IN THE MATTER OF AN ARBITRATION

BETWEEN:

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 1, CANADA
(the "Union")

-and-

FAMILY OPTIONS, INC.
(the "Employer")

(POLICY GRIEVANCE #1000-236-870)

| | |
|---|---|
| SOLE ARBITRATOR: | Margo R. Newman |
| APPEARING FOR THE UNION: | Meg Atkinson, Counsel<br>Richard Saladziak |
| APPEARING FOR THE EMPLOYER: | Carla Black, Counsel<br>Lynda Parsons |

A pre-hearing conference with counsel was held on June 2, 2020, during which the parties agreed to file written submissions on a preliminary issue raised by the Employer.

PRELIMINARY DECISION OF ARBITRATOR

The Employer provides services and supports to adults with developmental disabilities and operates residential care and support programs for clients at various locations in Ontario. The Union represents all employees working in and out of Halton Region, Peel Region, and the Regional Municipality of Waterloo, except Team Leads and persons above that rank. The Union and Employer are parties to a Collective Agreement (CA) with effective dates January 1, 2019 through March 31, 2020, which continues in effect pending negotiation for a successor CA.

The Union policy grievance in this case was filed on April 17, 2020, and protests the Employer's unilateral change of schedules and hours of employees, creating 12 hour shifts where none existed before, alleging an adverse impact on employees. The Union received an email response from Employer counsel the same day which states:

> I acknowledge receipt of the grievance and your voicemail.
>
> As you know, the Ontario government has issued O. Reg. 121/20 ORDER UNDER SUBSECTION 7.0.2(4) OF THE ACT - SERVICE AGENCIES PROVIDING SERVICES AND SUPPORTS TO ADULTS WITH DEVELOPMENTAL DISABILITIES. That Order provides that service agencies are permitted to take any measure to respond to the COIVD-19 emergency, including changing the scheduling of work or shift assignments. The Order specifically states that the employer may do so without complying with the provisions of the collective agreement and, contrary to what you asserted in your voicemail, the employer has no obligation to consult with the union in doing so. Further, the right to change schedules is not in any way limited by the Order, so it is not clear on what basis the Union states that the employer has "gone beyond" what is permitted.
>
> The Order also permits service agencies to defer the grievance process with respect to any matter addressed by the Order until the end of the COVID-19 emergency. As such, we do not intend to respond to the grievance at this time.
>
> That being said, and as we have expressed to the Union many times, it is important to the employer to foster positive labour relations. As such, I would be more than happy to discuss the Union's concerns if it would be helpful in

> dealing with your members. I would also ask that you please remember to send your correspondence to Lynda Parsons as well – I have copied her above.

On May 19, 2020 the Union filed an arbitration request with the Ministry of Labour under Section 49 of the *Labour Relations Act*, *1995*, under which I was appointed to hear this matter which was scheduled for hearing on June 9, 2020.

In our initial conference call on June 2, 2020, the Employer raised a preliminary objection to proceeding in this matter, asserting that it is covered by O. Reg 121/20 (Emergency Order), referenced in counsel's response to the grievance, which requires the grievance to be dismissed since the subject matter of the grievance is permitted under such Order without regard to the CA or any applicable statute, and the Emergency Order (EO) suspends the grievance process for its duration. The Union's position was that the Employer is not covered under the EO, and the arbitration hearing should proceed. The parties agreed to postpone the scheduled hearing to July 21, 2020, and to argue this issue by way of written submissions, the last of which was received by the arbitrator on June 26, 2020.

Relevant Statutory Provisions:

The following statutes are relevant to a determination of the preliminary issue in this case. Only the relevant portions are reprinted below.

**ONTARIO REGULATION 121/20 (April 3, 2020)**
made under the

**EMERGENCY MANAGEMENT AND CIVIL PROTECTION ACT**

**Order under Subsection 7.0.2 (4) of the Act - Service Agencies Providing Services and Supports to Adults with Developmental Disabilities**

* * * * *

SCHEDULE 1

WORK DEPLOYMENT, STAFFING AND STREAMLINED REQUIREMENTS

**Definitions**

1. For purposes of this order, "service agency" and "service and support" have the same meanings as in the Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008 (the "governing" Act).

**Work deployment and staffing**

2. Every service agency shall and is authorized to take, with respect to work deployment and staffing, any reasonably necessary measure to respond to, prevent and alleviate the outbreak of coronavirus (COVOD-19) (the "Virus").

**Same**

3. Without limiting the generality of section 2 of this Schedule, and despite any statute, regulation, order, policy, arrangement or agreement, including a collective agreement, service agencies are authorized to do the following:

1. Identify staffing priorities and develop, modify and implement redeployment plans, including the following:

* * * * *

iii. Changing the scheduling of work or shift assignments.

* * * * *

5. Suspend, for the duration of this Order, any grievance process with respect to any matter referred to in this Order.

**Redeployment plans**

4. For greater clarity, a service agency may implement redeployment plans without complying with provisions of a collective agreement, including lay-off, seniority/service or bumping provisions.

The Ontario government amended O. Reg 121/20 on April 24, 2020 to add the following language to its caption "**And Service Providers Providing Intervenor Services**," and adding that language to all enabling provisions, with the following definition:

> (2) For the purposes of this Order, an "intervenor service provider" is a transfer payment recipient funded by the Ministry of Children, Community and Social Services that provides intervenor services for persons who are deafblind.

**Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008** - S.O. 2008, Chapter 14

**PART I - INTERPRETATION**

**Definitions**

1. In this Act,

"service agency" means a corporation or other prescribed entity that provides services and supports to, or for the benefit of, persons with developmental disabilities and that has entered into a funding agreement with the Minister under section 10 with respect to those services and supports;

"service and support" means a service and support described in section 4 that is provided to a person with a developmental disability, or for the benefit of such a person.

* * * * *

**Services and supports**

4(1) The following are services and supports to which this Act applies:

1. Residential services and supports…..

"residential services and supports" means services and supports that are provided to persons with developmental disabilities who reside in one of the following types of residences and includes the provision of accommodations,

or arranging for accommodations, in any of the following types of residences, and such other services and supports as may be prescribed:

2. Supported group living residences.

"supported group living residence" means a staff-supported residence operated by a service agency, in which three or more persons with developmental disabilities reside and receive services and supports from the agency.

* * * * *

**Funding of service agencies**

10(a) The Minister may enter into a written agreement with a service agency to fund the agency for the provision of specified services and supports to, or for the benefit of, persons with developmental disabilities.

**ONTARIO REGULATION 177/20**

**Order Under Subsection 7.0.2 (4) of the Act- Congregate Care Settings**
(April 24, 2020)

SCHEDULE I

**Interpretation**

1. In this Order,

"congregate care setting service agency" means a service agency or transfer payment recipient to which this Order applies under section 2.

2. This Order applies to services agencies and transfer payment recipients in the following sectors:

**Developmental services sector**

1. Service agencies as defined under the *Services to Promote the Social Inclusion of Persons with Developmental Disabilities Act*, 2008 that provide,

i. residential services and supports to adults with developmental disabilities who reside in supported group living residences or intensive support residences, as defined in that Act.

**Violence against women/anti-human trafficking sector**

2. Transfer payment recipients funded by the Ministry of Children, Community and Social Services that provide residential or emergency services under the Violence Against Women Support Services program or the Anti-Human Trafficking Community Support program.

**Intervenor sector**

3. Transfer payment recipients funded by the Ministry of Children, Community and Social Services that provide intervenor services for persons who are deafblind in a residential setting.

**Limit on work locations**

4. Beginning at 12:01 a.m. on Thursday, April 30, 2020, a staff member of a congregate care setting service agency who performs work in a residence operated by the agency shall not also perform work as a staff member of a different congregate care setting service agency in the same sector in a residence operated by a different agency.

**This order prevails**

10. Where there is a conflict between a requirement of this Order and any other Order applying to congregate care setting services agencies, including, for greater certainty, Ontario Regulations 121/20 and 145/20, the requirement in this Order prevails.

Positions of the Parties:

The Employer contends that it is covered by the EO - O. Reg 121/20 - which was enacted to protect vulnerable adults with developmental disabilities who live in group residential settings from COVID-19. It acknowledges that it has not entered into a funding agreement with the Minister of Children, Community and Social Services (MCCSS), and that it contracts with services agencies to provide residential services and

supports for individuals when the service agency has no available vacancy in one of its direct residential homes, and receives government funding by transfer payments from that placing agency through individual agreements.

The Employer asserts that the EO must be read in a manner that gives effect to its purpose and intent, citing *Rasouli v. Sunnybrook Health Sciences Centre*, 2013 SCC 53 (2013) and *Bell ExpressVu Ltd Partnership v. Rex*, 2002 SCC 42 (2002). It posits that the EO was drafted quickly to respond to the emergent risk, and that the use of the term "service agency" under the Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008 (herein the "*Social Inclusion Act*") is shorthand, and it, and O. Reg 177/20 (the *"Congregate Care Order"*) could not have intended to differentiate care solely based on whether the entity has a direct funding model, since that would result in protecting some individuals with developmental disabilities and not others, an absurd and inequitable result which is to be avoided, relying on *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27. The Employer notes that this would pose a severe risk to the health and safety of vulnerable people, whom the EO was designed to protect.

The Employer maintains that there is little, if any, differentiation between it and those agencies with direct funding agreements, as it is required to meet Ministry standards for care including the Quality Assurance Measures (QAM) set forth in the *Social Inclusion Act*, it must complete Serious Occurrence Reports for filing with the Ministry, and its employees were eligible for pandemic pay, which was only available to front line workers in publicly funded and regulated workplaces. It points out that other regulations enacted as EOs under the Emergency Management and Civil Protection Act (EMCPA) apply to entities that are not receiving direct funding from the Ministry, such as retirement homes under O. Reg. 118/20 and Long Term Care (LTC) homes under O. Reg 77/20. The Employer also insists that it is covered by the May 28, 2020 government

issued COVID-19 Guidance - Congregate Living for Vulnerable Populations - whose purpose is to minimize the risk of transmission through people working or residing in these settings.

As to the effect of finding that it is covered by the EO, the Employer contends that this disposes of the grievance in its entirety, since it is permitted to make schedule changes, despite statutes or the CA, which is the subject matter of the grievance, and that this is not a dispute under the CA, from which the arbitrator's jurisdiction arises. It notes that the EO is specific legislation suspending the the general application of the *OLRA* and the right to grieve this issue under the grievance procedure, including arbitration. The Employer points out that the CA requires that the grievance be properly carried through the grievance procedure before being referred to arbitration. As an aside, the Employer asserts that the CA also permits these schedule changes and notes that it offered to discuss the Union's concerns outside the grievance procedure.

The Union argues that the Employer is not covered by the EO since it is not a "service agency" as defined in the *Social Inclusion Act*, as it has no funding agreement with the Minister under Section 10. It notes that the Employer is a private, for profit enterprise and is not listed as a designated application/service entity in Ontario. The Union contends that the language of the EO with respect to its coverage is clear and unambiguous, defining "service agency" by specific reference to the *Social Inclusion Act*'s definition, which requires the agency to have entered into a funding agreement with the Minister. The Union asserts that this was not a drafting error, pointing out that the EO was amended on April 24 to expand its scope to intervenor service providers who are transfer payment recipients providing services to the deafblind, but retained the definition of "service agency" unchanged. It points out that the government chose not to include wholesale transfer payment recipients, but only those providing services for the deafblind.

The Union maintains that at the same time as the EO amendment, the government issued O. Reg 177/20, Congregate Care Settings, wherein it considered transfer payment recipients, but only extended coverage to those falling under the Violence Against Women Support Services and Anti-Human Trafficking Community Support programs, as well as intervenor services for persons who are deafblind in a residential setting. It notes that neither this Order, nor the EO amendment, extended applicability to transfer payment recipients for residential services for adults with developmental disabilities, which is the area serviced by the Employer. O. Reg 177/20 limited staff to working at one government funded residential service agency, and did not permit them to work at more than one such agency.

The Union states that the EO was an extraordinary measure giving significant powers to employers, which, in turn, requires a measure of accountability to the government (via funding or licensing) to be able to monitor its use. It asserts that other Regulations issued under the EMCPA regarding deployment of staff reveal this connection. The Union insists that there is a duty owed to residents by the Employer without government intervention, and it can develop procedures to protect against COVID-19 outlined in Guidance issued covering Congregate Living for Vulnerable Populations, which is a broader guideline document applicable to various congregate living settings, not only ones covered by the EO or O. Reg 177/20. It states that these guidelines instruct employers on the implementation of protective health measures, and note that they should work with staff and unions to limit the number of locations where staff work and develop policies limiting non-essential visitors. The Union argues that a literal reading of the EO does not leave the vulnerable population serviced by the Employer unprotected or without proper care and support.

The Union contends that the arbitrator should dismiss the Employer's preliminary objection and hear the merits of the grievance. It argues that, even if the EO applies, it

does not preclude a referral to arbitration under *OLRA* Section 49, which can be brought 30 days after the grievance was presented to the Employer even if it is not processed through the grievance procedure, citing *City of Toronto & CUPE, Local 79*, 113 L.A.C. (4th) 151 (Springate, 2002). It notes that it met this time requirement, as the grievance was presented on April 17 and referred to arbitration on May 19, 2020. The Union further asserts that even if the EO applies, it does not negate the arbitrator's authority to hear and decide the case, since it suspends only the grievance procedure and not arbitration, which are separate under this CA, citing *Leisureworld Nursing Homes Inc.,* 1997 CarswellOnt 830 [1997], 70 A.C.W.S. (3d) 281 (Ont. C.A.). It insists that the Employer can seek leave to adjourn until the end of the EO, and, at best, the arbitrator can suspend the hearing, but not dismiss the grievance. The Union asserts that the Employer has shown its readiness to engage in litigation before the OLRB in the past few weeks. It maintains that the Union let the Employer know of its desire for consultations, and is entitled to scrutinize the reasonableness of its decisions with respect to schedule changes adversely impacting its members.

Reasons for Decision:

The preliminary issue I must determine is whether the Employer is covered by the EO. I am in agreement that the general principles of statutory interpretation apply, and that the EO must be read in context, in the ordinary sense of the words used, and in keeping with the scheme and object of the Act and its intention. See, e.g. *Rasouli*, supra; *Bell ExpressVu*, supra. The context of the enactment of the EO stems from the declared state of emergency by the Province of Ontario on March 17, 2020 under the EMPCA, due to concerns about community spread of COVID-19, which enables it to implement and enforce orders quickly in the public interest to respond to the evolving pandemic. Initially the state of emergency was for a 14 day period, but it has recently been extended to July 15, 2020. The EO currently remains in effect until July 10, 2020. Many of the Orders

issued under the EMPCA are aimed at addressing the spread of the virus in places where vulnerable populations reside.

The clearly stated objective and intent of O. Reg 121/20, issued on April 3 and amended on April 24, 2020, is to permit reasonably necessary measures with respect to work deployment and staffing to be implemented to respond to, prevent, and alleviate the outbreak of the virus. (See par. 2). In any interpretation case, the first place to look to ascertain the intent of the drafters is the "ordinary sense of the words used" to determine if they are clear or ambiguous. In this case, I find the language regarding the intended coverage of the EO is clear on its face and unambiguous. It sets out the definitions of who and what is covered. Initially, "service agency" and "services and supports" as defined in the *Social Inclusion Act*, which it refers to as the "governing" Act. By amendment it broadened the coverage to intervenor or transfer recipients funded by the Ministry who provide services for the deafblind. Thus, reference to the *Social Inclusion Act* is critical in determining whether the Employer falls under the intended coverage of the EO.

The Employer asserts that it is intended to be covered under O. Reg 121/20 as a "service agency." The *Social Inclusion Act* specifically defines "service agency" as an entity that provides services and supports to, or for the benefit of, persons with developmental disabilities and that has entered into a funding agreement with the Minister under section 10 with respect to those services and supports. While the Employer may meet the first part of the definition, it admittedly does not meet the second requirement.

Its argument that the legislature must have intended coverage for all providers of residential services to adults with developmental disabilities, not only those directly funded, is neither supported by this clear language, nor by the amendment to O. Reg 121/20, passed 3 weeks after its initial enactment. That amendment broadens the scope of

coverage to include "service providers providing intervenor services" which is defined as a "transfer payment recipient (TPR) funded by the MCCSS that provides intervenor services for persons who are deafblind." This fact undermines the Employer's claim that the EO was hastily drafted, since the amendment shows that one specific type of service provider that does not have a direct funding agreement with the MCCSS was considered for coverage - a TPR who services the deafblind, not one who services adults with developmental disabilities, as does the Employer. In the amendment, the government retained the original definition of "service agency" contained in the *Social Inclusion Act*.

As noted by the Employer, an important intent of the EO is to assure the health and safety of vulnerable populations within certain congregate living situations by giving the "service agency" or TPR providing care flexibility in their work deployment and staffing. Notably, the amendment came at the same time as the enactment of O. Reg 177/20, Congregate Care Settings, designed to limit staff interactions between covered agencies. This Order also clearly states that it applies to "service agencies" and TPR as defined in the *Social Inclusion Act*, that provide residential services and supports to adults with developmental disabilities in a supported group living residence, TPRs who deal with those services under the Violence Against Women and Anti-Human Trafficking support programs, and intervenor services for the deafblind. This Order also supports the clarity of the legislature's intention to broadly include all "service agencies" and narrowly include TPRs dealing only with 3 specific categories of individuals, none of which is adults with developmental disabilities. The legislature clearly put its mind to who is to be covered by the EO, that grants extraordinary powers to circumvent protections in other statutes and CAs. The evidence does not support the Employer's position that this was an unintentional drafting error.

These clearly written legislative enactments support the conclusion that the Employer is not covered under the EO as a "service agency." Nor is it a TPR in a sector encompassed within the EO.

Additionally supportive of this interpretation is the COVID-19 Guidance issued on May 28, 2020 regarding Congregate Living for Vulnerable Populations. This document makes clear that it applies to various congregate living settings, including those that may be subject to, and bound by, the EO, and that this Guidance applies to a larger group of residential providers, which encompasses the Employer. It is designed to minimize the risk of transmission of COVID-19 to people working or residing in these settings, and offers specific and general advice for the implementation of public health measures, including enhanced screening and testing, hand hygiene, physical distancing, masking, cleaning and disinfecting, isolating, reporting incidents, and managing outbreaks. The Guidance notes that the employers should work with their staff and unions to limit the number of work locations where staff work and develop policies limiting non-essential visitors.

I cannot accept the Employer's claim that by limiting the coverage of O. Reg 121/20 to "service agencies" and specifically defined TPRs, the legislature intended to put vulnerable individuals at risk based solely on a funding model. Rather, they chose to limit its mandated actions and the grant of extraordinary power to disregard statutes and agreements to those over whom the MCCSS has direct oversight and involvement. The Guidance's suggested protocol to protect all others harnesses the Employer's own self-interest in assuring the health and safety of its residents and staff, and adequately provides information and support to aid employers in protecting those residents.

Finally, the Employer's claim that its employees coverage under the MCCSS' COVID-19 Relief Fund indicates an intention to cover it under the EO is misplaced. That

relief fund's coverage has an extended scope to permit Outside Paid Resources (OPR) who deliver support to request funding through the COVID 19 Relief Fund, which is a larger group than those covered by O. Reg 121/20. Apparently, the Employer meets the test of being such an OPR.

For all of these reasons, I find that the Employer is not a covered "service agency" under O. Reg 121/20, and that its preliminary objection to proceeding with the grievance is dismissed.

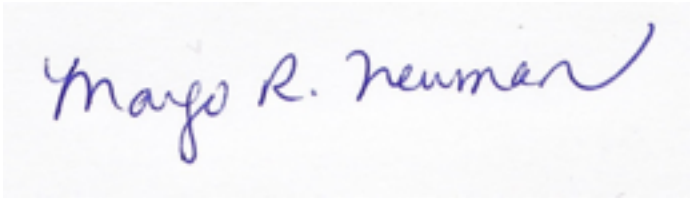
Conclusions:

1. The Employer's preliminary objection is dismissed.

2. A pre-hearing videoconference with counsel will be scheduled by the arbitrator on July 9, 2020 at 1:00 p.m.

3. As previously agreed, a hearing on the merits of the grievance will proceed by zoom videoconference on July 21, 2020 at 10:00 a.m.

DATED at Toronto this 30th day of June, 2020.



Margo R. Newman, Arbitrator