There, he awarded the 'pattern wage increase of 2.9% annually for the three-year term of the Collective Agreement, effective 01 November 2003, and for what he termed the "pattern +", a wage adjustment of 2.3% effective the commencement date of the Collective Agreement. That adjustment brought the NSGEU Nurses at CDHA to parity with the nurses in the NSNU bargaining unit. In doing so Arbitrator Christie commented: "Furthermore, the increases we have awarded position the Registered Nurses in this bargaining unit appropriately "at the forefront of wages paid for equivalent classifications in Atlantic Canada and in the middle of the Canadian 'pack'." [at p.16]. That was for a bargaining unit of multiple classifications in a single profession.

20. Lest one should think that the 'Kaplan rationale' has faded away since the setting of wage rates for the 2003-2006 round of collective bargaining, we have the recent Award of Arbitrator Kevin Burkett setting the wage rates for the RN Bargaining Unit in a Renewal Collective Agreement of a three-year term between NSGEU and CDHA effective 01 November 2009 to 31 October 2012. Rejecting the Employer's submission that the 'First in Atlantic Canada' rubric is more a matter of happenstance than of principle, Arbitrator Burkett wrote:

> The Employer, in seeking to have the November 1, 2009 to October 31, 2011 Nova Scotia public sector 1% and 1% pattern applied, asks us to discount the "first in Atlantic Canada, middle of the Canadian pack" placement of these nurses as being more the result of happenstance than collective bargaining design. We reject this suggestion. These are sophisticated parties who, as they have done here, would have made extensive detailed submissions to both the Ashley and Christie boards of arbitration. The awards of these arbitrators did not result in placement of these nurses relative to those in other provinces by happenstance. Indeed, arbitrator Christie described the resultant placements as "appropriate". Further, in voluntarily agreeing to their terms of the 2006 – 2009 collective agreement, these parties would have known full well that they were restoring the placement of these nurses as the salary leader in Atlantic Canada and in the "mid-pack" of the Canadian provinces. We are compelled to find that while there exists a Nova Scotia public sector pattern for the period November 1, 2009 to October 31, 2011, there also exists a pattern that has manifested itself in each and every collective agreement between these parties since the inception of QEII. This is the pattern that flows from the historical relationship between these nurses and their counterparts in the other provinces; a pattern designed to either respond to or avert recruitment or retention issues. These nurses have always been the highest paid in Atlantic Canada and in the middle of the Canadian pack.[at pp.6-7]

21. Arbitrator Burkett applied the provincial restraint 'pattern wage increase' of 1% in each of the first two years of the Renewal Collective Agreement, and in the third year a grid adjustment of 3.5% coupled with a wage increase of 1.6% equal to an increase of 5.1% for that final year. Although not sufficient to place the RNs at the lead in Atlantic Canada, it did place them once again in the middle of the Canadian pack, "the longer –term relativity between the hourly wage paid to a nurse in Newfoundland and that paid to a nurse in Nova Scotia left to be determined in future rounds of bargaining." – the uncertain state of the Nova Scotia economy

being such as to dissuade the Board from making a third year award "of the magnitude necessary to surpass the November 2011 Newfoundland hourly rate – a rate rthat is reflective of a flourishing provincial economy." [at pp.10-11].

ii. Pattern Wage Increases

22. As with all public employers across the country, the Government of Nova Scotia strives to ensure that across the public sector across-the-board wage increases in any bargaining cycle are uniform. Standardization of wage rate increases allows for rational budgetary planning and responsible management of the public fisc particularly in times of challenging economic circumstances. Arbitrators are sensitive to the right of the citizenry to ensure that democratically elected officials set economic policy and maintain control of the public purse. Hence the ready acceptance by arbitrators of 'pattern settlements' within distinct units of the public sector as well as across the public sector as a whole. We see it in the Kaplan, Christie and Burkett Awards, in each of which the Arbitration Boards adopted the pattern wage increases of the bargaining cycle in which the Award was fashioned.

23. At the same time, Arbitrators, who are mandated by the legislature to resolve public sector bargaining disputes on a rational basis, have developed an arbitral jurisprudence sensitive to the ethos which animates the labour legislation under which they act. In Nova Scotia the Legislature has articulated that ethos in the Preamble to the *Trade Union Act* as follows:

> WHEREAS the Government of Nova Scotia is committed to the development and maintenance of labour legislation and policy designed for the promotion of common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> AND WHEREAS Nova Scotia employees, labour organizations and employers recognize and support freedom of association and free collective bargaining as the bases of effective labour relations for the determination of good working conditions and sound labour-management relations in the public and private sectors of Nova Scotia;
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> AND WHEREAS the Government of Nova Scotia desires to continue, and extend, its support to labour and management in their co-operative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good labour relations to be in the best interests of Nova Scotia:

Hence in each of those cases, Arbitrators Kaplan, Christie and Burkett fashioned an Award responsive both to Government's fiscal policy, and to the equities of the particular bargaining relationship before them.

iii. Wage Parity

24. It has always been the aim of workers to achieve wage parity for all who perform the same type of work, possess equivalent qualifications and exercise the same skills and abilities under similar circumstances. For the trade union movement, sub-standard or inferior wage rates

are an unacceptable basis upon which an employer should be able to gain a competitive advantage in the marketplace. The U.S. *Clayton Antitrust Act* of 1914 famously declared: "The labor of a human being is not a commodity or article of commerce."[s.6], thereby exempting collective bargaining and the setting of common terms and conditions of work from the reach of anti-trust legislation. This is so under our anti-trust legislation as well, the Federal *Competition Act* (R.S.C., 1985, c. C-3, at s.4.

25. However, it is not only labour which values wage parity, but employers too, particularly public sector employers. Generally within the Atlantic Canada acute health care sector, parity of wages and other working conditions has been achieved by legislative action – the structuring of province-wide bargaining units and collective agreements. This is not the case in Nova Scotia. There, the collective bargaining structure in the acute health care sector is deeply fragmented, with some 50 collective bargaining agreements in operation. In its written submissions, the Employer acknowledged that "competitition using varying wage rates for similar work within the province is inefficient and costly. It also creates labour relations instability." To further wage parity, there has been some consolidation of the Employers' bargaining structure with the legislative creation of nine District Health Authorities and one stand alone Health Authority , the Isaac Walton Killam Health Centre [IWK] in Halifax . On the Union side too, there has been consolidation of collective bargaining structures within the four trade unions active in the sector: NSGEU, NSNU, CUPE and CAW-Canada, although not of bargaining units.

26. Because full rationalization of bargaining structures has not been attained, rationalization of the collective bargaining system continues to be a 'work in process', as both labour and management engage in coordinated bargaining strategies to achieve that desirable goal. There have been successes, and since the late nineties, wage parity has obtained across the acute health care sector as between employees who perform the same type of work, possess equivalent qualifications and exercise the same skills and abilities under similar circumstances throughout the Province, regardless of the Union which holds bargaining rights on their behalf. The same cannot be said for all terms and conditions of employment, although disparities there too are lessening progressively.

27. Historically, this has meant the leveling up of wages across the Province to equal those obtaining in the CDHA. Overlapping terms of collective agreements across the sector meant that there was always some time lag in attaining wage parity. But more recently, through coordinated bargaining, uniformity of the term of acute health care collective agreements has been achieved, with common commencement and termination dates. That is the case at CDHA. For the Employer, a principal objective in the current round of collective bargaining has been to ensure the maintaining of wage parity across the acute health care sector within the framework of collective agreements of common three-year terms commencing 01 November 2011 and terminating 31 October 2014. That means application to this bargaining relationship of the wage rate increases reached in the settlements with CUPE and CAW-Canada no more, no less. The Union rejects the suggestion that wage parity in the acute health care sector requires that outcome.

Fashioning an Award: The Process

28. In each collective bargaining dispute they are called upon to resolve, interest arbitrators must grapple with apparently discordant public policies so as to facilitate their working together in concord. The Board of Arbitration in the *PEI Health and UPSE* Award referenced above wrote of the interest arbitration process as follows:

> 10. The interest arbitration process, in contrast to grievance arbitration under a collective agreement, is not in essence an adjudicative one in which evidence is led, findings of fact made and relevant law applied. Rather, it is one that is 'legislative' in nature as noted by the Supreme Court of Canada in *CUPE v. Ontario (Minister of Labour)*, [2003] 1 SCR 539 at para 53, cited and applied most recently by the Ontario Divisional Court in *Rivera Retirement v. Armstrong* , 2010 ONSC 3041, 08 June 2010. By this is meant that, in crafting a collective agreement, the interest arbitrator or board assesses the evidence within the context of the broad overarching policy considerations outlined above which inform both the collective bargaining and the interest arbitration processes. The interest arbitrator exercises a broad discretion in shaping an award which is both reflective of the evidence and responsive to those overarching policy considerations.
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> 11. Where, as was the case here, and is often the case, the formal briefs and evidence led in support exhibit a deep divide between the parties as to the shape which the award should take, the task of the interest arbitration board becomes that much more onerous. If the system of interest arbitration is to maintain the confidence of the parties, the award outcomes must be credible. To be sure, there may be disappointment, but so long as the outcomes lie within a 'zone of acceptability' which the parties can tolerate, that confidence in the process is assured. Identifying that zone is critical and the weak link in the formal interest arbitration process is that the interest arbitrator may mis-step and issue an award which in part or in total lies beyond the margin of error which the zone of acceptability can withstand. The result: loss of confidence in the system of binding interest arbitration.

29. Tripartitism in the interest arbitration process was fashioned to forestall such mis-steps. For the nominees of the parties, in contra-distinction to the nominees on a grievance arbitration panel, are expected to be familiar with the collective bargaining relationship, the concerns of the nominating party and indeed to be partial to the nominating party's broader outlook on collective bargaining and labour relations generally. The Courts have recognized that impartiality is not expected of nominees on an interest arbitration board. *Gypsumville District Teachers' Association No. 1612, MTS v. Gypsumville Consolidated School District No. 2461*, (1979) 103 DLR #d) 672 (Man CA), lv. to appeal denied (1980), 121 DLR (3d) 509 (SCC). Indeed, such partiality is a virtue, each nominee able to 'advocate' with the Chair for its nominator's position, to correct misperceptions, to suggest possible avenues of resolution, to joust before the Chair with the nominee of the other party, and prior to the close of hearings, to convey to its nominator the concerns raised by the Chair and the nominee opposite. Such multi-textured dialogue assists greatly in setting out the boundaries of that zone of acceptability within which the Chair will craft an Award, ideally one with which both nominees can concur.

Fashioning an Award: The Outcome

30. Based upon all of the material before it and the very able submissions of Counsel, the Board has given special attention to several salient factors which affect the outcome of this matter. First it is now beyond dispute that 'First in Atlantic Canada' is a guiding principle in the setting of wage rates for acute health care employees engaged at CDHA. However, that principle is not to be applied in isolation, but rather in tandem with two other guiding principles of general application: pattern wage increases and wage parity. Arbitrator Kaplan found a wage pattern on the basis of one bargained settlement in the sector. Here, the two clusters of settlements reached between CUPE and eight District Health Authorities, and between CAW-Canada and three more Health Authorities covering over 5000 employees in the sector including some 2500 in seven health care bargaining units constitute a pattern: 22 collective agreements each of a three-year term, with common dates of commencement and termination, 01 November 2011 to 31 October 2014 and annual wage increases of 2%, 2.5%, and 3%, for an uncompounded arithmetic total of 7.5%. The Award here must reflect that pattern as did the Kaplan, Christie and Burkett awards in their respective settings.

31. Parity of wage rates naturally flows from implementation of the pattern, as it has since the late 1990's. But neither the pattern nor parity of wages trumps *per se* the 'First in Atlantic Canada' principle. That is the common holding in the Kaplan, Christie and Burkett awards. How is that principle to be recognized in this award? Here we must be cautious to understand the suppleness of the principle as applied by the arbitrators. It is not done mechanically, nor absolutely. Rather, in applying it arbitrators have tempered its effect to accommodate other concerns, including the fiscal circumstances of the Province, the Atlantic Region and Canada as a whole [Arbitrators Kaplan and Burkett]. They have integrated it within broader cycles of collective bargaining than the particular cycle in which they are acting, so that achievement of the 'leading in Atlantic Canada' standard may be staggered over time [Again, Arbitrators Kaplan and Burkett]. They have had the leeway to target particular classifications [Arbitrator Kaplan], or to alter the term of a renewal collective agreement [Arbitrator Burkett]. They have given effect to the parity principle [Arbitrator Christie].

32. Here, the parties have severely restricted the discretion of the Board. We have no leeway to alter the term of the renewal Collective Agreement, which must be of a three-year term, both parties rejecting our suggestion that we be given some leeway to extend its term. We have no leeway to target particular classifications but have been directed to award "the rates of increases in pay of all employees in the bargaining unit", both parties insisting that we are authorized only to award across-the-board wage increases. We have considered these strictures and concluded that despite the Kaplan Award, the only mechanism open to us to ensure compliance with the 'First in Atlantic Canada' principle is the across-the-board weighted average increase for the bargaining unit, *if warranted on the evidence and in the circumstances.* Here, our concern is

two-fold. First, it is not at all clear that the formula used to calculate the weighted average percentage difference between the CDHA rate and the highest comparator rate to arrive at a shortfall difference of - 5.66% is reliable. The Union explains the process used to arrive at that figure in its written submissions as follows:

> The Weighted Average Table includes all classifications with 20 or more members. This captures 2807 of 3802 members, or 73.8% of the bargaining unit.
>
> Rate used is maximum hourly wage (top of pay scale, excluding long service increments).
>
> The Weighted Average is calculated by first determining the percentage difference between the CDHA rate and the highest comparator rate for each classification. That is, the percentage by which the CDHA rate would have to increase (or decrease) to match the highest comparator rate. That figure is then multiplied by the total number of members in that classification. The sum of those figures is then divided by the total number of employees in the table. [p. 33, n.1].

The Board has no difficulty with a calculation based on the maximum hourly wage, top of pay scale, excluding long service increments. The 25-years service 3.5% salary increment is defined by the parties in Memorandum of Agreement #11 to be a 'Retention Incentive' and is qualitatively distinct from the wage rate classification structure – as was implicitly recognized as by Arbitrator Burkett in his award.

33. More troublesome is the limitation of the analysis to classifications with 20 or more members, thus excluding just over 25% of the bargaining unit members from the calculations. And from Appendix B, we learn that 151 members included in the calculations occupy positions at Present Incumbent Only [PIO] rates superior to those formally in effect. Thus, although the Board notionally accepts that a weighted average across-the-board wage increase may be used to meet the 'First in Atlantic Canada' standard, it is not convinced that the weighted average increase here proposed is the appropriate one.

34. Coupled with this technical concern, is one of policy. As between the Union proposal of 9.05% over three years and that of the Employer of 7.5%, there is a difference of 1.55%. Does closure of what is a shortfall from the perspective of the Union so as to attain the 'First in Atlantic Canada' standard across the entire bargaining unit, merit departure from the two principles of pattern wage increases and wage parity? This is a value judgement – as is so much of the 'legislative' process of interest arbitration. After careful consideration the Board has concluded that to close such a limited shortfall, in circumstances where a significant number of bargaining unit members are likely to meet the 'First in Atlantic Canada' standard in any event with the pattern settlement, does not warrant departure from it or from the principle of wage parity. It would serve a symbolic function to be sure, but this is not an appropriate basis upon which to make such an award.

35. Accordingly, and for all of the foregoing reasons, the Board awards rates of increases in pay of all employees in the bargaining unit during the renewed Collective Agreement over a term of three years commencing 01 November 2011 and terminating 31 October 2014 as follows:

01 November 2011 – 2%

01 November 2012 – 2.5%

01 November 2013 – 3%

36. The Board remains seized until such time as the parties enter into a formal Collective Agreement incorporating this Award of increases in the rates of pay for all employees in the bargaining unit.

Dated this 15th day of June 2011 in the City of Windsor, Ontario

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Thomas Kuttner, QC, Chair