NOVA SCOTIA COURT OF APPEAL

Citation: *Doctors Nova Scotia v. Nova Scotia (Attorney General)*, 2020 NSCA 22

Date: 20200311
Docket: CA 485932
Registry: Halifax

Between:

Doctors Nova Scotia

Appellant

v.

The Attorney General of Nova Scotia
Representing Her Majesty the Queen
In Right of the Province of Nova Scotia

Respondent

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	November 25, 2019, in Halifax, Nova Scotia
Subject:	Statutory Interpretation – Exclusive Bargaining Agent Appellate Practice – Motion for Fresh Evidence
Summary:	Doctors Nova Scotia ("DNS") was constituted as exclusive bargaining agent for non-government physicians under the *Doctors Nova Scotia Act*. It sought a declaration that, as a result, the Minister of Health and Fitness was not permitted to negotiate agreements with individual physicians. The application proceeded without evidence and was dismissed by a judge of the Nova Scotia Supreme Court in chambers. DNS appealed and brought a motion to introduce fresh evidence.
Issues:	(1) Should DNS be permitted to file fresh evidence.? (2) Did the hearing judge err in her interpretation of the applicable legislation?
Result:	The proposed fresh evidence consisted of copies of various

agreements, including some between the Minister and individual physicians. DNS did not satisfy the *Palmer* test for admission of evidence on appeal and this motion was dismissed.

The designation of DNS as sole bargaining agent meant that any agreements with it were binding on physicians but that did not prevent individual physicians from contracting with the Minister.

The Province conceded that the *Health Services and Insurance Act* required the Minister to negotiate physician compensation with DNS and not individual physicians.

The hearing judge was correct in her interpretation of the legislation and in dismissing the application. The appeal was dismissed with costs of $2500.

The hearing judge commented on several issues not properly before her in relation to certain forms of agreement and the role of DNS in negotiating tariffs for insured medical services. These were declared to be *obiter dicta*.

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Judges:	Wood, C.J.N.S.; Oland and Van den Eynden, JJ.A.
Appeal Heard:	November 25, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Wood, C.J.N.S.; Oland and Van den Eynden, JJ.A. concurring
Counsel:	Ronald A. Pink, Q.C. and Jaime Burnet, for the appellant Agnes E. MacNeil, Q.C. for the respondent

Reasons for judgment:

[1] All qualified medical practitioners in Nova Scotia must be members of Doctors Nova Scotia (DNS). DNS says, because of its designation as sole bargaining agent for its members, the Province has no authority to negotiate agreements with individual physicians not in the employ of the Province. The Province says, other than an obligation to negotiate compensation with DNS, it is free to contract directly with physicians.

[2] To resolve the dispute, DNS applied to the Nova Scotia Supreme Court for a determination of its rights as sole bargaining agent. Part of the relief sought was a declaration that the Province was in breach of DNS's bargaining rights by negotiating contracts with individual physicians. DNS claimed that without its involvement and approval these contracts were a nullity.

[3] The parties asked the hearing judge to interpret the legislative framework that governed the parties' relationship. She did so and concluded the role of DNS as sole bargaining agent was limited in scope. She found that, other than the requirement to negotiate physician compensation with DNS, there was nothing that mandated the Province to contract with DNS, nor restricted the Province from entering into agreements directly with physicians.

[4] The parties agreed that the task before the hearing judge was one of statutory interpretation, thus neither party filed any evidence in support of their respective positions. On appeal, DNS seeks to introduce fresh evidence.

[5] For the reasons that follow I would deny the motion for fresh evidence and dismiss the appeal with costs.

Background

[6] For context it is helpful to understand how the proceedings unfolded and why there is an absence of an evidentiary record.

[7] DNS is constituted as the "sole bargaining agent for any and all duly qualified medical practitioners" pursuant to s. 7(1) of the *Doctors Nova Scotia Act*, S.N.S. 1995-96, c. 12 as amended ("*DNSA*"). It filed a Notice of Application in Chambers seeking the following relief:

> The applicant is applying to a judge in chambers for a declaration:
>
> (a) that Doctors Nova Scotia is the legislated sole bargaining agent for all duly qualified medical practitioners and the Province is obliged to recognize Doctors Nova Scotia as such;
>
> (b) that the act of negotiating contracts with individual physicians is a breach of Doctors Nova Scotia's legislated rights as sole bargaining agent; and
>
> (c) for its costs of the proceeding.

[8] An amended Notice was filed seeking the same relief and indicating that DNS would be relying on the affidavit of Alana Patterson, its Director of Physician Compensation and Practice Support. The Attorney General of Nova Scotia ("the Province") filed a Notice of Contest and, with respect to the potential for evidence on the application, it said:

> **Evidence of Respondent**
>
> The Respondent's position is that the issue raised in this proceeding is purely one of statutory interpretation and does not require evidence. If it cannot be heard as a pure issue of law, then the Respondent expects to file the affidavit(s) of employees of the Department of Health and Wellness regarding the nature and kind of agreements entered into for the recruitment and retention of physicians under the 2016 Master Agreement, the understanding of the roles of Doctors Nova Scotia and the Department of Health and Wellness, how the Master Agreement works with Alternative Payment Plans, and the positions taken by Doctors Nova Scotia and the Department regarding their roles and authority, and the understanding of the Department regarding same and regarding the implementation of the 2016 Master Agreement.

[9] The Notice of Contest set out the Province's position that it was not obliged to contract exclusively with DNS. It referred to Alternative Payment Plans ("APPs") which were described as follows:

> 9. Alternative Payment Plans, or APPs, were created and used as an alternative payment system to the fee-for-service model. It allowed physicians to earn a salary or to work part-time. It guaranteed a minimum funding level to provide income stability and facilitated the delivery of health care services to rural and hard to serve areas.
>
> 10. APP agreements set out the nature and scope of the health services to be delivered (the Deliverables), as agreed upon by individual physicians and the Health Authority. The oversight role of the Department of Health and Wellness consists of a review of the Deliverables to ensure that they comply with the Accountability Framework requirements.

> 11. The Minister has authority to enter into APP agreements with individual physicians.
>
> 12. The APP agreements are valid and binding.

[10] At the motion for directions the Province indicated that if there were to be evidence on the application, it would move to consolidate the matter with two other proceedings then under way with DNS. Both parties advised the court that the application involved a question of law and required no evidence to be filed. The matter proceeded on that basis and was heard on June 21, 2018.

[11] In its pre-hearing brief DNS set out its position that, as sole bargaining agent for all duly qualified medical practitioners, the Province was required to negotiate with it on all issues and there was no scope for individual contracts between physicians and the Province. The argument was based primarily on importing principles from labour relations jurisprudence.

[12] The Province's brief conceded the Minister was required to negotiate physician compensation with DNS but said this did not prevent the Minister from negotiating APPs with physicians. The Province argued its obligation to negotiate compensation did not arise out of the *DNSA* but rather s. 13(1)(a) of the *Health Services and Insurance Act*, R.S.N.S. 1989, c. 197 ("*HSIA*"). As part of the overview of the proceeding the brief also mentioned the tariff of physician fees:

> Section 13(1)(c) provides that the Minister must also set the tariff or tariffs of fees or other system of payment for insured professional services under section 13, but it does not require the Minister to negotiate the tariff. The provision goes on to say that the Minister can also authorize payment, but requires that authorization to be subject to the approval of the Governor in Council.
>
> [page 96 Appeal Book]

[13] The DNS reply brief submitted that APPs fell within the definition of compensation in s. 13(1)(a) of the *HSIA* and, therefore, must be negotiated with it.

[14] In oral submissions on the application the Province clarified its position that APPs did not require involvement of DNS even though they contained terms related to physician compensation. It said the compensation terms found in those agreements were settled with DNS through a separate process and, therefore, nothing was left to negotiate in relation to compensation in any individual APP. DNS disputed this assertion and argued that many of the provisions in APPs fell within the scope of compensation.

[15] By decision dated February 4, 2019 (2019 NSSC 40), the Honourable Justice Robin C. Gogan dismissed the DNS application. She framed the issue in the following terms:

> [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.

[16] The hearing judge concluded that s. 7(1) of the *DNSA* was intended to be permissive in nature and did not oblige the Minister to negotiate with DNS. She found the purpose of the appointment as sole bargaining agent was to ensure that members of DNS were bound by any agreements entered into (see paras. 59 and 60). The hearing judge summarized the position of DNS as follows:

> [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.

[17] In conclusion, the hearing judge said:

> [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.

[18] In the course of her decision the hearing judge referred to APPs and the tariffs for physician fees. Counsel for both parties spoke of these in their submissions. They described APPs as contracts between the Province and physicians for the provision of insured medical services where compensation was provided on a basis other than fee for service. Counsel also reviewed how the tariff, which applied to fee for service compensation, was established and utilized in determining payment for insured services.

[19] On March 8, 2019, DNS filed a Notice of Appeal requesting the following relief:

> 1. The Court should allow the appeal and the judgment appealed from should be set aside;
>
> 2. Judgment should be granted declaring that the designation in the *DNSA* of Doctors Nova Scotia as the "sole bargaining agent for any and all duly qualified medical practitioners" in Nova Scotia (other than provincial employees), means that the Province of Nova Scotia may not negotiate or form agreements related to compensation, including APPs, without the participation and agreement of Doctors Nova Scotia; and
>
> 3. Judgment should be granted declaring that "compensation" under the *HSIA* includes "the tariff or tariffs of fees or other system of payment for insured professional services", which includes APPs, and declaring that "the tariff or tariffs of fees or other system of payment for insured professional services", including APPs, are therefore required subjects of negotiation between the Province of Nova Scotia and Doctors Nova Scotia.

Fresh Evidence Motion

[20] DNS brings a motion to introduce fresh evidence on this appeal in the form of an affidavit of Alana Patterson. The affidavit attached the following four documents:

1. The Master Agreement dated October 29, 2008;
2. The Master Agreement dated September 9, 2016;
3. The template APP agreement for family physicians;
4. The template APP agreement for anaesthesiologists.

[21] The DNS application proceeded in chambers without evidence. The parties had agreed that since their dispute was restricted to an issue of statutory interpretation evidence was not required. Nevertheless, in the course of their submissions both counsel described aspects of the parties' relationship and some of their past agreements. This included APPs and Physician Services Master Agreements. The hearing judge was invited to, and did, consider this information in reaching her conclusion.

[22] DNS now criticizes the hearing judge, in part, for not properly understanding the complex contractual and statutory circumstances governing physician services in Nova Scotia. It seeks to correct this evidentiary vacuum by providing fresh evidence to this Court. This is apparent from DNS's motion brief which states in part:

> 6. DNS submits that this fresh evidence will assist the Court in its interpretation of s. 13(1)(a) to (c) of the *HSIA*. This evidence shows that, until recently, the Province has complied with its obligation to negotiate APP agreements with DNS under s. 13(1)(c), including the money physicians receive and the time, services, and other conditions of engagement physicians provide in exchange for that money, in accordance with its obligation to negotiate compensation for insured professional services with DNS under s. 13(1)(a).
>
> 7. This evidence will allow the Court to have a clear understanding of the issues on appeal. DNS submits that it would be unfair for the Court to consider this most important matter without a basic understanding of the documents underlying the issues.

[23] The test for admission of fresh evidence on appeal is found in the following, often cited passage, from the Supreme Court of Canada in *Palmer v. R*, [1980] 1 S.C.R. 759 at p. 775:

> Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them—see for example *R. v. Stewart*, *supra*; *R. v. Foster* (1978), 8 A.R. 1 (Alta. C.A.); *R. v. McDonald* [1970] 2 O.R. 114, 9 C.R.N.S. 202, [1970] 3 C.C.C. 426 (C.A.); and *R. v. Demeter* (1975), 10 O.R. (2d) 321, 25 C.C.C. (2d) 417, affirmed [1978] 1 S.C.R. 538, 38 C.R.N.S. 317, 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251, 16 N.R. 46. From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. R.*
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[24] DNS acknowledges the due diligence requirement in the *Palmer* test has not been met in the sense that the evidence was available at the time of the hearing. In fact, it was part of the information included in the affidavit of Ms. Patterson, which DNS had initially intended to rely upon in support of the application.

[25] DNS argues that even if the due diligence requirement is not met, fresh evidence may be admitted on appeal if it is in the interests of justice. In support of this position, it relies on the following from *R. v. Warsing*, [1998] 3 S.C.R. 579:

> 56 While the fresh evidence failed the due diligence test in *Palmer*, the evidence sought to be introduced was credible and if believed could affect the verdict. It is my opinion that the Court of Appeal's decision to admit the evidence after balancing the factors described was correct and should be upheld. The respondent's failure to meet the due diligence requirement is serious and in many

> circumstances would be fatal; however it **is overborne by the interests of justice** and as Carthy J.A. stated in *R. v. C. (R.)* (1989), 47 C.C.C. (3d) 84 (Ont. C.A.), at p. 87, a failure to meet the due diligence requirement should not "override **accomplishing a just result**".
>
> [emphasis added]

[26] I would echo the statement by the Supreme Court of Canada in *Palmer* that the test for admission of fresh evidence will be more strictly applied in civil appeals than criminal. In civil cases, parties are in control of the evidence they choose to present. Where, as here, strategic decisions are made about whether to present evidence at first instance, there is no overriding principle of justice which should allow a party on appeal to change course and introduce the evidence that could have been presented at the initial hearing.

[27] I agree with the submissions of the Province that the fresh evidence is irrelevant to the statutory interpretation issue raised by the Notice of Application. This means that in addition to being discoverable by due diligence and, therefore, excluded under part one of the *Palmer* test, it is also not relevant in the sense that it does not affect a potentially decisive issue nor could it be expected to have impacted the result. The evidence should not be admitted as it fails to satisfy the requirements of the *Palmer* test.

[28] The residual discretion to achieve a just result described by the Supreme Court in *Warsing* is specifically related to the failure to meet the due diligence requirement under *Palmer*. It does not extend to permit the admission, on appeal, of evidence that is not relevant to a decisive issue or likely to have affected the result. I would dismiss the fresh evidence motion.

Substantive Appeal

Legislation

[29] This proceeding involves interpretation of provisions found in the *DNSA* and the *HSIA*. The specific provisions in question are as follows:

Doctors Nova Scotia Act

> **Certain agreements binding on members**
> 7 (1) The Society may enter into 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 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 advisers to the Department.

Health Services and Insurance Act

Function and powers of 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, authorize payments in respect thereof;

(d) interpret tariffs and determine their application to the assessment of claims;

…

(g) do all other acts and things that the Minister considers necessary or advisable for the purpose of carrying out effectively the intent and purposes of this 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 submission 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.
…
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. 1992, c. 20, s. 8.
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 professional 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. 2002, c. 5, s. 22.

Issues

[30] The DNS factum describes the issues on appeal as follows:

> 1. Did the Judge err in her interpretation of the term "compensation for insured professional services" in s. 13(1)(a) of the *HSIA* as not inclusive of time spent, services rendered, and other conditions of engagement, so as to lead her to incorrectly hold that the Province need not negotiate with DNS "the tariff or tariffs of fees or other system of payment for insured professional services" in s. 13(1)(c), the latter of which includes APP agreements?
>
> 2. Did the Judge err in her interpretation of the term "sole bargaining agent" in s. 7(1) of the *DNSA*, so as to lead her to incorrectly hold that the Province may negotiate and form APP agreements directly with individual physicians without DNS's participation and agreement?

[31] The Province's factum says the sole issue is:

> 9. Does DNS' legislated designation as sole bargaining agent for all physicians in Nova Scotia mean that only DNS may negotiate and enter into agreements for the delivery of physician services, exclusive of the individual physicians themselves?

[32] The issues as framed by DNS are a response to matters raised by the parties in their submissions concerning the evolution and use of APPs and the tariff of fees. In my view, the proper description of the issue on appeal, which is consistent with the question that the hearing judge was asked to decide, is the one proposed by the Province.

Standard of Review

[33] Both parties say the issue on appeal is one of law and, therefore, should be reviewed on the standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33). I agree.

Analysis

[34] The proper approach to statutory interpretation can be found in the recent decision of this Court in *Sparks v. Holland*, 2019 NSCA 3:

> [27] The Supreme Court of Canada and this Court have affirmed the modern principle of statutory interpretation in many cases that "[t]he 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 (*Rizzo & Rizzo Shoes Ltd. (Re*), [1998] 1 S.C.R. 27 at ¶21).
>
> [28] This Court typically asks three questions when applying the modern principle. These questions derive from Professor Ruth Sullivan's text, *Sullivan on the Construction of Statutes*, 6th ed (Markham, On: LexisNexis Canada, 2014) at pp. 9-10.
>
> [29] Ms. Sullivan's questions have been applied in several cases, including *Slauenwhite v. Keizer*, 2012 NSCA 20 (N.S.C.A.), and more recently, in *Tibbetts*. In summary, the Sullivan questions are:
>
> 1. What is the meaning of the legislative text?
> 2. What did the Legislature intend?
> 3. What are the consequences of adopting a proposed interpretation?
>
> (Sullivan, pp. 9-10)

[35] The position of DNS is that by virtue of being designated as the sole bargaining agent in s. 7(1) of the *DNSA*, the Province is required to negotiate with

it on all matters relating to physicians. The Province's position on this legislation is that the appointment of DNS as sole bargaining agent is only to ensure that any agreement reached would be binding on all physicians who are members. It points out the permissive language used in s. 7(1) and notes ss. 2 which expressly states that nothing in this section requires the Province to enter into any agreement with DNS.

[36] DNS says that the phrase "sole bargaining agent" is a legal term of art and should be interpreted according to its established meaning found in jurisprudence which comes from the labour law context. For example, it relies on the Saskatchewan Court of Appeal decision in *C.U.P.E., Local 59 v. Saskatoon (City)*, 2001 SKCA 67 where an employee sought to set aside an arbitration award without the participation of the union. The Court dismissed the appeal summarily and noted:

> 4 CUPE Local 59 is the Union certified by the Saskatchewan Labour Relations Board as the sole bargaining agent to represent the employees group to which Mr. Oranchuk belongs. The governing collective bargaining agreement with the City of Saskatoon contains a union recognition clause which reads:
>
> > Article 4. UNION RECOGNITION
> >
> > Pursuant to the provisions of *The Trade Union Act (1994)*, the Employer recognizes the Canadian Union of Public Employees and its Local No. 59 as the sole bargaining agent for all those employees covered by this Agreement, and hereby agrees to negotiate with the Union or any of its authorized committees, concerning any matters covered by this Agreement.
>
> 5 This clause recognizes and gives effect to the fundamental principle in labour law that any individual right to contract and negotiate directly with individual unionized employees with respect thereto has been removed: see for example, *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1, [1976] 1 S.C.R. 718 (S.C.C.);.

[37] There is no doubt that the phrase "sole bargaining agent", or something similar, can be found in some labour legislation, collective agreements and jurisprudence. It is not in the Nova Scotia *Trade Union Act*, R.S.N.S. 1989, c. 475 where the effect of certification of a bargaining agent is found in s. 27:

> **Effect of certification**
>
> 27 Where a trade union is certified under this Act as the bargaining agent
>
> of the employees in a unit,

> (a) the trade union shall immediately replace any other bargaining agent of employees in the unit and shall **have exclusive authority to bargain collectively on behalf of employees in the unit and to bind them by a collective agreement** until the certification of the trade union in respect of employees in the unit is revoked;
>
> (b) if another trade union had previously been certified as bargaining agent in respect of employees in the unit, the certification of the last mentioned trade union shall be deemed to be revoked in respect of such employees; and
>
> (c) if, at the time of certification, a collective agreement binding on or entered into on behalf of employees in the unit is in force, the trade union shall be substituted as a party to the agreement in place of the bargaining agent that is a party to the agreement on behalf of the employees in the unit. R.S., c. 475, s. 27.
>
> [emphasis added]

[38] In this provision the legislature indicates the exclusive nature of the bargaining agent's authority by expressly stating it. It did not use the phrase "sole bargaining agent" and so, when that term is used in the *DNSA* it is not an indication of an intention to import all of the principles found in the *Trade Union Act* and the jurisprudence arising from it.

[39] The employment relationships found in trade union regimes include many obligations on employers, employees and unions which are foreign to the relationship between DNS, physicians and the Province. A number of examples will illustrate the point. In the trade union context:

- Employees have the right to vote on whether to be represented by a union, by which union, and whether that union should be replaced.
- A union owes an enforceable duty of fair representation to its members.
- Employers and bargaining agents can be forced to participate in good faith negotiations and mandatory conciliation.
- Collective actions such as work stoppages and lockouts may be available if negotiations fail.
- Unfair labour practice complaints are available if a union or employer engages in certain prohibited conduct.

[40] In the unionized workplace, employees give up their right to negotiate terms of employment directly with their employers in exchange for receiving the benefit

of collective bargaining along with the legislative structure designed to ensure that good faith negotiations take place. This is simply not comparable to the position of physicians in Nova Scotia.

[41] To paraphrase the Saskatchewan Court of Appeal, in *C.U.P.E, Local 59*, the issue is whether physicians' "individual right to contract and negotiate" directly with the Minister has been removed by virtue of s. 7(1) of the *DNSA*. I am satisfied that it has not.

[42] That section says that DNS "may" enter into agreements with the Province and "for that purpose" is constituted the sole bargaining agent for medical practitioners. This language indicates the purpose of the designation is to ensure that DNS is free to negotiate agreements on behalf of its members. This is not the same as removing the individual physician's ability to negotiate or requiring the Minister to deal exclusively with DNS.

[43] This interpretation is confirmed by the heading for section 7 of the *DNSA* which reads: "**Certain agreements binding on members**". Headings may be taken into account and relied upon like any other contextual feature when interpreting legislation (Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto ON: Irwin Law Inc., 2016) at pp. 167 to 169).

[44] I agree with the hearing judge's conclusion that the inclusion of the words "sole bargaining agent" in s. 7(1) of the *DNSA* was for the purpose of confirming that any agreements reached with the Province with respect to the subjects listed in that section would be binding on all medical practitioners with the exception of those employed by the Department of Health (s. 7(2)(b) *DNSA*).

[45] In reaching my conclusion on the interpretation of s. 7(1) of the *DNSA*, I have answered the question raised in this proceeding. However, in the circumstances, I will comment on the submissions made with respect to s. 13 of the *HSIA*. These relate to the issues of APPs, physician compensation and the tariff of fees.

[46] The Province concedes that by virtue of s. 13(1)(a) of the *HSIA*, it is obliged to negotiate exclusively with DNS in relation to "compensation for insured professional services". It also acknowledges the final offer arbitration process set out in the other subsections is applicable when they cannot reach an agreement. Subsection 13(1)(c) says the Minister may establish a tariff of fees or other system

of payment for insured professional services, but the Province submits these items are not within the scope of compensation and do not require negotiation with DNS.

[47] DNS takes the view that compensation ought to be broadly interpreted and covers many issues which affect the delivery of medical services in Nova Scotia, including the establishment of tariffs and other systems of payment. They say APPs are an example of such a payment system.

[48] In my view, once it was determined that DNS was not the mandatory bargaining agent for physicians on all matters and the Minister was not obliged to contract exclusively with DNS, the application should have been dismissed. The judge went on to make findings that were non-essential to resolve the issues in dispute and for which there was no supporting evidence.

[49] The parties had agreed that evidence was not required for purposes of deciding the statutory interpretation question. They provided submissions about factual matters; however, these do not constitute evidence (*Re G.W. Holmes Trucking (1990) Ltd*., 2005 NSCA 132 at para. 9).

[50] The hearing judge responded to the arguments as presented by the parties. Some of the submissions led her to topics on which she had no evidence, limited submissions and which were outside the scope of the issue as framed in the Notice of Application. Of particular concern on this appeal are her comments with respect to the authority to negotiate APPs directly with physicians and whether the Minister is obliged to negotiate the tariffs of fees with DNS.

[51] The Province's position that APPs can be negotiated directly with physicians, which appears to have been accepted by the hearing judge, is based upon their assertion that any contractual provisions falling under the rubric of compensation have been separately negotiated and agreed with DNS. DNS disputes this and says APPs contain many provisions related to "compensation" which must be negotiated with them. Since the hearing judge did not have these documents, or any other evidence, there was no basis on which she could reach a conclusion on that question. Similarly, she had no evidence about the tariffs and how they fit into the physician compensation scheme in Nova Scotia.

[52] In its Notice of Appeal DNS asks this Court to come to a different conclusion than the hearing judge with respect to APPs and the tariffs. For the reasons just discussed, the hearing judge should not have dealt with these issues. I would adopt the approach of the British Columbia Court of Appeal in *British*

Columbia (Technology, Innovation and Citizens' Services) v. Columbus Real Estate Inc., 2018 BCCA 340 and make it clear that these points of contention remain to be resolved in another proceeding:

> [10] … [The judges'] *obiter* comments regarding indemnification were the product of an erroneous analysis and were not within the bounds of the case as pleaded. Should the issue arise in future proceedings, the judge's comments should not be considered to be decisive of the issue.

Conclusion and Disposition

[53] The hearing judge was correct in her interpretation of s. 7(1) of the *DNSA* in reaching her conclusion that the Minister is not obligated to contract exclusively with DNS in relation to physician related matters. Neither does anything in the *HSIA* create this requirement, except with respect to compensation. On this basis, she was right to dismiss the application.

[54] To the extent the hearing judge discussed the use of APPs and the establishment of tariffs of fees for insured medical services those issues were not properly before her. These *obiter* comments should not be considered decisive on those issues should they arise in future proceedings.

[55] I would dismiss the appeal for the above reasons. No costs were ordered in the court below and it does not appear from the record that they were sought. The Province has been successful on the appeal and so I would award them costs in the amount of $2500.

Wood, C.J.N.S.

Concurred in:

Oland, J.A.

Van den Eynden, J.A.