

August 23, 2018

The Alberta Union of
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Marrazzo/ Cherie Langlois-Klassen**
Fax: (780) 930-3393

Capital Care Group Inc.
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**Attention: Ian Caldwell/
Elgie Demchuk**
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United Nurses of Alberta
700 - 11150 Jasper Avenue
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**Attention: David Harrigan/
Mark Wells**
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Attention: Craig W. Neuman, Q.C.
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Alberta Continuing Care Association
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Attention: Labour Relations
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The fair and equitable
application of Alberta's
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To administer, interpret
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**RE: An application brought by The Alberta Union of Provincial
Employees affecting Capital Care Group Inc. – Board File No. ES-
00005**

**RE: A cross-application brought by Capital Care Group Inc. affecting
The Alberta Union of Provincial Employees– Board File No. ES-
00005**

Enclosed is a copy of the Board's Written Reasons for Decision dated August
23, 2018.


for Tannis Brown
Director of Settlement

vml
Enclosure



IN THE MATTER OF THE LABOUR RELATIONS CODE

THE ALBERTA UNION OF PROVINCIAL EMPLOYEES

Applicant

- and -

CAPITAL CARE GROUP INC.

Respondent

**UNITED NURSES OF ALBERTA
ALBERTA HEALTH SERVICES
ALBERTA CONTINUING CARE ASSOCIATION**

Intervenors

FILE: ES-00005

BOARD MEMBERS

Gwen J. Gray, Q.C. – Vice-Chair and Essential Services Commissioner
Donna Neumann – Board Member
Dianne Wyntjes – Board Member

APPEARANCES

For the Applicant: Cherie Langlois-Klassen (Counsel)
For the Respondent: Craig W. Neuman, Q.C. (Counsel)
For United Nurses of Alberta: Mark Wells (Counsel)
For Alberta Health Services: Monica M. Bokenfohr (Counsel)
For Alberta Continuing Care Association: Hugh J.D. McPhail, Q.C. (Counsel) (written submissions only)

REASONS FOR DECISION

[1] These reasons address an interpretative question which has arisen in the negotiation of an essential services agreement between the Alberta Union of Provincial Employees (“AUPE”) and Capital Care Group Inc. (“Capital Care”).

[2] The question pertains to standards legislation affecting the delivery of nursing home services and their role in determining essential services. Capital Care proposes to include the following clause in the Essential Services Agreement (“ESA”):

1.07 Both parties acknowledge that the requirements set forth in the *Protections of Persons In Care Act* (PPIC), the *Continuing Care Health Service Standards* (CCHSS), the *Nursing Homes Act*, the Nursing Homes Operation Regulation, the *Supportive Living Accommodation Licensing Act*, Supportive Living Accommodation Licensing Regulation, Long-term Care Accommodation Standards, and other relevant legislation, laws, regulations and/or contractual obligations remain in effect during any strike or lockout.

[3] Capital Care claims AUPE, in the course of negotiating the ESA, refuses to acknowledge that requirements arising from health care statutes, regulations, ministerial orders and standards applicable to Capital Care’s operations must still be adhered to during a labour dispute and accommodated within provisions of an ESA. It claims AUPE’s position is impeding the negotiations of an ESA and seeks the assistance of the Board in resolving the interpretative issue.

[4] The parties have been bargaining with respect to the ESA with assistance from Umpire Lyle Kanee. Both parties have filed bad faith bargaining complaints against the other party. At the suggestion of Umpire Kanee, the parties agreed to have the interpretative issue resolved by a Commissioner’s panel. The parties retain their ability to request hearings of the unfair labour practice aspects of their complaints, if required.

[5] As the matters in question raise issues which may affect the negotiation of other ESAs in health care, the Board invited submissions from other health care unions and employers. Written and oral submissions were received from the United Nurses of Alberta (“UNA”) and Alberta Health Services (“AHS”). The Alberta Continuing Care Association provided written submissions only.

[6] The process of referring an essential services issue which may impact more than one ESA bargaining relationship to the Commissioner or a Commissioner's panel is a sensible and practical method for resolving what might be described as global issues especially at this early stage of ESA negotiations. A question of this nature can be referred to the Commissioner under section 16(3) of the *Code* (as contemplated by section 15.3(3)) without the need for the filing of unfair labour practice complaints. Parties should discuss the issues first with the umpire and be prepared to justify in their application why the matter requires resolution before the Commissioner. Should the Commissioner accept an application, the Commissioner will invite other affected parties to participate in the proceedings as intervenors.

Submissions

Capital Care and AHS

[7] Capital Care and AHS argue the various legislative and regulatory standards ("health standards legislation") applicable to health care are intended to provide minimum standards of care for patients/clients of the health care system. They stress that residents receiving care in long term and continuing care homes are a vulnerable group.

[8] Both argue the essential services provisions contained in Division 15.1 do not have legislative supremacy over health standards legislation and, as a result, must be read in harmony with the standards. Division 15.1 does not state the provisions apply "notwithstanding any other enactment". Capital Care and AHS argue health care employers are required to comply with the health standards legislation during a strike and/or lockout. As a result, they argue the standards set in health standards legislation constitute essential services which must be provided during a strike or lockout.

Alberta Continuing Care Association

[9] The Alberta Continuing Care Association is a non-profit organization representing the providers of continuing care services in Alberta from all three streams of care: home care, supportive living and long term care. It referred the Board to a report of the Alberta Health Continuing Care Branch entitled *2015/2016 Alberta Long-Term Care Resident Profile* which

describes the vulnerability and fragility of the client group served by continuing care providers in Alberta. The Association argues health standards legislation is not aspirational but provides minimum standards which clients are entitled to expect and demand even during a labour dispute. It notes the obligations to continuing care residents are part of a complex health system, including acute care. An upset to the continuing care sector would impact the whole system. It agrees with the position of Capital Care and AHS that there is nothing in Division 15.1 of the *Code* indicating it is dominant over health standards legislation. The Association also points to section 95.44(7) of the *Code* and argues the use of compulsory binding arbitration is a more palatable solution to labour disputes in this sector and urges the Commissioner to take a cautious approach to the interpretative issues.

AUPE

[10] AUPE argues the Board's interpretive approach must balance competing constitutional rights. *SFL v. Saskatchewan*, 2015 SCC 4 ("*SFL*") constitutionalized the right to strike. The right of each individual bargaining unit member to participate in strike activity should be impaired no more than necessary. The insertion of the standards clause into an ESA as proposed by Capital Care would circumvent the intent of the *Code* which is intended to minimally impair workers' rights to strike. AUPE also argues Capital Care's bargaining position avoids the arduous work of delineating what duties are essential. AUPE relies on *The Crown in Right of Ontario*, [1999] OLRB Rep. Jan./Feb. 10, summarized in *Ontario (Ministry of Community Safety and Correctional Services), Re*, 2005 CanLII 5721 (Ont. L.R.B.), for the proposition an ESA must identify which work functions are essential, as well as identify the classifications that are essential.

[11] AUPE does not dispute that health standards legislation applies during a strike or lockout. It asserts, however, that not every requirement set out in health standards legislation constitutes an "essential service" under Division 15.1 and not every requirement needs to be performed by employees designated as essential service workers. It understands Division 15.1 as placing limits on day-to-day operations, curtailing operations in the event of a work stoppage, and allowing only what is necessary to prevent any endangerment to the life, personal safety or health of the public. Inconvenience to the public is not sufficient. The temporal aspect of a strike must also be

considered as the withdrawal of services may not affect the life, personal safety or health of the public unless it is withdrawn for some period of time. AUPE referred to various ESA decisions of Labour Relations Boards in New Brunswick and British Columbia setting out methods of determining essential service levels.

UNA

[12] UNA addressed a number of issues in its written submissions which were abandoned at the hearing. In oral argument, UNA argued that *SFL* must inform the interpretation of Division 15.1 of the *Code*, noting the principles in *SFL* apply across the country. UNA encouraged the Board not to derogate from the right to strike unless the derogation is necessary. Inconvenience and hardship do not constitute threats to life, personal safety or health of the public. Health standards legislation is relevant and can be taken into account in determining essential services but they are not determinative of essential services.

Relevant Legislative Provisions

[13] Division 15.1 of the *Code* contains provisions for the maintenance of essential services during strikes or lockouts among health care and other employees.

[14] Essential services are defined in section 95.1 which provides:

For the purposes of this Division, essential services are those services

(a) the interruption of which would endanger the life, personal safety or health of the public, or

(b) that are necessary to the maintenance and administration of the rule of law or public security.

[15] The process of ensuring essential services are maintained during a strike or lockout involves the negotiation of an essential services agreement in accordance with section 95.4.

[16] The mandatory contents of an essential services agreement are set out in section 95.41:

95.41(1) An essential services agreement must include at least the following:

- (a) provisions that identify the essential services that are to be maintained by employees in the bargaining unit in the event of a strike or lockout;*
 - (b) provisions that set out the classifications of employees, and the number of positions in each classification, required to perform the essential services referred to in clause (a);*
 - (c) provisions that set out a method by which the employees capable of performing and qualified to perform essential services will be assigned to perform those services during a strike or lockout;*
 - (d) provisions that set out the procedures to be followed in responding to emergencies and foreseeable changes to the essential services that need to be maintained during a strike or lockout;*
 - (e) provisions describing changes or permitted changes, if any, to the terms and conditions of employment that are to apply to designated essential services workers under sections 130(2) and 147(4) of this Act and sections 24.1(2) and 46(2.1) of the Public Service Employee Relations Act;*
 - (f) provisions that identify sufficient umpires, but at least one umpire, to be available to provide timely resolution of disputes under section 95.7.*
- (2) For the purposes of this section, the requirement for designated essential services workers is to be determined having regard, subject to subsection (3), to the availability of other capable and qualified persons who are not members of the bargaining unit.*
- (3) During a strike or lockout, the employer shall not use the services of a person, whether paid or not,*
- (a) who is hired by the employer for the purpose of, or*
 - (b) who is supplied to the employer by another person for the purpose of,*
- performing the work of an employee in the bargaining unit that is on strike or lockout.*

[17] If the parties are unable to reach agreement on an ESA, they may apply to an umpire or the Commissioner for assistance in concluding the ESA: *Code*, section 95.42. An umpire's

decision with respect to the contents of an ESA can be reviewed by the Commissioner on the grounds of reasonableness: *Code*, section 95.42(7). An ESA must be filed and accepted by the Commissioner: *Code*, section 95.44. Section 95.44(6) provides the Commissioner with various processes to use to make an ESA acceptable for filing. If none of the processes will achieve an acceptable ESA, the Commissioner can declare the labour dispute is to be resolved by compulsory arbitration: *Code*, section 95.42(7). The parties cannot engage in a strike or lockout until an ESA is filed with the Commissioner: see sections 73(a.1) and 74(a.1).

Decision

[18] There is no dispute between the parties with respect to the obligation of long term and continuing care employers to abide by the standards set for their operations by government even during a strike or lockout. A failure to comply with the standards would risk a closure of the operations: see, for example, *Nursing Homes Act*, RSA 2000, c. N-7, s. 14, which empowers the Minister to cancel or suspend a nursing home contract for operating in contravention of the *Act* or Regulation.

[19] However, it cannot be said that all of the health standards legislation address matters that are required to ensure the life, personal safety or health of the residents of the operations. For instance, section 8 of Nursing Homes Operations Regulation, AR 258/1985 requires a nursing home operator to make an inventory, in duplicate, of a resident's personal property at the nursing home including any money in the resident's possession. Similar examples can be found in other health standards legislation. Standards of this nature cannot be said to impact the life, personal safety or health of the resident so as to make the performance of the task an essential service within the meaning of the *Code*. As a result, an employer cannot require this task to be performed by an essential services worker: *Code*, s. 95.11(2). Management employees would be required to perform the task if it is necessary during a strike or lockout.

[20] On the other hand, some standards clearly address services which, if withdrawn during a strike or lockout, would endanger the life, personal safety or health of a resident. For instance, the Continuing Care Health Service Standards ("CCHSS") require an operator to provide oral care to residents a minimum of two times a day: CCHSS, paragraph 14.2. Similarly, operators

are required to provide bathing a minimum of two times per week in a manner chosen by the resident: CCHSS, paragraph 14.3. The continuing care operator is required to develop Care Plans for each resident which address the resident's physical, mental, emotional, social, intellectual and spiritual health care needs: CCHSS, paragraph 1.0. Care Plans set out the interventions required for the resident to ensure their personal safety and health and are important to take into account when determining the level and type of services to be maintained during a strike or lockout.

[21] It may be that not all aspects of a particular standard are necessary to ensure the health and safety of a resident, for instance, the manner of taking a bath or shower. In such circumstances, it would be appropriate for an ESA to require an employer to make its best efforts to encourage residents to select a method which provides the safest and most efficient method of bathing. If the resident declines to do so, the standard still requires the service must be provided in the manner selected by the resident. Similar efforts can be required of employers with respect to other matters. For instance, although the regulations require homes to accept admissions when beds become available, an employer may be required under an essential services agreement to make its best efforts to persuade the admissions committee to stop or limit admissions to its facility during a strike or lockout. These efforts to impact matters over which an employer has no legal control are practical and appropriate in the circumstances of a strike or lockout. Similarly, standards which do not impose schedules for providing a particular service can be postponed for a period of time.

[22] There are many ways an ESA can be negotiated to take into account the requirements of those aspects of health standards legislation which impact on life, personal safety and health of residents. For instance, in *Lifestyle Retirement Communities Ltd. v. British Columbia Nurses' Union*, 2000 CanLII 27286 (B.C.L.R.B.), the British Columbia Labour Relations Board described the "scope of services" as follows in Schedule A:

Scope of Services:

1. ADMISSIONS - On hold
2. MARKETING - On hold
3. CARE - Must meet licensing requirements. All individualized care plans to be followed including medications, treatments, rehabilitative procedures, nutritional care plan, activities of daily living (i.e., level of

- assistance with personal hygiene, oral hygiene, peri-care, dressing, weekly bathing, mobility and ability to feed self, etc.)
4. PALLIATIVE CARE - No provision for palliative care services. Transfer to acute care/hospice.
 5. EXTENDED CARE - WAITLISTED FOR PLACEMENT - Request emergency placement.
 6. NUTRITION - Regular meal hours with reduced menu selection. Menu must follow Canada Food Guide and meet licensing regulations. Regular nourishment and nutritional supplements. Table settings to continue with paper plates and stainless steel cutlery. Registered Dietitian to continue providing 12 hours weekly to provide dietetic service as per licensing regulations.
 7. HOUSEKEEPING - Bathroom sanitation once a week and emergency clean up as needed. Daily bed making, bi-weekly vacuuming and general cleaning/organizing, weekly bed linen change with emergency bed linen as needed. Emergency carpet, upholstery and resilient floor cleaning due to incontinence, spills.
 8. LAUNDRY - Weekly laundering of bed linens, bibs and personal clothing.
 9. MAINTENANCE - As needed for emergency repairs.
 10. THERAPEUTIC RECREATION PROGRAMS - On hold
 11. PHARMACEUTICAL/LABORATORY SERVICES - Maintain current level of services by current service providers.
 12. PHYSIOTHERAPY/PODIATRY - Current services to continue if necessary to meet item #3 above.
 13. PRIVATE PAY AGENCY SUPPORT - Continue with current home support services only.
 14. VOLUNTEERS - To provide current volunteer programs - no bargaining unit work.
 15. FAMILY - Will be allowed access and egress.
 16. RECEPTION - Provided by managers.

(Emphasis added)

[23] In an ESA involving a care home in Manitoba, the essential duties to be performed by essential services workers were described in part as follows:

III. Nursing Support

1. Respond to and provide care during emergency codes.
2. Activities of daily living
 - Safety – constant care (1:1), restraint management, respond to environmental hazards such as spills, assisted mobilization, responding to call bells and alarms, and scheduled patient monitoring as per policy/care plan.

...

(Emphasis added)

[24] In a recently filed ESA, essential service duties related to animal care services were described with reference to Canadian Council on Animal Care guidelines and regulations pertaining to the proper care and use of animals in research: University of Lethbridge and AUPE ESA, Part B, clause 4.

[25] The main goal of an ESA is to identify what functions or tasks are essential to be maintained during a strike or lockout. The functions or tasks should be clearly identified in the ESA to enable essential services workers to understand what work they are required to perform during a strike or lockout and to reduce the number of disputes which might otherwise arise during a strike or lockout. In addition, the identification of the essential service functions is necessary for the purpose of determining the number of employees who are required to provide the services during a strike or lockout. In the long run, as well, the Commissioner must be able to assess if the ESA ensures the provision of essential services during a strike or lockout: *Code*, section 95.44(4).

[26] In health care, it may be easier to identify functions which are not essential or which can be performed with less frequency than normal without endangering life, personal safety or health, instead of listing essential functions, but this is a matter for the parties to decide in the course of their negotiations.

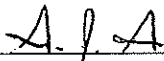
[27] We find it unnecessary to address many of the arguments raised in the hearing concerning interpretive principles, the meaning of the “rule of law” definition of essential services, or the balancing of constitutional rights. The provisions contained in Division 15.1 of the *Code* establish a clear balancing of rights and interests through the definition of essential services and the requirements imposed on essential services workers.

[28] In conclusion, while wording akin to the Employer’s proposed clause 1.07 could form part of an essential services agreement, there is nothing in the essential services provisions of the

Code requiring it to be part of an essential services agreement. The parties should focus their efforts on addressing the matters required to be included in an essential services agreement:

Code, s. 95.41(1). While some of the standards can be used as a shorthand method of defining essential services, a general clause such as the one proposed insufficiently defines what services are essential and required to be performed by essential services workers.

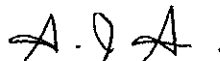
ISSUED and DATED at the City of Edmonton in the province of Alberta this 24th day of August 2018 by the Labour Relations Board and signed by its Vice-Chair.



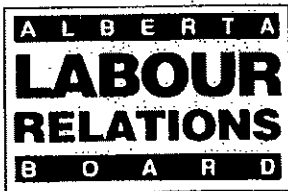
Gwen J. Gray, Q.C.
Vice-Chair and Essential Services Commissioner

Code requiring it to be part of an essential services agreement. The parties should focus their efforts on addressing the matters required to be included in an essential services agreement: *Code*, s. 95.41(1). While some of the standards can be used as a shorthand method of defining essential services, a general clause such as the one proposed insufficiently defines what services are essential and required to be performed by essential services workers.

ISSUED and DATED at the City of Edmonton in the province of Alberta this 23th day of August 2018 by the Labour Relations Board and signed by its Vice-Chair.



Gwen J. Gray, Q.C.
Essential Services Commissioner



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DATE: August 23, 2018 **TIME:** 4:20 p.m.

TO: Parties

FROM: Marlene Leslie

SUBJECT: AUPE_Capital Care Group Inc. et al ES-00003

A decision was faxed to you this afternoon in the above matter. There were two page 10s included in the faxed decision. Please remove the page dated August 24th and retain the page dated August 23rd.

There are no other changes to this decision. Sorry for the inconvenience.

Marlene Leslie
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NO. OF PAGES: 1 **(including cover page)**

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