

SUPREME COURT OF NOVA SCOTIA

Citation: *Doctors Nova Scotia v. Nova Scotia (Attorney General)*, 2019 NSSC 40

Date: 20190204

Docket: 470908

Registry: Halifax

Between:

Doctors Nova Scotia

Applicant

v.

The Attorney General of Nova Scotia
representing Her Majesty the Queen
In right of the Province of Nova Scotia

Respondent

Decision on Application in Court

Judge: The Honourable Justice Robin C. Gogan

Heard: June 21, 2018, in Halifax, Nova Scotia

Counsel: Brian Casey, Q.C., for the Applicant
Agnes E. MacNeil, Q.C., and Glen Anderson for the
Respondent

By the Court:

Introduction

[1] This matter involves the relationship between Doctors Nova Scotia (“**DNS**”) and the Province of Nova Scotia (the “**Province**”).

[2] DNS is the sole bargaining agent for its members, Nova Scotia’s doctors. It may enter into agreements with the Province that bind its members. Notwithstanding, the Province negotiates agreements with individual doctors in the province. This decision deals with whether the Province must bargain only with DNS and not individual doctors. The question is whether the Province can enter into agreements with individual doctors without the knowledge, consent, participation, or approval of DNS.

[3] The parties agree that doctors in the employ of the Province are exempted from the matters in dispute. References to “doctors” in this decision does not include provincial employees unless context requires otherwise.

[4] The parties agree that the issue to be decided is a question of law. Accordingly, what follows is an exercise in statutory interpretation, involving the application of the *Interpretation Act*, R.S.N.S. 1989, c. 235, and examining the

relationship between the *Health Services and Insurance Act*, 2002 S.N.S. c. 5, and the *Doctors Nova Scotia Act*, S.N.S. 2012, c. 26.

Background

[5] Doctors in Nova Scotia have been organized for over 150 years. The first organization of doctors in the province, The Medical Society of Nova Scotia, was incorporated by statute in 1861. Doctors have been organized in some fashion since then. Since 2012, the organization of doctors in this province has been known as Doctors Nova Scotia.

[6] As context for its submission, DNS provided a succinct overview which is worth reproducing:

In Nova Scotia, physicians are publicly paid, on a fee-for-service basis, on an alternate fee basis, or as employees of the Province. Doctors Nova Scotia (DNS) is the sole bargaining agent for physicians who are not employees of the Province. DNS seeks a declaration of what that means.

DNS recognizes that its relationship with the Province is not governed by the *Trade Union Act*, and that the statutory provisions are unique.

What does it mean that the Province (the Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia) is obligated to recognize DNS as the sole bargaining agent for all duly qualified medical practitioners? Is the act of negotiating contracts with individual physicians without DNS's participation a breach of DNS's bargaining rights?

[7] DNS commenced this application seeking declaratory relief. It seeks declarations that:

- (a) DNS is the sole bargaining agent for qualified medical practitioners in Nova Scotia;
- (b) the Province is required to deal with DNS in negotiating with physicians; and
- (c) any agreement reached without the participation and agreement of DNS is null and void.

[8] The Province opposes much of what DNS seeks on this application. It is of the view that the relevant provisions of the *Health Services and Insurance Act* permit it to enter into payment arrangements with individual physicians. Moreover, it is argued, the provisions of the *Health Services and Insurance Act* prevail over any conflicting legislative provisions.

[9] The Province does not dispute that DNS is the sole bargaining agent for doctors under the provisions of the *Doctors Nova Scotia Act*. Nor does it dispute that a contract signed September 9, 2016, between it and DNS is binding, and that the contract recognizes DNS as sole bargaining agent for qualified medical practitioners.

[10] There is a significant history to the present statutory framework governing the relationship between DNS and the Province. The evolution of the legislative framework is set out in the written submissions of DNS and is not contested. Suffice to say at this point, the legislative context of the relationship between DNS and the Province has evolved significantly over an extended period of time.

[11] Presently, there are two key pieces of legislation to be considered, first the *Doctors Nova Scotia Act*, and second, the *Health Services and Insurance Act*. It is not disputed that the *Doctors Nova Scotia Act* provides that DNS is “the sole bargaining agent for any and all duly qualified medical practitioners” in Nova Scotia. The question is what that this designation means in the context of the present provisions of the *Health Services and Insurance Act* and the overall statutory scheme governing the relationship.

Issue

[12] The specific question before the Court is whether agreements between individual doctors and the Province are permitted by the governing legislation. Resolving this issue involves an analysis of the nature and scope of DNS as the sole bargaining agent for its members

Position of the Parties

Doctors Nova Scotia

[13] DNS argues that as sole bargaining agent for its members, it must be a party to any and all contracts with doctors in the province. Further to this position, it says that allowing the Province to negotiate directly with individual doctors is in breach of its legislated authority as sole bargaining agent. Finally, it submits that any contracts between individual doctors and the Province to which it is not a party are null and void.

[14] DNS relies extensively on labour relations law principles and union analogies to support its position. It says that the applicability of these principles is settled by the reasons in *Merry v. Manitoba Medical Association* (1989), 58 Man. R. (2d) 221, [1989] M.J. No 105 (Man.Q.B.), affirmed (1989), 6 Man.R (2d) 81 (C.A.), and *George v. Nova Scotia*, 2014 NSSC 184.

[15] On this basis, it is argued that the terms and conditions of employment are within the DNS's exclusive bargaining authority and that is so whether or not the matter is covered by an agreement. DNS says that the Province is not entitled to negotiate any terms and conditions of employment with any doctor unless DNS participates and agrees.

[16] In its reply submissions, DNS argues generally that the *Health Services and Insurance Act* mandates that negotiation must take place, but it is the *Doctors Nova Scotia Act* that sets out how negotiation must take place (and implicitly, the parties to the negotiation). It is the view of DNS that a vacuum is created by the silence in the *Health Services and Insurance Act* about who is to negotiate and the vacuum is filled by the more recent and more specific provisions of the *Doctors Nova Scotia Act*.

The Province of Nova Scotia

[17] The Province says that this application must be dismissed. It says that notwithstanding the legislative function granted to DNS, the provisions of the *Health Services and Insurance Act* provide the Minister authority to enter into agreements with individual physicians in various circumstances.

[18] The Province says specifically that the provisions of the *Health Services and Insurance Act* permit it to enter into Alternative Payment Plans (“**APPs**”). These APPs are an alternative method of compensation (alternative to fee for service payment) for physicians who wish to work on a salaried or part time basis. APPs facilitate the delivery of health care services in rural and hard to serves areas of the province. The Province submits that it has authority to enter into such agreements,

that the agreements are valid and binding, and such arrangements do not conflict with the rights held by DNS.

[19] What is very clear from the parties' respective submissions is that the issue is important to both. The Province sees its ability to negotiate APPs with individual physicians as important to attraction and retention of doctors in the province, especially in under-serviced areas. DNS says that its involvement in all negotiations is a means to prevent competition for doctors within the province and ensure consistency in bargaining. In its view, consistency in bargaining will assist in retention. Both parties are interested in the best delivery of health care. Unfortunately, a contest persists about their respective roles within the delivery system. This contest arises from different interpretations of the legislative scheme governing the relationship between them.

Analysis

The Legislative Context – The History

[20] The parties agree that the legislated relationship between doctors and the Province has significantly evolved. The history is not contested. It is reviewed here briefly as context for the subsequent analysis of existing legislative provisions governing the relationship.

[21] The Medical Society of Nova Scotia was incorporated by statute in 1861. It was not until 2012 that the organization of doctors in the province became known as Doctors Nova Scotia (*Doctors Nova Scotia Act*, S.N.S. 2012, c. 26). DNS continues to operate as the representative of physicians in Nova Scotia. More will be said about the legislated function of DNS below.

[22] In the period prior to 2000, individual hospitals were the point of regulation. In 2000, the *Health Authorities Act*, S.N.S. 2000 c. 6, provided for district health authorities to become the successor authorities. Reorganization occurred again in 2014 with the *Health Authorities Act*, S.N.S. 2014, c. 32. The latter saw a reduced number of health authorities take over the responsibility formerly carried by hospitals and districts.

[23] In terms of physician compensation, the province at one time set the tariff of payments through the work of a commission known as the Hospital Insurance Commission (*Hospital Insurance Act*, R.S.N.S. 1967, c. 125). In 1973, the *Hospital Insurance Act* and the *Medical Care Insurance Act* were repealed and the first iteration of a consolidated law came into effect as the *Hospital Services and Insurance Act*, S.N.S. 1973 c. 8. One can infer that the objective of this consolidation was to rationalize and modernize the legislative scheme for the delivery of health services in the province.

[24] Under this new regime, the new Health Services and Insurance Commission retained the authority to “establish a tariff or tariffs of fees or other system of payment for insured medical services” (s. 11(1)(a)). However, it required the Commission to consult with the Medical Society before establishing or altering any tariff (s.11(1)(b)). The Commission was given broad authority “to do all other acts and things...for the purpose of carrying out the intent and purposes of the Act” (s. 11(1)(k)). The tariff set was to contain a “relative value for individual fee items” which then corresponded to a schedule established by the Medical Society (s. 11(2)). Any changes to the relative values could be altered by agreement with the Society at any time (s. 11(3)). This first version of the consolidated legislation defined both “insured medical services” (s. 2(g) and “tariff” (s. 2(n)), and referenced the relative values for individual fee items, but there was no reference to compensation.

[25] In 1989, the *Health Services and Insurance Act* was amended (R.S.N.S. 1989, c. 197). The Commission continued to have authority to “establish the tariff or tariffs of fees or other system of payment...as determined in accordance with this Section” (s. 13(1))(c)). Significantly, the concept of “compensation” was introduced in this version of the legislation. Section 13(1)(a) and (b) empowered the Commission to negotiate “compensation for insured medical services” with the

Medical Society, and, if unsuccessful, to participate in final offer arbitration. The arbitration section referenced “issues of compensation...not resolved by negotiation” (s.13(3)). The power to negotiate compensation was allocated to the Commission as a function separate and distinct from establishing a tariff or other form of payment. Subsections 13(6) and (7) retained references to “relative values for individual fee items” and the ongoing ability to alter those values at any time by agreement with the Medical Society.

[26] In 1992, the *Health Services and Insurance Act* was amended again (S.N.S. 1992, c. 20). It was at this point that the authority of the Commission to negotiate physician compensation was transferred to the Minister. The function of negotiating compensation remained separate and distinct from establishing tariffs or other systems of payment. The core functions assigned to the Minister mirrored those previously held by the Commission, including the requirement to participate in arbitration for unresolved “issues of compensation” and the broad enabling powers found in s. 13(1)(g). The statutory definition of “insured medical services” was repealed from s. 2 of the 1992 *Act* at the same time as the language in s. 13 changed to “insured professional services”. Reference to the 1967 society tariff was also repealed. The Minister retained the authority to change relative values for individual fee items at any time with the consent of the Society.

[27] Significantly, the 1992 amendments to the *Health Services and Insurance Act* included s. 13A which provided that the Minister *may* enter into agreements with the Medical Society of Nova Scotia concerning “compensation” and other matters. Such agreements would be binding on all medical practitioners. The Minister and the Medical Society reached such agreements in 1992 and 1995.

[28] In 1995-1996, the legislation that had governed the Medical Society since 1861 was replaced by *The Medical Society Act*, S.N.S. 1995-96, c. 12. The objects of the *Act* provided that the Society represent members and enter into agreements for and on behalf of members. Subsection 7(1) of the *Act* permitted the Society to enter into agreements with the Province that bound its members, and for that purpose it was “constituted the sole bargaining agent” for doctors in Nova Scotia. The authority found in this section referenced a non-exhaustive list of areas of potential agreement, including “the tariff of fees” and “other systems of payment”. Subsection 7(2) made it clear that the Province was not required to enter into any agreements. It is worth noting here that s. 7 of the *Act* is permissive and does not contain the word “compensation”.

[29] The 1992 and 1995 Agreements between the Medical Society and the Province were ratified under s. 9 of the *Medical Society Act*, presumably for the purpose of underscoring the binding nature of them on members, and reflecting the

intention of s. 13A of the 1992 amendment to the *Health Services and Insurance Act*.

[30] In 2002, further amendments were made to the *Health Services and Insurance Act*, S.N.S. 2002 c. 5. These amendments included the addition of s. 13B which referenced various forms of “compensation”, including compensation for the provision of insured professional services (taking up the language in s. 13(1)(a) dating to the 1992 amendment). This new section of the *Act* made compensation agreements between individual providers and a hospital null and void unless both the Minister and the Society were parties.

[31] All versions of the *Health Services and Insurance Act* since its inception in 1973 have contained a provision to the effect that in the event of any conflicts with any other general or special Act, its provisions prevail.

[32] The final piece of the current legislative scheme came in 2012 when the *Medical Society Act* was amended to the *Doctors Nova Scotia Act*, S.N.S. 2012, c. 26. This amendment changed the name of the *Act*, and the Medical Society, to Doctors Nova Scotia.

[33] I pause here to note that the relationship between the province and its doctors is of long standing. Only the more recent history is encompassed in the

foregoing review. At its most basic level, what this review reveals is that the province and its doctors have been able to cooperate and agree on matters important to both parties for many years, under the supervision of an evolving statutory regime.

Principles of Statutory Interpretation

[34] Before moving to a review of the present legislative framework, a brief review of the relevant considerations is required.

[35] An exercise in the interpretation of legislation must be in consistent with the *Interpretation Act*, R.S.N.S. 1989, c. 235 which provides:

Interpretation of words and generally

9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.

...

(3) In an enactment, “shall” is imperative and “may” is permissive.

...

(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters,

- (a) the occasion and necessity for the enactment;
- (b) the circumstances existing at the time it was passed;

- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects;
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

[36] In addition to the *Interpretation Act*, exercises of this kind require reference to the modern rule of statutory interpretation, as described in *Sullivan on the Construction of Statutes* (5th ed., 2008) at p. 1:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[37] The application of the modern rule requires the interpreter to consider the meaning and intent of the text with reference to the entire context of the legislation. Context is both internal and external. As in the present case, if related statutes exist, harmonious intent is presumed. The interpretation must assume that related statutes were drafted with each other in mind and were collectively intended to provide a coherent and consistent treatment of the subject. One begins by searching for an interpretation that avoids conflict.

[38] In this case, related statutes together supervise the relationship between the Minister and DNS. Each has a different perspective on the relationship. One empowers the Minister and the other DNS and, derivatively, its membership. It bears noting the obvious - that each party has different accountability in this framework. The Minister and ultimately the government is accountable to the residents of the province for the overall delivery of insured services. In contrast, while DNS has an interest in a variety of health-related issues as reflected in the objects of the *Doctors Nova Scotia Act*, its accountability is to its membership.

[39] The relevant provisions of each piece of legislation follow.

The Legislative Context – Existing Framework

[40] The present legislative framework guiding the relationship between doctors and the Province involves both the *Health Services and Insurance Act* and the *Doctors Nova Scotia Act*. What follows is a brief overview of each, before an analysis is undertaken as to how each of these Acts operate with and relative to one another.

(a) *The Health Services and Insurance Act*

[41] The provisions of the *Health Services and Insurance Act* generally provide a system for the delivery of insured health services in the province. As noted in the Province's submission at p. 5, the provisions of the *Act*:

... create a mechanism for determining compensation for physicians, setting tariffs for fee-for-service compensation, arranging payments to physicians on a fee-for-service basis or other system of payment, establishing hospitals and payments to hospitals. The statute governs the provision of insured medical services and payment for those services to providers, hospitals or groups or providers.

[42] The provisions of the *Act* have received sparse judicial consideration. Justice Moir had occasion for review in *George v. Nova Scotia (Minister of Health and Wellness)*, *supra*, noting that the *Act* founded Nova Scotia's participation in the national medicare scheme by guaranteeing medical and hospital services for all residents. As to its purpose, Justice Moir said:

63 The main purpose of the *Health Services and Insurance Act* is to conform Nova Scotia to the standards of the *Canada Health Act* so as to qualify for the funding that allows for universal health care...

64 Another purpose was to provide universal health care while trying to preserve some of the professional independence of physicians...

[43] For present purposes, the following portions of the *Act* are most relevant for consideration:

Interpretation

2 In this Act,

(ha) “insured professional services” means the services with respect to which a resident is entitled to receive insurance under the provisions of this Act and the regulations;

...

(k) “provider” means a person who provides insured professional services pursuant to this Act and the regulations;

...

(n) “tariff” means a tariff established by the Minister pursuant to Section 13.

...

Function and powers of the Minister

13(1) It is the function of the Minister and the Minister has power to

- (a) negotiate, in good faith, compensation for insured professional services on behalf of the Province with the professional organizations representing providers;
- (b) participate in any process of final offer arbitration as provided for in this Section;
- (c) establish the tariff or tariffs of fees or other system of payment for insured professional services determined in accordance with this Section and, with the approval of the Governor in Council, to authorize payments in respect thereof;
- (d) interpret tariffs and determine their application to the assessment of claims;
- (e) conduct surveys and research in relation to services that are insured under this Act;
- (f) perform such other functions as may be assigned to the Minister by the Governor in Council;
- (g) do all other acts and things that the Minister considers necessary or advisable for the purpose of carrying out effectively the intent and purpose of the Act;

(2) In this Section, “final offer arbitration” means the dispute resolution process whereby a final offer selection panel receives from each of the disputing parties a final offer on all outstanding issues in a negotiation and, following analysis of the submissions and fact finding, the panel selects one final offer or the other without modification, which selection is final and binding on the parties.

(3) Issues of compensation for insured professional services not resolved by negotiation shall be settled through final offer arbitration by a panel consisting of one appointee of the appropriate professional organization, one appointee of the Minister and an independent chairman agreed to by each of the appointees.

(4) ...

(5) The decision of the panel referred to in subsection (3) may not be altered except by an Act of the Legislature.

(6) The relative value for the individual fee items in a tariff or schedule of tariffs for payment for professional services rendered by a provider may, with the mutual agreement of the Minister and the professional organization representing the provider, be altered at any time in respect of any new item or new procedure.

...

Agreement with Society

13A The Minister may enter into an agreement with the Society on behalf of all duly qualified medical practitioners in the Province who provide insured medical services concerning compensation for insured medical services and other matters of common concern between the Minister and the Society, and such agreement is binding on the Minister, the Society and all medical practitioners covered by the agreement.

...

Agreement null and void

13B Effective November 1, 2002, any agreement between a provider and a hospital, or predecessors to a hospital, stipulating compensation for the provision of insured services, for the provider undertaking to be on-call for the provision of such services or for the provider to relocate or maintain a presence in proximity to a hospital, excepting agreements to which the Minister and the Society are a party, is null and void and no compensation is payable pursuant to the agreement, including compensation otherwise payable for termination of the agreement.

...

Arrangements for payment by Minister

31(1) The Minister may enter into arrangements or make arrangements for payment to:

- (a) an employer of a provider who, with the consent of the employer, has assigned to the employer his right to collect fees under the M.S.I. Plan;
- (b) a partnership, association or group of providers who have assigned to the partnership, association or group, their right to collect their fees under the M.S.I. Plan; or
- (c) a provider who renders insured professional services on a basis other than a fee for services rendered.

Subsidy in underpopulated area

32 The Minister may make arrangement for payments of subsidies to providers practising in underpopulated areas of the Province.

...

Conflict

36 In the event of a conflict between the provisions of this Act or the regulations and the provisions of any other general or special Act, the provisions of this Act prevail.

[44] In general terms, the foregoing portions of the *Health Services and Insurance Act* empower the Minister to carry out certain functions in keeping with the obligation to deliver insured medical services to residents of the province. It specifically empowers the Minister to negotiate “compensation” for insured professional services. This is separate and distinct from a number of other functions enumerated in s. 13(1) including the setting of tariffs or other payment

systems. What is clear is that s. 13(1) enumerates a set of specific or core functions empowering the Minister along with the broad authority conferred by s. 13(1)(g).

[45] Section 13 in its entirety creates a system to resolve doctor compensation. The Minister must negotiate compensation for insured services. Insured services are those a resident of the province are entitled to receive under the *Act*. Those insured services are delivered by “providers” but the Minister must negotiate compensation with Doctors Nova Scotia. If an agreement is reached with Doctors Nova Scotia, it is binding on all members covered by the agreement. Any agreement reached between a provider and a hospital dealing with various forms of compensation is null and void unless the Minister and Doctors Nova Scotia are parties. The parties agree that this latter provision was designed to prevent hospitals or health authorities inside the province from competing by offering doctors various kinds of inducements.

[46] Unresolved issues of compensation must be settled by way of final offer arbitration. The section empowers the Minister to participate in this arbitration. The decision of the arbitration panel is final, subject to an Act of the Legislature.

[47] The Minister is separately empowered to establish tariffs of fees or other payment systems for insured services, as determined in accordance with s.13. The

word “tariff” is defined but in an unhelpful, circular fashion. The tariffs are described as containing relative values for individual fee items. The values may be altered at any time by agreement with Doctors Nova Scotia. The Minister is separately empowered to interpret the tariff when assessing claims.

[48] Somewhat removed from s. 13 of the *Act* is s. 31, which provides permissive authority to the Minister to make various kinds of payment arrangements with doctors. The Minister may enter into agreements or make arrangements to pay doctors’ “fees” to an employer, partnership, association or group. Alternatively, the Minister has the authority to make arrangements or agreements for payment directly with a doctor who renders insured services on something “other than a fee for services” basis. In other words, where a doctor is paid on a fee for service basis, the doctor’s fees may be assigned to another recipient. In the case of doctors who do not bill on a fee for service basis, the Minister may pay the doctor directly on whatever basis is agreed. This includes the specific ability to pay subsidies to doctors in underpopulated areas.

[49] The general authority contained in s. 31, formerly held by the Commission, dates back to 1973 version of the *Act*. This authority, now held by the Minister, is longstanding, predates the designation of DNS as a bargaining agent for doctors,

and survived it. The legislative history confirms the existing norm that doctors are paid on either a fee for service or alternative basis.

[50] In my view, s. 31 of the *Act* simply empowers the Minister to enter into various types of arrangements for payment. It is not the section that determines doctor compensation generally, specifically, or alternatively. The Minister's powers to resolve doctor compensation and its derivatives are contained in s. 13.

[51] It bears remembering that one of the key issues in dispute between the parties is whether the Province can enter into agreements with individual doctors without the knowledge and agreement of DNS. Such arrangements exist, in the form of Alternative Payment Plans or “**APPs**”, and represent instances where doctors are paid on something other than a fee for service basis. The Province agrees that it has the obligation to negotiate “compensation” with DNS but says that it retains the authority under the *Act* to enter into individual agreements with doctors who wish to be paid on something other than a fee for service basis. In those instances, it is not obligated to involve DNS. DNS strongly disagrees.

[52] In its submissions, the Province represented that in the case of APPs, the individual doctor's remuneration is still paid based upon the compensation negotiated with DNS. However, in such cases, the doctor will agree to a series of deliverables which would equate to some percentage of a full-time equivalent

salary. The Minister retains authority, expects accountability, and makes payment for these individual arrangements.

[53] Before moving into an interpretive exercise, it is convenient to review the pertinent provisions of the *Doctors Nova Scotia Act*.

(b) *Doctors Nova Scotia Act*

[54] Although doctors in the province have been organized in some fashion for well over a century, the modern statutory framework for their existence as a group dates to 1995 – 1996. Only a name change occurred with subsequent legislative amendments in 2012.

[55] The modern version of the legislation was foreshadowed by the 1992 amendments to the *Health Services and Insurance Act* and, in particular, s. 13A permitting the Minister to enter into agreements with DNS concerning “compensation ... and other matters” which would be binding on the parties and all members of DNS.

[56] The relevant provisions of the *Doctors Nova Scotia Act* for present purposes are as follows:

Objects

5 The objects of the Society are

...

- (f) to represent, act on behalf of and enter into agreements for and on behalf of its members.

...

Powers

6 In addition to any other power conferred by this or any other Act, the Society may do such things as it considers appropriate to advance the objects of the Society and, without limiting the generality of the foregoing,

...

- (m) act on behalf of any and all of its members;
- (n) do such things as are incidental or necessary to the exercise of the foregoing powers.

Certain agreements binding on members

7 The Society may enter agreements with Her Majesty in right of the Province that bind its members and for that purpose is constituted the sole bargaining agent for any and all duly qualified medical practitioners and, without limiting the generality of the foregoing, the Society may enter into agreements with respect to

- (a) the tariff of fees, other systems of payment and the management of the delivery of medical services;
- (b) the availability, supply and distribution of medical practitioners in the Province or any part thereof;
- (c) remuneration for non-clinical management services provided by physicians;
- (d) physician resource management issues including, but not limited to, billing number issuance, restriction and revocation and other physician resource-management issues;
- (e) provincial standards for measuring and providing quality care including evaluation and performance measures;

(f) management mechanisms including, but not limited to, the development of integrated information systems, peer review, clinical practice guidelines and evaluation;

(g) any other matter that may be agreed between the Society and the Minister of Health or the Minister's agents.

(2) For greater certainty,

(a) nothing in this Section requires Her Majesty in right of the Province to enter into any agreement with the Society; and

(b) this Section does not apply with respect to duly qualified medical practitioners who are employed by the Department of Health, including medical officers of health, medical consultants and advisors to the Department.

[57] Section 7 of the *Doctors Nova Scotia Act* is central to the main issue. There is no dispute that the preamble constitutes DNS as the sole bargaining agent for its members. Beyond that, the parties dispute the scope of authority granted in the section.

[58] DNS advances a very broad view. It argues that it is the sole bargaining agent for all areas referred to in the subsections, including the tariffs and other systems of payment. On this basis, the Province must negotiate and have the agreement of DNS for every contract involving a doctor. Conversely, the Province takes a very narrow view. It says that DNS is the sole bargaining agent only for the purpose of binding members to any agreement reached. The Province argues

that nothing in the section obligates it to negotiate with DNS or agree about anything.

[59] A plain reading of the preamble reveals that the grant of authority is entirely permissive. DNS and the Province *may* enter into agreements. The body of the section lists areas of potential agreement, but the list is neither obligatory nor exhaustive. Nothing in the section mandates agreement, or even negotiation. If there is any doubt about the effect of the purely permissive language in s. 7(1), s. 7(2) provides clarity. The Province is not required to do anything.

[60] In my view, the most significant aspect of s. 7, and the entirety of the *Doctors Nova Scotia Act*, is to bind members of DNS if DNS and the Province enter into any kind of agreement. This is consistent with the objects of the *Act* (s. 5(f)), the powers provided (s. 6(m)), the operative provisions, and context provided by a reading of the entire text. Consideration of the entire *Act* reveals clear legislative goals - to continue the organization as an advocacy group in the health field, modernize its structure, ratify its work as a representative of doctors in the province, and make its agreements binding on its members.

[61] If there is any doubt about the legislative intent, a review of the *Hansard* record provides important insight. Upon moving for second reading of *The Medical Society Act*, the Honourable Ron Stewart, Minister of Health, referred to

the “practical things that must be done” to have the Society represent its membership, and act as a representative and advocacy group. He went on to introduce the bill by saying:

... This bill, in essence, Mr. Speaker, and very importantly so, formally recognizes the Medical Society’s long established role in communicating as an advocacy group for its members on behalf of Nova Scotia physicians with both the public and also with the Ministry of Health and the Government of Nova Scotia. In fact, this bill allows us, as a Ministry of Health and as a government to form relationships, legal and otherwise with this society and with the physicians of the province and this bill recognizes the Medical Society of Nova Scotia as a spokesgroup for the physicians of this province and recognizes it as a representative agent in respect to dealing with the Ministry of Health and the Government of Nova Scotia and we welcome this....

[62] Other members of the Legislature recognized the proposed new role of the Medical Society as a bargaining agent for its members. The Honourable Ron Russell commented:

... Yet in this particular piece of legislation, Mr. Speaker, we talk about what the Society may do. One of the things that they do, just by the by, is that this society can negotiate with the government and set the fees for medical practitioners. As you know, it is very much like the labour negotiations; they meet and argue a little, I guess, and finally compromise on both sides and they establish a fee schedule, a tariff of fees.

[63] Members of the Legislature recognized the intent of the proposed *Act* to formalize the dual role of the Society as both an advocate for health issues and a representative of doctors in the province. The designation of the Society as a

bargaining agent for doctors was the subject of much discussion. The language used in the *Act* invokes concepts of representation from the field of labour relations. It clearly conveys that the Society had the authority to bind its members. Was anything more intended by the use of such language?

The Significance of Importing Labour Law Language

[64] DNS concedes that it is not a union, doctors it represents are not employees of the Province, and it is not, nor is the relationship, governed by the province's *Trade Union Act*. But it maintains that the use of the language "sole bargaining agent" in the *Act* supports its position that a very broad role was intended. In its written position, DNS quotes from the decision of Chief Justice Iacobucci (as he then was) of the Federal Court of Appeal in *P.S.A.C. v. Canada (Treasury Bd.)* (1989), 103 N.R. 142 (Fed C.A.) at para 18:

...The trade union's exclusive right to bargain carries with it a corresponding obligation on the employer to recognize the trade union as the bargaining agent for all employees. It follows from the principle of exclusivity that individual arrangements between employer and employees are illegitimate except where permitted by the relevant collective agreement.

[65] DNS advocates for an analogous interpretation of its role. It says that the language used in conjunction with s. 13B of the *Health Services and Insurance Act* was intended to require DNS to be a party to every contract involving a doctor.

[66] The Province takes a different view of the language. It says that the legislative provisions create a unique context – one that does not import traditional notions of labour relations and collective bargaining. It argues that drawing analogies between DNS and a union is a strained exercise. DNS is a creature of statute and its authority to do anything must be found in its legislative provisions. If DNS is to be successful, its “right” to negotiate, and agree, must be grounded in clear legislative language.

[67] The transferability of labour law and collective bargaining concepts to the organization of doctors has been raised tangentially in other types of cases. DNS relied upon Justice Moir’s reasons in *George, supra*, at para. 78:

Although we are not dealing with a labour collective agreement, *Matthias* tells us that constitutional law applicable to labour collective bargaining is easily transposed to medical services collective bargaining.

[68] In *George, supra*, Moir, J. considered whether a tariff for ophthalmologists was subject to judicial review. In that case, the tariff had been set under the provisions of both the *Health Services and Insurance Act* and the *Doctors Nova Scotia Act*. Justice Moir found that the tariff had resulted from the mutual agreement of the parties and that no duty of fairness existed in this space apart

from the duty of fair representation owed by the association to the doctors. The tariff was not subject to judicial review.

[69] In my view, invoking Justice Moir's words to support the meaning sought by DNS is too broad a reading. Justice Moir's conclusions had to do with what he termed "legislated collective bargaining" and the corollary import of the duty of fair representation.

[70] DNS also referred to *Merry, supra*, a 1989 decision of the Manitoba Court of Queens Bench. In that case, the Manitoba Medical Association was the exclusive bargaining agent for all medical practitioners under the province's *Health Services Insurance Act*. An issue arose concerning the mandatory collection of fees under the *Manitoba Medical Association Fees Act*. Ferg, J. found that the obligation on all doctors in the province to pay fees to the Manitoba Medical Association did not violate s. 2(d) of the *Charter*. In so finding, he reasoned that although the medical association was not a union, and doctors not union members, certain *Charter* jurisprudence from the labour law field transposed. This outcome was similar to Justice Moir's reasoning in *George*.

[71] Similarly, in *Cameron v. Medical Society of Prince Edward Island*, 2002 PEISCTD 31, a preliminary issue arose as to whether the Medical Society had a duty of fair representation. Under the province's *Medical Act*, the Medical Society

was “the sole bargaining agent on behalf of its members”. DesRoches, C.J.T.D. found that the Society was not a union. He also concluded that a duty of fair representation existed when one party acted as the exclusive bargaining agent or exclusive negotiator for another party. However, such a duty had only been imposed upon labour unions.

[72] The Province relies upon the decision of the Supreme Court of Canada in *Syndicat Catholique des Employées de Magasins de Quebec Inc v. Cie Paquet*, [1959] S.C.R. 206, which considered the employer and employee relationship under the *Professional Syndicates Act*, a precursor to the *Labour Relations Act*. Significant in the analysis was consideration of the nature of the union before and after the change in the legislative framework:

[4] This *Act* did not provide for compulsive collective bargaining. This came with the *Labour Relations Act* in 1944, which compelled an employer to recognize as the collective representative of his employee “the representatives of any association comprising the absolute majority of his said employees and to negotiate with them, in good faith, a collective labour agreement” (s. 4). “Collective Agreement” is defined as

Any arrangement respecting the conditions of employment (conditions de travail) entered into between persons acting for one or more associations of employees, and an employer or several employers or persons acting for one or more associations of employers. (s. 2(e))

Section 19(a) provides that the *Act* applies “to a collective agreement entered into under the *Professional Syndicates’ Act*...”

[5] The *Professional Syndicates Act* was enabling only, not compulsory, and the right of representation of the syndicate was confined to its members. Theoretically it was possible to have a collective agreement under this *Act* which

left untouched the position of the employees who were not members of the syndicate. The change made by the *Labour Relations Act* in 1944 was profound. The collective representative with the necessary majority acquired the right of representation of all employees, whether members or not, and the employer became obligated to negotiate in good faith with that collective representative...

...

[9] The union is, by virtue of its incorporation under the *Professional Syndicates Act* and its certification under the *Labour Relations Act*, the representative of all the employees in the unit for the purposes of negotiating the labour agreement. There is no room left for private negotiation between the employer and the employee. Certainly to the extent covered by the collective agreement, freedom of contract between master and servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. When this collective agreement was made, it then became the duty of the employer to modify his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized under the governing statutes. The terms of employment are defined for all employees, and whether or not they are members of the union, they are identical for all.

[73] In view of the Province, the reasoning in the *Syndicat Catholique* case is illustrative of the contrast between a relationship governed by labour relations legislation and one that is not. In the labour relations field, collective agreements are made in the context of specialized statutes in which unions are the exclusive bargaining agents for all members. Collective agreements are intended to cover all aspects of the employment relationship. A conventional unionized environment must be distinguished from the present case.

[74] The reasoning advanced by the Province on this point is compelling. I agree that a distinction exists between employee and employer relationships in the

traditional labour law sense and the type of relationship that exists between DNS and the Province. There are many reasons for such a distinction. And, while I accept that certain labour law principles may apply by analogy or otherwise, one cannot entirely transpose labour law principles to this case. There is no legislative basis to do so. DNS is not a union. It is a creature of statute. Doctors are not employees of the Province. They are self-employed. The relationship that exists here is unique. And, although an Agreement presently exists between the parties, it is subject to statutory governance.

[75] I hasten to note however, in choosing to constitute DNS as the “sole bargaining agent” for its members, the legislature clearly imported language from the labour law field with a specific intent. In my view, this was to underscore the nature of the relationship between DNS and its members. DNS is a representative of its members. In the event that DNS enters into an agreement with the Province, the agreement is binding on the members. This is a conclusion consistent with the reasons in *George*, *Merry* and *Cameron* to the extent those decisions have relevance. It is also consistent with the legislative history (particularly s. 13A of the *Health Services and Insurance Act*) and discussions in *Hansard*. Beyond this conclusion, I find no basis in the case law or the phrase “sole bargaining agent” as it is used in the legislation, to support the DNS interpretation.

The Legislated Relationship – What was Intended?

[76] In *George, supra*, Justice Moir had occasion to comment on the relationship between the *Health Services and Insurance Act* and the *Doctors Nova Scotia Act*. He characterized the operation of these related statutes at para. 67:

...The collective agreement for a tariff of fees and the various “mutual agreements” amending the fees are “contracts closely controlled by statute”. It could also be said that a “statutory framework...closely governs the rights and obligations of the parties since the formation of the collective agreement depends on statute.

[77] No issue can be taken with Justice Moir’s characterization. The legislative scheme that exists supervises the relationship between the parties. It is presumed that the relationship was intended to be harmonious and integrated, permitting both the Minister and DNS to carry out their respective objects in a manner consistent with powers and responsibilities conferred on each by the Legislature.

[78] The *Health Services and Insurance Act* and its key amendments were enacted before the *Doctors Nova Scotia Act*. It is recognized however, that even before the *Doctors Nova Scotia Act* came into force, the Society worked with the Province on matters of doctor compensation and other matters of common concern. Versions of the *Health Services and Insurance Act* prior to the *Medical Society Act*

and *Doctors Nova Scotia Act* reference agreements between the Province and the Society and ongoing consultation.

[79] Legislative history reveals a series of changes to the process of determining doctor compensation since 1973. In the first version of the *Health Services and Insurance Act*, a Commission set fee tariffs in consultation with the Society. In 1989, the process changed to one of negotiation and arbitration of “compensation”, separate and distinct from establishing tariffs or other systems of payment. Then in 1992, the authority to negotiate and arbitrate was transferred to the Minister and s. 13A was added to make any agreements with the Society binding on the doctors covered by the agreement. This evolution occurred prior to the existence of the *Medical Society Act* and formal recognition of the Society as a representative for legal purposes. This changed in 1995-1996 when the *Medical Society Act* was passed and a complete statutory scheme existed. Both sides of the relationship were now subject to regulation.

[80] How are the *Acts* intended to work together? Having reviewed the statutes and considered their history, context and objects, I am of the view that there exists no conflict between them, either in the overall legislative scheme or in the specific area of doctor compensation. The interpretation I accept drives my findings on the scope of authority held of DNS. Let me explain.

[81] Broadly speaking, I conclude that the Minister is empowered to carry out certain functions. These functions include the requirement that it negotiate doctor compensation. This negotiation must be done with DNS. This obligation is separate and distinct from the power of the Minister to set tariffs or other systems of payment, which does not require the engagement of DNS. If negotiation of compensation is unsuccessful, the unresolved compensation issues proceed to final offer arbitration with DNS. The outcome of the arbitration can only be altered by legislation.

[82] It is clear that the Minister must follow this process to set doctor compensation. The process involves DNS because s. 13(1)(a) of the *Health Services and Insurance Act* compels the Minister to engage DNS in the process. Nothing else in the *Health Services and Insurance Act* compels engagement with DNS. The parties *may* agree on matters of common concern (s. 13A) but it is not mandatory. The setting of tariffs or other payment systems does not require the involvement of DNS. And, s. 13(1)(g) sees the Minister retain broad authority to do what it considers necessary to carry out the intent of the *Act*.

[83] On the other side of the relationship, DNS is constituted the sole bargaining agent for doctors. It is the professional organization with which the Minister must negotiate compensation. If DNS and the Minister reach agreement, it is binding on

DNS members. The Minister and DNS may agree on other matters of common concern but there is no obligation. Any agreement on doctor compensation is only valid with the agreement of the Minister and DNS.

[84] I find the foregoing interpretation is driven by the plain and ordinary meaning of the words used in the context of each *Act*, with a view to having the two *Acts* operate in concert to achieve their respective objects. The Minister is responsible for the delivery of insured health services and, as part of this function, the Minister must resolve compensation for doctors. The Minister must do this efficiently and effectively with a view to providing the required health care throughout the province. DNS is an advocacy group and the legal representative of doctors in Nova Scotia. The existence and function of DNS allows the Minister to negotiate doctor compensation with one entity. The legislated relationship facilitates the resolution of doctor compensation and supports fairness in both negotiation and compensation. The setting of tariffs and the APPs are derivatives of the compensation process but do not require DNS involvement.

[85] In coming to this conclusion, I found the legislative history influential. The Province and the Medical Society had a relationship before it became the subject of legislated obligations. The Province recognized the Medical Society as the natural representative of doctors in the Province. The two parties negotiated and agreed

on matters before the modern relationship was created. But before the *Medical Society Act* in 1995-1996, the legislative focus was only on the Province's powers, duties and responsibilities. This makes sense when one considers that it is the Minister's responsibility to ensure healthcare delivery throughout the province. Why then was there a need for a new *Act* governing the Medical Society? Was there a legislative mischief that required a remedy?

[86] In my view, the 1992 legislative amendments to the *Health Services and Insurance Act* contained a clue about the gap that existed and future intent of the Legislature. It was at this point that s. 13A was added, providing that the Society could enter into agreements on behalf of all doctors "concerning compensation for insured medical services", and those agreements would be "binding on the Minister, the Society and all medical practitioners covered by the agreement". This was clearly intended to facilitate negotiation of compensation between doctors and the Province. Legislatively however, only one side of the bargain was subject to modern oversight. The legislation overseeing doctors needed updating to reflect this new approach to doctor compensation. The gap was filled with *The Medical Society Act* in 1995.

[87] I have also considered the consequences of the parties' competing interpretations. I found this a compelling aspect of the analysis.

[88] On this point, the Province submits that its interpretation is one that accords with the legislative scheme and the public interest. It has the responsibility for providing insured health services to residents of Nova Scotia along with the infrastructure to support the delivery of those services. The Province recognizes that benchmark compensation must be negotiated by the parties. Beyond that specific obligation, the relationship with DNS is one of collaboration and discussion and potential areas of agreement.

[89] Under the Province's interpretation, the role of DNS is specified in the *Doctors Nova Scotia Act* and nothing in that *Act* takes away the authority of the Minister under the *Health Services and Insurance Act*. The Minister recognizes DNS for what it is under its home statute, an advocate in terms of health issues and the representative of doctors. However, outside of the issue of compensation, there is no mandatory relationship with DNS. The Minister retains the authority to do whatever is necessary to carry out the purpose of the *Health Services and Insurance Act*. This includes the ability to set "other systems of payment" (payment on something other than a fee for service basis), pay subsidies to providers in rural areas, and generally enter into APP agreements with individual doctors.

[90] DNS sees itself with a much broader role and greater responsibility in the overall scheme. It argues that authority for this interpretation is found in s. 7 of the *Doctors Nova Scotia Act*, and the entirety of s. 13 of the *Health Services and Insurance Act* supported by the intent conveyed by the words “sole bargaining agent”. The cumulative interpretation offered by DNS requires its involvement in every doctor’s contract in the province. With this role, DNS says it will ensure consistency in bargaining within the province and prevent local authorities from competing with one another. As noted earlier in these reasons, I conclude that the words “sole bargaining agent” were chosen only to underscore the notion that any agreements entered into by DNS would be binding on members. Nothing more.

[91] In its oral submissions, the DNS position evolved to include the argument that s. 13(1)(c) of the *Health Services and Insurance Act* required DNS engagement by virtue of the words “determined in accordance with this Section”. In terms of process, DNS submits that s. 13(1)(c) requires that individual payment arrangements be subject to the negotiation and arbitration scheme created by s. 13(1)(a) and subsections (2) – (6). If an agreement is reached with an individual doctor under s. 13(1)(c), DNS argues that s. 7 of the *Doctors Nova Scotia Act* and s. 13B of the *Health Services and Insurance Act*, read together, require DNS to be a party to that agreement.

[92] Following the proposed interpretation further, a failed negotiation would then move into arbitration and potentially an Act of the Legislature. In my view, this is a very strained view of the legislative scheme. It would require each individual APP arrangement to be subject to final offer arbitration and perhaps an Act of the Legislature. I find it difficult to accept this process as the intended consequence of the legislative scheme.

[93] The more reasonable and harmonious interpretation is one that recognizes the Minister's responsibility to deliver health services and infrastructure in the Province. The responsibility of the Minister is very broad in that it has a general responsibility to provide health services to all residents of the province. By comparison, the responsibility of DNS is narrow with a focus on the place of doctors in the healthcare system. Its role is to advocate, represent and enter into binding agreements for its members.

[94] The interpretation I adopt recognizes each party's role in the delivery of healthcare and is in accord with the objects of the respective statutes. It obligates the Minister to engage DNS on the issue of doctor compensation, ensuring overall consistency in doctor remuneration. It provides a dispute resolution scheme for a mandatory relationship. It recognizes the need for the parties to work together on compensation issues to prevent local authorities from competing for doctors and

undercutting the ability to deliver a consistent level of insured services. It recognizes the importance of input from doctors on a variety of health issues. But it leaves the Minister with oversight for the delivery of services and the flexibility to make individual arrangements where gaps exist in the delivery system. It is an interpretation that sees the Minister and DNS function in a way that allows each to achieve their respective objectives.

[95] The interpretation that I accept has the relevant legislation working in concert. I find no conflict between the relevant provisions of the *Health Services and Insurance Act* and the *Doctors Nova Scotia Act*. Accordingly, I find no reason to resort to s. 36 of the *Health Services and Insurance Act* as an aid to interpretation.

Conclusion

[96] DNS commenced this application seeking various declarations respecting its role as a bargaining agent for doctors in the province. Conclusions about the intended role of DNS drive the determination as to whether the Province may negotiate directly with individual doctors who do not wish to be paid on a fee for service basis. The parties agree that the existence of APPs with individual doctors is the point of contention.

[97] In the end, I find that the legislative scheme governing the relationship between the Province and its doctors involves DNS as the sole bargaining agent. This is clearly the intention in the *Doctors Nova Scotia Act* and was not a contested declaration. The real contest on this application was the scope of DNS as a bargaining authority.

[98] As discussed in the foregoing reasons, I conclude that the Minister is only obligated to resolve the matter of physician compensation with DNS. Any agreement dealing with doctor compensation requires both the Minister and DNS to agree. There are many other matters that the parties may discuss, collaborate and agree upon. In the event an agreement is reached, it is binding upon all doctors covered by the agreement. But the Minister's obligations to DNS are limited to the subject of benchmark compensation. Beyond that, the Minister retains authority to enter into agreements with physicians who do not wish to be paid under the tariffs on a fee for service basis. In my view, the legislative scheme empowers the Minister to enter into APPs in its discretion, without agreement of DNS.

[99] This interpretation of the governing framework is the most effective, efficient, and harmonious way to give effect to the cumulative legislative intent.

[100] Order accordingly.

Gogan, J.