

Ontario Superior Court of Justice Issues Emergency Injunction in Long-Term Care Sector at Request of Nurses' Union

Date : April 24, 2020

A major characteristic of the global COVID-19 pandemic has been the occupational health and safety-related concerns that it has raised for those working in the health care field. In an effort to address these concerns and the associated risk, the Chief Medical Officer of Health for the province of Ontario has issued a number of Directives under section 77.7 of the *Health Protection and Promotion Act*, including two which specifically address long term care homes:

- Directive #3, which generally provides for the appropriate precautions and procedures (related to, for example, screening, masking, testing and communications, amongst other things) to be taken in long-term care homes to address the risk created by COVID-19; and
- Directive #5, which generally requires long-term care homes and public hospitals to obtain and maintain a sufficient supply of personal protective equipment (or "PPE").

On April 17, 2020, the Ontario Nurses' Association (or "ONA") filed a motion in the Superior Court of Justice seeking a mandatory injunction against four separate long-term care homes in and around the GTA alleging serious health and safety concerns related to COVID-19, including shortages of PPE. ONA sought an order requiring the respondent long-term care homes to comply with Directives #3 and #5, and to take any and all reasonably necessary measures to ensure that nursing staff receive health and safety protections as indicated in those Directives. Though ONA had already filed grievances on the issue, it argued that a mandatory injunction from the Court was required in the circumstances given the expected delays in the labour arbitration process and the alleged resulting irreparable harm.

In response to the filing, counsel for the long-term care homes argued that the union's position and desire to control the allocation of PPE was not reflective of the reality of global shortages. Furthermore, they argued that the specific wording of Directive #5 required that not only nurses, but also employers, take into account what is appropriate or necessary under the circumstances and that for employers, this must be done with a view towards conserving supplies for other health care workers as well as for future need. Conversely, ONA argued that the employers' allocation of limited PPE constituted a breach of the collective agreement, of the public health Directives and of the *Occupational Health and Safety Act*. ONA also initially raised constitutional questions regarding section 7 (i.e., the right to life, liberty and security of the person) as well, though it did not pursue that argument on the Motion.

On April 23, 2020, the Court issued a mandatory injunction ordering the long-term care homes to comply with the Directives. In his written decision, Justice Morgan indicated that the three-part test

for injunctive relief had been met by the union, finding that:

1. There was no dispute between the parties as to the fact that the issue raised a serious question to be tried.
2. There was no dispute between the parties as to the fact that the union's members might suffer irreparable harm if the injunctive relief was not granted.
3. The balance of convenience favoured granting the injunctive relief pending a final determination of the issue at arbitration. There was no potential prejudice to the long-term care homes that would outweigh the irreparable harm that could be done to the lives of nurses and their patients, and the balance of convenience therefore favours those measures that give primacy to the health and safety of medical personnel and their patients.

With respect to the third part of the test, counsel for the long-term care homes argued that the concept of irreparable harm could not be viewed in isolation of other health care workers' needs, as well as those of the public at large and should thus be factored into the analysis of the balance of convenience. However, Justice Morgan rejected the argument that the union's position only considered health care workers' narrow, personal interests.

The Court ruled that nurses working at the subject long-term care homes are not to be impeded in making an assessment and determination at point of care as to what PPE or other measures are appropriate and required under the circumstances. Nurses who determine that N95 masks or other PPE are required on the basis of their professional judgment, taking into account the immediate situation as well as relevant longer and shorter-term considerations, must be provided with the requested measures, even where the employer may not agree with their assessment.

In Our View

The Court's decision in this matter is likely worrying for those operating long-term care homes in the midst of a global shortage of PPE. In particular, this decision seems to indicate that courts will interpret the public health Directives as shifting the control over the allocation of PPE during the pandemic to employees, without shifting any of the potential liability that employers face with respect to their health and safety obligations. It remains to be seen if the decision will be appealed by any of the subject long-term care homes, or if it is followed in other similar cases.

For more information on your rights and obligations as an employer dealing with COVID-19 and other related health and safety issues, please contact [Vicky Satta](#) at [613-940-2753](tel:613-940-2753), [Porter Heffernan](#) at [613-940-2764](tel:613-940-2764), [André Champagne](#) at [613-940-2735](tel:613-940-2735), [Lynn Harnden](#) at [613-940-2731](tel:613-940-2731), [Raquel Chisholm](#) at [613-940-2755](tel:613-940-2755) or [J.D. Sharp](#) at [613-940-2739](tel:613-940-2739)