

## SEIU LOCAL 1 CANADA

### Head Office:

125 Mural Street  
Richmond Hill,  
Ontario  
L4B 1M4

Phone: 905-695-1767

Toll free: 1-800-267-SEIU (7348)

Fax: 905-695-1768

www.seiuhealthcare.ca

### Sharleen Stewart

President

### Emanuel Carvalho

Secretary Treasurer

### Carol McDowell

Executive Vice-President

### Regional Offices:

#### Barrie

121 Commerce Park Drive  
Unit G  
Barrie, Ontario  
L4N 8X1

#### London

41 Adelaide Street North  
Unit 83  
London, Ontario  
N6B 3P4

#### North Bay

126 Lakeshore Drive  
North Bay, Ontario  
P1A 2A8

#### Ottawa

SEIU Local 1 Canada @  
UnderOneRoof Properties  
251 Bank Street, 5th Floor  
Ottawa, Ontario  
K2P 1X3

#### St. Catharines

One St. Paul Street  
Ground Floor - Suite 102 St.  
Catharines, Ontario  
L2R 7L2

#### Thunder Bay

1200 West Walsh Street  
Thunder Bay, Ontario  
P7E 4X4

Toll free: 1-800-267-7348 (SEIU)

Toll free fax: 1-855-233-8238



April 22, 2016

Changing Workplaces Review, ELCPB  
400 University Ave., 12th Floor  
Toronto, ON  
M7A 1T7

### **RE: Changing Workplaces Review – Home Care Workers**

The Service Employees International Union, Local 1 Canada (“SEIU Healthcare”), is one of the largest health care unions in Ontario and is the bargaining agent for thousands of health care workers in hospitals, long term care facilities, home care employers and community organizations.

SEIU Healthcare is submitting this additional correspondence to the Changing Workplaces Review to provide the Special Advisors with insights on the state of unionized employment in the home care sector of health care, and to propose recommendations to the structural issues which oppress effective labour relations.

Some of the issues relating to workers in the home care industry were identified in SEIU Healthcare’s original submission to the Changing Workplaces Review dated September 18, 2015.

SEIU would also welcome the opportunity to arrange an in-person meeting with the Special Advisors to provide additional information and answer any questions they may have regarding employment in the home care industry. Please contact Brigid Buckingham, Head of Policy, SEIU Healthcare at [b.buckingham@seiuhealthcare.ca](mailto:b.buckingham@seiuhealthcare.ca) or by phone: 1-905-267-7348 x.3173.

## CONTEXT

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### **Transformation within Ontario's Healthcare System**

SEIU Healthcare workers are an essential pillar of Ontario's public health care system, and yet for a critical subset of these workers in the home care sector, work is precarious and recourse to improvements through collective bargaining is virtually entirely out of reach.

In recent years, the Ministry of Health and Long Term Care ("MOHLTC") has increased its reliance on home care as an alternative to more institutional settings of health care delivery. As a result, a growing number of patients who would otherwise have remained in hospitals or transferred to a long-term care home for ongoing care and monitoring are being provided with care in their own home.

The MOHLTC's recent policy paper from May 2015, *Patients First: A Roadmap to Strengthen Home and Community Care*, confirms this approach, noting for example that since 2003, funding for home care services has more than doubled and that approximately 1.46 million Ontarians receive community support services including home care.

Ultimately, SEIU Healthcare proposes that collective agreements should be resolved by recourse to interest arbitration.

### **Collective Bargaining in Ontario's Home Care Sector**

In Ontario's public health care industry, the vast majority of labour disputes are settled through either collective bargaining or binding arbitration.

Workplace parties engaged in the delivery of home care services have been captured by the usual terms of the *Labour Relations Act, 1995* (the "Act") governing collective bargaining, strikes and lockouts. As the bargaining agent for thousands of home care workers, SEIU Healthcare has found that the terms of engagement set out in the Act for work stoppage are insufficient to foster healthy and balanced collective bargaining in the home care sector.

Conversely, in the hospital and long-term care sectors, wages for key staff including nurses and PSWs are negotiated through centralized processes that ensure wage and benefit consistency across the province. SEIU Healthcare believes the government should embrace a similar approach to labour relations for home and community care.

Under the *Hospital Labour Disputes Arbitration Act* ("HLDAA"), the majority of traditional hospitals and long-term care facilities have recourse to interest arbitration to resolve disputes, which prohibits hospital employees from going on strike and prohibits employers of such employees from locking them out (s. 11). HLDAA does not, however, generally cover employers and employees engaged in the delivery of home care services.

*HLDA* does not cover employers and employees engaged in home care, however factors which may have been relevant in based on previous cases which the Ontario Labour Relations Board (“OLRB”) considered are no longer applicable in the delivery of home care services in present day.

For example, in 1995, the OLRB considered whether homemaking services provided by The Canadian Red Cross Society should be covered by *HLDA*, and concluded they were not<sup>1</sup>. What may have been the delivery of services in the home twenty years ago is no longer what is delivered in patients homes today. To be clear: homemaking and home care are two different services. Whereas homemaking is defined as services towards the care of the home (e.g. cleaning and laundry); the provision of home care services are directed towards the care of the patient.

In a more recent case, the OLRB did note that their decision not to cover home care services under the definition used under *HLDA* was constrained based on an outdated definition of both what a healthcare setting/“workplace” looks like and the delivery of health care services in today’s modern health care system<sup>2</sup>.

“...recent changes to the health system which have increased the amount and complexity of nursing work in the community, and which make quite clear, in the Board’s view, that community nursing is an integral and vitally important part of the current system of delivering health care in Ontario. This gives rise to a worthwhile policy debate that is outside the Board’s jurisdiction.”

There are several structures at play which have compounded the inequity of labour relations within the home care sector, including:

- Third Party Agencies
- Decentralized Workplace
- Compassionate Workers

## 1. Third Party Agencies

Historically, fourteen (14) MOHLTC-funded Community Care Access Centres (“CCACs”) have been charged with the task of assessing prospective patients and determine the package of healthcare services which will be provided to patients through public funding. Compiling those client profiles into packages of healthcare services are in turn sent to third party agencies to provide directly to patients. More recently, the fourteen (14) MOHLTC-funded Local Health Integration Networks (“LHINs”) have also tendered and engaged in home care service contracts with third party providers.

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<sup>1</sup> Canadian Red Cross Society v Service Employees International Union, Local 204, 1995 CanLII 9918 (ON LRB), <<http://canlii.ca/t/flq3t>>

<sup>2</sup> Ontario Nurses’ Assn. v. VON Metropolitan Toronto Branch, 2002 CanLII 32144 (ON LRB), <<http://canlii.ca/t/6z25>>

In Ontario, the model of care that dominates home care is the “Agency Model.” Through this model, third-party agencies, known as “service providers”, contract with government-funded organizations (CCACs or LHINs) for packages of home care services. These contracted home-care service provider agencies, subsequently, step into the place of “employer” for the purposes of labour relations.

In acquiring bargaining rights in home care, a trade union must therefore apply to the Ontario Labour Relations Board for bargaining rights with the service provider who contracts with the CCAC/LHIN. The trade union must then engage in collective bargaining with the contracted service provider.

However, due to the sub-contracting relationship between the agency and the CCAC/LHIN, the service provider present at the bargaining table does not have much control over monetary matters as costs are already fixed within their contracts. As a result, collectively bargaining with the service provider presents significant limits to what a trade union can accomplish with respect to improvement of working terms and conditions of home care workers at the bargaining table since CCACs/LHINs who ultimately have the power to make changes are not present at the bargaining table.

The problem is intensified not only by the structure of home care provision in Ontario but compounded by the terms included in the contracts between CCACs/LHINs and the home care providers.

This in turn makes collective bargaining and strike action both (a) ineffective and (b) unduly risky for employees:

(a) Strike action is ineffective

If at any point the home care provider is unable to meet the demands of the contract with the CCAC/LHIN (including due to a labour dispute), the CCAC/LHIN is empowered to transfer the contract to a different agency to provide the care.

Collective bargaining is ineffective because ultimate control over monetary matters lies with the public funder (i.e. CCAC/LHIN). The home care service providers have little discretion or ability to manoeuvre within the tight budgets included in the service contracts. Collective bargaining thus has insurmountable limits in the home care sector.

SEIU Healthcare has found that putting financial pressure on the service provider through strike action has proven not to amount to the economic pressure the strike/lock-out provisions of the *Act* were intended to facilitate. As a result, the *Act*'s purposes are defeated, along with the interests and rights of the unions and the members they represent.

### (b) Strike action is unduly risky

Strike action is highly risky for employees because there is no guarantee that their job will exist at the end of the work stoppage. This is due to obligations found within formal contracts wherein CCAC/LHIN must be notified whenever a conciliation officer issues a “no board” report under the *Act*. This allows the CCAC/LHIN to transfer the work to another provider that is not approaching a labour dispute. In addition, there is no guarantee that the work will ever be returned to the original home care provider.

Even if collective action is successful and a trade union can convince a care provider to increase wages through collective bargaining and/or strike action, the resulting increase in operating costs for the service provider could result in the loss of the service contract with the CCAC/LHIN, which means the loss of employment for the members of the trade union.

Employees are thus in an impossible situation of having to risk their livelihoods if they want to exercise their right to collectively lobby for better working terms and conditions. Accordingly, the employees’ right to exercise collective work stoppage is undermined by the real threat that the service provider will lose their service contract, resulting in the employee losing his/her employment permanently.

The structure of home care is precarious for workers and produces meaningless or dangerous labour relations. Although the right to strike exists, it is illusory in the context of home care. The repeated reaction by CCACs and LHINs to strike action (or threat of strike action) implies the services provided by home care workers is an essential service. The current situation is untenable and the time has come for fundamental change to labour relations in home care by formalizing the category of these workers as an essential service.

## **2. Decentralized Workplace**

The delivery of home care services in the province is inherently decentralized, making collective action (including work stoppage) even more difficult for the necessary role of trade unions and their members.

Home care workers operate alone, typically using their personal vehicle to transport them between patients’ private homes. The “workplace” is fragmented, presenting a further barrier for community and collective action among workers. Picket lines are more difficult to form and enforce than in typical institutional settings. The disconnected, dispersed form home care takes functions to further tip the balance in favour of employers in this industry and once again defeats the purposes of an outdated *Act* that has not kept up with the changing nature of the home care workplace.

### **3. Compassionate Workers**

The employees who provide home care services, being predominantly Personal Support Workers (“PSWs”) and Registered Practical Nurses (“RPNs”), are compassionate and committed to their work.

Although they, like any employee, seek improvements to their working terms and conditions, their enduring commitment to skilled, reliable and empathetic care to patients receiving home care often supersedes workers’ appetite to engage in work stoppage. Simply put, they put patients care ahead of their own needs.

For example, in its strike with Red Cross CarePartners in December 2013, SEIU Healthcare found that many of its members refused to join the pickets and engage in work stoppage because they felt morally accountable to the patients who relied on them for critical care.

Workers should not be forced to choose between professional client care and their own working terms and conditions.

## **RECOMMENDATIONS**

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SEIU is recommending the following changes to the *Labour Relations Act*, which will assist in addressing the long-standing challenges and inequities faced by home care workers:

1. Home Care as an Essential Service
2. Sectoral Approach to Labour Relations in Home Care
3. Successor Rights in Home Care

### **1. Home care as an Essential Service**

Home care is increasingly being used to provide care to vulnerable persons, including those recovering from surgical procedures, elderly persons, persons with chronic illnesses and disabilities, and persons requiring palliative care. The MOHLTC is increasingly relying on home care as a feasible substitute for delivering services in hospitals and long term care facilities, and yet home care work is not currently considered an essential service for labour relations purposes.

The principle at the heart of deeming work as an essential service (under *HLDAA*) is that there are certain public services that are so fundamental to the health and safety of Ontarians that the government will not tolerate a work stoppage. Indeed, the MOHLTC, through its CCACs and LHINs, has inferentially acknowledged the essential nature of the continuity of this health care service by ensuring, in service contracts, the freedom to transfer service contracts in the event of a work stoppage.

Transferring service providers in the event of a strike or lock-out subverts the principles of free collective bargaining set out in the *Act* and leaves essential home care workers vulnerable to permanent job loss and unable to take lawful action to effect changes in their working lives.

The current process of labour relations in home care also relies heavily on private arbitrators who tend to have prohibitively expensive rates and often have busy calendars. This results in a costly and drawn out processes for workplace parties who utilize private arbitration to settle collective agreements.

Moving to a system of binding arbitration would likely incentivise workplace parties attempting to negotiate a collective agreement to come to an agreement. Workplace parties also generally prefer to settle the terms of a collective agreement through negotiation rather than placing the outstanding items in the hands of a third party arbitrator, unfamiliar with the parties' operations and priorities.

### **Recommendation:**

SEIU Healthcare respectfully submits that home care is of such critical importance to the patients who rely on it that it ought to treat the labour relations between the employers and the workers in the same or similar manner as it does for the rest of the public health care sector. Home care services should be considered an essential service which should not be vulnerable to strike or lock-out.

SEIU Healthcare suggests that the *Labour Relations Act (Act)* should be amended to allow for employers and trade unions in the home care sector to use the Ontario Labour Relations Board as the arbiter of collective agreement impasses. The introduction of interest arbitration is a necessary measure to promote meaningful collective bargaining rights for trade unions and employees in the home care sector.

An arbitration process before the Ontario Labour Relations Board set up in an amendment to the *Act* can be structured to be financially accessible and include an expedited process. This will promote a more efficient and economical approach to resolving labour disputes in the home care sector and reflect the changing workplaces in health care by updating Ontario's labour laws.

## **2. Sectoral Approach to Labour Relations in Home Care**

The Ontario government recognizes that a strong and stable PSW workforce is essential for a successful transformation of the health care system, and a shift in services out of hospital and into the community. However, significant variations in the funding of home and community services across the province has led to inequities in terms of PSWs and RPNs employment standards, compensation and benefits, violating the principle of workers receiving "equal pay for equal work".

A sectoral approach contemplates that certain standard terms apply to the procedural and/or substantive regulation of a particular sector or industry. Typically, the approach also contemplates that multiple employers – and perhaps multiple trade unions – would come together at a centralized bargaining table to negotiate certain centralized items, such as wages and benefits.

For example, the sectoral approach to the construction industry in the *Labour Relations Act* is perhaps the most successful model of sectoral bargaining in the province. Multiple employers (usually from a specific trade, sector and/or region) unite at one table to determine working terms and conditions which will govern the trade, sector and region, thus creating centralized master collective agreements.

Sectoral approaches to bargaining have also been organically adopted in most of the health care sector. For example, in the hospital and long-term care sectors, wages for key staff including nurses and PSWs are negotiated through centralized processes that ensure wage and benefit consistency across the province.

### **Recommendation:**

SEIU Healthcare recommends that the job insecurity and unfavourable working terms and conditions in the home care sector could be ameliorated through changes to the Labour Relations Act, enabling a sectoral approach to labour relations in home care, fostering centralized, standardized working terms and conditions that govern the home care industry across the board.

### **3. Successor Rights in Home Care**

Job security for workers providing home care may be ameliorated by revisiting and amending the *Act* governing successor rights upon the transfer of service contracts in the home care sector.

Presently, if a CCAC/LHIN chooses to transfer a home care contract from one unionized service provider to another non-unionized service provider, the employees of the first service provider who were engaged to provide the services lose their jobs. The second service provider is free to employ employees of its choosing to perform the same work, on such working terms and conditions of its choosing (i.e. the collective agreement between the first service provider and the trade union does not apply to the second service provider).

This situation in home care can be contrasted with what occurs when a unionized long term care facility is transferred. In that case, unionized staff automatically become employees of the new operator of the long term care facility under the same terms and conditions as set out in the collective agreement; the collective agreement applies to the successor employer as it did to the predecessor employer. This is due to the successor rights provisions of the *Labour Relations Act, 1995*.

## **Recommendation:**

SEIU Healthcare submits that successor rights would be a preferred approach to contract transfers between service providers. Not only would this allow workers' working terms and conditions to be protected and improve labour relations among workers, employers and unions, but it would also result in a better service to patients as it protects the continuity of their care.

## **CONCLUSION**

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SEIU Healthcare strongly believes that labour relations in home care must change. Workers, trade unions and employers alike are all vulnerable, and require recourse to means to avoid lengthy, unproductive and expensive labour disputes which put vulnerable patients living at home and in the community at risk.

The time has come for the Ontario government to recognize that, if it is to rely on home care as an alternative to hospital and/or long-term care, then it ought to treat the labour relations between the employers and the workers in the same or similar manner.

SEIU Healthcare submits that home care services should be considered an essential service and should not be vulnerable to strike or lock-out. Allowing for the use of interest arbitration is also the best way to settle collective agreement disputes in an efficient, fair and cost effective manner.

In addition, enabling a sectoral approach to labour relations fosters centralized, standardized working terms and conditions that govern the home care industry and protect workers across the board.

Finally, successor rights should be honoured upon the transfer of service contracts in the home care sector that not only protect a home care worker's working terms and conditions but also ensure patients receive uninterrupted care.

SEIU Healthcare submits that these approaches to labour relations in the home care sector are consistent with the province's protection of essential services which goes to the heart of protecting the health and safety of Ontario patients during labour disputes.