

IN THE MATTER OF AN ARBITRATION

Between:

THE CORPORATION OF THE CITY OF HAMILTON

(the “Employer”)

- and -

HAMILTON PROFESSIONAL FIREFIGHTERS’ ASSOCIATION

(the “Association”)

and in the matter of grievance no. 2004-07 regarding the Ontario Health Premium.

Russell Goodfellow – Sole Arbitrator

APPEARANCES FOR THE EMPLOYER:

John Saunders,
Hicks Morley

APPEARANCES FOR THE ASSOCIATION:

Howard Goldblatt,
Sack Goldblatt Mitchell

A hearing was held in this matter in Hamilton on September 24, 2004. Additional submissions were completed in writing up to and including December 3, 2004.

AWARD

This award deals with an Association grievance alleging that the Employer is in breach of the collective agreement by refusing to pay the amount of the Ontario Health Premium on employees' behalf.

The same issue has recently been addressed in five awards involving other parties. In four of those awards the grievances were dismissed (see: *Jazz Air Inc. and Air Line Pilots Association International*, dated September 27, 2004, unreported (Teplitsky); *College Compensation and Appointments Council and Ontario Public Service Employees' Union*, dated October 29, 2004, unreported (Shime); *Goodyear Canada Inc., Collingwood Plant and United Steelworkers of America, Local 834L*, dated November 1, 2004, unreported (Tims) and *Walker Exhausts and United Steelworkers of America, Local 2893*, dated November 8, 2004, unreported (Samuels)). In the fifth award – *Lapointe Fisher Nursing Home and United Food and Commercial Workers' Union, Locals 175/633*, dated October 6, 2004, unreported (Barrett) – the grievance was upheld. The last mentioned award, I was advised by the Employer, is presently the subject of an application for judicial review. I was made aware of no such applications having yet been filed in respect of the other awards.

To come quickly to the point, in my view, whether or not existing collective agreement language requires an employer to pay the Ontario Health Premium on employees' behalf is first and foremost a matter of collective agreement interpretation. The relevant language of the present agreement states:

- 11.3 The Employer agrees to maintain and pay one hundred percent (100%) of the present and future cost of the designated hospitalization plan and medicare plan (O.H.I.P.). It is agreed that all benefits in the above plans shall remain in effect during the life of this Agreement. If any improvements in any of these plans come into effect during the life of the Agreement, they shall be passed on to the Association at the expense of the Employer. It is agreed that during the life of this Agreement, an improvement is granted other Corporation employees in such plans, it will be forthwith granted those covered by this Agreement at the expense of the Employer.

Article 11.3 has been in the parties' collective agreement for approximately 30 years. The specific reference to the "medicare plan (O.H.I.P.*)" appears to have been included in the early 1970's after the system of statutorily supported or regulated hospitalization and medical insurance plans available for purchase by employers or individuals was replaced by the Ontario Health Insurance Plan ("O.H.I.P.*"). Pursuant to this provision the Employer paid O.H.I.P. premiums on employees' behalf until those premiums were eliminated in 1989 and the Employer Health Tax was created. Notwithstanding this change, however, the parties retained and renewed the language of Article 11.3 with each successive renewal of the collective agreement. To be clear, this was done even though the provision appears to have been completely inoperative (the "designated hospitalization plan", I was advised, was eliminated at or about the time that O.H.I.P. was created). Although I have no specific evidence on the point, it is safe to assume that the parties proceeded in this fashion for either or both of two reasons: (1) the general tendency in collective bargaining not to change or eliminate language unless it is being replaced with something else ("if it's not broke, don't fix it"); (2) a desire on the part of the Association to keep it around for a rainy day. To the extent that it was the latter, it is the Association's position that that day has arrived.

At the time that this case was first presented none of the above-mentioned awards had yet been released. As those awards began to trickle in, however, they became the subject of additional submissions by the parties. It was the Association's position at the hearing, and it remained the Association's position subsequently, that any possible distinction between a "premium" and a "tax", such as found favour in at least some of those awards, is entirely irrelevant for purposes of this agreement. Article 11.3 refers to "*cost*", not premiums, and, indeed, it refers not just to cost but to "*present and future cost*". The Association submits that this is a very broad obligation which effectively sidelines any discussion about whether the Ontario Health Premium is a "tax" rather than a "premium" – in either case it is covered.

As a further interpretive point, the Association notes that when medicare first appeared on the horizon – in the late 1960's and early 1970's – the parties negotiated anticipatory language in the 1970 collective agreement requiring the Employer to pay the maximum amount of any "premium" that might be instituted for a "medicare plan". Later, after O.H.I.P. was created, the relevant word was changed to "cost" – a change which appears to have been a feature of an Association proposal in 1971. The Association also points to other benefit provisions of the agreement – some of which refer to premiums and some of which refer to cost – to demonstrate that the parties are capable of distinguishing between the two where it seems appropriate. Thus, while the Association steadfastly disagrees with the idea that any meaningful distinction can be drawn between "premiums" and taxes for the purposes of this issue generally, it submits that any such distinction is entirely moot under the terms of this agreement.

As for the remainder of the language, the Association notes that the Employer has committed itself to pay the costs of the “medicare plan” and that the reference to O.H.I.P. is purely parenthetical. According to the Association, the words “medicare plan”, on their normal and natural meaning, refer not just to O.H.I.P. but, more generally, to all “government-funded health care benefits” and that that is precisely what we have here. As indicated in the government’s repeated pronouncements in the Legislature and in its extensive written materials accompanying the proposed legislation – which were placed before me in significant quantity by the parties – the revenues derived from the Premium are intended to be used *solely* and *exclusively* for the provision of health care. To the extent that the same materials indicate that the Premium will be used to pay for *more* types of health care services than fall within O.H.I.P., the Association submits, essentially, “so what”. All of these services form part of what the average person properly understands to be covered by the term “medicare” or the “medicare plan”, *ie.* government-funded health care benefits. Referring, once again, to the other benefit provisions of this agreement, the Association notes that there is virtually no health-related benefit that is not paid for by the Employer to some extent and submits that it is “simply inconceivable” that these parties would ever have expected employees to reach into their pockets to pay for the provision of basic health care services.

The Association adds, however, that even if one were to construe the reference to the “medicare plan (O.H.I.P.)” more narrowly – as referring to *only* those services that are covered by O.H.I.P. – at least some (and possibly the significant majority) of the revenue raised by the Premium will be used to pay for such services. As a result, to reject the Association’s claim on this more limited view would be to permit

the Employer to escape a substantial obligation that it has clearly undertaken. The Association submits that this, too, is a reason to uphold the grievance.

More fundamentally, perhaps, the Association submits that any analysis that is built on an attempt to trace or track the use of government revenues is fatally flawed from the outset. The Association notes that the funds derived from the present Premium, *as was the case with O.H.I.P. premiums*, are included in the province's "consolidated revenue fund" and that there never has been any way to be certain whether such funds will be devoted exclusively to health care services. (Indeed, the Association makes this point notwithstanding that a feature of the proposed Legislation is to require the Public Accounts for each fiscal year to include information about the uses to which the revenue will be put, presumably to assist in ensuring that the government lives up to its commitment to use the funds exclusively for health care). On that basis, the Association rejects the reasoning in the most recent (Samuels) award, and adds that all of the awards released to date – including the Barrett award – are distinguishable on the basis of the collective agreement language.

The Employer's submissions, both at the time of the original hearing and subsequently, sounded many of the same themes that are documented in at least two of the decided cases (Tims and Shime). Thus, it was the position of the Employer that the Ontario Health Premium, whatever the government may have chosen to call it for "political" reasons, is a "tax" rather than a "premium"; that it is not reasonable to suppose that the Employer would ever have agreed to pay employees' taxes; that, unlike the present funding arrangements, O.H.I.P. was a pure insurance scheme; that that insurance

scheme no longer exists; that it was the government's intention that employers would not be required to pay the Premium under existing collective agreement language; and that the services which the revenues derived from the Premium will be used to provide exceed those things that fall within O.H.I.P. (eg. long term care facilities, home care, certain types of vaccinations, protection against SARS, etc.).

With respect to the specific language of the agreement, the Employer submits that there is nothing to suggest that it has agreed to pay anything other than the "four square of O.H.I.P.". In particular, it has not agreed to pay all of the costs of the Ministry of Health and Long Term Care. The Employer submits that if it had agreed to undertake the kind of broad obligation asserted by the Association there would have been no need for the third sentence in the Article. The Employer submits that while it has agreed to pay the cost of O.H.I.P. there is, in effect, "no cost of O.H.I.P. today"; O.H.I.P. is funded entirely out of taxes. Further, the Employer refers to the schedule of benefits under the agreement which, it notes, sets out in "infinitesimal" detail the specific health care benefits to which employees are entitled. The Employer submits that it would be out of step with the parties' approach to defining benefits under this agreement for the Employer to be found to have agreed to bear a substantial cost – estimated by the Employer to be in the range of \$375,000 annually – on the basis of such inexact language. Finally, the Employer invites me to conclude that, placed in historical context, the words "medicare plan (O.H.I.P.)" should properly be construed as meaning something less than all health care services since, prior to the arrival of O.H.I.P., hospitalization matters were covered under one insurance scheme (the designated hospitalization plan) and medical services were covered under another (the designated

medical plan). Finally, the Employer supports the reasoning and results in the most recent awards and urges me to follow those awards here.

On my reading of this agreement, the grievance must be upheld. As the Association was at pains to point out, the present collective agreement, unlike all of the agreements considered previously (including the agreement before Arbitrator Barrett), expresses the Employer's obligation in the form of "cost". In my view, this term is more than adequate to embrace the Ontario Health Premium. On its normal and natural meaning, the word "cost" refers to an expense, rather than to the manner in which that expense is incurred or the form which that expense takes. It is the existence of a charge, rather than the form or character of the charge, which these parties have chosen to address. So long as there is a cost, the Employer has agreed to pay it.

Does this mean that the Employer has agreed to pay employees' taxes? Perhaps, but not in the pejorative sense in which that characterization has been used to rebut these sorts of claims. In my view, so long as it is possible to point to a distinct and separate charge – as contrasted, for example, with a general increase in taxes (even one that might be justified by reference to increased health care costs) – it matters not whether it comes in the form of "a tax" under the *Income Tax Act* or as a "premium" under the *Health Insurance Act* (or, indeed, whether it conforms to the common law definition of a tax set out in *Re Eurig Estate*, [1998] 2 S.C.R. 565, relied on by the Employer here). In any case, it qualifies within the normal and natural meaning of the word "cost" as utilized by the parties in this agreement.

Somewhat more difficult, in my view, is the question of whether the Ontario Health Premium fits within the second part of the language. Should the words “medicare plan (O.H.I.P.)” be taken to refer to *only those things* that are included within O.H.I.P. under the *Health Insurance Act*, as the Employer submits, or to all government or publicly-funded health care services including, but not limited to, O.H.I.P., as the Association submits. On balance, I have concluded that it must be the latter. I agree with the Association that the reference to “O.H.I.P.”, when read in context, should not be construed as having been intended to define, restrict or limit the scope of the Employer’s obligation to only those services that fall within O.H.I.P. The primary reference is to the “medicare plan”.

Neither “medicare” nor the “medicare plan” are terms of art. I was referred to no statutory or other definition of these words. As I see it, “medicare” and the “medicare plan” are colloquial terms or terms of common usage. They describe, on my sense of the vernacular, health care services that are provided by the government out of public funds; that is, health care services that, but for their provision by the government, would be paid for by individuals directly. To the extent that O.H.I.P. has a more narrow base (*ie.* pursuant to the terms of the *Health Insurance Act*), the average person – and, in my view, the average collective agreement negotiator – would not draw this distinction.

What meaning, then, is to be given to the parenthetical reference to O.H.I.P.? Does the foregoing not effectively read out this reference from the provision? Would it not be at least as consistent with the parties’ presumed intention to find that these words were meant to refer, solely and exclusively, to the thing that was being

created (*ie.* O.H.I.P.) when the language was first negotiated some 30 years ago? I do not think so. While I accept the submissions of counsel for the Employer that, in effect, it was the advent of O.H.I.P. and O.H.I.P. premiums that was the animating force behind the introduction of the language, the parties obviously did not choose to restrict themselves in this way. If they had, they could simply have referred to O.H.I.P., pure and simple. The fact that they did not do so must be given some greater meaning.

As I see it, it is a *more* reasonable construction of the language chosen by these parties, and it is *more* consistent with their overall approach to the provision, to conclude that they intended to take a more generic and comprehensive approach to the kinds of charges to which employees might become subject in the new era of “medicare”. In other words, by referring, primarily, to the “medicare plan”, and by mentioning O.H.I.P. only in parenthesis, the parties were attempting to ensure that the Employer’s obligation would extend not just to O.H.I.P. but to whatever form government-funded or government-provided health care benefits might take. To put it still another way, the reference to O.H.I.P. was meant to be descriptive of the current model; it was not meant to be exclusive of any other government-provided health care services which could reasonably fall within the words “medicare plan”.

In sum, as a purely interpretive matter, faced with a choice between placing greater weight on the expression within the brackets or the words outside, I have chosen the latter. To take the contrary approach – the one which is advocated by the Employer – would, in my view, be to unduly diminish or negate the natural meaning of the words “medicare plan”.

In coming to this conclusion, I would note that I have been unable to make anything of significance out of the Employer's reference to the legislative history prior to the arrival of O.H.I.P., the pre-existing designated hospitalization and designated medical plans, the continuing inclusion of the words "designated hospitalization plan", or the reference to "improvements in any of these plans" in the third sentence of the Article. It is clear that the former system was dismantled with the arrival of medicare and I cannot see how that history or those references can assist in defining the Employer's obligation under this new scheme.

As for the allegedly unanticipated nature of the cost and its consistency or inconsistency with the approach taken by the parties to defining other benefits in the agreement, the short answer is that it was ever thus. The generalized, non-specific, or inclusive nature of the language has always been a feature of Article 11.3. The fact that the only discrete and separate "cost" of the "medicare plan (O.H.I.P.)" for these employees now appears in the form of an Ontario Health Premium rather than in the form of an O.H.I.P. premium changes nothing from this point of view. Even a return to O.H.I.P. premiums would have brought about a cost and, indeed, that cost was always one that was subject to change at the Employer's expense.

I would also note that the Employer here did not attempt to make the argument which appeared to find so much resonance with Arbitrator Samuels, *viz.* that the uses to which the revenues derived from the Ontario Health Premium are to be put are not legislatively restricted to health care services. This may have been for either or both

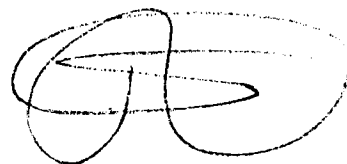
of two reasons. First, the Employer chose to rely on the extensive oral and written statements by the government – as reflected, for example, in Hansard and in various Ministry publications – that the funds *would be* devoted solely and exclusively to such purposes to buttress the argument, addressed above, that the funds will be used to pay for *more health care services* than fall under O.H.I.P. As a result, for purposes of this issue, I and, it would appear, the Employer, have been prepared to accept such representations as matters of fact, if not of law. Second, the Employer may have shared the view of the Association as to the alleged flaw in this argument, *viz.* that even O.H.I.P. premiums found their way into the government’s consolidated revenue fund and were not necessarily traceable to “O.H.I.P. uses”.

As for the question of the government’s intention (or, more accurately, opinion), as expressed, for example, on at least one occasion in the Legislature (*ie.* that the costs of the Premium would not be covered by existing collective agreement language), it is, quite simply, irrelevant to the issue before me. The issue here is not the intention of the government, since that intention is nowhere expressed in the terms of the proposed Legislation, but the intention of the parties as expressed in the language of the collective agreement. Had the government wished to ensure that the Ontario Health Premium was not covered by existing collective agreement language, it could easily have included the necessary provision. The government not having done so, its views can have no bearing on this decision.

Lastly, I am fully cognizant of the fact that this award may be seen to be out of step with the recent run of authority. However, I have attempted to explain why. Returning to the point that I made at the outset of this award, I see this issue as no different from any other that arbitrators may be called upon to decide under the terms of the collective agreement. It is, quite simply, a matter of interpretation and, as such, its resolution depends upon the language of individual agreements. Thus, while there is much that may be said about the preceding awards (and the parties here took the opportunity to say some of it in their written submissions), it is enough for me to observe that *all* of the awards are distinguishable on the basis of the relevant collective agreement language, none of which referred to “cost” and none of which referred to the “medicare plan (O.H.I.P.)”.

In the result, the grievance is upheld. I find and declare that the Employer is required to pay the amount of the Ontario Health Premium on employees’ behalf in respect of the income earned from the Employer. The employees are entitled to be compensated for the amount of any and all such deductions that have been made to date. I will remain seized to resolve any disputes as to the calculation of those amounts or with respect to any other issues arising out of the interpretation or implementation of this award.

DATED at Oakville this 17th day of December, 2004.



Russell Goodfellow - Sole Arbitrator