

Arbitrator Upholds Hospital's Objection to Qualification of Occupational Hygiene Expert in Field of COVID-19 Infectious Disease Transmission

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Since the beginning of the global COVID-19 pandemic, Ontario health care sector unions have raised occupational health and safety-related concerns particularly with regard to the provision of personal protective equipment ("PPE"), including N95 respirators ("N95"). We previously broached this topic in Focus Alerts regarding challenges brought forward by the Ontario Nurses' Association in the long-term care sector specifically, including [one](#) which resulted in the issuance of a mandatory injunction by the Ontario Superior Court of Justice and [one](#) which formed the basis of an expedited COVID-19 policy grievance.

Recently, the Ontario Council of Hospital Unions and the Canadian Union of Public Employees (collectively the "Union") filed a grievance against the Almonte General Hospital and Fairview Manor (the "Manor"), alleging that the Manor failed to take every reasonable precaution to protect its workers. In particular, the grievance alleged that the Manor failed to provide and make accessible appropriate PPE, failed to adequately train workers regarding appropriate use of PPE, and failed to implement necessary administrative controls. At the heart of the grievance was the Union's allegation that the Manor should provide health care workers ("HCWs") with fit-tested N95 respirators any time they wished to have them when working within six feet of a suspected, presumed or confirmed COVID-19 positive patient. The Manor's view was that its policies complied with applicable Directives from the Chief Medical Officer of Health, in that the use of N95s was indicated when aerosol generating medical procedures were performed by HCWs, and that in other circumstances contact and droplet precautions were required, in accordance with available Infection Prevention and Control ("IPAC") guidance from Public Health Ontario ("PHO").

In support of the grievance, the Union submitted a report prepared by an occupational hygienist employed by the Occupational Health Clinics for Ontario Workers, Inc. and sought to have him qualified as an expert to provide opinion evidence on the modes of transmission of COVID-19. Represented by Emond Harnden's Porter Heffernan and Joël Rocque, the Manor raised an objection to the occupational hygienist's qualification as an expert. In a decision issued on August 18, 2020, Arbitrator Kaplan upheld the Manor's objection, finding that because the occupational hygienist could not be qualified as an expert on modes of transmission of COVID-19, his report was inadmissible.

Admission of Expert Evidence

Arbitrator Kaplan's decision centered primarily on the question of the admissibility of expert evidence. In order for expert evidence to be admitted in a proceeding, four (4) criteria must be met:

1. The expert evidence is relevant;
2. The expert evidence is necessary to assist the arbitrator;
3. There is no rule which would otherwise exclude the expert evidence; and
4. The expert is a properly qualified expert.

In order to determine the admissibility of the evidence at issue, Arbitrator Kaplan reviewed the Union's proposed expert's *curriculum vitae* and his report submitted in evidence. In particular, he noted that:

- The proposed expert held a B.A.Sc. degree in Chemical Engineering and a M.Sc. in Health Research Methods. He was certified and recognized by multiple bodies in the field of Occupational Hygiene across Canada and the United States. He had worked in the field of Occupational Hygiene for decades, conducting research and serving on related committees. Additionally, he had an impressive publication record.
- Comparatively, however, the proposed expert's experience in health care environments was relatively limited. The proposed expert conceded to having no training in infectious disease transmission or control and holding no certifications in this area.
- In his report, the proposed expert challenged PHO's IPAC guidelines with regard to the modes of transmission of COVID-19 and the appropriate PPE for workers in view of same. The proposed expert asserted that, in his opinion, HCWs should be provided with N95s whenever working near or with patients/residents who could be infected with COVID-19, and not only when performing aerosol generating medical procedures.

The Manor objected to the admissibility of the proposed expert's report in evidence because he did not have the necessary expertise to provide an expert opinion on matters pertaining to infectious diseases or routes of transmission of diseases; rather, his expertise was in exposure to chemicals and toxic substances and in health research methods. The Manor's argument was therefore that the proposed expert was in no position to provide an expert opinion on the modes of transmission of COVID-19. Conversely, the Union argued that its proposed expert should be qualified as an expert and his report should be admissible in evidence because of his decades of experience in occupational hygiene, including providing advice to workers and unions in the health care sector, as well as his review of COVID-19 literature and participation in discussions, working groups and committees on the issue of appropriate PPE during the COVID-19 pandemic.

In upholding the Manor's objection, Arbitrator Kaplan recognized that the proposed expert did have considerable experience in occupational hygiene, but did not have the "*necessary training, experience and expertise in infectious disease transmission and control to provide an expert opinion.*" Although the proposed expert had expertise in exposure to chemicals and toxic substances, Arbitrator Kaplan noted that reviewing epidemiological literature does not make one an

epidemiologist “*qualified to opine on infectious disease transmission and control.*”

Arbitrator Kaplan also pointed out that it was obvious that the purpose of the proposed expert’s report was to contradict the conclusions and advice of PHO and that “[t]he truth is that parts of the report read more like advocacy for a desired outcome – uniform provision of the N95 – rather than the offering up of dispassionate expert advice to assist in a most serious task [...]. I cannot and do not conclude that his evidence is fair, objective and non-partisan.”

In Our View

This case is one among many in which health care unions have sought to expand the circumstances in which health care employers are obliged to provide N95 respirators to their employees. These cases are of fundamental importance to the health and safety of health care employees – supplies of respirators continue to be very limited and their use where not required risks creating shortages in cases where they are truly necessary to protect the safety of workers. We are glad to see the recognition from the Arbitrator in this case that decisions about transmission of COVID-19 and appropriate IPAC precautions must be made on the basis of the best available evidence. The case is ongoing on its merits and we will provide further updates as the matter proceeds.

For more information or advice on your rights and obligations as an employer when dealing with COVID-19 or related issues, please contact [Porter Heffernan](#) at [613-940-2764](#), [Joël Rocque](#) at [613-563-7660 ext. 232](#), [Vicky Satta](#) at [613-940-2753](#), [André Champagne](#) at [613-940-2735](#), [Lynn Harnden](#) at [613-940-2731](#), [Raquel Chisholm](#) at [613-940-2755](#) or [J.D. Sharp](#) at [613-940-2739](#).