IN THE MATTER OF AN ARBITRATION

B e t w e e n:

NORTH BAY REGIONAL HEALTH CENTRE

(the "Hospital")

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 139

(the "Union")

and in the matter of a policy grievance re registered Pharmacy Technicians

Russell Goodfellow – Chair
John Kuhne – Hospital Nominee
Joe Herbert – Union Nominee

APPEARANCES FOR THE HOSPITAL:

Shane Smith, counsel
Shelley Fraser
Kathryn McLenaghan

APPEARANCES FOR THE UNION:

Mark Wright, counsel
Louis Rodrigues
Fran Boulanger
Shawn Shank
Terry Maki
Linda Bertrand

Hearing held on February 16 & 17, October 27, and December 8, 2016. Executive Session held on February 25, 2017.

AWARD

The issue in this policy grievance is whether the Hospital was required to apply the "elimination of position" and "layoff" provisions of the collective agreement to the following agreed facts and others to be described or whether it was entitled to terminate the employment of the employees referred to in paragraph 25 for just cause:

1. The Hospital and the Union are party to a collective agreement which consists of both the central collective agreement between the participating hospitals and CUPE, as well as an appendix of local provisions.

2. The Pharmacy Technician classification is included in this bargaining unit.

3. The *Health Systems Improvement Act, 2007* was passed on June 4, 2007. This legislation made several amendments to the *Regulated Health Professions Act,* the *Pharmacy Act*, and the *Drug & Pharmacies Regulation Act.*

4. This legislation included an amendment to the *Pharmacy Act* (s.10 (1)) to state that the title of "pharmacy technician" can only legally be used by pharmacy technicians licensed with the Ontario College of Pharmacists.

5. On December 3, 2010 this particular amendment was proclaimed in force, which meant that from that point forward, only those pharmacy technicians who were registered with the College could use the title "pharmacy technician".

6. On the same day, amendments to the General Regulation (O.Reg 202/94) were filed. These amendments established the requirements for individuals who wish to register with the College and become regulated pharmacy technicians.

7. Pharmacy technicians were not a regulated health profession prior to December 3, 2010.

8. As described in more detail below, the persons employed by the hospital as 'pharmacy technicians' (and who were not registered with the College) had their job title changed to 'pharmacy assistant' due to 'pharmacy technician' being a protected job title.

9. A bridging program was established by the College to allow those individuals who were already working as pharmacy technicians prior to the amendments to become regulated. The elements of the bridging program were as follows:

a. Successfully pass the Pharmacy Technician Evaluating Examination by January 1, 2012, to be administered by the Pharmacy Examining Board of Canada (PEBC);

b. Complete the Bridging Education Program, which consisted of 4 continuing education courses, by January 1, 2015;

c. Successfully pass the Pharmacy Technician Qualifying Examination, consisting of a written and practical component, also administered by the PEBC;

d. Successfully pass the Pharmaceutical Jurisprudence Examination; and

e. Complete the registration process with the College.

10. Note that the last three steps (c to e) are the same for individuals graduating from an accredited pharmacy technician program and those persons who were already working as pharmacy technicians and pursuing registration through the bridging program.

11. As part of becoming regulated, pharmacy technicians became able to independently perform certain acts/functions in their work as pharmacy technicians.

12. In particular, once regulated, pharmacy technicians can independently:

a. Be responsible for the technical aspects of dispensing medication, including compounding, retrieving, counting, weighing, measuring and verifying to ensure the correct patient, drug, dose and doctor;

b. Accept verbal, paper and electronic prescriptions (with some exceptions related to narcotics);

c. Provide and accept prescription transfers (a function related to the retail aspects of pharmacies); and

d. Interview patients about medication history (seeking the assistance of a pharmacist where necessary).

13. Prior to becoming a regulated profession with a job-protected title, pharmacy technicians (and later, pharmacy assistants) worked under the direct supervision of the Hospital's pharmacists and the pharmacists delegated to the pharmacy technicians (and later, pharmacy assistants).

14. In addition, as regulated health professionals, pharmacy technicians are:

a. Subject to Standards of Practice set by the Ontario College of Pharmacists;

b. Subject to a Code of Ethics set by the Ontario College of Pharmacists;

c. Subject to a complaint, investigation and disciplinary process administered by the Ontario College of Pharmacists.

15. The Hospital currently employees approximately 22 FT and 18 PT pharmacy technicians in the classification of "Pharmacy Technician".

16. By letter date July 26, 2010, the Hospital provided notice to the Union of its decision to request all CUPE Pharmacy Technicians to become Registered Pharmacy Technicians by January 1, 2015 (Tab #1).

17. The Hospital provided a power point presentation to pharmacy staff on July 22, 2010, outlining the plan for Regulation of Pharmacy Technicians at the Hospital (Tab #2).

18. The Hospital changed the job title of "Pharmacy Technician" to "Pharmacy Assistant" effective March of 2011 in order to comply with the legislation and regulatory changes described above, one effect of which was restrict the title of "Pharmacy Technicians" to Registered Pharmacy Technicians (Tabs #3 and #4).

19. There was no change in wage rate for persons who had their job title changed to "pharmacy assistant".

20. Once an individual working under the title "pharmacy assistant" attained regulation with the Ontario College of Pharmacists their job title was changed back to "pharmacy technician".

21. On or about May 23, 2013, the Hospital sent all Pharmacy Assistants a form letter outlining their requirements for regulation. Employees hired on or before July 2010 were sent versions of the form letter that also outlined the financial support available for education from the Hospital (Tabs #5 and #6).

22. By email dated July 02, 2014, the Hospital's Labour Relations Specialist, Rob Taylor, answered a number of questions put to him by Pharmacy Assistant, Pam Frair, about how Pharmacy Assistants who were not Registered Pharmacy Technicians by January 1, 2015, would be dealt with by the Hospital (Tab #7).

23. All affected Pharmacy Assistants received a further letter dated September 18, 2014 reminding them of the requirement to attain Registration as a Pharmacy Technician if they wanted to continue to work in the Pharmacy after January 1, 2015 (Tab #8).

24. On or about November 12, 2014, the Union filed a grievance on behalf of all potentially affected Pharmacy Assistants alleging that, amongst other things, their rights to notice of lay-off and related rights under article 9.08 and 9.09 of the collective agreement were violated (Tab #9).

25. On or about December 22, 2015, six Pharmacy Assistants who had not attained Registration as Pharmacy Technicians were advised by the Hospital of certain employment options (Tab #10).

26. Effective August and September of 2015 the Hospital has developed certain policies that rely on utilization of Registered Pharmacy Technicians (Tabs #11, #12, #13, #14 and #15).

The following additional facts emerge from the documents referred to in the agreed facts.

In the power point presentation to employees on July 22, 2010, referred to in paragraph 17, the Hospital identified a number of advantages to the proposed change. Describing the Regulated Pharmacy Technician, or R.Ph.T., position as a "new role", the Hospital indicated that employees would have "access to the Authorized Act for Dispensing and Compounding" and "would be allowed to independently compound and dispense drugs". As a further advantage, the Hospital pointed to "increased professional accountability" and noted that, "tasks like 'tech check tech' will no longer require delegation or supervision by a Pharmacist". Another advantage was said to be "increased patient safety due to the standardized approach to education and programming the Technicians will undertake for licensing". The Hospital further indicated that the new role would afford it "greater flexibility in scheduling staff as currently not all staff are based in all areas - e.g. 'tech check tech' and training of new hires that are regulated will not be required".

Also as part of the power point presentation, the Hospital advised employees that consideration would be given to "exempting" some staff from the requirement "due to the position they currently occupy or the potential for retirement before the regulation deadline". Were it to be "determined [that staff were] in a position where regulation is not a requirement of the job", the Hospital indicated that they would nevertheless be advised that not becoming regulated could be a "career-limiting decision". Ultimately, however, no such exemptions were granted.

In the form letters sent to employees on May 23, 2013, referred to in paragraph 21, employees hired *after* the original 2010 notice referred to in paragraph 16 were advised that if they did not become regulated on or before January 1, 2015 their employment would "cease" in accordance with their original terms of hire. For longer service employees, the form letter indicated that failure to provide "proof of regulation or proof of expected date of regulation by August 31, 2014" would result in notification "that you will be terminated from your position effective December 31, 2014."

The Hospital's email dated July 2, 2014, referred to at paragraph 22, was in response to an email from the Union advising that employees were still uncertain about whether those "who do NOT complete Technician Regulation by January 1, 2015" (i) would be "laid off or terminated"; (ii) if laid off, when they would "receive their layoff notices"; and (iii) whether they would be able to "bump into other departments". To these questions, the Hospital responded (i) "termination", (ii) "not applicable" and (iii) "there is no option to bump because this is not a layoff".

Following this email exchange, in the Hospital's September 18, 2014 letter, referred to at paragraph 23, the Hospital referred to employees presently "holding" a "Pharmacy Technician position" and having been "provided the opportunity to continue in that role [in the interim] under the delegation of a Pharmacist and utilizing the title of Pharmacy Assistant". In the same letter, the Hospital advised that "all employees working within a Pharmacy Technician position must meet the regulatory requirements of that title on or before January 1, 2015, failing which they would be "released from employment effective December 31, 2015".

Finally, in the letter dated December 22, 2015, referred to at paragraph 25, which was shortly after the filing of the grievance, the Hospital advised the six employees that had indicated that they had not and would not become registered, that, "after further consideration as an alternative to termination the Hospital will place you on a recall list effective January 1, 2015 for a period of 48 months", with certain specifically listed collective agreement recall rights. As an alternative, employees could "choose to resign from the Hospital effective December 31, 2014", in which case they would receive "severance pay in accordance with the *Employment Standards Act, 2000* (eligible to employees with at least 5 years of service)".

The agreed facts and documents were supplemented by brief testimony from one Union witness and one Hospital witness. The testimony focused on the differences, if any, between the unregulated Pharmacy Technician/Pharmacy Assistant (hereinafter "PA") positions that preceded the change and the registered or regulated Pharmacy Technician (hereinafter "registered PT" or "PT") positions that followed it, together with the Hospital's reasons for making the change.

Linda Bertrand is a registered PT. She has been employed by the Hospital or its predecessors in the Pharmacy for many years. She is also Vice-President of the Local.

Ms. Bertrand first testified as to her disappointment with the Hospital's decision to move to an *exclusively* registered PT model. Ms. Bertrand did not understand why the Hospital could not, for example, have followed the approach taken with nurses, whereby RPNs work alongside RNs.

Ms. Bertand testified that she viewed the two positions as "totally different". After first identifying approximately ten different checks for which registered PTs are now responsible that were formerly the responsibility of Pharmacists, Ms. Bertrand pointed out that she is now licenced and legally responsible for the many "sign offs" that must be carried out. As a consequence, Ms. Bertrand and her colleagues are now required to carry liability insurance. Further, as a registered PT, Ms. Bertrand is subject to the standards applicable to her profession as determined by the National Association of Pharmacy Regulatory Authorities and administered through the Ontario College of Pharmacists, the licencing and regulatory body.

In cross-examination, Ms. Bertrand testified that the changes unfolded gradually, over the entire transition period. She also acknowledged that in the particular area in which she works, the Narcotics Vault, the day-to-day tasks have not changed.

Through Ms. Bertrand, the Hospital introduced the job description that had been created, after the filing of the grievance and referral to arbitration for the "revised" PT position. Plainly based on the original, pre-regulated Pharmacy Technician position description from 2009 and the PA position description from 2011, the 2015 description is substantially similar, if somewhat more detailed. Nevertheless, Ms. Bertrand identified approximately 30 drugs and associated containers and delivery devices now checked by PTs that were not checked previously.

Ms. Bertrand agreed that the *process* of checking is the same. It involves checking for the "seven rights": the right patient, the right drug, the right time, the right route, the right strength, the right quantity and the right physician. It is only the number and types of drugs that have been expanded, along with accountability and liability for the checks. Finally, Ms. Bertrand conceded that of the approximately 12 different areas in which PTs work, of which Ms. Bertrand was

herself knowledgeable about 11, the tasks performed were unchanged in all but four and, in respect of those four, the changes were to the scope of drugs checked and their circumstances (*e.g.* refills of clozopine, an anti-psychotic, going out to patients and leave of absence medications from the Dispensary).

Kathryn McLenaghan has been the Manager of Pharmacy Services since 2012. Ms. McLenaghan first testified about the reasons for making the change. She stated that the object of employing *only* registered PTs was to "raise the bar" for patient care, which, it seems, would be accomplished in two ways. The first way would be by enabling Pharmacists to leave the Pharmacy to spend more time on the floor dealing directly with patients and physicians. Since making the change, the number of Pharmacists working on a given shift has increased but the number working in the Pharmacy has decreased, from five to two. This is because Pharmacists are no longer required to delegate and supervise certain tasks. PTs are now responsible for them on their own. Second, Ms. McLenaghan pointed out that as registered PTs employees have "greater knowledge and skills" to bring to bear on their practice and, through the accreditation process, the Hospital now has "proof of assessment and competency". Ms. McLenaghan also spoke of an "increase in professionalism and accountability" on the part of PTs.

Addressing Ms. Bertrand's point about a mixed model, Ms. McLenaghan testified that the Hospital was initially uncertain about whether that was possible but later concluded that there was no reason why it should not "have the best – the cream of the crop", in any event. Ms. McLenaghan also testified that employing only registered PTs would increase the Hospital's scheduling flexibility.

It was the evidence of Ms. McLenaghan that the "PT *role*" had not changed. She testified that the work processes are the same and the expanded list of drugs to be checked could always have happened, albeit formerly only following certification and delegation from the Pharmacist. Checking leave of absence medications, Ms. McLenaghan conceded, was new.

The following are the relevant collective agreement provisions:

9.08(A) - NOTICE AND REDEPLOYMENT COMMITTEE

(a) Notice

In the event of a proposed layoff at the Hospital of a permanent or long-term nature or the elimination of a position within the bargaining unit, the Hospital shall:

(i) provide the Union with no less than five (5) months' written notice of the proposed layoff or elimination of position; and

(ii) provide to the affected employee(s), if any, who will be laid off with no less than five (5) months' written notice of layoff, or pay in lieu thereof.

Note: Where a proposed layoff results in the subsequent displacement of any member(s) of the bargaining unit, the original notice to the Union provided in (i) above shall be considered notice to the Union of any subsequent layoff.

(b) A layoff shall not include a reassignment of an employee from her or his classification or area of assignment who would otherwise be entitled to notice of layoff provided:

(i) reassignments will occur in reverse order of seniority;

(ii) the reassignment of the employee is to an appropriate permanent position with the employer having regard to the employee's skills, abilities, qualifications and training or training requirements;

(iii) the reassignment of the employee does not result in a reduction of the employees wage rate or hours of work;

(iv) the job to which the employee is reassigned is located at the employee's original work site or at a nearby site in terms of relative accessibility for the employee;

(v) the job to which the employee is reassigned is on the same or substantially similar shift or shift rotation; and

(vi) where more than one employee is to be reassigned in accordance with this provision, the reassigned employees shall be entitled to select from the available appropriate vacancies to which they are being reassigned in order of seniority provided no such selection causes or would cause a layoff or bumping.

The Hospital bears the onus of demonstrating that the foregoing conditions have been met in the event of a dispute. The Hospital shall also reasonably accommodate any reassigned employee who may experience a personal hardship arising from being reassigned in accordance with this provision.

(c) Any vacancy to which an employee is reassigned pursuant to paragraph (b) need not be posted.

(d) Redeployment Committee

At each Hospital a Redeployment Committee will be established not later than two (2) weeks after the notice referred to in 9.08(A)(a) and will meet thereafter as frequently as is necessary.

(i) Committee Mandate

The mandate of the Redeployment Committee is to:

(1) Identify and propose possible alternatives to the proposed layoff(s) or elimination of position(s), including, but not limited to, identifying work which would otherwise be bargaining unit work and is currently work contracted-out by the Hospital which could be performed by bargaining-unit employees who are or would otherwise be laid off;

(2) Identify vacant positions in the Hospital or positions which are currently filled but which will become vacant within a twelve (12) month period and which are either;

(a) within the bargaining unit; or
(b) within another CUPE bargaining unit; or
(c) not covered by a collective agreement.

(3) Identify the retraining needs of workers and facilitate such training for workers who are, or would otherwise be, laid off.

(4) subject to article 9.11, the Hospital will award vacant positions to employees who are, or would otherwise be laid off, in order of seniority, if with the benefit of up to six (6) months retraining, an employee has become able to meet the normal requirements of the job.

(5) Any dispute relating to the foregoing provisions may be filed as a grievance commencing at Step 2.

(ii) Committee Composition

The Redeployment Committee shall be comprised of equal numbers of representatives of the Hospital and of the Union. The number of representatives will be determined locally. Where for the purposes of HTAP (the Ontario Hospital Training and Adjustment Panel) there is another hospital-wide staffing and redeployment committee created or in existence, Union members of the Redeployment Committee shall serve on any such hospital-wide staffing committee established with the same or similar terms of reference, and the number of Union members on such committee will be proportionate to the number of its bargaining unit members at the particular Hospital in relation to other staff groups.

Meetings of the Redeployment Committee shall be held during normal working hours. Time spent attending such meetings shall be deemed to be work time for which the representative(s) shall be paid by the Hospital at his or her regular or premium rate as may be applicable.

Each party shall appoint a co-chair for the Redeployment Committee. Co-chairs shall chair alternative meetings of the Committee and will be jointly responsible for establishing the agenda of the Committee meetings, preparing minutes and writing such correspondence at the Committee may direct.

(iii) Disclosure

The Hospital shall provide to the Redeployment Committee all pertinent staffing and financial information.

(iv) Alternatives

The Redeployment Committee or where there is no consensus, the committee members shall propose alternatives to cutbacks in staffing to the Hospital's Chief Executive Officer and to the Board of Directors.

At the time of submitting any plan concerning rationalization of services and involving the elimination of any position(s) or any layoff(s) to the

District Health Council or to the Ministry of Health the Hospital shall provide a copy, together with accompany documentation, to the Union.

9.08(B) - RETIREMENT ALLOWANCE

Prior to issuing notice of layoff pursuant to article 9.08(A)(a)(ii) in any classification(s), the Hospital will offer early retirement allowance to a sufficient number of employees eligible for early retirement under HOOPP within the classification(s) in order of seniority, to the extent that the maximum number of employees within a classification who elect early retirement is equivalent to the number of employees within the classification(s) who would otherwise receive notice of layoff under article 9.08(A)(a)(ii).

An employee who elects an early retirement option shall receive, following completion of the last day of work, a retirement allowance of two (2) weeks' salary for each year of service, plus a prorated amount for any additional partial year of service, to a maximum ceiling of fifty-two (52) weeks' salary.

9.08(c) - VOLUNTARY EXIT OPTION

If after making offers of early retirement, individual layoff notices are still required, prior to issuing those notices the Hospital will offer a voluntary early exist option in accordance with the following conditions:

i) The Hospital will first make offers in the classifications within department(s) where layoffs would otherwise occur. If more employees than are required are interested, the Hospital will make its decision based on seniority.

ii) If insufficient employees in the department affected accept the offer, the Hospital will then extend the offer to employees in the same classification in other departments. If more employees than are required are interested, the Hospital will make its decision based on seniority.

(iii) In no case will the Hospital approve an employee's request under (i) and (ii) above for a voluntary early exit option, if the employees remaining are not qualified to perform the available work.

(iv) The number of voluntary early exit options the Hospital approves will not exceed the number of employees in that classification who would otherwise be laid off. The last day of employment for an employee who accepts a voluntary early exit option will be at the Hospital's discretion following the employee's written acceptance of the offer.

An employee who elects a voluntary early exit option shall receive, following completion of the last day of work, a separation allowance of two (2) weeks' salary for each year of service, to a maximum of fifty-two (52) weeks' pay.

9.09 - LAYOFF AND RECALL

An employee in receipt of notice of layoff pursuant to 9.08(A)(a)(ii) may:

(a) accept the layoff; or

(b) opt to receive a separation allowance as outlined in Article 9.12; or

(c) opt to retire, if eligible under the terms of the Hospitals of Ontario Pension Plan (HOOPP) as outlined in Article 9.08(B); or

(d) displace another employee who has lesser bargaining unit seniority in the same or a lower or an identical-paying classification in the bargaining unit if the employee originally subject to layoff has the ability to meet the normal requirements of the job. An employee so displaced shall be deemed to have been laid off and shall be deemed to have been laid off and shall be entitled to notice in accordance with Article 9.08(A)(a).

An employee who chooses to exercise the right to displace another employee with lesser seniority shall advise the Hospital of his or her intention to do so and the position claimed within seven (7) days after receiving the notice of layoff.

For purposes of the operation of clause (d), an identical-paying classification shall include any classification where the straight-time hourly wage rate at the level of service corresponding to that of the laid off employee is within 1% of the laid off employee's straight time hourly wage rate.

(e) In the event that there are no employees with lesser seniority in the same or a lower or identical-paying classification, as defined in this article, a laid-off employee shall have the right to displace another employee with lesser seniority in a higher-paying classification provided they are able to meet the normal requirements of the job, with orientation but without additional training.

(f) In addition, in combined full-time/part-time collective agreements, a full-time employee shall also be entitled to displace another full-time employee with lesser seniority in a

higher-paying classification provided that they are able to meet the normal requirements of the job, with orientation but without additional training, when there are no other full-time employees in the same or a lower or similar-paying classification with lesser seniority, prior to being required to displace a part-time employee.

(g) An employee who is subject to layoff other than a layoff of a permanent or long-term nature including a full time employee whose hours of work are, subject to Article 14.01, reduced, shall have the right to accept the layoff or displace another employee in accordance with (a) and (d) above.

(h) No full-time employee within the bargaining unit shall be laid off by reason of his/her duties being assigned to one or more part-time employees.

(i) In the event of a layoff of an employee, the Hospital shall pay its share of insured benefits premiums for the duration of the five-month notice period provided for in Article 9.08(A)(a).

(j) The Hospital agrees to post vacancies during the recall period, as per the job posting procedure, allowing employees on recall to participate in the posting procedure. Should the position not be filled via the job posting procedure, an employee shall have opportunity of recall from a layoff to an available opening, in order of seniority, provided he or she has the ability to perform the work.

(k) In determining the ability of an employee to perform the work for the purposes of the paragraphs above, the Hospital shall not act in an arbitrary or unfair manner.

(l) An employee recalled to work in a different classification from which he or she was laid off shall have the privilege of returning to the position held prior to the layoff should it become vacant within six (6) months of being recalled.

(m) No new employees shall be hired until all those laid off have been given an opportunity to return to work and have failed to do so, in accordance with the loss of seniority provision, or have been found unable to perform the work available.

(n) The Hospital shall notify the employee of recall opportunity by registered mail, addressed to the last address on record with the Hospital (which notification shall be deemed to be received on the second day following the date of mailing). The notification shall state the job to which the employee is eligible to be recalled and the date and time at which the employee shall report for work. The employee is solely responsible for his or her proper address being on record with the Hospital.

Reference was also made to the following provisions:

9.03 - LOSS OF SENIORITY

An employee shall lose all seniority and service and shall be deemed to have terminated if he:

(a) resigns;

(b) is discharged and not reinstated through the grievance/arbitration procedure;

(c) is retired;

(d) is absent from scheduled work for a period of three (3) or more consecutive working days without notifying the Hospital of such absence and providing to the Hospital a satisfactory reason;

(e) has been laid off for forty-eight (48) months;

(f) if the employee has been laid off and fails to return to work within seven (7) calendar days after that employee has been notified by the Hospital through registered mail addressed to the last address on the records of the Hospital, subject to any special provisions regarding temporary vacancies noted under the heading of Layoff and Recall.

12.08 - EDUCATION LEAVE

If required by the Hospital, an employee shall be entitled to leave of absence with pay and with full credit for service and seniority and benefits to take courses and to write examinations to upgrade his or her employment qualifications. Where employees are required by the Hospital to take courses to upgrade or acquire new employment qualifications, the Hospital shall pay the full costs associated with the courses.

Subject to operational requirements, the Hospital will make every reasonable effort to grant requests for necessary changes to an employee's schedule to enable attendance at a recognized up-grading course or seminar related to employment with the Hospital.

Subject to operational requirements, the Hospital will make every reasonable effort to grant requests for an employee to take an educational leave without pay and without loss of seniority of up to twelve (12) months for training related to the employee's employment at the Hospital.

Submissions

Union

The Union begins its submissions by noting that, following the amendments to the *Pharmacy Act*, "Pharmacy Technician" became a "protected title" and a regulated health profession. Only College of Pharmacists registrants could use it and, in order to become registered, applicants had to undertake a comprehensive education and examination process. Once registered, Pharmacy Technicians would enjoy a broader scope of practice than was available previously.

Wishing to take advantage of this broader scope of practice, the Hospital decided that all of its Pharmacy Technicians would have to become registered by December 31, 2014. In the meantime, they would be designated as Pharmacy Assistants. Failure to become registered, the Hospital made clear, would mean termination of employment.

On December 22, 2014, shortly after the filing of the grievance and immediately prior to the effective date, the Hospital altered its position somewhat. It offered the six employees who had not become registered a choice. They could go on a (unilaterally fashioned) recall list for 48 months or resign and receive severance pay, if applicable, under the *Employment Standards Act*.

The Union submits that both the Hospital's original and subsequent positions were wrong. The Union submits this was a "classic layoff situation" to which the Hospital was required to apply the elimination of position and layoff provisions of the collective agreement.

The Union describes the Hospital as "getting out of the business of employing PAs" and moving to a new model of employing only registered PTs. The result was the elimination of the PA positions and the ultimate termination of employment of six PAs. The Union submits the Hospital was required to apply Article 9.08(A)(a) of the agreement to these events and the rights related thereto.

Understanding the Hospital's position to be that no such steps were required because the only thing that changed was employees' job *titles* not their *jobs*, with the six employees simply

ceasing to be qualified to perform their existing jobs, the Union disagrees both factually and legally.

Factually, the Union submits that the registered PT position is not the same as the former PA position. The Union refers to paragraphs 11-14 of the agreed facts, the contents of the Hospital's power-point presentation to employees, a comparison between the two job descriptions, and the evidence of the two witnesses.

The fundamental difference, the Union submits, is that PTs can now work on their own rather than under the delegated authority and supervision of the Pharmacist, with an expanded list of drugs to be checked. The expanded scope of practice has freed up Pharmacists' time to work on the floor and participate more directly in patient care. As a result, there are now three fewer Pharmacists working in the Pharmacy.

As a legal matter, the Union submits, the PA positions were eliminated. However, it hastens to add that notice of layoff under Article 9.08 does not depend upon the elimination of a position or classification. They are separate questions, with separate obligations.

The Union notes that although "layoff" is not defined in the collective agreement, it has been given a broad meaning in the case law. A layoff has been found to include a reduction in hours of work [*St. Vincent de Paul Hospital (Brockville) and CUPE, Local 2491*, dated May 12, 2006 (Devlin)], a reassignment that is not in accordance with the Article 9.08(A)(b) reassignment provision [*Scarborough Hospital and CUPE, Local 487*, dated January 7, 2006 (Burkett)], and being displaced by a laid off employee in the exercise of the laid off employee's bumping rights [*St. Joseph's Healthcare (Hamilton) and CUPE, Local 786*, dated August 1, 2014 (Kaplan)]. There is absolutely no requirement of a "layoff to the street"

The Union submits that the facts of this case do not call for any kind of expansive approach to "layoff". The result, the Union submits, is obvious. The Hospital formerly employed PAs but does so no longer. All of the PA positions were eliminated and all of the PAs were required to become registered PTs in order to remain employed. Ultimately, the employment of six employees was terminated but without the benefit of any layoff notices or seniority rights.

The Union notes that none of this was forced upon the Hospital. It was a Hospital decision. The Hospital could have continued to employ PAs exclusively or it could have employed a mixture of PAs and PTs. Instead it chose to employ *only* PTs. The Union does not challenge the merits of the Hospital's decision but submits that it has collective agreement consequences. Those consequences were that the Hospital was required to apply Article 9.08(A)(a), giving five months written notice of the proposed layoff or elimination of positions to the Union and five months written notice of layoff to the affected employees. This, in turn, would have triggered the obligation to establish a Redeployment Committee under Article 9.08(A)(d).

In addition, prior to issuing any actual notices of layoff, the Hospital would have been required to offer retirement allowances and, to the extent necessary, voluntary exit options under Articles 9.08(B) and (C), respectively. Thereafter, any employees in receipt of layoff notices would have been entitled to the specific rights listed in Articles 9.09 through 9.12. The Union describes these and the bargaining unit-wide seniority protections in Article 9.02 and Articles 9.04 through 9.07 as a "robust set of rights that reflect the history of restructuring in the hospital sector".

The Union refers to a number of additional cases in support of its position. In what the Union describes as the "*Steripro* saga", two hospitals, in purported reliance on the collective agreement provision that requires a hospital wishing to enter into a subcontract that will lead to layoffs to subcontract only with a contractor that agrees to take on the hospital collective agreement and employ the affected employees, argued that, in consequence, the job security rights set out in Article 9 did not apply because the jobs continued and employees could "transfer" with them. In *The Credit Valley Hospital and CUPE, Local 3252*, dated October 21, 20111 (Shime) and *Trillium Health Centre and CUPE*, dated February 16, 2012 (Kaplan), the argument was rejected, with both awards being upheld on judicial review: see *The Credit Valley Hospital and CUPE, Local 3252* and *Trillium Health Centre and CUPE, Local 4191,* Ct. file nos. 521/11 and 128/12, dated December 19, 2012 (Ont. Div. Ct.). The Union submits that if the provisions applied in those circumstances, where the identical jobs and employment under the same collective agreement terms and conditions continued, they must certainly apply here. The Union also refers to *Tung-Sol of Canada Ltd. and U.E.W., Local 512*, (1964) 15 L.A.C. 161 (Reville),

as to the importance of employee seniority rights that, the Union submits, were extinguished in this case.

More specifically, the Union refers to the "Pharmacy Technician" cases, of which there are now four. All deal with movement by hospitals to the fully registered PT model, exactly as occurred here. The first three cases address the question of whether the employers were required to pay for the costs of education pursuant to Article 12.08 or its equivalent: see *Thunder Bay Regional Hospital and OPSEU*, 2012 CarswellOnt 7315, 111 C.L.A.S. 170 (Herlich), *Joseph Brant Memorial Hospital and CUPE, Local 1065*, 2012 CarswellOnt 11390, [2012] O.L.A.A. No. 467, 112 C.L.A.S. 1065 (Kaplan) *Timmins and District Hospital and OPSEU, Local 643*, 2014 CarswellOnt 11339, 119 C.L.A.S. 335, 245 L.A.C. (4th) 203 (Stout) (hereinafter "*Timmins no. 1*"). The fourth case dealt with the employment status of individuals that did not become registered: see *Timmins and District Hospital and OPSEU, Local 643,* 2015 CarswellOnt 4457, 122 C.L.A.S. 211, (Stout) (hereinafter "*Timmins no. 2*"). While this last case is obviously the most relevant, the Union relied on aspects of the first two in respect of the Hospital's just cause argument.

In the first two education cases (*Thunder Bay Regional Hospital* and *Joseph Brant Memorial Hospital),* the employers were found not to be required to pay for the education because it was seen by the arbitrators as a matter of employee choice rather than employer "direction" or "requirement", respectively. The reason it was so viewed is because it was determined by the arbitrators to relate not to the employees' existing PA position but to a new or different position; that of registered PT. In other words, on account of the same statutory changes – the expanded scope of practice and the increased responsibility and accountability – the two positions were viewed as necessarily different. The Union submits that the conclusions arrived at in these cases are directly contrary to the basis for the Hospital's just cause argument here.

In the third education case, "*Timmins no. 1*", the Union acknowledges, the opposite conclusion was reached. However, the Union notes that in that case there was some indication that the PTs were still working under the supervision of the Pharmacists.

Of greatest significance to the Union, however, is the fourth Pharmacy Technician award. In "*Timmins no. 2*", the dispute was about the rights of employees that did not become registered. It was the position of the hospital that the employment relationships had become "frustrated". It was the position of the union that the layoff provisions applied. The arbitrator found in favour of the union, concluding that there was no "frustration" because moving to the new model, which had the effect of depriving the employees of their employment, was the product of employer decision-making.

The Union submits that *Timmins no. 2* is directly on point and correctly decides the present issue. Indeed, the Union submits, the present case is *even stronger*, given the "obvious elimination" of the PA positions here, something that was not part of the decision in *Timmins no. 2*. The essence of the reasoning in *Timmins no. 2,* the Union asserts, is that the employees were laid off because the hospital decided that there was no longer any PA work for them to perform. The Union submits that describes our case exactly.

Finally, the Union submits that Article 9.03 of the collective agreement presents a "complete code" of the ways in which employees may lose their employment. Employees cannot simply "fall through the cracks". The provision lists six possibilities. Of those, the Union submits, only the last two could possibly apply, both of which concern layoff. The Union notes that, at the time, the Hospital did not, ultimately, assert, "just cause for discharge" and that "frustration" is not on the Article 9.03 menu.

On the basis of the foregoing, the Union asks that we find and declare that the Hospital breached the collective agreement by failing to give notice of elimination of positions to the Union and notices of layoff to the employees, and that we remain seized of any and all other relief upon which the parties may be unable to agree.

Hospital

The Hospital begins its submissions by noting that the facts are largely not in dispute. The issue is what they mean. The Hospital submits this is a case of first impression because the

Hospital is asserting just cause for discharge, in a non-disciplinary sense, something that was not asserted in *Timmins no. 2.*

The Hospital submits that it neither eliminated positions nor reduced staff. Rather, it took advantage of a new requirement for employees to fulfill the duties of their *existing* positions. The Hospital submits that the situation is analogous to the introduction of a new machine or the addition of a new process or the requirement for a new form of certification, all of which can impact employees' ability to do their *existing* jobs. Jobs can change or evolve, the Hospital submits, such that employees may no longer be able to do them and, when that occurs, it does not mean that a position has been eliminated or that an employee has been laid off. To the contrary, it means that the employer is entitled to terminate the employee's employment for just cause.

The Hospital freely acknowledges that *it* decided to move to the fully registered PT model. It was not legislatively mandated. But that is irrelevant, the Hospital submits. The Hospital is not asserting that some supervening event frustrated the employment relationship, but, rather, that on account of a legislative change of which the Hospital decided to take advantage, PAs that did not become registered were unable to perform the duties of their existing positions. The jobs did not change, only the qualifications did, and the Hospital was therefore entitled to terminate the employment of the employees that did not become qualified.

The Hospital submits that it met all of its collective agreement obligations to the employees, and more. It gave them four and one half years to become registered and, unlike the hospitals in the three cases to which the Union refers, met its educational payment obligations in full. It also notified the PAs of their right to apply for posted jobs and made career counseling available. Finally, out of concern for the six employees that did not becoming registered, recall and severance options were offered, neither of which was required and neither of which should now be held against it in respect of its original position that no such obligations were owed.

The Hospital submits that the existence of Article 12.08, which requires employers to pay for educational upgrading in connection with employees' existing jobs, provides implicit support for its position and demonstrates the "oddity" of the Union's. That oddity consists of the fact that

even though the work is still there and even though the jobs are still there and even though Article 12.08 contemplates that employees can be required to upgrade their qualifications in order to do those jobs and even though the Hospital complied with the Article, employees can nevertheless opt not to receive the education and claim the benefits of the layoff provisions instead.

On the facts, the Hospital submits, the differences in the two positions identified by the Union are not material. It is not the scope of employees' authority that matters but what they do. From that perspective, the Hospital notes, the jobs have changed virtually not at all. Most employees are doing exactly the same thing after the change as they were doing before, with some few experiencing only minor changes. For this reason, the Hospital disagrees with the findings in the first two Pharmacy Technician cases and notes that we have additional evidence here. *Timmins no. 1*, the Hospital submits, supports its position that the jobs are indeed the same. The Hospital also points out that the Union has not grieved under the "new classification" article of the collective agreement (Article 20.01(A)), claiming a new and improved wage rate, something it likely would have done if it believed the positions were truly different.

The Hospital submits that the evidence does not support the initial claims by Ms. Bertrand, that the two jobs were "totally different"; rather, it established the opposite. Ms. Bertrand acknowledged that her own duties in the Narcotics Vault had not changed. Further, the checking of some new drugs could always have happened and PAs have always been accountable for their work. Formerly, they were accountable to their supervisor, the Pharmacist and the Hospital; now they are also accountable to the OCP. This does not mean that the job has changed.

In sum, the Hospital submits, no positions were eliminated, no employees were laid off and there was no need for any layoff notices. Far from "a classic layoff situation", the Hospital submits, this was not a layoff situation *at all*. The Hospital had the right to terminate the employees' employment for just cause on a non-disciplinary basis and the addition of the final recall/severance option in no way undermined that right. The employees had ample time to become registered and were fully aware of the consequences if they did not do so.

Commenting briefly on certain of the cases relied on by the Union, the Hospital notes that in *Scarborough Hospital* the issue was the validity of a contracting out; in *St. Vincent de Paul* there was a substantial reduction in hours of work; in *St. Joseph's Hospital* there was an undisputed layoff triggering a bump; and in the *Steripro* cases there was a contracting out and the complete elimination of jobs at the former employer. *Tung-sol*, the Hospital submits, does not support the existence of any kind of generalized seniority rights that are everywhere applicable.

As for the four "Pharmacy Technician" cases, three dealt with the question of the employers' obligation to pay for the education and, the Hospital submits, beyond the factual findings in *Timmins no. 1*, are of no real assistance here. With respect to *Timmins no. 2*, the Hospital is at a loss to understand how the layoff conclusion could possibly have been arrived at in the light of the conclusion in *Timmins no. 1*. The Hospital submits that the case is simply wrong.

On the question of layoff, the Hospital refers to *Sensebrenner Hospital, Kapuskasing and SEIU, Local 204*, [2002] O.L.A.A. No. 602, 115 L.A.C. (4th) 434, 202 CarswellOnt 3929 (Brent). In that case, changes to the *Ambulance Act* and Regulations meant that all paramedics were required to become qualified as EMTs. One paramedic was unable to do so. The hospital then claimed that it had the right to treat the employment relationship as frustrated. The arbitrator disagreed, finding that it was incumbent on the employer to establish just cause for discharge, something that, the arbitrator concluded, the hospital had failed to do, seemingly because it had not proven that the grievor was unable to be employed *at all*.

Of significance to the Hospital here, however, is the arbitrator's further conclusion in *Sensenbrenner* that the layoff provisions did not apply, in part because there was no need to reduce the workforce and because given the grievor's lack of qualifications he could not be recalled to his paramedic job. As a matter of remedy, the arbitrator fashioned a sort of halfway house, requiring the employer to reinstate the grievor to employment on an "unpaid leave" for two years, with the right to apply for posted jobs. The Hospital urges us to adopt the same conclusion in respect of layoff here.

The Hospital also refers to *City of Calgary and CUPE, Local 37*, [2003] A.G.A.A. No. 18 (Tettensor) and *North Bay General Hospital and CUPE, Local 139*, [2003] O.L.A.A. No. 580,

122 L.A.C. (4th) 366 (Goodfellow). In *City of Calgary*, an equipment operator's employment was found to have been properly terminated for the loss of a driver's licence; while in *North Bay General Hospital* the employer was found to be under no obligation to continue to employ as a paramedic an employee that had declined to obtain a statutorily required flu shot.

The Hospital submits that it has established just cause for discharge and that the grievance should be dismissed. However, were we to disagree with that conclusion, the Hospital submits that there is still no basis for a layoff finding. Instead, we should take the *Sensenbrenner* approach and conclude that the employees should have been placed on a recall list, an option that was provided by the Hospital here.

Union Reply

The Union replies that six employees with seniority rights formerly worked at the Hospital but no longer do so because, to borrow the reasoning from *Timmins no. 2*, the Hospital decided that they could no longer perform work in the manner that the Hospital wanted it performed: as registered PTs. There is no evidence as to why the six employees did not become registered, nor is there any suggestion that it matters. All we know is that the employees no longer work at the Hospital because the Hospital decided to eliminate their former jobs and require them to qualify for new ones. The Union asks how such *Hospital actions* could possibly provide it with "just cause for discharge" and why they would not amount to a layoff, precisely as found in *Timmins no. 2*.

The Union agrees with the conclusion in *Sensenbrenner* that just cause for discharge is not available. However, it disagrees with the conclusion that there was no layoff. The Union points out that the layoff provisions in that agreement were not reproduced in the award, which severely limits what can be made of the comments by the arbitrator that precede those referred to by the Hospital that, "looking at the layoff and recall language ... the collective agreement does not fit the situation". The Union submits that *Sensenbrenner* and *North Bay General Hospital* are also distinguishable for the fact that no employer decision-making was involved. Rather, the changes were externally imposed. *City of Calgary*, the Union submits, is much the same; there the employee lost a licence that was always a job requirement. Further, in *North Bay General*

Hospital, the arbitrator expressly noted that "layoff" was not argued. Finally, the Union describes the halfway house constructed in *Sensenbrenner* and the Hospital's "recall" option as completely inconsistent with the terms of the agreement and, respectfully, as nothing that could be or should be imposed.

Decision

The issue in this case is whether the Hospital was required to provide notice of the elimination of PA positions to the Union and notice of layoff to the affected employees, and the rights associated therewith, in consequence of its decision to employ only registered PTs *or* whether it was entitled to terminate for non-disciplinary just cause the employment of the six PAs that did not become registered.

In evaluating the alternatives presented, we first note our agreement with the Hospital that it is, of course, entitled to effect terminations of employment for non-disciplinary reasons on a just cause basis. A not necessarily exhaustive list of possible instances is provided in *Timmins no. 2,* albeit there referred to as instances of "frustration", a term that is more typically used to describe situations in which performance has been made impossible by a supervening event. However, even in that event, it would still fall to the employer to establish the basis for termination. Or to put it only slightly differently, as the Union does here, employment under a collective agreement does not simply "come to an end"; rather, it must be *brought to an end* in accordance with the terms of the agreement.

In this case, the Hospital appears to accept the just cause burden. It claims that it had the right to terminate, for non-disciplinary reasons, the employment of the six employees that did not become registered. The cause alleged is that the employees ceased to be qualified to perform the duties of their existing positions. The Union disagrees. The Union submits that the employees' positions ceased to exist *and* it was not because of some supervening event but because of an employer decision. In these circumstances, the Union submits, the Union is entitled to notice of the elimination of positions and the employees to notice of layoff.

We agree with the Union, both factually and legally. Factually, the dispute is about whether the registered PT position is the same as or different from the PA position. This issue has arisen before. In *Thunder Bay Regional Hospital, supra* and *Joseph Brant Memorial Hospital, supra*, it was material to the question of whether the employers were required to pay for the costs of education. Here it is relevant to the just cause/layoff issue.

In *Thunder Bay* and *Joseph Brant*, looking at the same background facts, the arbitrators concluded that the registered and non-registered positions either were or would necessarily be different. (Indeed, in *Joseph Brant*, the arbitrator appeared to view the conclusion as plain and obvious.) Although, as the Hospital points out, the opposite result was arrived at in *Timmins no. 1*, on our reading of that award it was largely, if not exclusively, a product of the fact that the employer chose to maintain the same classification for the position. The *hospital* having taken that step, the arbitrator concluded, *it* was unable to later argue that the positions were different.

In this case, we are satisfied that the positions are not the same. We say this for essentially the same reasons as the arbitrators in *Thunder Bay* and *Joseph Brant*. As we see it, a "position", especially in a professional setting with public responsibilities of the highest order, such as a hospital, may be much more than the day-to-day tasks performed by the employees. It is also the public responsibilities and accountabilities associated with those tasks and, indeed, the qualifications to perform them. This is why Ms. Bertrand, a long service Pharmacy Technician, testified that she views the positions as "totally" different.

"Pharmacy Technician" is now a regulated health profession. As such, PTs now owe professional obligations to the Ontario College of Pharmacists and legal obligations to members of the public. PTs are licenced and must be insured. The scope of practice has increased, which means that employees such as Ms. Bertrand can now do things on their own without delegation from or supervision by the Pharmacist. And, while that increased scope of practice and authority may not have altered the vast majority of the tasks that PTs perform on a daily basis, its significance has been felt in other important ways, notably in allowing the Hospital to assign its Pharmacists to work outside of the Pharmacy providing more direct patient care. And that is because, on account of the increased scope of practice and regulation, the PTs can now work

independently. As Ms. Bertrand put it, it is because they now have "the accountability", both publicly and to the College.

Further, as Ms. McLenaghan observed, through the education and evaluation process, the PTs' knowledge has been *provably* enhanced and their skill-sets *demonstratively* increased, to the benefit of themselves, co-workers, patients and the Hospital. PTs are more knowledgeable about the work and better at it. It is what flows from the successful completion of the course of study, examination and licencing process. And, as well, there have been *some* new duties, such as checking an expanded list of drugs, particularly narcotics, and being responsible for leave of absence medications.

In our view, it follows *as a legal matter* that not only was there no just cause for the termination of the six employees in a non-disciplinary sense (the alleged absence of any change being at the root of the Hospital's just cause argument) but also that the former PA positions were eliminated *and* the six employees laid off therefrom. While we would hasten to add that it is possible for a position to be eliminated without *any* layoffs or the need for any notices of layoff (*e.g.* where the position is vacant or where, under this agreement, the employer is able to take advantage of the "reassignment" clause), that would not generally be the case where the positions are *occupied*. In this case, positions were eliminated and employees were separated from those positions *and* from their employment. In these circumstances, we find that the Hospital was required to apply the notice of elimination of position and layoff provisions of the collective agreement.

For what it is worth, we note that this very set of contractual obligations appears to have informed the arbitrator's thinking in *Joseph Brant*. In that case, the arbitrator observed that, "any employee who chooses not to take the courses and obtain registration retains all of their other rights under the collective agreement". In context, that appears to have been a direct reference to the hospital's *express acknowledgement* in that case that, "if and when their [former] jobs were eliminated, [the employees] could avail themselves of the job elimination/job security provisions of the collective agreement". And, of course, that was the conclusion reached, albeit under a different collective agreement, in *Timmins no. 2*, a case that appears to be "on all fours" with the present. Indeed, as the Union points out, it is a conclusion that was reached notwithstanding

Timmins no. 1, in which, for the reasons noted above, the employer was unable to establish that the positions were different.

As for Article 12.08, to which the Hospital appeared to attach considerable interpretive importance, the short answer is that we have not found the jobs to be the same; hence, the substratum of the Hospital's argument disappears. To be clear, however, that does not mean that the Hospital was under no obligation to pay for the education; nor, of course, does the fact that it did pay for the education mean that the jobs are the same.

As to the former, we might note that the collective agreement test of payment is *not* whether the education relates to an employee's existing job. That test emerged in *Wexford Inc. and CUPE, Local 3791*, [2001] CarswellOnt 5972, 2001 CanLii 33933 (Albertyn), but it is not one that fits easily with the contractual language. Article 12.08 does not say, as the *Wexford* case did, that, "Only when, *within the terms of the employee's existing job*, the Employer requests, asks, commands or compels an employee to undertake a course of study is the Employer liable" (emphasis in original). Not only does the provision not speak of the employer "requesting" or "asking" but only of "requiring", it also makes no mention of whether the education relates to the employee's existing job or to a new or different job. The test is employer requirement and, in our view, that is broad enough to embrace a *practical* requirement that is the product of employer decision-making, as compared to something externally imposed. And while we agree that might be much less likely to occur where the education relates not to the employee's existing job but to a new or different job, it is far from impossible.

Indeed, in our view, the present case provides just such an illustration. Here, as we have found, the Hospital decided to eliminate the employees' existing positions and to only make available, after a certain date, registered PT jobs, advising employees that if they did not become registered, which could only be accomplished through the prescribed education and examination process, their employment would be terminated without the benefit of the job-security provisions. That was not the employer's position in *Wexford* nor was it the employer's position in *Joseph Brant,* where such rights were expressly acknowledged in the context of what was claimed by the employer to be, and what was found by the arbitrator to be, a different job. It was, however, the employer's position in *Timmins no. 2*, where, like here, employees were told that if

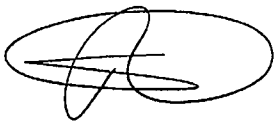
they did not become registered their employment would effectively come to an end. If that is not a form of employer requirement (or "direction"), we do not know what is.

For these reasons, we do not see the presence of Article 12.08, or the fact that the Hospital applied it, as in any way strengthening the argument that it had just cause to terminate the employment of the employees that did not become registered or weakening that of the Union that the employees were entitled to notice of layoff. We see nothing at all "odd" about the simultaneous availability of the education payment benefit and the job security rights in the collective agreement. They are two different, not incompatible, sets of rights. The availability of the first in no way implies the unavailability of the second, either generally or specifically for those employees who either decline to undertake the education or do so unsuccessfully.

Finally, we view the additional cases relied on by the Hospital, one of which was authored by this chair, as distinguishable for the reasons given by the Union. In particular, we might note that neither of the reasons offered in *Sensenbrenner* would appear to stand in the way of the operation of the notice provisions of this agreement. And, in respect of the Hospital's very brief alternative submission that were we to reject its principal argument we ought nevertheless to find, as was done in *Sensenbrenner,* that unilaterally constructed recall-type rights were an appropriate outcome, we respectfully decline. For the reasons given, we find that the job security provisions of the agreement applied and we prefer to follow rights that do exist rather than attempt to fashion some that don't.

For all of these reasons, we find and declare that the Hospital breached the collective agreement by failing to apply the provisions of Article 9.08 and the rights related thereto. We will remain seized in respect of any and all other remedial relief upon which the parties may be unable to agree.

DATED at Toronto this 18th day of April 2017.



Russell Goodfellow – Chair

I dissent (see below).

"John Kuhne"
Hospital Nominee

I concur.

"Joe Herbert"
Union Nominee

DISSENT OF EMPLOYER NOMINEE

Respectfully, I disagree with the decision of the majority. The employer's right to continue to employ Pharmacy Technicians using that title became prohibited by legislation (except for those employees who met the requirements to become regulated.) Reclassification of unregulated employees to the title of Pharmacy Assistant was not the employer's choice; it was required by law. The employer did make a choice, that to continue employment as Pharmacy Technicians employees would have to meet the requirements to become regulated.

The employer did not require layoffs; it simply required its employees to meet upgraded qualifications for the positions they held. There was no requirement to reduce staff or the number of hours worked by Pharmacy Technicians. There was no requirement to eliminate any position other than one occupied by employees pending regulation, with a title change required by law. There was certainly no need to offer voluntary exit offers or early retirement allowances to vacate Pharmacy Technician positions as would be required if invoking a layoff.

The employer wanted to maintain what it had prior to the legislated changes – a workforce qualified to perform the work required. It seized the opportunity to require an upgrading of qualifications, as it was permitted to do under article 12.08 in order to maintain a qualified workforce. Employees were properly apprised with sufficient notice of the requirement to upgrade and were provided support to do so. Six of a total of forty employees ultimately did not meet the upgraded qualification requirement.

I would not have based a decision on "the employer's decision to eliminate the employees' existing positions" in these circumstances. Nor would I have thought it necessary to put the employer to the task of offering voluntary attrition incentives and displacement rights to employees who were required to meet a legislated qualification to continue to do the work in the job classification for which they were hired but failed to do so.

Respectfully submitted,

John G. Kuhne