IN THE MATTER OF AN ARBITRATION
Pursuant to the *Hospital Labour Disputes Arbitration Act*

Between:

WINDSOR REGIONAL HOSPITAL
(the Employer or the Hospital)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LOCAL 101
(the Union or OPSEU)

INTERIM AWARD

Board of Arbitration

Paula Knopf - Chair
Matthew Sutcliffe - Employer Nominee
Helen Nowak - Union Nominee

Appearances:

For the Employer: Jodi Gallagher Healy
Julia Ferreira

For the Union: Michèle Dawson Haber
Christian Down
Rosa Zetler

This Award is based on hearings held on April 29 and May 10, 2021,
and written submissions.

The Parties have referred the determination of the terms and conditions of their renewal Collective Agreement to arbitration pursuant to the *Hospital Labour Disputes Arbitration Act*. Because it is always best for labour relations to try to achieve mutual agreement, the hearing commenced with the Parties engaging in mediation, assisted by this Board of Arbitration. In the course of those discussions, it became apparent that there was no prospect of achieving mutual agreement until and unless there was certainty about the method of calculating the monetary implications of the Parties' respective proposals under the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (Bill 124). The Parties have fundamentally different views about how compensation increases should be costed if they are implemented on a staggered basis during the course of Bill 124's "moderation period". Accordingly, this Interim Award addresses this question so that the Parties can continue with, and hopefully conclude, their collective bargaining.

By way of context, the Parties' Collective Agreement expired on March 31, 2019. Accordingly, under Bill 124, their three-year moderation period under Bill 124 runs from April 1, 2019 to March 31, 2022. Any increases in the salary rates and/or compensation enhancements must comply with the constraints under Bill 124.

There is no dispute that the first three steps of the costing methodology required under subsections 10(1), 11(1) and 11(2) of Bill 124 are:

1. The parties or a board of arbitration must determine the increase in wage rate applicable to the employees in the bargaining unit. This increase in salary rate is limited by subsection 10(1) to 1% for each year of the moderation period;

2. The parties or a board of arbitration must determine the impact of the actual cost of the 1% wage increase from a total compensation perspective. This impact must include the costs of the wage rate increases on overtime, pension contributions, statutory remittances and any other compensation items tied to wage rates; and

3. Once the actual cost of the wage rate increase is established, the parties or a board of arbitration can consider how much room remains to provide for any further compensation increases.

The aim of both Parties and/or this Board is to achieve monetary terms that are permissible within Bill 124's parameters. The issue to be resolved in this Interim Award is how to cost compensation increases if they are implemented on a "staggered" basis in the midst of any year within the moderation period.

As far as the Parties and this Board are aware, this Interim Award will be the first to analyze different potential costing methodologies and to consider the impact of staggered enhancements on the restrictions within Bill 124. Because of the importance of this issue, the Parties' submissions are set out in detail below. The specifics of their proposals have been omitted from this Interim Award because they are not germane to the analysis and we wish to preserve the confidentiality of their collective bargaining process.

THE SUBMISSIONS OF THE HOSPITAL

The Hospital asserts that if any compensation increases are implemented on a staggered basis, they must be costed on a full year basis, or the annual costs of each increase must be allocated between years to reflect the reality of the increased costs that the Hospital will have to bear. The Hospital acknowledged that there are three possible approaches to costing staggered compensation and addressed each one as follows.

Approach #1: Attribute compensation increases introduced midway through a year of the moderation period on a full year basis (Full Year Costing)

This is one of the approaches advocated by the Hospital.

It was argued that regardless of when an increase comes into effect in any given year of the moderation period (i.e., the first day, mid-way or on the last day), the cost should be calculated on the basis of an employer paying for that entitlement for a full year and not costed only on an actual cash flow perspective within the year that it is first implemented.

It was asserted that subsection 11(1) makes it clear that the focus should be on the "incremental increases to existing compensation entitlements" during each of the respective 12-month periods of the moderation period, not on the actual cost of implementing the changes in any given year. Accordingly, the Hospital argued that the entire or ultimate annual cost associated with any increase to compensation in one of the 12-month periods of the moderation period would be allocated to that year.

The Hospital stressed that the purpose of Bill 124 is to constrain costs and that any other approach would be inconsistent with section 24's prohibition against avoidance. Support for its position was said to be found in the dissent of the employer nominee Steven Wilson in *Victoria Village Inc. v. CUPE Local 4660*, 2020 CanLII 55857 (Goodfellow, Chair). Mr. Wilson drew upon the guidelines used by the province under Ontario's 1982 *Inflation Restraint Act* and opined that awarding a benefit increase mid term or on the last day of the contract's terms and costing that increase as an increase for only a portion of the year rather than the full year amounts to an "evasive practice" that would constitute avoidance of compensation restraint.

The Hospital urged this Board of Arbitration to take a similar approach under Bill 124 to ensure the legislative constraints are respected.

Approach #2: Attribute compensation enhancements on a cash flow basis only within the year they are introduced without factoring in the continuing cost of implementation over the life of the contract or the value flowing to employees (Cash flow within each year)

This is the approach advocated by the Union.

Under this approach, compensation enhancements that are implemented on a staggered basis would be costed on a "cash flow" basis within the year they are implemented. Accordingly, the only amount taken into account for the purposes of Bill 124 would be the cost of what the Hospital would actually have to pay in the year the enhancement is implemented. The Hospital submitted that this approach would ignore the "real cost" of the compensation improvements received by the employees and thereby violate Bill 124 by permitting compensation increases that exceed the permissible 1% of total compensation per year of the moderation period.

For example, the Hospital argued that even if a union proposal for an increase to a shift premium in the midst of Year 1 might be consistent with Bill 124 on a cash flow basis, it would be wrong to ascribe no cost to this in Year 2 and/or a possible third year because that would effectively ignore the actual increased costs to the employer over the life of the contract and increased compensation the employees would receive.

The Hospital stressed that the goal of subjecting public sector collective agreements to moderation under Bill 124 is to restrain costs. The Hospital submitted that staggering the effective dates of compensation enhancements is designed to "avoid" the 1% total compensation restriction and is therefore inconsistent with the purpose of Bill 124.

Since any public sector collective agreement can be subjected to scrutiny by Treasury Board Secretariat, the Hospital expressed concern that the cash flow costing method could be considered to be an improper attempt to avoid the constraints of the legislation. This concern was said to stem from Treasury Board Secretariat's February 12, 2021 letter explaining the basis on which the *Groves Memorial Community Hospital*

and OPSEU[1] award was held to be inconsistent with Bill 124. It made it clear that benefits proportionally linked to salary must be included for Bill 124 costing purposes because those amounts "result[ed] in extra money flowing to employees". That letter reads in part:

- The purpose of the Act is to ensure that increases in public sector compensation reflect the fiscal situation of the Province are consistent with the principles of responsible fiscal management and protect the sustainability of public services.
- All arbitration awards for in-scope employers and employees are expected to comply with the provisions of the Act.
- Treasury Board Secretariats' position is that benefits proportionally linked to salary cannot be excluded from the calculation of compensation increases under subsection 11(1).
- For benefits proportionally linked to salary, the corresponding increase due to an increase to salary results in extra money flowing to employees. For example, if vacation pay is paid at 4% of an employee's regular salary it would be paid out at a higher rate if the base salary is increased by 1%. It follows, therefore, that increases to benefits proportionally linked to salary should be included in the costing of total compensation since they are for the benefit of the employee.
- Section 2 of the Act defines "compensation" as anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary, benefits, perquisites, and all forms of non-discretionary and discretionary payments.

  Benefits that are proportionally linked to salary rate fall under the definition of "compensation" in the Act as they are items paid to or provided to employees and lead to an incremental increase to compensation entitlements.

- The methodology that was applied in the award that excluded the increase in the costs of pre-existing benefits proportionally linked to salary from the calculation of total compensation entitlements results in increases to total compensation greater than what is permitted under subsection 11(1); the increases that were awarded would represent an increase to total compensation of approximately 1.3% per year in each year of the award.
- An increase to total compensation of approximately 1.3% is not consistent with the requirements of subsection 11(1) of the Act which states "During the applicable moderation period, no collective agreement or arbitration award may provide for any incremental increases to existing compensation entitlements or for new compensation entitlements that in total equal more than one per cent on average for all employees covered by the collective agreement for each 12-month period of the moderation period.

[1] unreported decision dated July 20, 2020

- TBS's position is that subsection 11(3) applies to address situations where the increase in the cost of providing a pre-existing benefit entitlement goes up for the employer and the benefit does not increase for the employee (e.g. increases for premium charged for insured benefits).
- In other words, it is intended to exclude any cost increases to pre-existing benefits that are out of the control of the employer from the costing of total compensation under subsection 11(1) and avoid the need to offset any such increases.

  For example, where an employee is entitled to a monthly transit pass and the cost of that monthly transit pass is increased by the transit provider.

  Increases to salary rate that result in increases to pre-existing benefits that are proportionally linked to salary are negotiated and not outside the control of the employer.

- Subsection 11(1) is specific that the one percent maximum on incremental increases to compensation entitlements on average for all employees applies to each 12-month period; amounts cannot be moved between 12-month periods and the provision does not contemplate averaging between years of a collective agreement or arbitration award.
- The costing methodology used to determine the allowable increase in each year of the award is inconsistent with the Act as it applies amounts left over from the previous year of moderation to the following, contrary to subsection 11(1).
- The use of "averaging" in subsection 11(1) is intended to allow for increases to total compensation based on a specific amount for all employees covered by a collective agreement within a specific 12-month period, not across periods.

  The provision does not contemplate averaging between years of a collective agreement or arbitration award.

  According to subsection 11(1), each 12-month period of the moderation period is to be treated separately.

Relying on these points as an expression of the Legislature's intent, the Hospital argued that the actual money flowing to employees from the compensation increases over the life of a contract must be fully captured for costing purposes under Bill 124.

It was acknowledged that a number of previous arbitration awards under Bill 124 have implemented increases on the last day of a collective agreement or on some other staggered basis. However, it was asserted that those decisions are "fundamentally flawed" and inconsistent with section 24, the anti-avoidance provision of Bill 124. The

Hospital stressed that neither the Parties nor this Board can engage in "tricks or creative math" to try to mask prohibited increases within the prescribed compensation limits.

Approach #3: Ensure the "reality" of the annual cost of a compensation improvement (Annualized Costing)

This is the second alternative approach that the Hospital advocates.

This approach requires the assessment of any compensation improvement in each 12-month period that a compensation increase is implemented and views the increased amount paid to employees or paid by the Hospital on an annualized basis.

For example, it was said that if a premium is enhanced by 4% mid-way in the first year of the moderation period, 2% should be attributed to Year 1 and, given the carryover of that provision into the second year of the contract, 2% should be factored into the equation in Year 2 to recognize an annualized increase above the pre-moderation period cost. In other words, the Hospital asserted that the actual cash flow cost of enhancements implemented mid year in Year 1 would have to be taken into account for Bill 124 purposes in Year 1 and also be factored into the costing of the following year(s) of the contract.

The Hospital suggested that this approach to costing permits staggered implementation of compensation enhancements while it ensures that both the cost of the enhancements to the Hospital and the increases received by employees are captured, rather than ignored, for Bill 124 costing purposes.

The Hospital urged this Board of Arbitration to accept either Approach #1 or Approach #3 in order to ensure compliance with Bill 124.

THE SUBMISSIONS OF OPSEU[2]

OPSEU asserted that the most appropriate methodology is the staggered or "Cash Flow with each Year" approach to costing. It was stressed that nothing in Bill 124 requires the parties to attribute the cost of a staggered increase on a full year basis or to carry over the increases in subsequent years for purposes of costing. The Union pointed out that the cash flow approach to costing in each separate year has been applied consistently by parties and boards of arbitration under Bill 124 without being overturned by Treasury Board. Further, it was argued that the "plain reading" of Bill 124 suggests that the Hospital's preferred approaches amount to the "averaging" that Treasury Board has rejected.

The Union addressed the Hospital's stated concerns about the anti-avoidance measures in Bill 124 by submitting that section 24 is not intended to constrain the Parties from negotiating increases if they remain within the limit of a 1% total compensation increase in each individual 12-month period during the moderation period. It was pointed out that the moderation period for this bargaining unit runs from April 1, 2019 until March 31, 2022, with each April 1 - March 31 period counting as one 12-month period. It was asserted that section 24 is meant to address situations where parties enter into a settlement for a period longer than the entire three-year moderation period and implement greater benefits in the period after the moderation period in order to "make up" for the restraint.

The Union acknowledged that Treasury Board is currently reviewing the arbitration award regarding *CUPE 1132 and Hotel Dieu Grace Hospital,* 2020 CanLIl, wherein a

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[2] The Board notes the Parties had agreed to share costing calculations during bargaining and that the Union has raised concerns about the Hospital's calculations of the costs associated with the Union's proposals. These concerns are not related to methodology, but are instead related to accuracy, as we understand them. This is not a matter than can or should be addressed in this Interim Award. However, we hope and expect that the clarifications the Union seeks shall be provided ASAP.

“market adjustment” of 1.4% was implemented in the fourth year of a contract, along with a general wage increase of 1.65% in that same year. It was pointed out that there were no staggered compensation enhancements implemented in that award. It was submitted that the Hospital’s concerns about a Treasury Board review of the case at hand are unwarranted because OPSEU is not seeking any increased compensation entitlements after the moderation period, or more than 1% total compensation in any of the three 12-month periods of the Collective Agreement. It was asserted that aside from section 24 prohibiting any catch-up post-moderation, the legislation makes no mention of an expectation of further fiscal restraint after the three-year moderation period. It was said that if the legislation intended to impose restraint specifically on the “downstream costs” after the moderation period, it would have done so explicitly.

The Union asserted that each 12-month period should be treated independently under the legislation for the purposes of calculating the 1% total compensation that can be allocated in each year. This was said to be consistent with Treasury Board’s response to the decision in *Groves Memorial Community Hospital and OPSEU, supra.* It was pointed out that the award in that case had used “averaging” of the 1% across the years of the moderation period to achieve greater non-wage compensation in a given year, and ignored the increases to benefits that are proportionately linked to salary in order to leave more room for non-wage compensation. It was pointed out that when Treasury Board rejected both practices, it provided the logic that supports costing staggered increases in the year they are implemented. Since Treasury Board indicated that an increase of greater than 1% in one 12-month moderation period cannot be offset by a reduced amount in a subsequent year, the Union argued that costing methodology must only be applied to the year that increases are implemented and should not be calculated as having an impact with regards to the compensation limit in subsequent years. The Union acknowledged that any compensation enhancements in one year would create increased costs to the Employer’s expenses in the following years and have to be considered from an accounting perspective. However, for purposes of Bill 124, it was said that there will be compliance with Bill 124 if the compensation enhancement allows the employer’s cost to remain within the limits prescribed for each 12-month period

within the moderation period. The Union also relied on what Treasury Board advised in relation to *Groves Memorial Community Hospital and OPSEU, supra:*

> Subsection 11(1) is specific that the one percent maximum on incremental increases to compensation entitlements on average for all employees applies to each 12-month period; amounts cannot be moved between 12-month periods and the provision does not contemplate averaging between years of a collective agreement or arbitration award.

The Union argued that costing under Bill 124 is not the same as accounting. The Union acknowledged that staggering the introduction of increases to mid year or on the last day of a contract year does have an impact on the Hospital's ongoing costs. However, this was said to be compatible with Bill 124 that focuses on the impact of an increase only in each of the 12-month periods during the moderation period. The Union asserted that the staggered approach does not try to "get around the application of Bill 124", but instead aims to work within its constraints.

In support of this, the Union relied on Arbitrator Keller's award in *Foyer Richelieu Welland v. CUPE, Local 3606*, *supra,* as well as the following awards that introduced staggered increases and were either not reviewed or where the reviews were not pursued by Treasury Board: Unionville Home Society (Union Villa) v. Canadian Union of Public Employees, Local 3744, 2020 CanLII 77573; *St. Peter's Residence at Chedoke (Thrive Group) v. Niagara Health Care and Services Workers Union Local 302, affiliated with CLAC*, 2020 CanLII 33060; *Glen Hill Terrace Christian Homes Inc. v. Canadian Union of Public Employees, Locals 2225-06, 2225-12; 5110-00*, 2020 CanLII 52609; *Holland Christian Home Inc. v. Christian Labour Association of Canada*, 2020 CanLII 4895; *Tabor Manor v. Christian Labour Association of Canada*, 2020 CanLII 66104; *St. Patrick's Home of Ottawa v. Canadian Union of Public Employees, Local 2437*, 2020 CanLII 45584; *North Renfrew Long-Term Care Services Inc. v. Canadian Union of Public Employees, Local 5271*, 2020 CanLII 43703; *Villa Marconi Health Centre v. Canadian Union of Public Employees, Local 4793*, 2020 CanLII 94856; *The Toronto Aged Men's and Women's Homes v. SEIU Local 1,* 2021 CanLII 5445; *Labdara Lithuanian Nursing Home v. SEIU Local 1,* 2021 CanLII 17011.

Therefore, it was submitted that the appropriate approach to costing should be to assess whether an increase to a benefit implemented mid year of any year within the moderation period would fit within the available money in that year. The Union asserted that the increase should not be treated as an "addition cost" for purposes of Bill 124 in the subsequent 12-month period(s).

The Union submitted that an annualized method of costing would require the Parties or the Board to consider the Year 1 costs of a compensation increase in Year 2 and possibly Year 3. This was said to be inconsistent with any previous arbitration decisions in this sector and contradictory to the general costing methodologies that are applied to collective bargaining. To illustrate this contention, the Union argued as follows:

> . . . . [if]a two-year term was awarded, the costing from year to year would be affected. Year 1 benefits, if staggered, would have additional costs for Year 2 under this method regardless of length of term. However, if in a two-year term there were staggered benefits in Year 2, it would be unprecedented to include additional costs from the previous round of bargaining in the third 12 month moderation period as stipulated under method 3 when negotiating the next contract. This would result in Year 3 of the moderation period, which is also Year 1 of the next collective agreement, using a different costing method where 'go forward' rates from Year 2 are included solely as a base cost and not as a cost to the funds available for non-wage related benefit increases. Each 12-month moderation period should be calculated using the same methodology, regardless of the length of term.

Further, it was submitted that the annualized costing method ultimately amounts to 'averaging of costs' over multiple 12-month moderation periods which would be contrary to a plain reading of Bill 124 and Treasury Board's response to the *Groves Memorial Community Hospital and OPSEU, supra,* decision.

The Union acknowledged the moderation period under Bill 124 limits any wage and compensation enhancement increases to a 1% increase during each 12-month period. The Union stressed that this severely limits what employees can earn. The Union submitted that the annualized approach to costing would mean less than 1% would be

available to employees in Years 2 and 3 of the moderation period. The Union insists that given the constraints of Bill 124, a costing methodology should not place further limits on the funds available during each year of the moderation period. The Union argued that treating each 12-month period separately, as Treasury Board advised, allows the Parties to use all of the money available in each 12-month period under Bill 124.

The Union argued that the dissent of the employer nominee Steven Wilson in *Victoria Village, supra,* should be rejected because it was based on the approaches taken to the 1982 *Inflation Restraint Act* which were said to have "little bearing" on the terms and requirements of Bill 124. The Union asked this Board to reject this approach to costing in this Award.

THE HOSPITAL'S REPLY SUBMISSIONS

The Hospital pointed out that none of the arbitral awards relied on by OPSEU reveal the analysis of their costing methodology or explain how, or if, they comply with Bill 124.

The Hospital pointed to Treasury Board Secretariat's June 1, 2021 response to the *Foyer Richelieu Welland and CUPE* award stating that staggered increases structured specifically to avoid the requirements of Bill 124 could constitute avoidance under section 24 of Bill 124. That letter states, in part:

> We acknowledge that implementation dates for compensation increases may be selected for a variety of reasons during the collective bargaining process. However, when increases are structured specifically to avoid the requirements of the *Protecting a Sustainable Public Sector for Future Generations Act*, 2019 (the Act), the practice could constitute avoidance under Section 24 of the Act.
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> In that regard, we continue to review collective agreements and arbitration awards for compliance with the Act.

The Hospital does acknowledge that Treasury Board ultimately did not take issue with *Foyer Richelieu Welland's* award granting staggered increases. However, it was

stressed that neither Treasury Board nor that award explain how the costing was calculated. Therefore, it was suggested that the Union should not be able to suggest that there has been an endorsement of the costing methodology it advocates in this matter.

The Hospital submitted that OPSEU's proposed costing methodology attempts to avoid the requirements of Bill 124 with a "slight of hand" by having compensation enhancements that employees begin to receive mid year in Year 1 have no cost implications under Bill 124 purposes in subsequent years, despite the Employer's actual increased financial burden. The Hospital provided the following example to illustrate this point:

> Following OPSEU's proposed methodology, a 200% increase in shift premiums (for example) on the last day of Year 1 of the moderation period would comply with Bill 124 as long as the 1 day of enhanced premiums fit within the additional compensation increase permitted in Year 1. OPSEU would then have the Board ignore the cost of the 200% increase in shift premiums in subsequent years because the 200% increase was already in effect. . . . In this example, the reality of what has been implemented in Year 1 is far less than the 200% increase OPSEU would claim has been implemented. The Hospital's methodology #1 would require the full cost of the 200% increase to be taken into account in Year 1 to ensure that the increase is permissible under Bill 124. The Hospital's methodology #3 would calculate the reality of what was implemented in Year 1 in order to calculate what further increase has actually been implemented in Year 2 and ensure that further increase is permissible under Bill 124.

The Hospital also argued that the Union is wrong when it asserts that section 24 only relates to the pre or post full moderation period. The Hospital submitted that such a conclusion would undermine the purpose of the anti-avoidance provision and would sanction evasion of Bill 124's restrictions within the three-year moderation period. The Hospital also drew upon Treasury Board's letter sent in response to its initial review of the *Foyer Richelieu Welland and CUPE* decision indicating that staggered increases that are structured specifically to avoid the requirements of Bill 124 could constitute avoidance.

It was stressed that the legislation should be given a "purposive" reading so that the applicable "moderation period" should be read as within each year of the moderation period as well.

The Hospital acknowledged that Treasury Board's direction to Groves Memorial Community Hospital and OPSEU indicated that each year of the three-year moderation period must be treated separately for Bill 124 purposes. However, it was pointed out that the Hospital's third option for costing does not 'average' or carry forward amounts from one year to another. Instead, it calls for consideration of the actual increase in Year 1 when an increase comes into effect part way through the year and carries on into the next year(s). This was said to be more than just an 'accounting' issue and that it is very relevant to the intent of restraint in Bill 124.

THE DECISION

This Interim Award is designed to assist the Parties' collective bargaining by resolving the issue of compensation methodology under Bill 124. The outcome is an exercise of statutory interpretation, not a matter of discretion. This Board of Arbitration and the Parties are bound by the limits that the Legislature has put upon public sector compensation increases. The rationale for limiting salary rates and compensation enhancements for public sector employees was set out in the Preamble of Bill 124:

> These measures would allow for modest, reasonable and sustainable compensation growth for public sector employees. For public sector employees who collectively bargain, these measures respect the collective bargaining process, encourage responsible bargaining, and ensure that future bargained and arbitrated outcomes are consistent with the responsible management of expenditures and the sustainability of public services.
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> The Government believes that the public interest requires the adoption, on an exceptional and temporary basis, of the measures set out in this Act.

Bill 124 provides:

s. 2 "compensation" is defined as "anything paid or provided, directly or indirectly, to or for the benefit of an employee and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments".

s. 3 Subject to the other provisions of this Act, the right to bargain collectively is continued.

s. 10 (1) No collective agreement or arbitration award may provide for an increase in a salary rate applicable to a position or class of positions during the applicable moderation period that is greater than one per cent for *each 12-month period* of the moderation period, but they may provide for increases that are lower.

11 (1) During the applicable moderation period, no collective agreement or arbitration award may provide for any incremental increases to existing compensation entitlements or for new compensation entitlements that in total equal more than one per cent on average for all employees covered by the collective agreement *for each 12-month period* of the moderation period.

s. 24 An employer shall not provide compensation before or after the applicable moderation period to an employee for compensation that the employee will not, does not or did not receive as a result of the temporary moderation measures in this Act.

[emphasis added]

The explanatory note accompanying Bill 124 states that the purpose of Bill 124 is to:

"…ensure that increases in public sector compensation reflect the fiscal situation of the Province, are consistent with the principles of responsible fiscal management and protect the sustainability of public services…"

Bill 124 is the existing law in Ontario. It binds the Parties and this Board of Arbitration. Therefore, this Interim Award addresses how compliance can be achieved.

This may be the first Award that directly addresses the three options for calculating cost increases under Bill 124. However, the impact of Bill 124 on collective bargaining has already been ably addressed by Arbitrator Brian Keller in *Foyer Richelieu Welland v.*

CUPE, Local 3606, supra. The analysis and principles contained therein warrant repeating:

> The Board acknowledges that Bill 124 (the Act) largely governs the results of this interest arbitration. That is, it limits compensation and the Board is obliged, by law, to adhere to those limits. We are not of the view that it is necessary to repeat all that has been said by previous arbitrators with respect to that Bill. We do wish to make the point, however, that the obligation of the Board is to adhere to what the Act provides, in its various sections. As, in the view of the Board, the Act limits normal free collective bargaining, our obligation is to interpret the law strictly. That is, unless there is an absolute and clear limitation on the rights of the parties, and the Board, we will not read into the Act what is not there. In other words, it is not the role of the Board to enforce the spirit of the law. Rather, its role is to interpret and abide by its actual provisions.
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> Having said the above, we further acknowledge that the Act provides:
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>> "*Subject to the other provisions of the Act, the right to bargain collectively is continued"*
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> In our opinion, notwithstanding that provision, the Act results in an artificial construct with respect to collective bargaining. The Act clearly limits, or straitjackets, the ability of the parties to engage in the normal give-and-take of collective bargaining that is key to successful negotiations. Similarly, it limits the ability of this Board to engage likewise. We are not blaming either party for this. The constraint falls equally on both of them. The unions are constrained in their ability to negotiate compensation matters beyond the strict limitations in the Act, as is traditional and part of free collective bargaining. Employers are constrained in their attempts to seek concessions or language changes to improve their ability to manage their business. To put it bluntly, they do not have the "traders" that they would normally be able to offer. Consequently, in our opinion, the statement that the right to bargain is continued ignores the reality of what collective bargaining normally is, but has become in the 3 years of the moderation period as a result of the Act.
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> In free collective bargaining, there will be, of necessity, trade-offs. That is, each party determines what their needs are and, in order to achieve those needs, to the greatest extent possible, must be willing to give up something in order to achieve what they consider to be important. For example, often that involves the employer "paying" for something sought by the union in return for achieving one of its own collective bargaining aims as, for example, more flexibility in how it manages its operations. Under the Act, those trade-offs are not possible. And, just as the Act limits those trade-offs between the parties, so too does it limit the ability of the Board to "negotiate" those trade-offs during the course of its consideration of the submissions of the parties.

. . . . . .

Two last introductory points. The first is that this Board, as will be seen below, has introduced compensation improvements on a staggered, or late introduction, basis. This is clearly in order to keep within the compensation limits of the Act. Nothing in the Act prohibits what the Board has done. Importantly, introducing compensation related items in this way is not unusual in either face-to-face negotiations or interest arbitration awards. Generally, its purpose is to allow for an increase in a cost related matter while, at the same time, reducing the cost of that item for the employer during the life of the collective agreement.

We note that awarding compensation related matters in this manner has been done by a substantial number of boards of arbitration recently . . . . [quoted above]

All these cases were subject to the application of the Act, and were decided objectively, by applying the HLDAA criteria.

None of these concepts are novel or controversial, provided this objective approach is followed.

The bigger question, in our opinion, is not whether we can do it, but what is the appropriate time in the collective agreement to introduce something on such a staggered basis?

That is not an easy question to answer and, again, there may not be a right answer. As interest arbitrators, we are tasked with, among other things, the attempt to replicate what the parties would have done in free collective bargaining. In attempting that replication, we look at comparators and whether what is being sought, or awarded, generally fits within the norms. We would, obviously, take into account the concerns of the employer, including the cost of any item.

In the instant case, an increase to the percentage-in-lieu and various premiums are being sought by the union. If the dynamics were normal, such increases could be awarded on the first date of one of the years of the collective agreement but, more normally, on issuance of the award. Were the Board to make such an award in this case, there is no question that the compensation limitation, as required by the Act, would be exceeded. Therefore, no such award can be made. That does not mean, in our opinion, that there should not be an increase as sought so long as it is justified. It simply means that the normal date of implementation is not possible.

Therefore, in our opinion, the analysis of whether an increase can be implemented in the late stages of the collective agreement and, if so, when, must be as follows. First, there must be a subjective determination of whether what is being sought, based on the principles of comparability and replication, among others, might have been agreed to by the parties had negotiations been successful. Second, there must be a determination of whether what is being

> sought is justified and, therefore, should be awarded pursuant to the normal criteria followed by boards of arbitration. Third, if the answer is yes, then it is no longer a question of whether what has been sought should be awarded, but only what the implementation date should be. Because of the limitations forced on the parties by the Act, the date of implementation is driven by the constraints on compensation required by the Act.
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> Given the compensation limitation in the Act, once a general wage increase is awarded, there are limited funds remaining to be used for compensation related matters. Therefore, the normal date of implementation is generally not possible as it would almost always result in an expenditure that is greater than what is permitted. Consequently, another date must be determined. That determination, in our opinion, becomes nothing more than a mathematical exercise. That is, with the remaining dollars available, when can the award be implemented without exceeding the compensation limitations.
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> The above approach does not, in our opinion, offend the Act. To the contrary, it is consistent with the principle, as stated in the Act, that *"the right to bargain collectively is continued."* What is awarded is consistent with the HLDAA, on the one hand, attempting to replicate what the parties would have done had they been able to negotiate the collective agreement on their own, and the limitation in the amount of compensation mandated by the Act.
>
> We acknowledge that there will be an increase in cost to the employer in the next and subsequent years. That result is not peculiar or unique. That results any time an increase in compensation or a compensation related matter is agreed to by the parties. There is an initial cost, which then is perpetuated in future years, unless agreed otherwise by the parties. Additionally, there is nothing in the Act which talks to, or limits, compensation beyond the three-year moderation period.

We fully endorse and adopt the rationale and conclusions in *Foyer Richelieu Welland v. CUPE, Local 3606, supra*. That decision reflects appropriate respect for the fact that an interest arbitration board with jurisdiction pursuant to the *Hospital Labour Disputes Arbitration Act* is bound by Bill 124. That decision also acknowledges and respects the fact that any compensation increases that may be awarded will have cost implications in each and every year of a contract. That award also acknowledges that once a general wage increase is awarded, there are limited funds available to allocate to other monetary items in each year.

Accordingly, the implementation for any increases to existing compensation entitlements cannot result in expenditures that would be greater than what is permitted

under section 11 of Bill 124. Therefore, if there are funds available within the limitations of Bill 124 after a salary rate increase is determined, a board of arbitration or the parties can engage in the “mathematical exercise” of calculating the remaining dollars available, and determine where or if they can be allocated without exceeding the compensation limitations. In that process, they can consider options such as staggering the implementation of such increases. This appears to be the only way that there can be compliance with Bill 124 while also allowing for “collective bargaining to continue”.

This leaves the question for this Board of Arbitration to resolve concerning how that “mathematical exercise” should be conducted. For the following reasons, the Board has concluded (with the Employer nominee dissenting) that the Union’s method of costing increases not only complies with Bill 124, but is also the proper method of doing so. This conclusion is driven by the wording of Bill 124 and is buttressed by Treasury Board’s own directives.

Sections 10 and 11 set the limits for salary rates and compensation entitlements “for each 12-month period of the moderation period”. Since the accepted rules of statutory interpretation prescribe that every word must be given meaning and effect, the use of the word “each” in both sections signals that the 1% limit applies to “each” 12-month period during the moderation period. That is consistent with what Treasury Board wrote with regard to *Groves Memorial Community Hospital and OPSEU, supra:*

- Subsection 11(1) is specific that the one percent maximum on incremental increases to compensation entitlements on average for all employees applies to each 12-month period; amounts cannot be moved between 12-month periods and the provision does not contemplate averaging between years of a collective agreement or arbitration award.
- The costing methodology used to determine the allowable increase in each year of the award is inconsistent with the Act as it applies amounts left over from the previous year of moderation to the following, contrary to subsection 11(1).
- The use of “averaging” in subsection 11(1) is intended to allow for increases to total compensation based on a specific amount for all employees covered by a collective agreement within a specific 12-month period, not across periods.

> The provision does not contemplate averaging between years of a collective agreement or arbitration award.
>
> According to subsection 11(1), each 12-month period of the moderation period is to be treated separately.
>
> [emphasis added]

To summarize, Treasury Board, the body charged with review powers over public sector collective agreements, has stated clearly that the 1% maximum on incremental increases to compensation entitlements on average for all employees applies to each 12-month period. It is therefore contrary to subsection11(1) to apply amounts left over from the previous year to the following year. Nor does subsection 11(1) contemplate averaging between years of a collective agreement. As a result, each 12-month period of the moderation period must be treated separately when computing or determining whether there has been compliance with Bill 124.

While this Board of Arbitration is not bound by Treasury Board's interpretations of Bill 124, we are cognisant of its prerogative to review arbitration awards for compliance with the Bill. We also respect the Parties' mutual goal of achieving a Collective Agreement that complies with Bill 124. Most importantly, we agree with and adopt Treasury Board's approach. It is consistent with sections 10 and 11 of the Bill that direct that each 12-month period within the moderation period is to be treated separately. It recognizes that Bill 124 does not contemplate or allow for the "averaging" between the years of a contract's duration. Therefore, any unspent amounts that might have been available in one year cannot be utilized in the following years. Accordingly, the cost of improvements in one year of a contract cannot be factored again in the costing of the next or following years of that contract. Any doubt about Treasury Board's interpretation can also be dispelled by its letter to the parties in the *Foyer Richelieu Welland v. CUPE, Local 3606, supra,* case. As quoted above, Treasury Board stated: "We acknowledge that implementation dates for compensation increases may by selected for a variety of reasons during the collective bargaining process". While it warned that if the increases are structured to avoid the requirements of Bill 124, the

practice could violate section 24. However, Treasury Board has not interfered with staggered increases to non-salary rates that do not exceed the expenditure of any remaining funds available within "each 12-month period of the moderation period". Most significantly, Treasury Board has not interfered with the *Foyer Richelieu Welland v. CUPE, Local 3606, supra,* case or any of the other awards relied upon by the Union. This indicates that Treasury Board may properly interfere with any attempts to avoid Bill 124, however, as long as the parties are able to navigate within the limits of Bill 124, their contracts will survive scrutiny.

Therefore, each year within the moderation period must be treated separately. Further, it is clear that a board of arbitration or the parties can choose to implement increases at any point within each 12-month period as long as the cost of those increases to the employer do not exceed the allowable amounts available within each year.

With those strictures in mind, it must also be acknowledged that the cost of any salary and compensation entitlements flowing to an employee must be factored into the Employer's cost during the 12-month period of its implementation. Any amounts that could have been spent within Bill 124's mandate that are left "on the table" within that 12-month period cannot be carried forward into the next year. Since each year is to be considered separately, the second year of a contract must be considered afresh to determine whether increases in that year fit within the limited compensation entitlements available for all employees within that 12-month period. This method does not "avoid" the spirit or the wording of Bill 124. Instead, it is consistent with the Legislature's stated intent of respecting the collective bargaining process, encouraging responsible bargaining, and ensuring that outcomes are consistent with the responsible management of expenditures and the sustainability of public services. It does this by significantly limiting the amount of increases available to public sector employees.

It must be recognized that this methodology does have a financial impact on employers. For example, if a premium is implemented in the last month of Year 1 of a two or three-year collective agreement, only the cost of the one month in Year 1 will be factored into

the computation of whether the Year 1 package complies with Bill 124. While the actual financial burden to the employer and benefits to the employees in Years 2 and 3 will include the increased value of the premium, that increased amount over the pre-moderation period cost is not a factor that Bill 124 takes into consideration. Instead, Bill 124 focuses its concerns and limits on the increases in "each 12-month period". Therefore, there is, and must be, a difference between the cost to an employer of any compensation increases and the methodology of costing compensation entitlements for each period of the moderation period.

This conclusion becomes more compelling by comparing it to the Hospital's two alternative options for calculating or attributing cost increases. The Hospital's first suggested approach creates a fiction. The notion of attributing the cost of a staggered increase over the full year of a contract makes no labour relations or fiscal sense. If a compensation item is introduced mid year or even on the last day of a contract's year, this means that there is no financial liability or cash flow impact for an employer or benefit to the employees until the date it is implemented. Therefore, it would be entirely unfair to characterize the cost of an enhanced entitlement to the months it did not take effect. Nor does Bill 124 ask for the parties to factor in compensation entitlements that do not flow to employees for purposes of computing the percentage increase for new compensation entitlements. If the Hospital's interpretation were to be adopted, it would mean that any enhancement introduced mid or late in each year would have to be factored in as if it applied for the entire year. That would significantly diminish any amounts that would otherwise have been available in each 12-month period. There would have to be much clearer language in Bill 124 for such a result to be accepted.

Similarly, we cannot accept the Hospital's suggestion that Bill 124 intends to have the cost of compensation improvements in one 12-month period factored into subsequent years during the moderation period. We understand why that has been advocated because it does recognize the real costs to the employer. It makes complete sense from an accounting point of view. However, that approach would add any increase implemented at any point in Year 1 of a contract to the calculation of any increases in

the following years. The Hospital is correct in pointing out that the costs carry on for purposes of the employer's liability and the item becomes part of an enhanced compensation package received by the employees. Therefore, they are more than a simple accounting matter. We also acknowledge that the Hospital has not suggested "averaging" as a method in this case, although that may be the effective outcome of its proposal. However, the problem with the third "approach" is that it completely ignores section 11's wording that only limits total increases "for each 12-month period of the moderation period". This means that the new rate forms part of the base upon which the parties can negotiate terms in each separate year if they stay within the fiscal parameters set by section 11 of the Bill. Again, if the Hospital's submission on the annualized method was accepted, it would significantly limit the funds available during subsequent years in the moderation period. That, in and of itself, would not be a reason to reject this methodology if that was what Bill 124 required. However, the Bill only requires the limits to be applied and therefore calculated in each 12-month period.

Further, Bill 124 does not limit compensation beyond the three-year period. Therefore, the cumulative effect of increases that fit within the limitations in each 12-month period by being implemented on a staggered basis complies with the language of Bill 124.

CONCLUSION

For all these reasons, it must be concluded that OPSEU's approach to costing complies with Bill 124. When or if compensation entitlements are implemented on a staggered basis during a 12-month period within the moderation period, the costing of the item must be calculated on the basis of the actual cost to the employer within that 12-month period. Any new rate will certainly carry forward and have implications on costs in the next year(s) of a contract. However, Bill 124's clear direction to treat each 12-month period separately compels the conclusion that the cost cannot be carried forward for purposes of computing the funds available in subsequent years. Nor can the cost be attributed on a full year basis unless it has been implemented for the 12-month period. These conclusions mean that staggered increases are not, per se, appropriate or

inappropriate. They are simply a tool that parties can consider in their collective bargaining under Bill 124. Their challenge is to achieve contractual terms that comply with the limits imposed by sections 10 and 11 in each 12-month period within the moderation period. To that end, the Parties must keep in mind that increases to benefits proportionally linked to salary have to be included in the costing of total compensation since they are for the benefit of the employees. However, the costing can and should be done for each separate 12-month period within the moderation period.

Having provided this direction to the Parties to this hearing, we hope that they will now be able to reach mutual agreement concerning the outstanding issues in dispute. Failing that, we shall reconvene our hearing as scheduled.

Dated at Toronto this 23rd day of August, 2021

Paula Knopf - Chair

"Matthew Sutcliffe"

I Dissent - See Attached

Matthew Sutcliffe - Employer Nominee

"Helen Nowak"

I Concur

Helen Nowak - Union Nominee

DISSENT OF EMPLOYER NOMINEE - MATTHEW SUTCLIFFE

I have had the opportunity to review the interim award of the Board in this matter and must respectfully dissent from the reasoning and result of the majority. While I would not disagree that the majority's result might appear to align with the results in previous awards issued in the Bill 124 environment, in my view, the approach endorsed by the majority is inconsistent with the restrictions contained within and/or the intent or spirit of Bill 124. I will comment below further on previous Bill 124 awards.

As a starting point, the parties pointed to the Treasury Board Secretariat's June 1, 2021 letter to the parties in *Foyer Richelieu Welland and CUPE*, which states that staggered compensation increases structured specifically to avoid the requirements of Bill 124 could constitute avoidance under Section 24 of the Act. This caution from TBS warrants analyzing why compensation increases are being implemented on a staggered basis and whether such staggered increases comply with Bill 124. Earlier awards (and TBS' letters to the parties in those cases) do not shed light on other parties' costing methodology for staggered increases.

The crux of the dispute as I see it regarding costing methodology was stated by employer counsel in its main brief as follows:

> The key question, then, is how staggered compensation increases must be costed to ensure that "any incremental increases to existing compensation entitlements" do not exceed the permissible 1% total compensation increase "for each 12 month period of the moderation period" without running afoul of anti-avoidance principles and ensuring consistency with the principles of responsible fiscal management.

The Union has been transparent that it endorses "costing methodology 2" in order to maximize the compensation increases available in the Bill 124 environment. The Union did not point to any comparators or other non-Bill 124 bases for this Board awarding compensation increases on a staggered basis using the costing methodology endorsed by the union.

I disagree with the majority's adoption of "costing methodology 2", which as employer counsel correctly points out, ignores significant components of the actual costs of implementing the compensation increases sought by the Union. As employer counsel emphasized, Bill 124 states its purpose as follows:

> The purpose of the Act is to ensure that increases in public sector compensation reflect the fiscal situation of the Province, are consistent with the principles of responsible fiscal management and protect the sustainability of public services.

With the utmost of respect to the majority, the methodology awarded results in unreasonable outcomes inconsistent with the stated purpose of Bill 124 and its restrictions. The employer's example from its reply brief illustrates this point clearly: If the Board awarded a 200% increase in shift premiums on the last day of Year 1 of the moderation period, the majority's approach to costing would view that increase as Bill 124-compliant as long as the cost of 1 day of increased shift premiums fit within the additional compensation increase permitted in Year 1. The majority's approach would ignore the cost of implementing the 200% increase in shift premiums that falls almost entirely in the subsequent year on the basis that the 200% increase was already in effect prior to Year 2. I agree with employer's counsel that this approach creates a fiction that is inconsistent with Bill 124.

To ensure Bill 124 compliance in this example, the actual cost of implementing a 200% increase in shift premiums must be accounted for, a small part of which falls in Year 1 of the moderation period and the lion's share of which falls in Year 2 of the moderation period. The implementation cost that falls within Year 2 must be reviewed to ensure Bill 124 compliance. The cost of <u>implementing</u> a compensation increase can and should be distinguished from the increased cost to the employer moving forward once a compensation increase is implemented, the latter of which no one contended needs to be taken into account for Bill 124 purposes.

I disagree with OPSEU's contention that accounting for the actual cost of implementing a compensation increase where that cost falls within two years constitutes "averaging" amounts between years of the moderation period or is in any way contrary to TBS' guidance in *Groves Memorial*. Like employer counsel, I see *Groves Memorial* as distinguishable from this case. The aspect of *Groves Memorial* relied on by OPSEU related to whether monies not "spent" in one year of the moderation period could be carried over and "spent" in another year. That issue does not address Bill 124-compliant costing for compensation increases implemented on a staggered basis.

I simply cannot agree that a costing methodology that results in the disregard of what would amount to the lion's share of compensation costs in the above example is in any way consistent with Bill 124's wording or any "principles of responsible fiscal management," nor can I see how

this would “protect the sustainability of public services.” As employer counsel argued, there is a distinction between an increase in compensation and when the cost of that increase is to be implemented. This is more than an accounting exercise, as suggested by OPSEU, but the reasonable accounting of expenses by organizations that have funding and budgetary accountabilities.

I find it instructive to consider this question from the opposite perspective: Would any union agree or support an employer’s contention that a 2% wage reduction implemented halfway (50%) through a year of an agreement only has a 1% impact on the employee’s income because it “straddles” two separate 12-month periods? As with the cost to the employer, the cost to the employee in this example is clearly fully implemented over two 12-month periods, and should be accounted for. This conclusion (resulting in the ignoring of the full impact experienced by the employee) is as untenable as the majority decision in this matter, in my respectful view.

As noted, I did want to comment on previous awards that would appear to be consistent with the majority’s outcome, even though those awards are not technically binding on this Board. Simply, as was argued by employer counsel, we do not have the benefit of knowing how those outcomes were costed by either the parties or the Boards that rendered those decisions. That is not to say that all those outcomes are rightly (or wrongly) decided or reached. While the outcome in this case may appear to be consistent with these previous awards, we cannot conclude that those outcomes used this same methodology. In my view, this Board has a responsibility to conduct its own analysis and ensure its reasoning and outcome is Bill 124 compliant, particularly given the parties’ detailed submissions and their request that we do so.

Ultimately, as this is the first award that specifically analyzes the Bill 124-compliant costing methodology for staggered compensation increases, the Treasury Board will have the opportunity to provide its perspective as to whether the majority’s approach is consistent with Bill 124.

All of which is respectfully submitted.