

# Novel Issues in Canadian Labour Arbitration Related to COVID-19

by

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## Abstract

The COVID-19 pandemic of 2020-21 changed working conditions for millions of Canadians quickly and dramatically. Employers responded by requiring employees to quarantine, implementing workplace COVID policies, disciplining employees who violated those policies, changing work schedules, cancelling leaves or vacations, and furloughing or laying off employees. Union have challenged many of these actions, raising a variety of novel issues that are now being resolved through labour arbitration. This article surveys those labour arbitration awards.

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## I. Introduction

The COVID-19 pandemic arrived in Canada in late January 2020.<sup>1</sup> By mid-March, much of Canada had shut down.<sup>2</sup> In both Canada and the United States, arbitration hearings were postponed as arbitrators and parties hoped the pandemic would be short-lived and everything would soon return to normal.<sup>3</sup> When it became clear this assessment was overly optimistic, hearings resumed, mostly online.<sup>4</sup>

Working conditions in Canada and throughout the world changed quickly and dramatically.<sup>5</sup> Hospitals, nursing homes, and other health care facilities were overwhelmed. Many workers lost their jobs, either temporarily or permanently, as the economy shut down, then slowly reopened, and consumer demand shifted. For the many workers who could not work for home – often workers with the most precarious of jobs – going to work became much riskier.<sup>6</sup> Employers cut or shifted working hours, imposed new COVID policies to protect worker’ health, furloughed or laid off workers, cancelled employee vacations, and cut benefits.

Where workers were organized in a labour<sup>7</sup> union, these employer actions might sometimes conflict with the terms of a collective bargaining agreement. If so, the employer would be required to bargain with the union for changes to the agreement that would allow the actions. Often, however, employers acted unilaterally, or after consulting but not obtaining agreement from unions. Such employers might argue their action was justified by a management rights clause, or by the need to take immediate emergency action because of the pandemic, or that the language of the collective bargaining agreement permitted the action.

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<sup>1</sup> Xavier Marchand-Sen cal et al., *Diagnosis and Management of First Case of COVID-19 in Canada: Lessons Applied From SARS-CoV-1*, 71 CLINICAL INFECTIOUS DISEASES 2207-10 (Oct. 2020), <https://doi.org/10.1093/cid/ciaa227>.

<sup>2</sup> Richard Haigh & Dan Priel, *Law in the Time of COVID*, 57 OSGOODE HALL L.J. 533, 533-34 (2020).

<sup>3</sup> Richard Bales, *The Current Status of [Online?] Labor Arbitration Workplace Prof Blog* (June 12, 2020).

<sup>4</sup> *Id.*

<sup>5</sup> Haigh & Priel, *supra* note \_\_, at 534.

<sup>6</sup> *Id.*

<sup>7</sup> I am using the Canadian spelling because this article focuses on Canadian arbitration awards.

When unions disagreed, often they grieved. The final step in resolving grievances in nearly every collective labour agreement is binding arbitration (arbitration is mandatory under Canadian labour law). This has led to arbitration awards over the last year of novel issues that have arisen for the first time specifically because of the pandemic. This article surveys those awards. Though many of issues raised by the pandemic may recede as vaccinations increase and the pandemic (hopefully) ends, these awards may provide guidance to arbitrators, employers, and unions in future disaster situations.

## II. Methodology

This article surveys Canadian labor arbitration awards that deal in some significant way with issues that arose because of the COVID-19 pandemic in 2020-21. The article does not include the many interest arbitration awards in which healthcare workers, firefighters, police officers, and other front-line essential workers have requested safer working conditions and additional pay to compensate them for the additional hazards they have faced. The article does include a handful of awards from the United States when discussion of those awards would provide additional insight on an issue.

I began this project by informally asking members of the National Academy of Arbitrators (NAA) to share their covid-related arbitration awards with me. Most of the awards I received this way are unpublished opinions. I have included a brief discussion of such awards where the issue is novel or the analysis compelling. However, consistent with the NAA Code of Professional Responsibility, I cannot cite to these cases by name or describe the facts in too much detail because each would violate the confidentiality of the arbitration proceeding.<sup>8</sup>

By far my best source of Canadian awards was the database of Canadian law provided by the Canadian Legal Information Institute (CanLII).<sup>9</sup> Most Canadian arbitrators apparently post their awards to CanLII, and the awards often are available within two or three weeks after the date of the award. I searched the “Labour Arbitration Awards” database for each province, using only the search term “covid”. I then excluded interest arbitration awards and awards that mentioned covid only in passing, such as in an explanation for why the hearing was held online instead of in person.

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<sup>8</sup> National Academy of Arbitrators, Code of Professional Responsibility, §2.C.b. (“Discussion of a case at any time by an arbitrator with persons not involved directly should be limited to situations where advance approval or consent of both parties is obtained or where the identity of the parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification.”)

<sup>9</sup> <https://www.canlii.org/en/>. Special thanks to Arbitrators Christopher Albertyn and John Stout for alerting me about CanLII’s existence.

A follow-up article will survey American COVID-related labour arbitration awards. This article will offer an opportunity to compare both the subjects and the outcomes of these awards.

### III. Covid-Related Arbitration Awards

#### A. Ordering Online Hearings Over a Party's Objection

The single issue that has generated the most Canadian arbitration awards is whether to hold an arbitration online over the objection of one of the parties. Before COVID, arbitrators presumed hearings would be in-person – and that all witnesses would testify in-person – absent a compelling contrary reason. Arbitrators reasoned that observations of a witness's demeanor are important to assessing credibility, and that demeanor can best be observed in-person rather than by telephone or video. Similarly, arbitrators reasoned that advocates needed to be able to observe a witness's demeanor to conduct an effective cross examination.<sup>10</sup> Even after the pandemic began, arbitrators frequently referred to in-person hearings as “the gold standard”.<sup>11</sup>

A trio of cases by Arbitrator Gordon F. Luborsky illustrates the evolution of arbitrators' perspective on the issue during the pandemic. The April 2020 award of *Southampton Nursing Home and Service Employees Int'l Union, Local 1 Canada*<sup>12</sup> involved a nursing home that the union believed had assigned bargaining-unit work to management.<sup>13</sup> The parties held three days of hearings in 2018, during which the employer nearly finished presenting its witnesses,<sup>14</sup> but the parties estimated an additional two days of testimony would be needed for the union's witnesses.<sup>15</sup> The additional days were scheduled for 2019, but had to be postponed until April 2020.<sup>16</sup>

Then the pandemic hit. In March 2020 the Province of Ontario declared a state of emergency and, among other things, forbade gatherings of more than five people and ordered

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<sup>10</sup> Memorial Univ. Newfoundland, 2014 Carswell Nfld. 456 (2014) (Arbitrator Oakley) (cited in BC Public School Employers' Assoc./ SD No. 39 (Vancouver) and BC Teachers' Federation/ Vancouver Elementary School Teachers' Assoc., 2020 CanLII 76272 (BC LA) (Sept. 1, 2020) (Elaine Doyle)); Sunnybrook Health Sciences Ctr. and ONA (SB16-06), 2017 CarswellOnt 21721, 294 L.A.C. (4<sup>th</sup>) 183 (Ont. Arb.) (Arbitrator Surdykowski).

<sup>11</sup> See, e.g., Toronto Transit Commission v. Amalgamated Transit Union, Local 113, O.L.A.A. No. 103 (Ont. Arb.) (2020) (Arbitrator Goodfellow) at ¶ 14.

<sup>12</sup> 2020 CanLII 26933 (ON LA) (Apr. 14, 2020 (Gordon F. Luborsky)).

<sup>13</sup> *Id.* at ¶ 7.

<sup>14</sup> *Id.* at ¶¶12-13. Though the usual custom is that the union presents its case first in contract-interpreted cases, here the employer agreed to go first. *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at ¶12.

non-essential workers to stay home,<sup>17</sup> thus making it impossible to finish the hearing in-person.<sup>18</sup> The choices were to finish the hearing online or to postpone the hearing indefinitely.<sup>19</sup> The union preferred to proceed online. The employer objected, on the grounds both that it would be prejudiced by having to conduct its cross examination of union witnesses online<sup>20</sup> and that its witnesses and representatives were urgently needed at the nursing home to deal with the health crisis and could not be absent during two days of hearings.<sup>21</sup>

Arbitrator Luborsky cited to and discussed pre-covid cases in which a party had wished to present a witness by telephone or videoconference and to the handful of post-covid-onset cases that then had been decided. He then announced a new balancing test for determining whether to grant an adjournment or convert an in-person hearing into a videoconference where the pandemic made it impossible to convene hold an online hearing:

(a) In the face of the present health crisis the “new norm” is that the hearing will presumptively proceed as scheduled utilizing a form of remote attendance through videoconferencing or other technologies agreed upon or determined appropriate; (b) which is subject to rebuttal or limitation by an objecting party that must show compelling reasons justifying a contrary result; (c) to be assessed by the arbitrator, if necessary, balancing the interests of the parties, including the need to maintain the essential integrity and fairness of the hearing process; (d) having regard to the particular facts and circumstances of each case.<sup>22</sup>

Arbitrator Luborsky further wrote that “a concern over credibility is not sufficient reason, in itself, to overcome the presumption of proceeding remotely with the hearing through an appropriate technology.”<sup>23</sup> The presumption that a hearing would proceed online, Arbitrator Luborsky later explained, was “rooted in typical collective agreement language promoting the expedition of grievances.”<sup>24</sup>

Arbitrator Luborsky was not convinced by the employer’s objection to videoconferencing. He noted that witness credibility was unlikely to be a significant issue in a case involving alleged assignment-out of bargaining unit work, and even if it were, the videoconferencing format was unlikely to hinder his ability to make credibility determinations.<sup>25</sup>

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<sup>17</sup> *Id.* at ¶ 13.

<sup>18</sup> *Id.* at ¶ 33.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at ¶ 22.

<sup>21</sup> *Id.* at ¶¶ 19-21.

<sup>22</sup> *Id.* at ¶ 41.

<sup>23</sup> *Id.* at ¶ 42.

<sup>24</sup> *City of Hamilton and Hamilton Ontario Water Employees Assoc. (HOWEA)*, 2020 CanLII 59546 (ON LA) (Gordon F. Luborsky), at ¶ 13.

<sup>25</sup> *Id.* at ¶¶ 44-45.

However, he was much more convinced by the employer’s argument that it needed all hands on deck at its nursing home while COVID cases appeared to be peaking.<sup>26</sup> He therefore granted the employer’s request for an adjournment and ordered the parties to confer within 30 days and agree upon a “reasonable timeframe for reconvening the proceedings.”<sup>27</sup>

Arbitrator Luborsky confronted a similar issue under similar circumstances in August 2020. *City of Hamilton and Hamilton Ontario Water Employees Association (HOWEA)*<sup>28</sup> was another case involving a union’s allegation that the employer was assigning out bargaining-unit work.<sup>29</sup> The first day of hearing was held in late 2019, and continuation dates were scheduled for July, August, and November 2020. In spring 2020, the parties agreed to adjourn the July date in the hope the pandemic would abate and allow an in-person hearing on the remaining dates. By early summer, the pandemic situation had changed since spring when Arbitrator Luborsky had decided the *Southampton* case – the region was no longer in lockdown, and rules had been eased to permit gatherings of up to 50 people if everyone were masked and socially distanced.

The union argued the August hearing date should proceed by videoconference, noting both the general risk of proceeding in-person and the particular risk to one of its participants who had an underlying medical condition making her more susceptible to COVID-19 complications.<sup>30</sup> The employer argued that the *Southampton* presumption of videoconferencing was predicated on the impossibility of an in-person hearing, and that since an in-person hearing now was possible, the hearing should proceed in that format.<sup>31</sup>

Arbitrator Luborsky agreed with the union. On the issue of risk, he quoted with approval a “Notice to the Profession” issued by the Chief Justice of the Ontario Superior Court of Justice noting the risks of attending a courthouse in person and acknowledging that some people may be reluctant to disclose their underlying medical conditions or other risk factors.<sup>32</sup> Arbitrator Luborsky dismissed the argument that credibility determinations could not be made online, noting the argument had “not been borne out by practical experience”<sup>33</sup> and that it would be easier to see and hear witnesses online than in a cavernous hearing room with everyone

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<sup>26</sup> *Id.* at ¶ 53.

<sup>27</sup> *Id.* at ¶ 55.

<sup>28</sup> *City of Hamilton*, *supra* note \_\_\_\_,

<sup>29</sup> *Id.* at ¶ 4.

<sup>30</sup> *Id.* at ¶ 14.

<sup>31</sup> *Id.* at ¶¶ 20, 28.

<sup>32</sup> *Id.* at ¶ 36, quoting Geoffrey B. Morawetz, Chief Justice, *Notice to the Profession re: Justice Participants Unable to attend In-Court Hearings in the Ontario Superior Court of Justice* (July 21, 2020), available at <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/in-court-hearings/>.

<sup>33</sup> *Id.* at ¶ 35.

masked and socially distanced.<sup>34</sup> He therefore ruled that the presumption of proceeding online applied during the pandemic even if an in-person hearing were legally permissible.<sup>35</sup>

Arbitrator Luborsky issues a third decision on the issue of online proceedings in September 2020. *In Corporation of the City of Belleville and Belleville Professional Firefighters' Association*,<sup>36</sup> the union alleged deficiencies in the promotion process for certain firefighters.<sup>37</sup> Early hearing dates proceeded by videoconference, but the parties optimistically hoped a waning pandemic would permit later hearings to be held in-person.<sup>38</sup> When the pandemic failed to abate, the union moved to convert the in-person dates to videoconference, but the employer objected.<sup>39</sup>

Arbitrator Luborsky once again ordered the in-person date converted to online. He noted that although the pandemic situation had improved somewhat, masks and social distancing still were required and risks remained.<sup>40</sup> He also noted that he would “be able to hear and see each witness much better by videoconference than from a person who is masked and sitting across a large ballroom.”<sup>41</sup> He therefore ordered that all future hearing dates be converted on videoconference.<sup>42</sup>

Other Canadian arbitrators similarly have ordered online hearings over party objections. For example, in *Regional Municipality of Waterloo and Canadian Union of Public Employees, Local 5191*,<sup>43</sup> Arbitrator Colin Johnston ordered an online hearing over a union’s objection that such a hearing was inappropriate for a termination case.<sup>44</sup> He specifically found that the online format had “become the norm for holding labour arbitration hearings since the onset of the Pandemic”<sup>45</sup> and that “having conducted multiple hearings, my own experience is that the current technology is very effective in replicating a face to face experience and has not hindered my ability to assess a witness’s demeanor.”<sup>46</sup> Other arbitrators ordering online hearings have rejected arguments based on security of the online platform,<sup>47</sup> a party’s general

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<sup>34</sup> *Id.* at ¶ 42.

<sup>35</sup> *Id.* at ¶ 45.

<sup>36</sup> 2020 CanLII 65743 (ON LA) (Gordon F. Luborsky).

<sup>37</sup> *Id.* at ¶ 1.

<sup>38</sup> *Id.* at ¶ 2.

<sup>39</sup> *Id.* at ¶ 3, 5.

<sup>40</sup> *Id.* at ¶¶ 9-12.

<sup>41</sup> *Id.* at ¶ 13.

<sup>42</sup> *Id.* at ¶ 19.

<sup>43</sup> 2020 CanLII 107569 (Oct. 27, 2020) (Colin Johnston).

<sup>44</sup> *Id.* at ¶ 3.

<sup>45</sup> *Id.* at ¶ 16.

<sup>46</sup> *Id.* at ¶ 21.

<sup>47</sup> *City of Toronto and Canadian Union of Public Employees Local 79*, 2020 CanLII 68805 (ON LA) (Marilyn A. Nairn) at ¶11.

discomfort with online technology,<sup>48</sup> and purported difficulty of using online technology in document-intensive cases.<sup>49</sup>

At least one arbitrator has ordered an in-person hearing over objection. In *BC Public School Employers' Association SD No. 39 (Vancouver) and BC Teachers' Federation/ Vancouver Elementary School Teachers' Association*,<sup>50</sup> the union requested that a scheduled in-person hearing be converted to an online hearing, but the employer objected. Arbitrator Elaine Doyle favorably cited *Southampton* for the proposition that an online hearing could be ordered over a party's objection when an in-person hearing was impossible, but held that was inappropriate when in-person hearings were permissible with masks and social distancing.<sup>51</sup> However, because her award was issued only a few days after Arbitrator Luborski's *City of Hamilton* decision, her award did not reflect the finding in that award that the presumption favoring online hearings applies even when in-person awards are legally permissible.<sup>52</sup> Several arbitrators have adjourned hearings temporarily, when the employer is a hospital or nursing home contemporaneously overwhelmed with COVID cases and there is little or no prejudice to the union.<sup>53</sup>

## **B. Workplace Safety Issues**

One of the more comprehensive arbitration decisions regarding workplace safety issues was a series of awards issued by Arbitrator John Stout. When the pandemic hit Canada, the country's nursing homes were hit particularly hard.<sup>54</sup> Both residents and staff were stricken. The Ontario Nurses Association (ONA), which represents nurses at many unionized nursing homes (Homes) in Ontario, filed a plethora of grievances beginning in March 2020 against the Homes.<sup>55</sup> These grievances alleged, among other things, a general breach of the duty of care to employees, failure to provide adequate personal protective equipment (PPE), and failing to permit employees to self-isolate as needed.<sup>56</sup>

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<sup>48</sup> *Cancoil Thermal Corp, and United Food and Commercial Workers Canada, Locals 175 & 633*, 2020 CanLII 34521 (May 12, 2020) (Kim Bernhardt) at ¶18.

<sup>49</sup> *Regional Municipality of Peel (Peel Regional Paramedic Services) and Ontario Public Service Employees Union Local 277*, 2020 CanLII 48565 (July 20, 2020) (Kelly Waddingham), at ¶19.

<sup>50</sup> 2020 CanLII 76272 (BC LA) (Sept. 1, 2020) (Elaine Doyle).

<sup>51</sup> *Id.* at 5-6.

<sup>52</sup> *BCPSEA/SD No. 68 and BCTF/Nanaimo District Teachers' Assoc.*, 2020 CanLII 89909 (Sept. 29, 2020) (Amanda Rogers).

<sup>53</sup> *Mount Sanai Hosp. and National Organized Workers Union*, 2020 CanLII 28953 (ON LA) (Apr. 22, 2020) (Gail Misra); *Extencicare and Service Employees International Union*, 2020 CanLII 36854 (ON LA) (June 1, 2020) (Elaine Newman) at ¶¶ 15-14.

<sup>54</sup> *Participating Nursing Homes and Ontario Nurses Association* (May 4, 2020), ¶ 10.

<sup>55</sup> *Id.* ¶¶ 1-2. 5.

<sup>56</sup> *Id.* ¶ 5.



The parties agreed to consolidate the grievances and have them heard as a “Central Rights Arbitration” case with expedited evidence-gathering and hearing procedures and a bottom-line decision<sup>57</sup> issued quickly.<sup>58</sup> Arbitration was preceded by mediation, in which the parties agreed to general principles related to safety.<sup>59</sup> On May 4, 2020, Arbitrator Stout issued a forward-looking order which, among other things, ordered the Homes to provide adequate fitted N95 respirators and other PPE, required nurses to provide a point-of-care risk assessment before all interactions with residents, required the Homes to respect nurses’ reasonable conclusions regarding risk assessment, required the Homes to implement administrative controls such as isolating and cohorting residents and staff, and forbade the Homes from intimidating or retaliating against nurses exercising their right to fitted N95s and PPE.<sup>60</sup>

On May 26, Arbitrator Stout issued an Award on the issue of sick pay; this Award will be discussed in Part III.D.1 below. ONA alleged that one of the Homes had failed to comply with Arbitrator Stout’s May 4 order, by not making adequate supplies of N95 respirators available and not providing proper information regarding point-of-care risk assessments.<sup>61</sup> On June 10, 2020, Arbitrator Stout issued an Award finding the Home had failed to comply with the previous order by providing expired N95 respirators<sup>62</sup> and inadequately ensuring compliance with point-of-care risk assessments.<sup>63</sup>

On January 13, 2021, Arbitrator Stout issued yet another award involving another of the Homes.<sup>64</sup> This Award provided “clarification and direction” of the May 4 order in light of the evolving situation posed by the pandemic.<sup>65</sup> This Award ordered, among other things, that the Home must:

- Provide staff with adequate access to fit-tested N95 respirators.
- Distribute those N95s throughout the Home for easy access.
- Not use expired N95s.
- Provide training on reusable respirators, and
- Advise staff of any resident who tests positive for COVID19 or who has been exposed or is suspected to have it.<sup>66</sup>

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<sup>57</sup> A “bottom-line” decision is a short summary decision, more common in Canada than the United States, that does not contain extensive findings or analysis. For a general discussion of reasoned and unreasoned awards, see Richard Bales & Steven Hooten, *What Makes a “Reasoned” Arbitration Award?*, 12 ARBITRATION L. REV. 81 (2020).

<sup>58</sup> *Id.* at ¶¶ 3-4.

<sup>59</sup> *See, e.g., id.* at ¶¶ 29, 32-33, 36, 39.

<sup>60</sup> *Id.* ¶¶ 43-52.

<sup>61</sup> Participating Nursing Homes Sienna Madonna Care Community and Ontario Nurses’ Association (June 10, 2020) ¶¶ 4-5.

<sup>62</sup> *Id.* ¶ 13.

<sup>63</sup> *Id.* ¶ 20.

<sup>64</sup> Blackadar Continuing Care Ctr. and Ontario Nurses’ Association, 2021 CanLII 3440 (ON LA) (January 13, 2021).

<sup>65</sup> *Id.* ¶ 4.

<sup>66</sup> *Id.* ¶ 5.

Arbitrator Stout's awards on safety measures are the most comprehensive I have seen in arbitration awards.

## **C. Covid Workplace Policies**

### **1. Duty-to-Bargain Challenges**

By mid-2020, most employers had adopted some form of workplace policies designed to protect employees and others from COVID-19. Sometimes, issues arose as to whether the employer had properly implemented the policy. In unionized workplaces, this might involve a duty to bargain. An unpublished award by a United States arbitrator illustrates.

When employees reported to work one day the employer greeted them with an unannounced new COVID-safety policy based on recommendations from the Center for Disease Control. Before coming to work each day (including the day they arrived and were presented with the new policy), employees were required to certify, among other things, they did not have a body temperature exceeding a specified threshold. The Company instructed the employees to sign the policy and make the certifications or go home. The employees refused to sign because neither they nor the employer had a thermometer at the time and they therefore could not certify that their temperature did not exceed the threshold. The Company sent the employees home and did not pay them for working that shift. The employees grieved.

The arbitrator sustained the grievance. He began by noting that the policy itself was not at issue, and that employers generally have the right to implement reasonable safety policies to protect health and safety. However, requiring employees to sign the new policy, and to make certain certifications or be sent home, was a new term or condition of employment for which Company should first have bargained with the Union. Even absent bargaining, the Company could have allowed employees to sign the new policy under protest, or to sign merely to acknowledge receipt. The arbitrator found it was improper for the Company to require employees to certify their temperatures when there was no thermometer available and it was impossible for them to honestly do so, and to impose this as a requirement with no prior notice was a precondition for working that day. The arbitrator ordered the Company to pay the workers for the shift they had lost.

An award blending duty-to-bargain and substantive analyses of a COVID safety policy involved an employer's prohibition of moonlighting. In *Canadian Union of Public Employees, Local 3513 and Breton Ability Centre*,<sup>67</sup> the employer provided residential and rehabilitation

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<sup>67</sup> 2020 CanLII 93886 (NS LA).

services to adults with various intellectual and physical challenges.<sup>68</sup> Realizing that many of its employees worked also at other health care facilities, and fearful those employees might expose the vulnerable residents of the employer's facility to COVID, the employer implemented a policy forbidding its employees from working during their off-hours for other employers.<sup>69</sup>

The employer defended on the ground it was a reasonable exercise of management rights. In Canada, it is well-established in arbitral jurisprudence that a workplace rule unilaterally introduced by an employer without the agreement of the union must not be (a) inconsistent with the collective agreement, or (b) unreasonable; and must be (c) clear and unequivocal, both as to its requirements and the consequences of its breach; (d) brought to the attention of the employees affected before the rule is acted upon; and (e) consistently enforced.<sup>70</sup> This is known as the "KVP test".

Arbitrator Augustus M. Richardson focused on the first two elements. The anti-moonlighting policy was reasonable, he found, because the risk of community spread of COVID was high at the time, the consequences to vulnerable populations such as residents of the employer's facilities were dire, and the rule was temporary.<sup>71</sup> However, he also found that an article of the parties' CBA establishing a Labour Management Committee responsible for "promoting safety and sanitary practices"<sup>72</sup> required the employer to "engage in meaningful consultation" with the union over pandemic-related safety rules before unilaterally implementing them.<sup>73</sup> The union had not shown specific harm from the lack of consultation, so he sustained the grievance on the consultation issue but the only remedy he provided was a declaration that the employer had breached its consultation obligation.<sup>74</sup>

## 2. Substantive Challenges

Many awards involve substantive challenges to the safety policies themselves, or are disciplinary cases concerning employees who violated the policies. An example of a direct substantive challenge is *Caressant Care Nursing & Retirement Homes and Christian Labour Assoc. of Canada*.<sup>75</sup> The Union representing staff at a nursing home challenged an employer policy requiring all staff to receive a nasal-swab test for COVID every two weeks.<sup>76</sup> The policy

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<sup>68</sup> *Id.* ¶ 11.

<sup>69</sup> *Id.* ¶ 39.

<sup>70</sup> *Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.*, 1965 CarswellOnt 618, 16 LAC 73.

<sup>71</sup> *Id.* at ¶¶ 93-95.

<sup>72</sup> *Id.* at ¶ 97.

<sup>73</sup> *Id.* at ¶ 101.

<sup>74</sup> *Id.* at ¶ 104.

<sup>75</sup> 2020 CanLII 100531 (ON LA) (Dec. 9, 2020).

<sup>76</sup> *Id.* at 1.

had been recommended by the Ontario government; the employer adopted it and made it mandatory.<sup>77</sup>

The Union argued the policy was an unreasonable exercise of management rights and an intrusion on employee privacy and dignity.<sup>78</sup> The Union analogized the test to random drug and alcohol tests. In a prior decision, the Supreme Court of Canada had held that such tests were valid only if the need outweighs the impact on employee privacy rights, which the Supreme Court held a random alcohol test did not.<sup>79</sup>

Arbitrator Dana Randall rejected the analogy. He applied the balancing test adopted by the Supreme Court of Canada, but ruled it should be resolved differently because the severe impact of a COVID infection – especially to the vulnerable population of a nursing home – far outweighed the indignity of a nasal swab.<sup>80</sup>

Another case involving a direct challenge to a unilaterally imposed safety policy is an unpublished decision out of Michigan by Arbitrator Barry Goldman. The employer was a police department. The employer had a grooming-code rule requiring police officers to be clean-shaven, but there was an exception for officers with pseudofolliculitis barbae skin condition, which makes it difficult and painful to shave.

When the pandemic hit, the Department began requiring officers to wear N95 masks with an effective seal. However, officers with beards – i.e., who had the pseudofolliculitis barbae condition, were unable to get a proper seal. Fearing a spread of COVID within the Department, the Police Chief temporarily rescinded the exemption. That made Grievant unable to comply with the effective-seal requirement. The Chief found the Grievant was unfit for duty because he could not wear a mask with an effective seal. The Chief required the Grievant to take sick leave. The Grievant used 60 hours of sick leave and 20 hours of Vacation leave before the Chief's order was revised and Grievant was allowed to return to work without shaving if he wore both a mask and a face shield. The Union grieved, seeking to have the sick and vacation hours restored.

The Union argued the Department violated the collective bargaining agreement by requiring the Grievant to use sick time when he was not sick and vacation time when he did not request a vacation, and that the Grievant should have been given a disability accommodation. The Department argued the rule was reasonable given the state of knowledge the Department had at the time, and that allowing Grievant to use sick and vacation time was an

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 6-7.

<sup>79</sup> *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2 S.C.R. (2013).

<sup>80</sup> *Id.* at 8-9.

accommodation. Arbitrator Goldman held that allowing the Grievant to use sick and vacation hours was itself an accommodation, and that the employer's finding the Grievant unfit for duty did not violate the collective bargaining agreement because it was made reasonably and in good faith.

A third case, *United Steelworkers Local 2251 and Algoma Steel Inc.*,<sup>81</sup> challenged a Canadian employer's quarantine policy. Early in the pandemic, the Canadian federal government enacted an emergency order under the Quarantine Act<sup>82</sup> requiring individuals entering Canada from the United States to self-isolate for fourteen days. Regulations under the order exempted certain categories of persons who crossed the border regularly for employment.

The Grievant lived on the Upper Peninsula of Michigan and commuted daily to his job at a steel mill across the St. Mary's River in Ontario.<sup>83</sup> He fit the legal exemption from the quarantine rule, but the employer's covid policy required a fourteen-day quarantine with no exemption.<sup>84</sup> He had two young children who lived with their mother in the U.S. and could not cross the border to be with him while he was in Canada.<sup>85</sup> He thus was in the unfortunate position of having to choose between his children and his job.

The employer argued the management-rights clause of the CBA entitled it to enact a COVID policy stricter than the one required by the Canadian federal government, and that its no-exception quarantine policy was reasonable under the *KVP* test [discussed above in the *Canadian Union of Public Employees, Local 3513 and Breton Ability Centre* award].<sup>86</sup> Arbitrator Norm Jesin agreed with the employer that the employer's policy was reasonable and consistent with the parties' collective bargaining agreement.<sup>87</sup> However, he found that the application of the policy to this particular employee violated a state statute guaranteeing every employee the right to equal treatment in employment without discrimination on the basis of enumerated categories including family status.<sup>88</sup> He found the statute required the employer to accommodate the employee by allowing him to return to work without having to self-isolate. The employer was free, however, to re-assign the employee to less-populated shifts or work assignments, to require him to wear a mask and other PPE, and to discuss with the union the possibility of requiring regular testing for COVID.<sup>89</sup>

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<sup>81</sup> 2020 CanLII 48250 (ON LA) (July 20, 2020) (Norm Jesin).

<sup>82</sup> S.C. 2005, c. 20 § 58.

<sup>83</sup> *Id.* at 2.

<sup>84</sup> *Id.* at 2-3.

<sup>85</sup> *Id.* at 3.

<sup>86</sup> *Id.* at 5.

<sup>87</sup> *Id.* at 8.

<sup>88</sup> *Id.*, citing Ontario Human Rights Code, R.S.O. 1990 c. H.1 § 5(1).

<sup>89</sup> *Id.* at 9.

### 3. Disciplinary Cases

In addition to the awards described above challenging COVID policies on duty-to-bargain or substantive grounds, several awards involve disciplinary action employers have taken against employees for violating COVID policies. For example, in *Trillium Health Partners and CUPE Local 5180*,<sup>90</sup> a hospital's COVID policy restricted communal social gathering in the hospital and the sharing of food. The grievant and several co-workers nonetheless held a pizza party. Grievant ordered the pizzas and brought them to the hospital.<sup>91</sup> When a screener, employed by the hospital to ensure everyone entering the hospital complied with all COVID protocols, told the employees they could not bring the pizzas in, the Grievant ignored the screener and brought them in anyway.<sup>92</sup> Grievant's subsequent denial of responsibility was refuted with photos.<sup>93</sup> The same day, a vendor arrived at the shipping area without wearing a mask. When confronted by a screener, the vendor resisted. The Grievant intervened with a string of profanity on behalf of the vendor, not the screener, saying the hospital protocols were making it difficult for employees to do their jobs.<sup>94</sup> The hospital discharged the grievant for violating its COVID policies.<sup>95</sup>

Arbitrator Norm Jesin agreed with the hospital that the Grievant's conduct warranted discipline. However, he was troubled that the Grievant's discharge seemed disproportionate compared to the other employees who had participated in the pizza party.<sup>96</sup> He therefore ordered reinstatement without back pay, with Grievant subject to an 18-month last-chance provision.<sup>97</sup>

A similar case<sup>98</sup> involved a maintenance worker at a nuclear plant who had symptoms of COVID and was told not to come to work. He came to work anyway and, when asked at the gate if he had symptoms, said no. Arbitrator Joseph D. Carrier upheld his discharge.

Finally, in an unpublished American case, a manufacturing plant was shut down because of COVID. The Grievant, who had been furloughed, texted two co-workers and a supervisor who had not been furloughed and asked them to move N95 masks to the Grievant's work area. After

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<sup>90</sup> 2021 CanLII 127 (ON LA) (January 7, 2021) (Norman Jesin).

<sup>91</sup> *Id.* at 4.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 5.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 6.

<sup>97</sup> *Id.* at 6-7.

<sup>98</sup> Labourers' Int'l Union of North America, Ontario Provincial District Council and Labourors' Int'l Union of North America, Local 183 and Aecon Industrial, a Division of Aegon Constr. Group Inc., 2020 CanLII 91950 (ON LA) (Nov. \_\_, 2020) (Joseph D. Carrier) (date blank on award).

the co-worker had done so, the Grievant returned to the plant and stole several masks, then suggested that the others do the same. The arbitrator<sup>99</sup> upheld the discharge.

## D. Pay Issues

COVID-related pay disputes have been a significant source of conflict between employers and unions. Many front-line workers have demanded, in interest arbitration, higher pay for hazard duty. Interest arbitration is beyond the scope of this article.

Sick pay issues discussed in this Section include whether the sick-pay provisions of a collective agreement cover mandatory self-quarantining when an employee has not been confirmed as “sick”. Many collective labour agreements promise premium pay for working when the place of employment is “closed”, leading to thorny issues when the front door is closed because of COVID but at least some work is still being done. Likewise, many labour agreements specify shift length or timing; problems arise when employers must or prefer to change the length or times because of governmental COVID restrictions or COVID-related changes in demand for the employer’s products or services.

### 1. Sick Pay

The most comprehensive award to date on the issue of sick pay is *Participating Nursing Homes and Ontario Nurses’ Assoc.*,<sup>100</sup> by Arbitrator John Stout. ONA, who represents many Ontario nurses, filed grievances against several Ontario-area nursing homes, alleging failure to pay compensation when nurses had to quarantine because of the COVID pandemic. The parties agreed to consolidate the grievances into a single arbitration.<sup>101</sup>

The parties also agreed on the issue: for each of three categories of employees (full time, part time, and casual), whether the collective labor agreement required the employer to pay sick-pay benefits to an employee absent from work due to COVID-19 where:

1. The employee is symptomatic or tests positive;
2. The employee is asymptomatic and does not test positive or is never tested, and is absent from work due to:
  - a. Travel;
  - b. Exposure;

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<sup>99</sup> The arbitrator of this award requested that his name be withheld.

<sup>100</sup> 2020 CanLII 36663 (ON LA) (May 26, 2020) (John Stout).

<sup>101</sup> *Id.* at ¶ 2.

- c. Public health or government guidance or direction;
- d. Pursuant to the Award between the parties dated May 4, 2020; or
- e. Instruction from the employer to remain off work.<sup>102</sup>

The union's position was that all nurses – full-time, part-time, or casual – who were absent from work for any of the above reasons were “sick” and therefore entitled to sick-pay compensation.<sup>103</sup> The collective bargaining agreement, the union argued, should be interpreted in light of a “precautionary principle” that would encourage nurses to stay home if there is a reasonable chance they have become infected.<sup>104</sup> The nursing homes argued that only nurses who had have exhibited symptoms or tested positive are “sick” and therefore entitled to sick pay.

Arbitrator Stout agreed with the nursing homes. The language of the collective bargaining agreement creating an entitlement to sick time applied only to “full-time employees”, and only covered “legitimate personal illness or injury which is not compensable under the [workers’ compensation statute]”.<sup>105</sup> Full-time employees are entitled to sick time, Arbitrator Stout found, when they test positive for or are symptomatic for COVID, continuing until their symptoms subside and they are legally permitted to return to work.<sup>106</sup> Part-time and casual employees are not contractually entitled to sick pay.<sup>107</sup> Asymptomatic employees who have not tested positive or who have not been tested likewise are not contractually entitled to sick pay.<sup>108</sup>

A different sick-pay issue arose in *Toronto Terminals Railway West Division and Unifor Local 101-R*.<sup>109</sup> An employee self-isolated for fourteen days because possible exposure to someone with a confirmed COVID diagnosis.<sup>110</sup> The employer had a COVID policy providing that employees must comply with Center for Disease Control recommendations on self-isolation, but that such isolation would be unpaid save for a narrow exception for attending an immediate family member’s funeral which required airline travel.<sup>111</sup> The employer denied the employee’s request for compensation for the days he missed because of self-quarantining.

The union argued it was unfair for the employee not to have been compensated for his quarantine when a colleague had been compensated for a quarantine taken after traveling for

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<sup>102</sup> *Id.* at ¶ 3.

<sup>103</sup> *Id.* at ¶ 4.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at ¶ 43.

<sup>106</sup> *Id.* at ¶¶ 55-56.

<sup>107</sup> *Id.* at 57.

<sup>108</sup> *Id.* at 59.

<sup>109</sup> 2020 CanLII 99175 (Oct. 20, 2020 (Richard Coleman)).

<sup>110</sup> *Id.* at 2.

<sup>111</sup> *Id.* at 2-3.



the funeral of an immediate family member.<sup>112</sup> Arbitrator Richard Coleman disagreed, finding that the employer's policy of giving paid leave to employees who had to quarantine because of travel related to the death of an immediate family member did not create a contractual right to paid leave for an employee required to quarantine because of exposure to someone with COVID.<sup>113</sup>

## 2. Premium Pay for "Closed" Workplaces

Some collective bargaining agreements entitle employees to premium pay when they work during times when the place of employment is "closed" (or some variation on this theme). The intent of such a provision is to compensate employees for working nights, weekends, and holidays. But is the place of employment "closed" during a pandemic-related lockdown when the physical workplace is closed but work is still being done, perhaps from home?

Anecdotally, many such disputes have arisen, though none have yet appeared as published cases. Two as-of-yet undecided cases illustrate the issue, if not the resolution. One involved city workers demanding premium pay for working during normal office hours when the door to city hall was locked, but many workers were still inside doing their normal jobs and visitors from the outside could be "buzzed in" on a need-to-be-there basis. Another involved employees at a nuclear power plant who were entitled to double time pay in the event of a "Site Shutdown." The site severely cut back operations during the peak of the virus but didn't formally call a shutdown. The question was how to determine if there is a shutdown, and who gets to decide.<sup>114</sup>

An unpublished U.S. case raised a related issue. A collective bargaining agreement between a city and its highway and sanitation workers contained a section on "Overtime Callouts and Emergencies". This section provided that if the city declared an emergency, "thereby implementing the provisions of" [a subparagraph that said that overtime work was voluntary "except in case of emergency"], the city would "pay time and one-half (1-1/2) for all hours worked during the emergency...". The union argued this language required that if an emergency is declared, its members are entitled to overtime for all hours worked during the emergency, regardless of whether any overtime was actually worked.

Arbitrator Howard G. Foster found that the title of the relevant section suggested that everything in the section referred to overtime callouts, including those occasioned by an emergency. He also interpreted the reference to the subparagraph as indicating that the city would provide premium pay only if an emergency required the workers to work overtime— i.e.,

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<sup>112</sup> *Id.* at 3.

<sup>113</sup> *Id.* at 4.

<sup>114</sup> Dennis Nolan.

to work hours exceeding the employees' normal workweek. Finally, reading the language of the collective bargaining agreement as a whole, he described the bargain between the city and the union as this:

The primary rule is that overtime is voluntary, with an exception carved out for emergency situations, in which case overtime may be mandated. However, the quid pro quo for allowing management to mandate overtime is that employees forced to work overtime during an emergency get extra pay for not only their overtime hours but also their regular hours. But the antecedent to all this is that there is an overtime callout and overtime is worked. The idea is not simply to pay additional money to employees, but to compensate them for the extra burdens they are asked to shoulder, on behalf of the citizens of [the city], during an emergency.

He therefore denied the grievance.

### **3. Schedule Changes & Overtime**

The pandemic caused significant shifts in demand for various products and services, and employers often attempted to shift employees' workdays to meet the new patterns of demand. However, this often conflicted with provisions in collective bargaining agreements setting specific work hours.

For example, in an unpublished U.S. award, the company at issue installed, maintained, and serviced imaging equipment at hospitals and imaging centers in and around New York City. The pandemic hit New York City early and hard. Hospitals cut or reduced non-essential operations such as routine equipment-servicing or shifted it to later in the day to help minimize exposure to COVID-19. As a result, requests for services, and the Company's business revenues, decreased substantially, and overtime costs increased. The Company analyzed the effects of these business trends, and decided to reduce its overtime costs by shifting its employees to the second and third shifts and by reducing standby coverage.

The collective bargaining agreement provided for three shifts, for various start times for these shifts, and for payment of shift differentials of 10 or 20 percent depending on the starting time of the shift. It also stated that the company would give four weeks' notice before changing the starting hours of an employee's shift. Similarly, the CBA entitled employees to 25% of their regular hourly pay for standby hours, and required 60 days' notice before changing this part of an employee's schedule.

The company, after discussing these issues with the union but not reaching an agreement, unilaterally moved many employees from first shift to second and third shifts, and

significantly reduced standby hours. The union grieved. The company argued the notice periods “should be excused in light of the unprecedented pandemic that resulted in an adverse financial impact which required an immediate response.”

Arbitrator Richard Adelman found the CBA entitled the company to change the shift assignments and reduce the standby hours, but only after providing the required notice. Regarding shift assignments, he found no evidence the employees had been harmed economically, because they received a shift premium for working the later shifts, so he issued a go-and-sin-no-more order. Regarding standby hours, he ordered the company to compensate the employees who had lost those hours during the 60 days’ notice period.

A Canadian case confronted a conflict between health-related rescheduling and the shift terms of a collective bargaining agreement. In *Heritage Green Nursing Home and Service Employees Int’l Union, Local 1*,<sup>115</sup> the collective agreement set 7.5-hour shifts and required the nursing-home employer to pay time and one-half for work exceeding this.<sup>116</sup> When COVID hit, the home moved many employees to twelve-hour shifts, to reduce movement in and out of the home and thereby to limit the spread of the disease.<sup>117</sup> The change did not change the weekly total of hours worked,<sup>118</sup> and the home did not pay overtime for the daily hours exceeding seven and one-half.<sup>119</sup>

The home argued it was excused from paying overtime by a Provincial emergency order<sup>120</sup> authorizing nursing homes to “develop, modify and implement redeployment plans, including ... changing the scheduling of work or shift assignments.”<sup>121</sup> The union did not challenge the home’s authority to implement the shift changes, but argued the employer violated the collective agreement by failing to pay overtime.<sup>122</sup>

Arbitrator Herlich agreed with the union. He found the order authorized the home to schedule employees to regularly work twelve-hour shifts, even if that required overriding the provision of the collective agreement setting seven and one-half hour shifts.<sup>123</sup> However, the

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<sup>115</sup> 2020 CanLII 50475 (ON LA) (July 27, 2020) (Bram Herlich).

<sup>116</sup> *Id.* at 2.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 4.

<sup>119</sup> *Id.* at 2.

<sup>120</sup> Order Under Subsection 7.0.2(4) of the Act – Work Deployment Measures in Long-Term Care Homes (March 23, 2020), issued pursuant to Emergency Management and Civil Protection Act, O. Reg. 77/20, and reproduced in *id.* at 13-14.

<sup>121</sup> *Id.*

<sup>122</sup> 2020 CanLII 50475 at 4.

<sup>123</sup> *Id.* at 10.

order said nothing about compensation issues, and therefore did not authorize the employer to override those provisions of the collective agreement.<sup>124</sup>

## E. Layoffs and Furloughs

### 1. Layoffs

Part III.D.3 above describes how some employers responded to pandemic-induced shifts in patterns of demand for their goods or services by shifting employees' work hours. Other employers experienced profound reductions in demand, and responded by laying off or furloughing workers. This has led to conflict over whether such actions are permitted under existing collective labour agreements. Often, the furlough or layoff itself is not at issue, but instead the union challenges its implementation. Examples include whether the employer followed seniority provisions in the collective labour agreement when choosing employees for layoff or recall, or whether the employer provided adequate notice or complied with other procedural requirements.

An example is *BC Ferry Services Inc. and BC Ferry and Marine Workers Union*.<sup>125</sup> The employer was a ferry operator in British Columbia that began laying off employees in April 2020 because of a profound decline in ferry traffic caused by the COVID-19 pandemic.<sup>126</sup> Article 12 of the parties' collective labour agreement specifically governed layoffs. It established an elaborate procedure the employer was required to follow with multiple steps, including several notice periods, a "pre-adjustment canvas" of employees, cascading bumping rights, and severance pay.<sup>127</sup>

The employer argued it would be "absurd" to apply Article 12 to a temporary layoff, and equally absurd to hold it to a 60 days' notice requirement.<sup>128</sup> The employer instead asserted it was entitled to invoke management rights to effectuate an immediate layoff.<sup>129</sup> After extensive analysis, Arbitrator John Hall agreed with the employer that the unprecedented nature of the pandemic made it "not possible" for the employer to comply with the 60 days' notice requirement – but that the employer was nonetheless obligated to uphold the purpose of this provision by ensuring "the Union had an opportunity for input through good faith discussions."<sup>130</sup> However, the Arbitrator Hall agreed with the Union that Article 12's detailed

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<sup>124</sup> *Id.*

<sup>125</sup> 2020 CanLII 89913 (BC LA) (Sept. 28, 200) (John B. Hall).

<sup>126</sup> *Id.* at 2.

<sup>127</sup> *Id.* at 3, 7-11.

<sup>128</sup> *Id.* at 3.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 49.

description of layoff procedures foreclosed the employer from asserting a “retained” residual management right to temporarily lay off employees.<sup>131</sup> By agreement of the parties, he remanded the case to resolve the issue of remedy.<sup>132</sup>

Arbitrator Paul Love reached a similar conclusion in *District of Summerland and Local 213 of the Int’l Brotherhood of Electrical Workers*.<sup>133</sup> The employer, an electric utility, laid off thirty-five workers because of a COVID-induced reduction in demand for electricity.<sup>134</sup> The union challenged the layoff as to a particular employee who had seniority over other employees not laid off.<sup>135</sup> The employer invoked a management-rights clause giving the employer the right to lay off employees.<sup>136</sup> An article in the collective agreement required layoff in reverse order of seniority by classification.<sup>137</sup> Arbitrator Love held that a general management-rights clause permitting layoffs does not entitle the employer to disregard specific language elsewhere in the collective agreement specifying that layoffs are governed by seniority.

## 2. Furloughs

Some employers faced with a covid-related reduction in demand have avoided layoffs and instead furloughed workers temporarily. Furloughs raise many of the same issues as layoffs – whether the employer has the contractual right to furlough, and even if so, whether the employer followed the contract in effectuating it.

An example is an unpublished award from the United States by Martin Malin. A city’s tax revenue plummeted as a result of the pandemic, causing a significant tax shortage. The city negotiated a wage freeze with most of its unions in return for no layoffs, but the union representing public works employees refused. The city then implemented a furlough, reducing the hours of every bargaining unit member by 50%. The union argued that because the collective bargaining agreement contained procedures for layoffs but not furloughs, furloughs were prohibited. The city argued that language in the agreement stating that “nothing in this Agreement shall be construed as a guarantee of hours of work per day or per week” gave the city the unfettered right to reduce working hours. Arbitrator Malin agreed with the city.

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<sup>131</sup> *Id.* at 36, 43.

<sup>132</sup> *Id.* at 50.

<sup>133</sup> 2020 CanLII 108144 (BC LA) (Nov. 11, 2020) (Paul Love).

<sup>134</sup> *Id.* at ¶¶ 1-4.

<sup>135</sup> *Id.* at ¶ 192.

<sup>136</sup> *Id.* at ¶ 195.

<sup>137</sup> *Id.* at ¶ 212.

## F. Issues Unique to Education

### 1. Higher Education

A handful of cases have raised pay issues unique to higher education. In *Ontario Public Service Employees' Union, Local 242 and George Brown College*,<sup>138</sup> Arbitrator Norm Jesin found that changing a course's mode of delivery from in-person to online was not a "major revision" of the course entitling a faculty member to credit for additional preparation time.<sup>139</sup> Similarly, in *Northern College and Ontario Public Service Employees Union, Local 653*,<sup>140</sup> instruction shifted from in-person to online. A faculty member argued he was entitled to additional compensation not from this shift itself, but because many of his students took the course remotely from their homes in India, and the time difference created considerable extra work for him.<sup>141</sup> Arbitrator Paula Knopf applauded the faculty member's dedication to his students but found the situation did not warrant additional compensation.<sup>142</sup>

The most comprehensive Canadian higher-education award, however, was not about pay, but rather about working conditions that changed when a university shut down its campus and required that nearly all courses be taught online. The award is *Dalhousie Faculty Association, and Board of Governors of Dalhousie University*,<sup>143</sup> written by Arbitrator Paula Knopf. Dalhousie University is the largest university in Nova Scotia.<sup>144</sup> When COVID struck Canada, the University shut down. Faculty and staff were told to work from home; classes went online, and research that was not time- or resource-sensitive was suspended.<sup>145</sup> The University executive team met regularly with the faculty union, but were unable to resolve all outstanding issues.<sup>146</sup> In May 2020, the University announced the campus would remain closed and classes would be taught online for the duration of the Fall 2020 term.<sup>147</sup> In October, the University announced the same would be true for the winter 2021 term.<sup>148</sup>

The Union grieved, arguing that closing campus and requiring that courses be taught online were "significant changes to the general working conditions" of faculty members which violated the parties' collective labour agreement because the University imposed these changes

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<sup>138</sup> 2020 CanLII 35415 (ON LA) (May 25, 2020) (Norm Jesin).

<sup>139</sup> *Id.* at 3, 7-8.

<sup>140</sup> 2021 CanLII 1828 (Jan. 11, 2021) (Paula Knopf).

<sup>141</sup> *Id.* at 2.

<sup>142</sup> *Id.* at 6.

<sup>143</sup> 2021 CanLII 16001 (ON LA) (Feb. 26, 2021) (Paula Knopf).

<sup>144</sup> *Id.* ¶ 5.

<sup>145</sup> *Id.* ¶ 9.

<sup>146</sup> *Id.* ¶ 18.

<sup>147</sup> *Id.* ¶ 14.

<sup>148</sup> *Id.* ¶ 34.

unilaterally without first obtaining the Union’s consent and agreement.<sup>149</sup> The Union argued the shift to online courses significantly increased faculty workloads because courses had to be re-designed for a new format and faculty members had to learn new ways of teaching.<sup>150</sup> The Union also argued that closure of the physical campus meant faculty members could not access their offices, thus reducing their access to support services and impeding their research.<sup>151</sup>

Arbitrator Knopf agreed that the University’s actions imposed significant burdens on many faculty members’ working lives.<sup>152</sup> She found the University’s direction to work from home and to restrict access to offices and other facilities and services amounted to “significant changes” in working conditions, but that the collective labour agreement gave the University discretion to impose these changes without the agreement of the Union.<sup>153</sup> Regarding the shift to online teaching, she found the collective agreement gave the University the power to assign and schedule courses and did not specify how those courses would be delivered.<sup>154</sup> She therefore found no violation of the collective labour agreement.<sup>155</sup>

## 2. K-12 Education

As of mid-March 2021, only one reported decision in the CanLII database dealt with K-12 education, though it is expected this decision may be the tip of the iceberg that will come into full view as time progresses. The decision is *Hamilton-Wentworth District School Board and Elementary Teachers’ Federation of Ontario*,<sup>156</sup> written by Arbitrator S.L. Stewart. When school returned after summer vacation in fall 2020, the Hamilton-Wentworth School District established a dual model of delivery, with remote teaching via a video platform and in-person teaching in bricks-and-mortar schools.<sup>157</sup> The model was resource-intensive: even as enrollment declined, the District had to hire approximately 80 additional teachers and dip into its reserves for funding.<sup>158</sup>

The collective labour agreement (as well as a Policy/Program Memorandum issued by the Ontario Ministry of Education<sup>159</sup>) required an instructional day of 300 minutes.<sup>160</sup> Within

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<sup>149</sup> *Id.* ¶ 37.

<sup>150</sup> *Id.* ¶ 20.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* ¶ 102.

<sup>153</sup> *Id.* ¶ 103.

<sup>154</sup> *Id.* ¶ 106.

<sup>155</sup> *Id.* ¶ 112.

<sup>156</sup> 2021 CanLII 18496 (March 5, 2021) (S.L. Stewart).

<sup>157</sup> *Id.* ¶ 4.

<sup>158</sup> *Id.* ¶12.

<sup>159</sup> Ontario Ministry of Education, Policy/Program Memorandum No. 164 (Aug. 13, 2020), available at <http://www.edu.gov.on.ca/extra/eng/ppm/164.html>.

<sup>160</sup> Hamilton-Wentworth District, 2021 CanLII 18496, ¶18.

those 300 minutes, teachers were entitled to “preparation time” of at least 48 minutes per day.<sup>161</sup> Before the pandemic, when all teachers were still teaching in person, a different teacher would instruction for a homeroom teacher’s class during the homeroom teacher’s preparation time; that instruction would count toward the 300-minute daily total.<sup>162</sup>

In fall 2020, however, this changed for teachers in the online model. For Kindergarten teachers, a Designated Early Childhood Educator (DECE), who was not a bargaining-unit teacher, would be present in the virtual classroom during the homeroom teacher’s preparation time.<sup>163</sup> For teachers of grades 1-3, the District designated the last 50 minutes of the 300-instructional-minute-day as “asynchronous learning” time<sup>164</sup> during which the students might choose to work on homework or watch educational videos or engage in independent study.<sup>165</sup> During this time, “there was no obligation for the teacher to be present in the virtual classroom, there was no obligation on the student to remain in the classroom, and there was no qualified teacher covered by the Collective Agreement present in the virtual classroom.”<sup>166</sup> The District counted this as both part of a student’s 300-minute instructional day (even though no instruction was being provided) and as a homeroom teacher’s preparation time.<sup>167</sup>

The District argued these arrangements were consistent with both the labour agreement and with the Provincial Policy/Program Memorandum.<sup>168</sup> The district also argued that the home room teachers suffered no hardship because, as before, they were teaching for 250 minutes and received 50 minutes of preparation time each day.<sup>169</sup> Arbitrator Stewart disagreed. Both the labour agreement and the Memorandum, the Arbitrator found, required that students receive 300 daily minutes of instruction from bargaining-unit teachers.<sup>170</sup> This requirement was not met for Kindergarten students because the DECE was not a bargaining-unit teacher.<sup>171</sup> Nor was the requirement met for Grades 1-3 students because “instructional time requires the presence of a teacher and where there is no teacher present to provide instruction, there can, in my view, be no instructional time.”<sup>172</sup> Nor was it an answer for the District to argue that each teacher was still providing the same number of instructional minutes and receiving the same preparation time as before.<sup>173</sup> The harm was not to the individual teachers, but to the teachers collectively by the District’s providing fewer instructional minutes

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* ¶ 5.

<sup>163</sup> *Id.* ¶ 7.

<sup>164</sup> *Id.* ¶ 13.

<sup>165</sup> *Id.* ¶ 14.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* ¶ 17.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* ¶ 22.

<sup>171</sup> *Id.* ¶ 24.

<sup>172</sup> *Id.* ¶ 23.

<sup>173</sup> *Id.* ¶ 25.



to students each day than the labour agreement (or Memorandum) required, thus impermissibly cutting bargaining-unit work.

Also of note was the Arbitrator's rejection of the District's invocation of *Caressant Care*, discussed above in Part III.C.2,<sup>174</sup> as standing for a broad interpretation of management rights when an employer is responding to the pandemic. In that award, Arbitrator Stewart said, the arbitrator correctly analyzed the employer's requirement of COVID-19 testing every two weeks for whether it was inconsistent with the collective labour agreement, found it was not, and therefore held the employer had the right to require the testing. Here, Arbitrator Stewart found, the District's reduction of instructional minutes was inconsistent with the labour agreement.<sup>175</sup>

#### IV. Analysis

Most of the awards described in Part III turned on specific language in the applicable collective bargaining agreement, making it difficult to draw overarching themes from the awards. Nonetheless, a few consistent themes emerge.

First, Canadian arbitrators engaged in a robust debate throughout 2020 on the issue of whether an arbitrator may order an online hearing over the objection of a party who wants to proceed in-person. Early decisions assumed that in-person hearings were still the "gold standard", and were more likely to agree postpone hearings either in the hope the pandemic would abate and the hearings could proceed in-person or because the employer was a health care facility overwhelmed with COVID cases and could not cope with both a hearing and the pandemic. As 2020 wore on and hopes of a quick return to normality proved overly optimistic, arbitrators showed a disinclination to order in-person hearings or to postpone hearings for what might be an indefinite period of time. By the end of 2020, arbitrators had coalesced around a presumption that hearings would be online unless a party could show a compelling reason why the hearing needed to be in-person, and judging witness credibility or an aversion to technology was not such a compelling reason.

Second, employers were significantly more likely to win in arbitration when they could point to specific contract language entitling them to act unilaterally. Invocations of a standard management-rights clause, or claims of necessity because of economic conditions caused by the pandemic, were not successful arguments in the face of specific contract language limiting the employer's ability to act. However, arbitrators were more sympathetic to claims of necessity because of the direct health dangers of COVID, as with health care facilities that had to change work shifts to minimize the likelihood of transmitting the disease within the facility.

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<sup>174</sup> See *supra* notes \_\_\_ - \_\_\_ and accompanying text.

<sup>175</sup> *Id.* at ¶ 26.

Even then, employers were required to bargain with unions after the fact on the effects of the changes.

Third, arbitrators were relatively deferential to employer-promulgated workplace COVID policies designed to minimize transmission of the disease, so long as these policies did not violate specific provisions of the collective labour agreement. Similarly, arbitrators were relatively forgiving of employers who enacted policies that were more strict than, in retrospect, they needed to be, so long as the employer did so in good faith. Arbitrators were less forgiving toward employees who violated workplace COVID policies.

This article focused on Canadian awards because the CanLII database provided an almost-in-real-time source of awards. A follow-up article will focus on awards from the United States. This will offer an opportunity to explore the differences, if any, in the ways Canadian and American arbitrators have approached various issues.

It may also offer an opportunity to explore issues I expected to find, but did not, in Canadian awards. For example, I expected to find awards dealing with whether employers could use force majeure clauses to justify unilateral action in response to the pandemic, whether employers may discipline employees for off-duty conduct (such as non-socially distanced parties) exposing them to the COVID virus, and awards dealing with employers requiring employees to return to work in circumstances the employees consider unsafe.

## **V. Conclusion**

The COVID-19 pandemic changed working conditions for millions of Canadians quickly and dramatically. Employers often responded by taking immediate and unilateral action to design and implement workplace COVID policies or to respond to shifts in demand for the employer's goods or services. Unions have grieved many of these actions, raising a variety of novel issues that are now being resolved through labour arbitration. This article surveys those arbitration awards.