

Participating Nursing Homes and ONA – Expedited COVID-19 Policy Grievance: Right to PPE Not Completely Unfettered

Date : May 8, 2020

The Ontario Superior Court of Justice recently issued a mandatory injunction ordering four separate long-term care homes in and around the GTA to comply with Ontario's Chief Medical Officer of Health's ("CMOH") Directives #3 and #5 under section 77.7 of the *Health Protection and Promotion Act* ("HPPA"). These directives pertaining to practices and procedures in long-term care homes provide:

- 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").

See our previous [Focus Alert](#) on the ruling.

The CMOH's Directives #3 and #5 were once again the subject of litigation in Arbitrator's Stout [award](#) issued May 4, 2020 between the Participating Nursing Homes (the "Homes") and the Ontario Nurses' Association ("ONA"). Arbitrator Stout was appointed by the parties to hear all grievances filed by ONA at a number of the Homes relating to health and safety measures arising as a result of the COVID-19 pandemic.

ONA's grievances alleged that the Homes violated their respective collective agreements, the *Occupational Health and Safety Act* ("OHSA"), and the nurses' right to life, liberty and security under section 7 of *Canadian Charter of Rights and Freedoms* ("Charter"). ONA also asserted that the Homes breached their "duty of care" owed to their employees by failing to:

- take adequate measures to ensure the safety of Registered Nurses and healthcare professionals;
- provide adequate personal protective equipment ("PPE");
- allow employees to self-isolate;
- follow the "precautionary principle"; and
- take every precaution reasonable in the circumstances arising as a result of the extraordinary threat posed by the COVID-19 pandemic.

In denying that they violated their collective agreements with ONA, the *OHSA*, or the *Charter*, the

Homes submitted that they have complied with all legal requirements including the Directives, and that the grievances really had to do with the appropriate use and allocation of scarce and essential limited PPE.

The “precautionary principle”, that ONA alleged the Homes were failing to follow, was a recommendation that arose out of the Commission of Inquiry into the 2003 SARs outbreak chaired by Justice Archie Campbell. In the Report of the Commission of Inquiry, it was recommended that the “precautionary principle” be followed “in order to prevent unnecessary illness and death.” This 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.” Section 77.7 of the *HPPA* incorporates the precautionary principle.

Arbitrator Stout’s award highlighted many of the agreements reached by the parties, including:

- communicating with respect to ways to manage the precious stock of PPE to ensure there are sufficient supplies for nurses and other staff when needed;
- that physical distancing must be adhered to in the Homes in order to prevent the spread of infection;
- to comply with public health and MOHLTC Directives with respect to regular screening and assessments;
- 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.

Arbitrator Stout reiterated that the parties shared mutual goals and that this award had to provide a “path forward in a more positive way” for the parties to “work jointly in their struggle to combat this terrible disease and protect our valuable healthcare workers and the Homes’ vulnerable residents.”

In order to clarify any issues relating to the use of PPE and cohorting, Arbitrator Stout 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. He noted that the Orders were not made based on any finding of fault, but rather “to further peaceful labour relations and to provide for the health and safety of employees, pursuant to the collective agreements, *OHS*A and the Directives.” His orders regarding PPE included the following:

- the Homes are to provide nurses with access to fitted N95 masks, 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 the CMOH’s Directive #5;
- nurses must perform a point of care risk assessment (“PCRA”) before interacting with residents. If a nurse determines based on the PCRA, and based on their professional and

clinical judgement (exercised reasonably, on a case by case basis) that they require fitted N95 masks and/or other appropriate PPE as described above, the Homes will not deny access to such available PPE. In arriving at that decision, nurses must also take into consideration short term and long term needs, other appropriate health and safety measures, and in accordance with their professional obligations;

- both the Homes and the nurses must engage in the conservation and stewardship of PPE;
- fitted N95 masks must be worn whenever aerosol-generating medical procedures are performed, are frequent or are probable (such as intubation and related procedures, bronchoscopy);
- while the Homes have the right to store PPE in secure locations, a sufficient supply of all appropriate sizes of fit-tested N95 masks must be made readily available;
- the Homes are to pursue all proper avenues to procure sufficient supply of all PPE;
- while the nurses can exercise their right to appropriate PPE free of threats, intimidation or coercion, the Homes retain their management rights under the collective agreement to manage performance in appropriate circumstances or to discipline for just cause subject to a nurse's right to file a grievance;

Arbitrator Stout also ordered the Homes to implement administrative measures such as isolating and cohorting of residents and staff during the pandemic, as set out in the CMOH's Directives (such as moving residents to vacated rooms, moving residents to common areas that are closed to ensure physical distancing and isolation such as dining rooms and recreational rooms, and put in place floor to ceiling impermeable physical barriers between positive and negative residents if vacated rooms are not available). Subject to the availability of staff and where practical, Homes are to make reasonable efforts to cohort staff between suspected and confirmed COVID-19 residents and residents who have not been infected.

The award also sets out that if the current circumstances change, the parties can vary Arbitrator Stout's orders by written agreement or bring the matter before him on short notice.

In Our View

The previous Court injunction decision and this decision seem to interpret the public health Directives as shifting the control over the allocation of PPE during the pandemic to employees. However, Arbitrator Stout's award does highlight the importance to preserve PPE, and notes that a nurse's right to request it must also take into consideration the available supply. It was also recognized that management has the right to run their operations as they see fit in a manner consistent with their legal obligations under the collective agreement or statute.

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](#), [Porter](#)

[Heffernan](#) at [613-940-2764](#), [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](#).