NOTICE OF CONSTITUTIONAL QUESTION

The Union, Healthcare Office Professional Employees UBCJA, 2220, in the arbitration of Chartwell Seniors Housing REIT (The Woodhaven) and Healthcare Office and Professional Employees Union, Local 2220, UBCJA, Union/Policy Grievance (Grv. #09-07-20); Individual Grievance of Kasheka Fearon (Grv. #25-06-20); and Union/Policy Grievance (Grv. #27-06-20) (collectively, the "Grievances"), intends to question the constitutional validity of O. Reg. 77/20 and O. Reg. 95/20 to the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17.

The question is to be argued at an arbitration of the above-noted matters before Arbitrator Gail Misra which has been scheduled to be heard on September 25, 2020 heard via ZOOM Video Conference.

MATERIAL FACTS

The following are the material facts giving rise to the constitutional question:

1. Healthcare Office Professional Employees UBCJA, 2220 (the "Union") represents all employees of 1367178 Ontario Inc. c.o.b. as The Westmount - 200 David Bergey Drive, Kitchener, Ontario; The Wynfield - 451 Woodmount Drive, Oshawa, Ontario; The Woodhaven - 380 Church Street, Markham, Ontario; The Waterford - 2140 Baronwood Drive, Oakville, Ontario (the "Employer"), save and except supervisors and persons above the rank of supervisor, nurse managers, educator, co-ordinators, registered and graduate nurses, recreation managers, volunteer co-ordinator, maintenance, office and clerical staff. The present grievances relate to bargaining unit employees employed at The Woodhaven.

2. The current collective agreement between the Union and the Employer ("Collective Agreement") came into effect on June 25, 2017 and expires on June 24, 2020.

3. Article 12.8 of the Collective Agreement assigns overtime to bargaining unit employees on a seniority basis according to the terms of a "Call In" protocol, as follows:

> **12.8 Call In**
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> After the schedule is posted, call ins for additional shifts shall be made from a call in list where employees working less than 75 hours bi-weekly shall sign their availability to work additional hours. The lists shall be in order of seniority for each department. Employees will be called in on a rotational basis and offered all available shifts, by seniority. The Employee may accept one of the shifts offered at a time. The parties agree to review the above protocols at the labour management committee as required for effectiveness and make appropriate changes
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> i) When replacing shifts the employer will normally cover the entire shift.
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> ii) The employer will contact employees in the building before passing to the next in line.

4. Article 6.9 of the Collective Agreement is a union security provision which prohibits the Employer from "contracting in" bargaining unit work to the employees of outside (i.e. third party) agencies, rather than assigning the same work to bargaining unit employees, as follows:

> **6.9** The Employer shall not contract out any work normally performed by members of the bargaining unit, however, contracting out to an Employer who is organized with HOPE, UBCJA who would employ the employees of the bargaining unit, who would otherwise be laid off, with similar terms and conditions of employment.

5. Article 6.10 of the Collective Agreement is a further union security provision that prohibits employees that are not covered by the Collective Agreement from performing bargaining unit work, as follows:

> **6.10** Employees not covered by the terms of this Agreement will not perform any duties which are normally performed by members of the bargaining unit, which would directly cause or result in the layoff of regularly scheduled hours of work of an employee in the bargaining unit except for the purposes of instruction, in emergencies or when regular employees are not available.

6. As set out in the Grievances, the Employer has not assigned overtime on a seniority basis according to the requirements of the Call In Protocol set out in Article 12.8 of the Collective Agreement.

7. Further, contrary to the requirements of Articles 6.9 and 6.10 of the Collective Agreement, the Employer has improperly used "agency staff" – i.e. contracting in the performance of bargaining unit work (including but not limited to work taking place on overtime shifts) to the employees of an outside or third-party agency – rather than assigning the bargaining unit work and overtime shifts in question to bargaining unit members.

8. As set out in the Grievances, the Employer's actions also constitute a breach of Articles 1.01, 1.02, 2.02, 4.03 of the Collective Agreement and all other relevant Articles of the same – along with past practice.

9. In its September 11, 2020 response to the Grievances addressed to Arbitrator Misra, the Employer has taken the position, by way of a preliminary objection, that the Grievances and the circumstances giving rise to the Grievances fall within the ambit of O. Reg. 77/20 and/or O. Reg. 95/20 to the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17 (hereinafter, the "Regulations").

10. Further, the Employer has taken the position that **Section 3(v.)** of O. Reg. 77/20 requires that the Grievances and arbitration processes relating to them be suspended for the duration of the Emergency Order(s) in question.

11. As such, it is the Employer's position that the grievances are inarbitrable.

12. O. Reg. 77/20 ("Work Deployment Measures in Long-Term Care Homes") provides at **Section 2** that health service providers within the meaning of paragraphs 4 and 5 of subsection 1 (2) of the *Connecting Care Act, 2019* may take, with respect to work deployment and staffing, any measure with respect to work deployment and staff reasonably necessary to respond to, prevent and alleviate the outbreak of the coronavirus for residents:

> **2.** Health service providers shall and are authorized to take, with respect to work deployment and staffing, any reasonably necessary measure to respond to, prevent and alleviate the outbreak of the coronavirus (COVID-19) (the "Virus") for residents.

13. **Section 3** of O. Reg. 77/20 provides that despite any applicable collective agreement, health service providers may, *inter alia*, change the assignment of work, including by assigning non-bargaining unit employees or contractors to perform bargaining unit work, as well as change the scheduling of work and shift assignments:

> **3.** Without limiting the generality of section 2 of this Schedule, and despite any other statute, regulation, order, policy, arrangement or agreement, including a collective agreement, health service providers shall and are authorized to do the following:
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> **i.** Identify staffing priorities and develop, modify and implement redeployment plans, including the following:
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> **A.** Redeploying employees so that any particular employee is not providing services at more than one long-term care home operated or maintained by the health service provider.
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> **B.** Changing the assignment of work, including assigning non-bargaining unit employees or contractors to perform bargaining unit work.
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> **C.** Changing the scheduling of work or shift assignments.
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> **D.** Deferring or cancelling vacations, absences or other leaves, regardless of whether such vacations, absences or leaves are established by statute, regulation, agreement or otherwise.
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> **E.** Employing extra part-time or temporary staff or contractors, including for the purposes of performing bargaining unit work.
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> **F.** Using volunteers to perform work, including to perform bargaining unit work.
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> **G.** Providing appropriate training or education as needed to staff and volunteers to achieve the purposes of a redeployment plan.
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> For greater certainty, a health service provider may implement redeployment plans without complying with provisions of a collective agreement, including lay-off, seniority/service or bumping provisions.

ii. Conduct any skills and experience inventories of staff to identify possible alternative roles in any area.

iii. Require and collect information from staff or contractors about their availability to provide services for the health service provider.

iv. Require the provision of and collect information from staff or contractors about their likely or actual exposure to the Virus, or about any other health conditions that may affect their ability to provide services.

v. Suspend, for the duration of this Order, any grievance process with respect to any matter referred to in this Order.

14. As set out and cited above, **Section 3(v.)** suspends for the duration of O. Reg. 77/20, any grievance process with respect to any matter coming within the ambit of that Order.

15. O. Reg. 95/20 ("Streamlining Requirements for Long-Term Care Homes") provides at **Section 3** that licensed long term care homes may, despite any requirement set out under any statute, regulation, order or policy, fill any staff position with the person who, in their reasonable opinion, possessed the skills, training and knowledge adequate to perform the duties of the position:

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3. Despite any requirement set out in the LTCHA or Ontario Regulation 79/10 (General), made under that Act, or any other statute, regulation, order or policy, licensees shall and are authorized to do the following, or are not required to do the following, as the case may be:

i., ii. Revoked: O. Reg. 412/20, s. 5 (2).

iii. Staffing:

A. Licensees may fill any staff position with the person who, in their reasonable opinion, has the adequate skills, training and knowledge to perform the duties required of that position.

LEGAL BASIS

The following is the legal basis for the constitutional question:

16. O. Reg. 77/20 and O. Reg. 95/20 to the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, S.O. 2020, c. 17 – regulations made under the *Emergency Management and Civil Protection Act)*, enable the Employer, a licensed long term care facility, to disregard the terms of the Collective Agreement when assigning work, overtime hours and when "contracting in" work.

17. O. Reg. 77/20 also suspends any grievance process with respect any matters referred to in it for the during of that Order – enabling the Employer to sidestep the Collective Agreement terms governing both the Grievances and the arbitration process relating to them. The

Regulations effectively suspend the terms of the Collective Agreement, for the purposes, *inter alia*, of the Grievances.

18. In so far as they enable the Employer to disregard the terms of the Collective Agreement and/or suspend the terms of the same, the Regulations constitute a substantial interference with the right of the Union and its members to engage in a meaningful process of collective bargaining recognized by the Supreme Court of Canada, *inter alia*, in *Mounted Police Association of Ontario v. Canada*, 2015 SCC 1 (CanLII) ("*MPAO*"), *Royal Canadian Mounted Police v. Canada (Attorney General)* 2015 Carswell Nat 16 ("*Meredith*") and in *Saskatchewan Federation of Labour*, 2015 SCC 4 (CanLII) ("*SFL*"), and therefore infringe their constitutional right to freedom of association under section 2(d) of the Canadian Charter of Rights and Freedoms ("Charter").

19. The Union submits that the impugned Regulations substantially interfere with the right to engage in a meaningful process of collective bargaining by suspending the product of the exercise of that right – i.e. the provisions of the freely negotiated Collective Agreement to which the Employer is bound, including but not limited to those provisions cited and relied upon in the Grievances. The Regulations effectively eliminate these fruits of past collective bargaining processes between the Employer and the Union.

20. As set out in *MPAO*, a process that "substantially interferes" with "meaningful collective bargaining" constitutes a breach of section 2(d) of the Charter.

21. Section 1 of the Charter provides that:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

22. The Union submits that the onus of proving that a limitation on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.

23. In particular, Section 1 requires the party seeking to uphold the limitation to establish both that the objective underlying the limitation posed by the Regulations is sufficient to warrant overriding the constitutionally protected right to freedom of association set out in section 2(d) of the Charter, and that the means chosen to reach that objective are proportionate (i.e. that the three components of the proportionality test under *R. v. Oakes* have also been met. (See *R v. Oakes*, 1986 CanLII 46 (SCC)).

24. While the standard of proof under this section is the civil standard, this test must be applied rigorously and the evidence in support of such limits must be cogent and persuasive and make clear the consequences of imposing or not imposing the limit.

25. The Union submits that the violation of section 2(d) of the Charter caused by the Regulations is not justifiable in a free and democratic society and accordingly, is not saved by section 1 of the Charter.

26. Without limiting the foregoing, the Union submits that the limitations on the section 2(d) Charter rights of the Union and its members posed by the Regulations cannot be said to be rationally connected to the objectives of the Regulations.

27. Further, the measures adopted cannot be said to minimally impair the s. 2(d) Charter rights of the Union and its members. The Regulations effectively eliminate the fruits of past collective bargaining processes between the Union and the Employer – i.e. the Collective Agreement and those of its provisions relied upon in the Grievances – and make the very filing of a grievance impossible.

REMEDY

28. The appropriate remedy under s. 52 of the Charter is to declare that the impugned provisions within O. Reg. 77/20 and O. Reg. 95/20 to the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* are inapplicable and/or of no force and effect.