ORDER

LB-1466
2018 NSLB 61

LABOUR BOARD
Nova Scotia

BETWEEN

The Nova Scotia Council of Healthcare Unions - Applicant

-and-

The IWK Health Centre - Respondent

NATURE OF MATTER	Application under Section 9(1) of the *Essential Health and Community Services Act*
DATE OF FILING	March 27, 2018
BEFORE	Karen R. Hollett, Chair
REPRESENTATIVES	David J. Roberts, for the Applicant Patrick J. Saulnier and Siobhan Ryan, for the Respondent Edward A. Gores, Q.C., for the Attorney General (watching brief)
CASE MANAGEMENT DATES	March 28, 2018 April 10, 2018
DATES AND PLACE OF HEARING	April 12 and 13, 2018 in Halifax, Nova Scotia April 9, 14, and 18, 2018, scheduled but not held
ORDER	The Board declines to include the notice provisions (paragraphs 8, 9, 10) as proposed by the IWK or any variation of these provisions in the Parties' Framework Agreement. The agreed upon provisions of the Parties' draft Framework Agreement together with their agreed upon appendices constitute the Parties' Essential Services Agreement.

REASONS FOR DECISION

Nature of the Application

[1] This is the first Application where the Board has been required to settle the provisions of an essential services agreement ("ESA") under the *Essential Health and Community Services Act* (the "*EHCSA*").

[2] The parties to this Application are the Council of Healthcare Unions (the "Council") and the IWK Health Centre (the "IWK"). The Council, which is one of four councils of unions created by the *Health Authorities Act,* represents employees in the Healthcare Bargaining Unit at the IWK. The IWK is one of two health authorities created by the *Health Authorities Act*.

[3] The *EHCSA* requires the IWK and the Council to negotiate and enter into an ESA prior to any strike or lockout occurring. Subsection 5 (2) of the *EHCSA* provides:

> (2) In order to enable an employer to continue to provide essential health or community services in the event of a lockout or strike, an essential health or community services agreement must
>
> (a) identify the work functions that constitute essential health or community services;
>
> (b) identify the classifications of employees, and the number of employees in each classification, who are required at any one time to perform essential health or community services during a lockout or strike;
>
> (c) provide for a method by which employees competent to perform essential health or community services will be assigned to perform those services during a lockout or strike;
>
> (d) in order to allow the employer to respond to an unanticipated increase in the need for essential health or community services during a lockout or strike, set out a procedure for identifying and assigning additional employees within the classifications identified pursuant to clause (b) who are required at any one time to perform the work functions identified pursuant to clause (a), including the immediate assignment of the additional employees;
>
> (e) where the employer uses the procedure in clause (d), require the employer to immediately serve notice on the bargaining agent setting out the additional number of employees in each classification required to perform the work functions as a result of the unanticipated increase;
>
> (f) in order to allow the employer to respond to an emergency during a lockout or strike, set out a procedure for

(i) identifying additional work functions as essential health or community services,

(ii) identifying additional classifications of employees, and the number of employees in each classification, who are required to perform additional work functions identified as essential health or community services, in an emergency, and

(iii) assigning these additional employees, including the immediate assignment of the additional employees; and

(g) where the employer uses the procedure in clause (f), require the employer to immediately serve notice on the bargaining agent setting out the additional work functions identified as essential health or community services and the additional classifications of employees, and the number of employees in each classification, who are required to perform those work functions in an emergency.

[4] On March 27, 2018, the Council advised that the parties had been unable to conclude an agreement and requested the Board to settle the provisions of an ESA. The Board's jurisdiction to do so is set out in section 9 of the *EHCSA*. This section provides:

(1) Where an employer and a bargaining agent are unable to conclude an essential health or community services agreement, the employer or the bargaining agent may apply in writing to the Board to settle the provisions of such an agreement and the Board shall, as soon as is practicable, serve notice on both of them of receipt of such application.

(2) Upon receiving the notice served pursuant to subsection (1), the employer and the bargaining agent shall each, without delay, give the Board a statement setting out the matters they have agreed upon, if any, and the matters upon which they cannot agree, with respect to an essential health or community services agreement.

(3) The Board may hold an oral hearing before making a decision pursuant to this Section, but is not required to do so.

(4) The Board shall hear the matter as a panel consisting of the Chair of the Board or a vice-chair of the Board as a sole adjudicator.

(5) Within 30 days after receiving an application pursuant to subsection (1), or within such further time as the employer and bargaining agent agree upon, the Board shall make an award settling the provisions of an essential health or community services agreement between the employer and the bargaining agent.

(6) In settling the provisions of an essential health or community services agreement pursuant to this Section, the Board shall accept, without amendment, any provisions agreed upon by the employer and the bargaining agent.
(7) On application by the employer or the bargaining agent, the Board may modify any determination, decision, order or direction made by the

Board pursuant to this Section as the Board considers appropriate in the circumstances.

[5] At the time the Application was received, there were multiple issues pertaining to a draft "Framework Agreement" and staffing levels in dispute. The parties subsequently made significant progress and have now agreed upon all but one issue. This is with respect to certain notice provisions which the IWK seeks to include in the Framework Agreement.

[6] The notice provisions proposed by the IWK are as follows:

> Lockout or Strike
>
> 8) In recognition of the fact that the staffing levels agreed in this ESA and appendices are dependent upon the employer having the opportunity to reduce and/or stop services, the Parties agree that the Employer requires a minimum of 14 days in order to accomplish this "ramp down" of services.
>
> 9) The Parties agree that the Council shall provide the Employer with written notice of any Strike no less than 14 days prior to the commencement of the Strike. This notice period will apply for each period of Strike in the case that the Council ceases a Strike, and then intends to re-commence or commence a new Strike.
>
> 10) In the case of a partial or rotating strike the Council shall notify the Employer no later than 72 hours in advance of the Strike of the location or locations at which the Strikes shall occur, and the nature of the planned Strikes.

[7] The *Trade Union Act*, which is also relevant to this dispute, provides as follows:

> 47 (1) No employee shall strike and no trade union shall declare or authorize a strike of employees, and the employer shall not declare or cause a lockout of employees until
>
> (a) the trade union is entitled on behalf of the employees by notice under this Act to require the employer to commence collective bargaining; and
>
> (b) the bargaining agent and the employer, or representatives authorized by them in that behalf, have bargained collectively and have failed to conclude a collective agreement or a revision thereof, and either
>
> (c) a conciliation officer has been appointed and has failed to bring about an agreement between the parties and fourteen days have elapsed from the date on which the report of the conciliation officer was made to the Minister; or
>
> (d) a conciliation board has been appointed to endeavor to bring about agreement between the parties and seven days have

elapsed from the date on which the report of the conciliation board was received by the Minister.

(2) No employee shall strike and no trade union shall declare or authorize a strike of employees, and the employer shall not declare or cause a lockout of employees more than six months after the date upon which the times provided by clause (c) or (d) of subsection (1) has expired unless either party has thereafter requested conciliation services in accordance with Section 37 and the times provided by clause (c) or (d) of subsection (1) have again expired.

(3) Notwithstanding anything contained in this Act,

(a) no person shall declare or authorize a strike and no employee shall strike until after a secret vote by ballot of employees in the unit affected as to whether to strike or not to strike has been taken and the majority of such employees have voted in favour of a strike; and

(b) no person shall declare or authorize a strike or lockout and no employee shall strike until forty-eight hours after receipt by the Minister of a notice of strike or lockout.

[8] The *EHCSA*, which per section 2 (3) is paramount legislation, modifies these provisions in the *Trade Union Act.* Section 26 of the *EHCSA* provides as follows:

(1) Any lockout or strike between an employer and a bargaining agent that is taking place at the time this Act comes into force must cease until such time as the employer and bargaining agent have established an essential health or community services agreement.

(2) Where, on the coming into force of this Act, a conciliation officer has filed a report pursuant to subsection 38(1) of the *Trade Union Act* and the 14-day period provided for in subsection 47(1) of the *Trade Union Act* has begun, no further time of that period elapses until such time as the parties have entered into an essential health or community services agreement.

(3) Notwithstanding subsection 47(1) of the *Trade Union Act*, where a conciliation officer files a report pursuant to subsection 38(1) of the *Trade Union Act*, the 14-day period provided for in subsection 47(1) of the *Trade Union Act* may not begin until such time as the parties have entered into an essential health or community services agreement.

The Issue

[9] The issue is whether the Board can and should insert provisions into the ESA to require the Council to provide written notice of a strike as proposed by the IWK or as modified by the Board.

The Witnesses

Shawn Fuller

[10] Shawn Fuller is the Director of Services and Negotiations– Healthcare with NSGEU. NSGEU is the lead union in the Council. He was involved in the drafting of the Framework Agreement for essential services. Mr. Fuller's understanding of paragraphs 8, 9, 10 of the draft Framework Agreement was that the Council would have to give fourteen days notice of a strike. If the Council did not strike on the day indicated, there would be a further requirement for another fourteen-day notice period. There is also a 72-hour requirement for partial or rotating strikes.

[11] Mr. Fuller indicated the Council disagrees with these provisions because they are not provided for in the legislation and they would further impede the Council's ability to strike in a number of ways. He explained that building the momentum for a strike is a challenging process. If there was a notice given for a strike under such a provision, and the Council did not proceed on that day, it would be very difficult to build the membership up to strike a second time after waiting a further fourteen-day period. This would create a burden on the Council and would be very disruptive to their membership.

[12] In Mr. Fuller's experience, often the parties will negotiate right up to the day of a planned walkout and stay at the table to negotiate another day. If the provisions proposed were in place, they would have to assess whether staying at the table another day was worth a further two-week delay and/or whether they felt they could ramp the membership up again after that period. Even where another day of negotiating might result in a deal, they would have to make a judgment call and thus the requirement for another fourteen-day notice period might well make a strike more likely.

[13] Mr. Fuller has negotiated a number of rounds of health care bargaining which resolved on the brink of strike and one round in 2007 that went into a strike. He has been involved in other rounds of acute care bargaining, but not as a chief negotiator. In all these instances, there were no notice provisions required other than what is provided for in the *Trade Union Act*. He also referred to a Memorandum of Agreement between the IWK and NSGEU, Local 22 which was negotiated pursuant to Article 6.03 of a collective agreement between the parties. This MOA constituted the emergency services agreement used in the 2007 strike. There was no request for any notice periods during the negotiation leading up to that agreement and none were included.

[14] Mr. Fuller advised that the Council had done an analysis and it was their calculation that there would be 35% of the bargaining unit at work during a strike under the staffing agreement.

[15] On cross-examination, Mr. Fuller confirmed that the structure of bargaining under the *Health Authorities Act* and the timing of conciliation means that a health care strike can involve both the IWK and the NSHA simultaneously. He agreed that a health care strike could involve both health care authorities or one health authority or a part of one health authority. He acknowledged that some aspects of the framework document, such as the dispute resolution provisions, are integrated. He agreed that unless the Board imposed a notice requirement, the health authorities will not know if there will be a strike or whether it will affect one or two employers.

[16] Mr. Fuller agreed the IWK is unique in the province and the primary pressure on an employer in healthcare is the ability to deliver healthcare. He agreed the reduced staffing levels are significant and that it would only be possible for the IWK to operate at these levels by providing fewer services. His recollection, although he was not personally involved, was that in past strike situations the IWK would start to reduce its services in the second week after the conciliator's report started the count down to a legal strike position. He agreed this meant the IWK would have to have services reduced on the fifteenth day after the conciliator's report is issued. He also agreed there would be a reduction in services whether there was a strike or not, but questioned whether some services could still be delivered if the strike did not occur.

[17] Mr. Fuller was questioned with respect to whether the parties might waive the requested notice provision in order to permit the parties to stay at the bargaining table if such a situation developed. Mr. Fuller said he would have to rely on the employer for any such agreement. Mr. Fuller was also questioned with respect to the Emergency Services Agreement based on the collective agreement. He agreed on cross-examination that the relevant collective agreement provision did not require negotiation of staffing levels, did not require an independent dispute resolution adjudicator, and there was no obligation to discuss strike notice.

[18] On redirect, Mr. Fuller agreed that the IWK had committed to providing fewer services during a strike and that the staffing level agreement is in place for a one-week strike period. He also noted that after the cooling off period in the *Trade Union Act*, the employer can lock the bargaining unit out.

Carl Crouse

[19] Carl Crouse is a National Representative for CUPE based in Nova Scotia with responsibility for the health sector. He is a Licensed Practical Nurse and has worked for CUPE at the local or national level since 1997. He is deputy lead negotiator for the Health Care Council. He was involved in the staffing level agreement discussions and plan which is based on the premise of a one-week strike with a single bargaining unit on strike. His understanding was that the IWK's proposal called for fourteen-day written notice as to when a strike will take place and in the event a strike does not occur, a further fourteen-day notice period must be given and served. He felt the employer's proposal would have a substantially negative impact on bargaining as the purpose of a strike is to focus parties to find a resolution.

[20] In Mr. Crouse's experience, as parties negotiate there are escalating pressures leading to a strike or lockout which lead to the conclusion of a collective agreement. A two week

stop and start process would be detrimental. If you continually interrupt that momentum requirement with a further notice period, you will never get to a collective agreement or you will force a union to strike because it cannot keep relinquishing pressure. This is contrary to the efforts to get a deal. He has negotiated up to and past the two-week cooling off period on a number of occasions. The most time was in 2010 when CUPE ended up on strike for a very short duration. CUPE gave the 48 hours notice and after negotiating all weekend got the deal around the time of the strike. In his view, the anticipation of a strike is very effective in achieving a collective agreement. The proposed notice provision would mean that a union would have to follow through on an intended strike or lose momentum. With respect to requesting a waiver of the notice provision, Mr. Crouse indicated this would require an agreement between the parties and add another layer to the give and take of negotiations.

[21] On cross-examination, Mr. Crouse agreed that the anticipation of a strike, whether a date is known or not, is a pressure on a healthcare employer as it does not want to reduce its services. He also agreed that other than rotating strikes or strikes in various locations, he is not aware of a prior strike that started, stopped and then resumed.

LeeAnn Larocque

[22] LeeAnn Larocque is the Director, Children Emergency, Surgical and Critical Care at the IWK. She is one of two directors in the Children's Health Program. Currently, she has responsibility for, *inter alia,* cardiac care, emergency, perioperative, inpatients and surgical/ambulatory. She has a broad experience in children's health programs and mental health. Ms. Larocque has been involved for approximately two years in the negotiations toward the essential services agreement. She was working with a Human Resources Consultant and representatives from across the province as the IWK and NSHA met jointly. Her role was to represent the entire organization, by coordinating and communicating with other directors and the Vice-Presidents, to ensure an adequate ESA was reached.

[23] Ms. Larocque testified they would need to plan a "ramp down" in the IWK critical services to meet the agreed upon staffing levels with two weeks' notification "if we get it." They would look at every patient to see if the patient could return home or to the community; they would re-triage certain patients to see if they could come in earlier or if they could wait; and they would call and cancel appointments. They would also have a communications/public relations strategy to deal with the public, staff and physicians.

[24] Ms. Larocque indicated that it would take ten days in the areas under her responsibility to reach essential services staffing levels. All patients would be re-triaged and they would gradually scale down patient volumes. They would only bring in the urgent and emergent and those who can wait would be rebooked. Inpatients would also be reviewed and they would arrange community resources if possible for those who could potentially go home. In other areas, it would take more time because, for example, stopping mental health services for children and adolescents would be detrimental and risky to their mental and physical health. Thus, patient care and supports would need to be put in place. This would take two weeks. She indicated that not all services would be reduced during a strike. Certain services, such as emergency and acute mental health inpatient services, would remain at full service.

[25] Ms. Larocque testified that if the IWK knows a strike is potentially going to happen on or after a certain date, they would have to start planning immediately and start curtailing services in anticipation. This is because the risk is too great for patient safety if there is a strike and they are operating at less than full services. Thus, they would reduce to ESA staffing level services as soon as they could. If there was no strike, they would maintain only those services they could offer with ESA levels and re-evaluate after one week. It would be too great a risk to ramp up without knowing there would be enough staff.

[26] In order to return to normal services, Ms. Larocque indicated they would have to rebook all patients into the system and gradually ramp up the OR schedule. They also service the other Atlantic provinces and this would take time. She was involved when the NSNU potentially was going to strike in 2007. In her own areas, she felt it would take at least a week to ramp up to full services.

[27] On cross-examination, Ms. Larocque confirmed it was also her understanding that the IWK proposal would require a second fourteen-day notice if the Council did not strike on the specified day. She was asked what the IWK would do if the Council gave the second notice and she answered that they might ramp up somewhat, but not to one hundred *per cent*. She indicated that some patients may be rebooked on a moment's notice, but it would take ten to fourteen days to fully ramp up. When asked if the second notice would change their approach, she answered that with adequate staffing there are some patients who could be brought in at the last minute. Ms. Larocque agreed that she had agreed to the staffing levels in the ESA in full knowledge that the notice issue had not been resolved.

Submissions

The Council

[28] The Council submitted the purpose of the *EHCSA* is apparent from the preamble. The preamble states in the second recital: "*where there is a need to ensure that essential health and community services continue to be provided in the event of a lockout or strike*." The purpose of an ESA is to govern the conduct of the parties during a health care strike to ensure these services are provided.

[29] From the Council's perspective, the Board can fulfill its mandate without imposing a notice period. The Board's role, set out in section 9, is to accept all provisions the parties have agreed to and to impose further provisions as necessary to meet the requirements of section 5. There is no statutory basis upon which the Board can impose a notice provision. There are other parts of the *EHCSA* where the Board is given broad discretionary authority, but this is not the case with respect to the Board's authority to settle the provisions of an ESA.

[30] The Council submitted that the *Trade Union Act* provisions, which have been in force since 1972, have governed every strike and lockout in every sector, public and private, since that time. The IWK's proposed notice provisions alters that statutory framework and limits the bargaining pressure the Council can apply in their attempts to achieve a collective agreement. If the Board were to impose such a requirement it would mean a fundamental change to the statutory regime and would effectively eliminate the "legal

strike position" provided for in the *Trade Union Act*. This would be conceptually a significant infringement on the right to strike.

[31] This notice requirement would also, as evident from the testimony of Messrs. Fuller and Crouse, have a major impact on how the Council could govern itself in the lead up to a strike and how it manages its membership. As this will be the first time the Council has operated under the *EHCSA*, it may be difficult for it to mobilize for a strike. A real impediment for the Council would be if it provided notice and could not meet its deadline. As well, a "strike" has many meanings (such as a concerted withdrawal of overtime or "work to rule") and the notice provisions would be applicable to these activities as well.

[32] The Council submitted that the *Trade Union Act* provisions have always governed a legal strike position. These have not been changed by the *EHCSA* and the *quid pro quo* for the employer in such a situation is the legal ability to lock out. The legislature could have taken away the right to strike and imposed arbitration which is what Ontario has done, but the Nova Scotia legislature did not go that route. The IWK cannot now look to the provisions of an ESA to relieve against a problem the legislature did not address. If the existing structure created an imbalance, there could have been a provision enacted. The lack of a notice provision in the *EHCSA* is not accidental in the Council's submission. Manitoba has included a notice provision in its essential services legislation, but its provisions are not similar to the IWK proposals. The legislation in that province refers to a period of "at least 7 days" and there is no recurring notice provision.

[33] The Council submitted that Section 26 of the *Essential Health and Community Services Act* is not directly relevant to the current proceeding. Their legal counsel explained as follows:

> Subsections 1 and 2 of Section 26 are transitional provisions which were intended to apply to labour disputes that were underway at the time the EHCSA came into force in April of 2014.
> Subsection 1 ended any strike that was underway when the Act came into force until the parties to the dispute had entered into an essential services agreement. This provision ended an otherwise legal strike of Registered Nurses at the Capital District Health Authority that was underway when the EHCSA came into force.
> Subsection 2 of Section 26 suspended any 14-day waiting period that was underway at the time the Act came into force until the parties had entered into an essential services agreement.
> Subsection 3 of Section 26 delays the start of the 14-day waiting period that would otherwise begin under Section 47(1) of the *Trade Union Act* where the parties to the dispute have not yet entered into an essential services agreement. The waiting period will not begin until the essential services agreement is in place.

[34] With respect to the justification for the IWK's proposal - the need to ramp down services in anticipation of a strike - there never has been such notice before and it has not been requested according to Mr. Fuller. What the IWK is seeking will be a significant limit on the Council's right to strike and exert its economic power per the testimony of the Council's witnesses. The Board should be guided by *Charter* values in giving effect to the legislation and minimizing impact on the right to strike. The Council does not accept that

the IWK's suggestion that the absence of such a provision creates an imbalance between the parties. LeeAnn Larocque's evidence was that the requested notice will not make a difference as it is difficult to ramp up as well and she agreed to staffing levels knowing there may be no notice required.

[35] The Council submitted there is nothing in the Framework Agreement agreed to which requires such a notice and there was no concession on the issue before the Board in agreeing to these provisions. It also pointed out that the essential staffing levels are not frozen and there are provisions in the ESA which allow the parties to accommodate fluctuations in staffing needs.

The IWK

[36] Counsel for the IWK referred to Hansard and suggested the intent of the *EHCSA* is to balance labour rights with the continued provision of essential health services to the public. The objective is to provide essential services in accordance with the definitions in the legislation. Notice is a key component of its ability to achieve its responsibilities under the *EHCSA* and would achieve the legislative objective of a safe continuation of essential services during a strike.

[37] From the IWK's perspective, the Board can and should include a notice period in the terms of the ESA. The Board can because the only limitations on the Board's jurisdiction is pursuant to ss. 9 (6) of the *EHCSA* which prohibits the Board from altering any agreed provisions. Furthermore, the ESA, either negotiated or imposed, can be revisited by the Board under subsection 9(7) and that section gives the Board broad discretion to make any order it considers appropriate. As this is part of section 9, the Board must have similar authority with respect to all of section 9.

[38] With respect to the *Charter* values argument advanced by the Council, the IWK agreed that the right to strike and freedom of association are important rights. The Board cannot use *Charter* values to ignore the legislative intent nor to avoid following the clearly articulated language and definitions in the legislation which is the modern approach to statutory interpretation. Counsel submitted the Board should require notice as the proposed notice requirement would have very little bearing on the Council's right to strike. The right to strike does not include the right to an effective strike and there is nothing which prevents the Board, in its discretion, from including a notice period to make the ESA effective and workable. Letting the IWK know when a strike will occur will not impact the effectiveness of a strike and is consistent with the intent of the legislation. While it is acknowledged that the right to strike and freedom of association are important rights for the Council, the balancing of these concepts has already occurred within the legislation including section 15.

[39] The proposed provisions are intended to require fourteen days' notice of a strike and within that period 72 hours of notice if the strike will be restarting or partial. Counsel for the IWK explained:

> Paragraph 9, first sentence, is intended to require the Council to provide the Employer with at least 14 days written notice of a strike, so that it can

> minimize the extent to which it is reducing health services before it is required. The second sentence is intended to require the notice again if a strike ceases. It uses the terms "ceases" and "re-commence", and "commence a new strike". It was not directed at a scenario where notice was given and the strike did not occur on the date indicated in the notice. However, as acknowledged by the Employer during the hearing, both in argument and in the view of the employer's witness, the second sentence would have that effect, as argued by the council.
>
> Paragraph 10 is intended to require the council to provide 72 hours' notice where the Council plans on a partial or rotating strike. While the notice contained in paragraph 9, first sentence, is intended to be the initial notice of when a strike will start, the 72-hour notice is intended to apply to any partial or rotating strike and requires details be provided. Again, the intent is to provide the employer with information it can use to minimize the extent to which it is reducing health services where it may not be required, or before it is required. It is not intended that partial or rotating strike would also be considered a "re-commencement" covered by paragraph 9, second sentence.

[40] Counsel for the IWK submitted that the Board can accept the notice provisions as drafted by the IWK or it can settle the provision in a way the Board considers would make the ESA workable and effective. The Board could modify the proposed languages to prevent an extension on the fourteen-day notice if the parties continue to Bargain.

[41] Counsel pointed out that the *Health Authorities Act* means that the two authorities bargain together and a strike vote involving the IWK must be taken provincially. This means that the IWK cannot rely on other hospitals as it did in the past. As well, there is a likelihood of a coordinated two-employer strike and/or rotating strikes.

[42] Given the IWK is one employer and notice would have to be the same for the entire employer, its position supported by the evidence is that fourteen days are needed. LeeAnn Larocque's testimony was very specific that the IWK required ten days to ramp down some services; that other services such as mental health would require at least fourteen days; and some services such as emergency would remain at full service and thus require no notice. Mr. Fuller's evidence was that in a prior strike situation the IWK started to ramp down in the second week of the cooling off period, but he confirmed he was not personally involved and this was only his impression. The better evidence is that of Ms. Larocque. Furthermore, the issue for the Board is not what was needed historically, but what is needed to meet the agreed upon staffing levels. Likewise, the dated emergency services memorandum is not helpful to the Board.

[43] The IWK submitted that the *Trade Union Act* provisions are not "notice" provisions. Its fourteen-day period is a "cooling off" period and the 48 hours' notice to the Minister can be given anytime during those fourteen days. Given there has never been a strike conducted by the Council, the IWK does not know what such a strike will look like. Council's plan may or may not align with the expiry of the cooling off period. It may take Council a longer period to organize a strike. Furthermore, both the health authorities which deliver health care province wide may be on strike or there may be rotating strikes. Without notice of when a strike will occur, all services must be ramped down. Notice will

prevent disruption to the public where no strike occurs which is not offensive to the legislation or *Charter* rights. Without notice, the Council will never have to strike which shifts the burden to the employer and the potential for lockout which is not about Council's right to strike.

[44] The IWK does not consider s.26 of the *EHCSA* to be relevant to the issue of notice. Counsel submitted as follows:

> Section 26 only establishes the effect of not having an Essential Service Agreement (ESA) in place, in relation to three contexts:
>
> 1. Where a strike or lockout was happening at the time the Act came into force;
> 2. Where a conciliation report had been filed but the TUA 14 day cool down had not run out at the time the Act came into force; and
> 3. Where, after the coming into force of the Act, a conciliation report is filed prior to an ESA being in effect.
>
> It is only the 3rd scenario that could come into play in the current context. However, it is not relevant to the Employer's issue, because its effect would only be to prevent the TUA 14-day cool down period from starting to run until an ESA is in place (and after the Board renders a decision, even that will no longer be a potential). The Employer's issue is not the running of the TUA 14 days, which only provides the Employer with the knowledge that a strike will not be legal before a certain date. As argued before the Board, the Employer is seeking actual notice of when the Council plans to strike, in order to time its reduction of services to the public to the date of a strike.
>
> The Employer submits that s.26 of the Act was not intended to address the notice period that the parties were free to negotiate or ask the Board to settle in accordance with s. 9 of the EHCSA.

[45] Counsel for the IWK pointed to the Board that a number of provisions in the Application as originally filed are also not specifically prescribed in Section 5. This included the responsibility for assigning staff, which is now agreed, and the dispute resolution mechanism. Similarly, the parties have agreed to permit representative of Council access to the units of the hospital to assess compliance with the ESA. As well, there are several provisions in the Framework Agreement which will work more effectively with notice. Without notice, the IWK cannot live up to these obligations.

[46] Counsel for the IWK also referred the Board to examples in Manitoba and British Columbia where parties had agreed to enhanced notice periods beyond those which were provided for in their respective statutes.

[47] Based on the purposes and objectives of the *EHCSA* and the overall framework agreed to by the parties, the IWK's proposed language is not that onerous an ask and it will prevent having health services reduced except where there will be an actual strike.

Analysis

[48] The parties to this Application have agreed upon all but one item. The agreed upon provisions of their draft Framework Agreement, together with the agreed upon staffing levels and other appendices, will form the parties' ESA. The Board has no jurisdiction to alter their agreed upon terms, nor would it wish to. The question was whether the Board should impose, in addition to those terms which have been agreed upon, the notice provisions as requested by the IWK or as modified by the Board. The Board declines to do so, for the reasons which follow.

[49] The *EHCSA* establishes the statutory requirements of an ESA. These are set out in ss. 5 (2) and need not be repeated here. Suffice it to say, there is nothing which upon a plain and literal reading of the words of that section which contemplates the negotiation of any notice period as a requirement of an ESA. The IWK has not argued otherwise.

[50] The jurisdiction of the Board, where the parties are not able to finalize an ESA, is set out in ss. 9 (5) of the *EHCSA*. In the Board's view, its role under this subsection is to settle an ESA by imposing terms sufficient to meet the requirements of ss. 5(2). While the *EHCSA* sets out the requirements of a negotiated ESA, the parties can also agree upon other terms to facilitate their objectives. That the parties in good faith have negotiated certain provisions beyond that which is required by the *EHCSA* does not alter the statutory requirements of an ESA. The Board is not, however, empowered to impose an additional requirement upon the parties where this is not agreed.

[51] The Board notes that the only provision affecting the timing of a strike in the *EHCSA* is section 26 which "stops the clock" on the fourteen-day cooling off period normally commenced with filing of the conciliator's report under the *Trade Union Act*. The legislature could have, as Manitoba and British Columbia have done (although their respective provisions are not the same as those proposed by the IWK), included an explicit requirement for notice in the *EHCSA*. Alternatively, it could have made "notice" a requirement of a negotiated ESA in ss. 5 (2). This latter route would allow for varying considerations depending on the nature of the employer. The Board would then be required to resolve the issue absent any such agreement. That is not the situation here.

[52] The Board also notes that in other sections of the *EHCSA* (as well as the *Trade Union Act*) the Board is given a broad jurisdiction (for example, "to make any order or decision it considers appropriate"). While the legislature here entrusted the Board with determining how the parties meet the requirements of ss. 5(2), it did not give the Board explicit jurisdiction to alter the statutory requirements of an ESA nor any broad grant of authority. In the Board's view, our authority on an application under ss. 9 (7) does not expand our jurisdiction in this regard.

[53] The Board was also not persuaded that the IWK's proposed notice provision (or any variation of it that would meet the IWK's intended purpose of a firm strike date) would be appropriate. This is so even had the Board agreed it is empowered to make such an

order and is based on our view that the agreed upon provisions of the ESA meet the purposes of the *EHCSA*.

[54] The IWK will have at least two weeks in which to ramp down its services to essential staffing levels because of the *Trade Union Act* cooling off period. The parties have agreed on essential services staffing and have also negotiated specific provisions to deal with staffing need fluctuations and contingencies. Whether or not a notice period is provided, the IWK can and will be prepared to deliver essential services during a strike.

[55] The real issue for the IWK is that it will not know for sure if, when and where a strike will occur. It will, as LeeAnn Larocque testified, have no choice but to be fully prepared and it will not be able to rely on other hospitals given the new bargaining regime. In the Board's view, however, their concern does not relate to the IWK's ability to deliver essential services during a labour dispute. These notice provisions are sought to minimize disruption of non-essential services. The IWK's concern, and this is an understandable one, is the inconvenience to the public of non-essential services being delayed or interrupted when there is no strike taking place. This is not the purpose of the *EHCSA*.

[56] Furthermore, even if the IWK's proposal was accepted, its usefulness - given the likelihood that another strike notice may be given right away - is questionable. Ms. Larocque's evidence was that if there was no strike on the date a strike was to commence, with sufficient staff they could see some additional patients on a moment's notice. If there were a further strike notice given, they would possibly ramp up "somewhat," but fully ramping up their services would take a week. Given this would overlap with the ramping down time required for a further pending strike date, the second notice period would be of limited assistance.

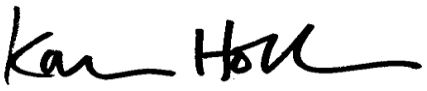
[57] On the other hand, the second notice requirement would likely have a significantly detrimental effect on the Council's ability to leverage its negotiating power. There may be no other reason for its failure to proceed with a strike other than it is not fully prepared in time. As both parties noted, this is also the first time the Council has had to organize a strike under the new *Health Authorities Act* regime.

[58] The Board has also considered the IWK's submission that without notice the Council will "never have to strike" and that this "shifts the burden to the employer." The Board disagrees. The mutual sanctions of strike and lock out are, as the Council submitted, the *quid pro quo* of collective bargaining. Just as the Council can call a strike, the IWK is able to lock its employees out and thus put pressure on the Council to reach a collective agreement. This is the system in which the parties operate. The Board also agrees with the Council that the IWK proposal would fundamentally change the nature of how and when a strike is called. The parties are already governed by the *Trade Union Act*, the *EHCSA* and the *Health Authorities Act*. It would not be appropriate for the Board to inject a notice requirement into this regime through an imposed ESA provision.

[59] The Board has confidence that the parties will be able to provide those services which they have agreed are essential; that their Framework Agreement is a workable one; and that there are sufficient mechanisms in their Framework Agreement to address fluctuations in the need for essential services and any contingencies which arise. The parties have successfully cooperated to conclude an ESA on all but this one issue. They

are urged to continue to work together and to now turn their full attention to conclude a satisfactory collective agreement.

MADE BY THE LABOUR BOARD AT HALIFAX, NOVA SCOTIA ON THE TWENTY-SIXTH (26TH) DAY OF APRIL, 2018 AND SIGNED ON ITS BEHALF BY THE CHAIR.



KAREN R. HOLLETT, LLM
CHAIR