

**ARBITRATOR RULES THAT EMPLOYER IS LIABLE FOR NEW HEALTH CARE PREMIUMS
FOR EMPLOYEES UNDER OLD COLLECTIVE AGREEMENT PROVISION**

*Lapointe Fisher Nursing Home and United Food and Commercial Workers Union, Local
175/633 (unreported), October 6, 2004 (Barrett).*

On July 1, 2004, the Ontario government began to collect the Ontario Health Premium (“OHP”). At present, most employers collect the OHP by withholding an additional amount from employee pay as mandated by recent amendments to the *Income Tax Act*. However, Arbitrator Anne Barrett very recently concluded that some employers may bear the responsibility to pay their employees’ OHPs.

In the *Lapointe Fisher* case, the arbitrator held that an employer was liable for the OHP based on the provisions of a dormant clause in the collective agreement relating to the payment of the old Ontario Health Insurance Plan (“O.H.I.P.”) premiums. Article 24.01 of the collective agreement provided that the employer would pay a percentage of statutory “O.H.I.P. premiums”. This Article had been introduced in 1980, when provisions in the Ontario *Health Insurance Act* (the “*Act*”) required Ontarians to pay O.H.I.P. premiums to obtain provincial health care coverage. When the government revised the *Act* in 1990, the obligation to pay O.H.I.P. premiums was removed, thereby rendering Article 24.01 inactive. In its place, the government imposed a payroll-based health tax on employers (Employer Health Tax Act, S.O. 1989, c. 76).

In her decision, the arbitrator reasoned that the obligation to pay O.H.I.P. premiums was removed from the *Act* pursuant to a “revision” of the *Act*, rather than a statutory abolition of the premiums. As such, the *Act* did not foreclose the possibility that the *Act* could be further “revised” to re-introduce the obligation to pay O.H.I.P. premiums. The arbitrator surmised that the possibility that O.H.I.P. premiums could be brought back at any time was the reason that the union had insisted that Article 24.01 be renewed with each new collective agreement despite the fact that there had been no obligation to pay O.H.I.P. premiums for approximately 14 years.

The employer argued that the so-called new “premium” is actually a health “tax” collected under the *Income Tax Act* and bore no relationship to “O.H.I.P. premiums” contemplated by the collective agreement. The arbitrator rejected this argument and held that Article 24.01’s employer payment obligation concerning “O.H.I.P. premiums” was broad enough to cover the new OHP.

This decision has several negative implications for employers. First, it imposes an undue administrative burden. Employers must now determine each employee’s total taxable income in order to make accurate OHP deductions. Since employers are not privy to their employees’ non-employment taxable income, it is unclear how they will carry out this responsibility. Second, the OHP effectively compounds some employers’ health care system contributions. Employers still submit contributions to the Ontario government pursuant to the *Employer Health Tax Act*. Now, some employers will be required to make added OHP payments on behalf of their employees.

Fortunately, the employer has applied for judicial review and it remains to be seen whether the arbitrator's decision will withstand judicial scrutiny. At root, the arbitral jurisprudence emphasizes that an employer cannot be presumed to have intended in any consensual sense to bestow a financial benefit on its employees in the absence of a clear expression of that intention. These employer-paid O.H.I.P. premium clauses were designed to satisfy the former requirements of the *Act* so that their employees could maintain O.H.I.P. coverage. Employers and unions did not negotiate these clauses to assist employees with their personal income tax obligations as imposed by the *Income Tax Act*. In fact, in light of her decision, one might wonder why the arbitrator did not impose an additional obligation on the employer to pay the Fair Share Health Care levy introduced by the Conservative government in 1996 (an income surtax applied to Ontario residents who earn more than \$53,000 per year) where applicable.