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Files: 569-02-175 and 178

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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Professional Institute of the Public Service of Canada v. Treasury Board

In the matter of policy grievances referred to adjudication

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Christopher Olutola, Professional Institute of the Public Service of Canada

For the Employer: Karl Chemsi, counsel

Heard at Ottawa, Ontario,
February 12 to 14, 2019.

REASONS FOR DECISION

I. Introduction

[1] On March 12, 2014, the Professional Institute of the Public Service of Canada ("the bargaining agent") filed two policy grievances against the interpretation of article 21 of a collective agreement by the Treasury Board ("the employer"). The parties' applicable collective agreement is for the Health Services Group bargaining unit; it expired on September 30, 2014 ("the SH collective agreement").

[2] In the grievance in file no. 569-02-175, the bargaining agent's position is that medical advisors in the Medical Expertise Division at Employment and Social Development Canada (ESDC) are entitled to be reimbursed for their continuing professional development (CPD) (or continuing medical education (CME)) tracking fees under article 21 (entitled "Registration Fees") of the SH collective agreement because the payment of such fees is a requirement for them to maintain a medical licence that is current and valid in a Canadian province or territory.

[3] The employer's position is that they are entitled to be reimbursed for their CPD tracking fees not under article 21 but under clause 18.04 of the SH collective agreement because it addresses the issue of continuing education courses required to maintain current licensing standards. Consequently, it denied the grievance.

[4] In the grievance in file no. 569-02-178, the bargaining agent's position is that the medical advisors are entitled to be reimbursed for professional liability insurance fees as per article 21 of the SH collective agreement.

[5] The employer's position is that they are not entitled to be reimbursed for professional liability insurance fees as per article 21 of the SH collective agreement. Therefore, it denied the grievance.

[6] On May 27 and August 18, 2015, the bargaining agent referred the policy grievances to adjudication.

[7] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of

the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

[8] For the following reasons, I find that the medical advisors' CPD tracking expenses as discussed in this decision (the non-member fees paid to the College of Family Physicians of Canada (CFPC)) fall within the scope of article 21 of the SH collective agreement. The bargaining agent has demonstrated that "… the payment of such fees is a requirement for the continuation of the performance of the duties of the [medical advisor's] position."

[9] I also find that to some extent, the ESDC medical advisors' professional liability insurance expenses fall within the scope of article 21 of the SH collective agreement. The bargaining agent has demonstrated that "… the payment of such fees is a requirement for the continuation of the performance of the duties of the [medical advisor's] position."

II. Policy grievances and decisions

[10] On March 12, 2014, the bargaining agent filed the policy grievance in file no. 569-02-175. It reads as follows:

> ***Details of the Grievance***
>
> *This is a policy grievance hereby filed by the Professional Institute of the Public Service of Canada pursuant to section 220 of the* Public Service Labour Relations Act (PSLRA s. 220*).*
>
> *The Institute grieves that the Employer has violated, misapplied and misinterpreted Article 21 (Registration fees Article) and any other related articles of the Health Services (SH) Collective Agreement between the Professional Institute of the Public Service of Canada and the Treasury Board.*
>
> *On February 7, 2014, the Department of Employment and Social Development Canada (ESDC) informed the Medical Advisors in its Medical Expertise Division that it would not reimburse them the fees for the formal Continuing Professional Development (CPD) implemented in 2013 by the College of Physicians and Surgeons of Ontario (CPSO).*
>
> *The Institute disputes the manner in which the Employer is applying and interpreting the Collective Agreement.*

> *In accordance with article 21 on Registration fees of the Health Services (SH) collective agreement between PIPSC and the Treasury Board:*
>
> > ***21.01*** The Employer shall reimburse an employee for the payment of membership, registration or other related fees to organizations or governing bodies when the Employer is satisfied that the payment of such fees is a requirement for the continuation of the performance of the duties of the employee's position.
>
> *In addition, in accordance with article 1 of the Health Services (SH) collective agreement between PIPSC and the Treasury Board:*
>
> > ***1.02*** The parties to this Agreement share a desire to improve the quality of the Public Service of Canada, to maintain professional standards and to promote the well-being and increased efficiency of its employees to the end that the people of Canada will be well and effectively served. Accordingly, they are determined to establish within the framework provided by law, an effective working relationship at all levels of the public service in which members of the bargaining units are employed.
>
> ***Corrective Actions***
>
> *The Institute seeks full redress including, but not limited to:*
>
> *i. A declaration that the employer has violated the SH collective agreement;*
>
> *ii. A declaration that the CPD fees are fees within the meaning of article 21 of the SH collective agreement;*
>
> *iii. An order that the employer reimburse the fees for the CPD to all its Ontario licensed physicians;*
>
> *iv. Any relief that the PIPSC may request and deems just in the circumstances and the Board may allow.*
>
> [Emphasis in the original]

[11] The employer's decision on the policy grievance in file no. 569-02-175 is dated September 2, 2015. It reads in part as follows:

> …
>
> *In the grievance, the PIPSC states that on February 7, 2014, the Department of Employment and Social Development Canada informed the Medical Advisors in its Medical Expertise Division that it would not reimburse them the fees for the program for Continuing Professional Development (CPD) implemented in 2013 by the College of Physicians and Surgeons of Ontario (CPSO). The PIPSC alleges that the Employer is in violation of article 21 of the collective agreement between the PIPSC and the Treasury Board with respect to the Health Services (SH) Group.*

…

> *The bargaining agent's argument is that Medical Advisors are entitled to be reimbursed for CPD as per article 21 of the SH collective agreement because CPD is a requirement for Medical Advisors to maintain a medical license [sic] that is current and valid in a Canadian province or territory.*
>
> *In reviewing the facts of the matter, I note that the relevant section to solve this matter is not article 21 of the collective agreement but clause 18.04(a)(i), which addresses the issue of continuing education courses required to maintain current licensing standards. The clause states:*
>
> 18.04 Professional Development
>
> a. The parties to this Agreement share a desire to improve professional standards by giving the employees the opportunity on occasion:
>
> i. to participate in workshops, short courses, similar out-service programs or continuing education courses to keep up to date with knowledge and skills in their respective fields, to acquire continuing profession specific credits required to complete or maintain current licensing/registration standards.
>
> *CPD meets the criteria of a continuing education course which allows your members to keep up to date with knowledge and skills in their respective fields, to acquire continuing profession specific credits required to complete or maintain current licensing or registration standards contemplated in clause 18.04 (a)(i).*
>
> *In addition, I note that the fees contemplated in article 21 are for registration or membership with a governing body or a professional organization. It does not cover registration in professional development programs. The costs covered by the Employer do not extend to indirect requirements such as CPD.*
>
> *Therefore, I conclude that Medical Advisors are not entitled to be reimbursed for CPD as per article 21 of the SH collective agreement and the grievance is consequently denied.*

[12] There is no dispute between the parties that the grievance and the employer's decision on it both apply to CME tracking fees.

[13] On March 12, 2014, the bargaining agent also filed the policy grievance in file no. 569-02-178, which reads as follows:

> [Translation]
>
> ***Grievance statement***

> *The Professional Institute of the Public Service of Canada files this policy grievance in accordance with section 220 of the* Public Service Labour Relations Act (PSLRA, s. 220).
>
> *The Institute finds that the employer breached, erred in applying, and misinterpreted article 21 (Registration Fees) and any other relevant provision of the Health Services* ***(SH)*** *collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada.*
>
> *On February 7, 2014, Employment and Social Development Canada (ESDC) informed medical advisors in its Medical Expertise Division that it would no longer reimburse professional liability insurance fees for its physicians holding a licence to practice in Quebec.*
>
> *The Institute challenges the employer's incorrect interpretation and application of the collective agreement.*
>
> *Article 21, about registration fees, of the SH collective agreement between the Institute and the Treasury board states:*
>
>> **21.01** The Employer shall reimburse an employee for the payment of membership, registration or other related fees to organizations or governing bodies when the Employer is satisfied that the payment of such fees is a requirement for the continuation of the performance of the duties of the employee's position.
>
> *Additionally, in accordance with article 1 of the SH collective agreement between the Institute and the Treasury Board:*
>
>> **1.02** The parties to this Agreement share a desire to improve the quality of the Public Service of Canada, to maintain professional standards and to promote the well-being and increased efficiency of its employees to the end that the people of Canada will be well and effectively served. Accordingly, they are determined to establish within the framework provided by law, an effective working relationship at all levels of the public service in which members of the bargaining units are employed.
>
> ***Corrective measures***
>
> *The Institute seeks any remedy that will fully resolve the situation, including but not limited to:*
>
> i. *A declaration that the employer breached the SH collective agreement;*
>
> ii. *A declaration that professional liability insurance fees fall under article 21 of the SH collective agreement;*
>
> iii. *An order that the employer reimburse professional liability insurance fees to its physicians who hold licences to practice in Quebec;*

> iv. *Any other remedy that the Institute may request and consider just under the circumstances and that the Board may grant.*
>
> [Emphasis in the original]

[14] The employer's decision on the policy grievance in file no. 569-02-178 was dated July 29, 2015. It read in part as follows:

> …
>
> *In the grievance, the PIPSC states that on February 7, 2014, Employment and Social Development Canada (ESDC) informed the Medical Advisors in its Medical Expertise Division that it would not reimburse them the professional liability insurance fees for physicians who have a licence to practice in Québec. The PIPSC alleges that the Employer is in violation of article 21 of the collective agreement between the PIPSC and the Treasury Board with respect to the Health Services (SH) Group.*
>
> …
>
> *The bargaining agent's arguments are that Medical Advisors in Québec are entitled to be reimbursed for professional liability insurance as per article 21 of the SH collective agreement because it is a requirement for Medical Advisors to maintain a medical license [sic] that is current and valid in that Canadian province.*
>
> *I first note that Article 21 covers "membership, registration or fees related thereto". It does not extend to premiums paid under an insurance contract, which are not in the same nature or share the same characteristics as membership or registration fees. Also, in reviewing the facts of the matter, I note that the fees contemplated in article 21 are direct requirements required by the Employer. The costs covered by the Employer do not extend to indirect requirements such as professional liability insurance fees.*
>
> *In addition I note that section 3.03 of the* Regulation respecting professional liability insurance of physicians, *CQLR c M-9, r. 15 (the* Regulation*), provides that a physician is not obligated to have professional liability insurance if they do not perform any of the activities listed at section 31 of the* Medical Act. *ESDC does not require its Medical Advisors to perform any of the duties listed in section 31 of the* Medical Act *and as such Medical Advisors can complete the form in Annexe 1 of the* Regulation *and report that they do not perform the activities.*
>
> *Therefore, I conclude that Medical Advisors are not entitled to be reimbursed for professional liability insurance fees as per article 21 of the SH collective agreement and the grievance is consequently denied.*

III. Issues

[15] Here are the issues:

A. Policy grievance in file no. 569-02-175: Is the employer misinterpreting article 21 of the SH collective agreement by refusing to reimburse ESDC medical advisors their Ontario CPD tracking fees?

B. Policy grievance in file no. 569-02-178:

   1. Issue 1 - Is the employer misinterpreting article 21 of the SH collective agreement by refusing to reimburse ESDC medical advisors working in Quebec their professional liability insurance fees?

   2. Issue 2 - The bargaining agent also asked me to decide whether, by refusing to reimburse the professional liability insurance fees of ESDC medical advisors working in Quebec, the employer is misinterpreting article 5 of the SH collective agreement and its implied obligations and duties that require that management properly exercise its discretion?

IV. Analysis

A. Policy grievance in file no. 569-02-175: Is the employer misinterpreting article 21 of the SH collective agreement by refusing to reimburse ESDC medical advisors their Ontario CPD tracking fees?

[16] The bargaining agent called to testify Pierre Bourassa, Medical Advisor, Medical Expertise Division, Canada Pension Plan (CPP) Disability Directorate, Income Security and Social Development, ESDC. The employer called to testify Marc Racine, the director of that division.

[17] Mr. Bourassa holds a medical licence in Quebec and in Ontario. He is employed by ESDC in its Medical Expertise Division. He has held a MD-MOF-02 group and level position since July 2001. Since 2005, he has been working in Quebec. In addition to his work at ESDC, Dr. Bourassa is a part-time emergency physician at a hospital and a part-time coroner for the province of Quebec. Generally speaking, he works the equivalent of three days per week at ESDC, of one day per week at the hospital's emergency department, and two-thirds of one day per week as a coroner.

[18] At ESDC, Dr. Bourassa conducts medical evaluations of files. He receives files containing medical reports, medical test results, and doctors' opinions. This information is provided by applicants (CPP disability applicants appealing denials of

their eligibility for CPP disability benefits). Dr. Bourassa's job is to provide his opinion on the prognosis and treatment of a condition or disease and on the evolution of the applicant's condition. He can also ask for an independent medical evaluation. Thus, he addresses issues of diagnosis, limitations, impacts on an applicant's ability to earn income, work capacity, etc. He works in both English and French. Specifically, he produces reports in both languages.

[19] Dr. Bourassa testified that medical advisors are required to hold a medical licence to maintain their employment at ESDC. In addition, their work description, on page 2, includes the key activity or requirement to, "Maintain an up-to-date knowledge of modern medical developments that influence the determination and management of disability files."

[20] He pointed out that he was hired at ESDC because he practises medicine. In 2007, his work description indicated that his role was, among other things, as follows:

> *Key Activities – Activités principales*
>
> *Conducts a medical assessment of files from CPP disability clients appealing the denial of their eligibility for CPP disability benefits and conducts a non-medical assessment of the case's compliance with legislation and policy and ensures the fair review of appellant's particular situation and the consistent application of the provisions of the CPP disability program.*
>
> *Reviews, analyzes and evaluates decisions of the Review Tribunal, the Pension Appeals Board, and the Federal Court, and makes recommendations on file management and on appeals to the Senior Medical Advisor.*
>
> …

[21] Dr. Bourassa explained that in the past, his role included testifying as a medical expert before different review tribunals. The fact that he practised medicine gave him more credibility. He provided an expert opinion on cases. In addition, in his role as a witness, he was subject to cross-examination by the opposing party. Therefore, he had to have experience practising medicine to do his job. Similarly, he explained that when he was hired, the employer assured him that it would pay for his medical licence, Fédération des médecins omnipraticiens du Québec (FMOQ) fees (association fees), insurance, and continuing education. Dr. Bourassa confirmed that all MD-MOF-02 physicians like him have a medical licence.

[22] He holds medical licences with both the Collège des médecins du Québec (CMQ) and the College of Physicians and Surgeons of Ontario (CPSO). He is also a member of the FMOQ and the Canadian Medical Protective Association (CMPA).

[23] Dr. Bourassa explained that he is a member, as well, of the College of Family Physicians of Canada (CFPC), which tracks his professional training hours. He explained that since 2014, he has had to be a member of the CFPC since the CPSO mandated it to compile physician training hours. Since he must annually demonstrate to the CPSO that he has received all the mandatory continuing education required to renew his licence in Ontario, he must pay a fee to the CFPC to have it track his training hours and confirm the number of hours of training he has received. CPD activities are mandatory in Ontario.

[24] To demonstrate the need to have his CPD activities tracked by the CFPC, Dr. Bourassa filed in evidence a copy of a letter dated March 25, 2013, which he received from the CPSO. It specified, among other things, the following:

> …
>
> *… These amendments* [to the "Quality Assurance" regulation] *came into effect in 2011 and now require all physicians to participate in a program of CPD that meets the requirements set by the CFPC or RCPSC* [Royal College of Physicians and Surgeons of Canada] *or an alternative organization approved by Council, and provide evidence of their participation. At its February 26, 2013 meeting, Council approved the General Practice Psychotherapy Association (GPPA) as an alternative organization.*
>
> *Your 2012 annual renewal survey indicated that you are not participating in an approved CPD program, although you may be meeting their requirements through your own self-directed CPD activities. Because it is a requirement for you to report your CPD activities through an approved organization, I would encourage you to review the programs of the approved organizations and join one of them to begin formally tracking your CPD Activities.*
>
> …
>
> *The College expects that when you complete your annual renewal in 2013, you will be in compliance with the regulation. Failure to do so will result in a review of information regarding your practice and any other relevant considerations, which will likely lead to either an assessment of your practice (at your expense) or an investigation into your lack of compliance.*
>
> …

[25] On May 28, 2013, Dr. Bourassa sent an email about the tracking of CPD activities to his new director, who at that time was James van Raalte. Part of his email read as follows:

> …
>
> *I understand that this year with the obligatory CME tracking, it adds to the amount but couldn't we be paid the similar amounts as last year, pending review of the obligatory nature of cme tracking. After all the cme tracking fees are mandatory, so why doesn't the government accept it. We have letters from our colleges telling us that we'll be investigated if we do not belong to these associations tracking our cme. Seems pretty obvious to me that it is mandatory.*
>
> …
>
> [*Sic* throughout]

[26] Then, on July 4, 2013, Mr. van Raalte informed the medical advisors that the deputy minister had approved the reimbursement of their costs for the tracking of their CPD activities.

[27] Dr. Bourassa clarified that by requesting the reimbursement of the amount he had paid to the CFPC, he was not requesting permission to attend a conference. Instead, he was asking the employer to reimburse him for his costs to the organization that keeps track of his training hours. According to him, he is entitled to the reimbursement of those costs under article 21 of the SH collective agreement because if he does not pay them, the organization will not keep track of his training hours, and his medical licence will be restricted or revoked.

[28] On February 7, 2014, Patricia Wilson, Acting Director, Medical Expertise Division, Canada Pension Plan Disability Directorate, Income Security and Social Development, ESDC, advised the ESDC medical advisors of the following:

> …
>
> *The purpose of this e-mail [sic] is to clarify the provision in the collective agreement relating to Article 21, which states:* "The Employer shall reimburse an employee for the payment of membership, registration or other related fees to organizations or governing bodies when the Employer is satisfied that the payment of such fees is a requirement for the continuation of the performance of the duties of the employee's position."
>
> ***<u>Reimbursement of membership fees for Medical Advisors</u>***
>
> *The provisions in the collective agreement regarding reimbursement of fees stipulate that the employer shall reimburse*

> *for payment of membership or registration fees if it is a requirement for the continuation of the performance of the duties of the position but does not provide for reimbursement of tuition or other fees for professional development.*
>
> *In this meaning, the "Continuing Professional Development fees" are considered a tuition fee and will not be reimbursed by the employer.*
>
> *However, Employment and Social Development Canada recognizes that in order to maintain and enhance professional expertise, employees need to have continuous learning opportunities to attend or participate in career development activities and are invited to discuss the possibility of including the required training on their learning plan.*
>
> …
>
> [Emphasis in the original]

[29] Since his request concerned only his tracking fees, Dr. Bourassa sent an email for clarification purposes. On March 12, 2014, he sent the email and a claim for the "[translation] reimbursement of [his] expenses for the compilation of his continuing medical education fees (CME tracking)". His message stated, "[translation] Here is the receipt for the $410 paid in 2013. Please notify me in writing (note, email) if this amount is not refunded."

[30] On March 27, 2014, Ms. Wilson wrote to Dr. Bourassa as follows:

> …
>
> *I am responding to your below e-mail. As per my e-mail of February 7, 2014, ESDC will not be able to reimburse the cost for CME tracking for 2013. As per that e-mail, I am happy to discuss the possibility of including the cost for 2014 as part of the 2014/15 learning plan.*
>
> …
>
> [*Sic* throughout]

[31] In cross-examination, Dr. Bourassa acknowledged that each year, he acquires CPD credits and that under article 18 of the SH collective agreement, the employer reimburses fees for workshops, courses, or similar out-service programs or continuing education courses, including his fees to the CFPC for compiling his training hours.

[32] Dr. Bourassa also recognized that the tool that the CFPC uses to compile the training hours completed by physicians is called "Mainpro". He was shown and stated that he was familiar with an excerpt from a document prepared by the CPSO in 2012 entitled "Dialogue", which was filed as evidence. One of its topics is tracking CPD

activities. Physicians were advised that CPD was now mandatory for them. Because tracking CPD credits would be a new experience for some doctors, the CPSO put together some frequently asked questions, some of which were the following:

> …
>
> ***Q:*** *I am not a member of either national body* [the CFPC or the RCPSC]. *Will either College allow me to track my CPD with them?*
>
> *Yes. Since 2006, both the CFPC and RCPSC have developed tracking services for the several thousand physicians who do not belong to either body. If physicians choose to use one of the national bodies to track CPD, this service will map to the same requirements as members. There is a fee for this service.*
>
> ***Q:*** *What if I want to have another organization track my CPD for me?*
>
> *This is possible. The regulation allows for an alternative for physicians who wish to complete their CPD requirements with organizations other than the two national bodies. However, these organizations must be approved by the College.*
>
> …
>
> [Emphasis in the original]

[33] Mr. Racine is a lawyer and a member of the Law Society of Ontario, in addition to being the director of the Medical Expertise Division. He is responsible for the disability cases that are referred to the Social Security Tribunal of Canada. As of the hearing, he managed a team of 11 doctors that reviews files and provides advice.

[34] Mr. Racine explained that medical advisors review files, provide medical and non-medical analyses according to the criteria of the law, and give instructions to the employer's legal services. Previously, medical advisors appeared before the Pension Appeals Board, which had the mandate to decide whether the evidence supported a decision to grant benefits. They also appeared before the Federal Court. He explained that the Social Security Tribunal was created in 2013 and that the medical advisors' 2007 work description has not been updated. Therefore, it refers to their former functions. However, since the creation of the Social Security Tribunal, their role has no longer included presenting evidence before a tribunal.

[35] Mr. Racine explained that the revision procedure for when benefits are denied has changed. A departmental adjudicator may or may not grant benefits, according to the criteria of the law, and may reconsider a decision, based on new evidence. Then, if the benefits are denied and the case is brought before the Social Security Tribunal, the

adjudicator represents the ESDC. He or she receives recommendations from medical advisors. Finally, the case may be brought before the Appeal Division of the Social Security Tribunal. At that stage, the medical advisors make recommendations to legal counsel if leave to appeal is granted. As a result, the medical advisors no longer testify in a tribunal or court.

[36] Mr. Racine confirmed that medical advisors hired by the department must be members in good standing of a provincial college of physicians and must have practical experience at the clinical level. He also recognized that medical advisors must receive CPD to maintain their medical licences. Specifically, s. 29(1) of the *Ontario Regulation 114/94*, made under the Ontario *Medicine Act, 1991* (S.O. 1991, c. 30), specifies that "Members shall participate in a program of continuing professional development …".

[37] Mr. Racine is also aware that Mainpro is a CFPC program used by family physicians to document and monitor their CPD progress. All colleges of physicians in Canada ensure that their members meet all requirements for licensure, and they may use Mainpro certification to verify their CPD progress.

[38] However, Mr. Racine explained that a physician is not required to be a CFPC member to earn Mainpro credits. The employer filed in evidence examples of official receipts submitted to it by medical advisors who have made "Mainpro Non-Member" payments in the past. Physicians can apply to become non-member Mainpro participants, to be assigned a five-year Mainpro cycle. CFPC members and non-member Mainpro participants may claim Mainpro credits for CPD activities.

[39] Mr. Racine explained that the employer reimburses the medical advisors for their non-member Mainpro participant payment the same way it reimburses them for their conference attendance or training expenses. It filed in evidence a table showing that for each medical advisor at ESDC, both the training expenses (for courses or workshops) and the "Mainpro credits - CFPC fee" were reimbursed in 2014-2015 and 2016-2017. Mr. Racine explained that these expenses, incurred by the medical advisors, were reimbursed under clauses 18.03 and 18.04 of the collective agreement, which read as follows:

> ***18.03 Attendance at Conferences and Conventions***

> a. *The parties to this Agreement recognize that attendance or participation at conferences, conventions, symposia, scientific meetings, workshops and other gatherings of a similar nature contributes to the maintenance of high professional standards.*
>
> b. *In order to benefit from an exchange of knowledge and experience, an employee shall have the opportunity on occasion to attend conferences and conventions which are related to the employee's field of specialization, subject to operational constraints.*
>
> c. *The Employer may grant leave with pay and reasonable travel expenses including registration fees to attend such gatherings, subject to budgetary and operational constraints.*
>
> d. *An employee who attends a conference or convention at the request of the Employer to represent the interests of the Employer shall be deemed to be on duty and, as required, in travel status. The Employer shall pay the registration fees of the convention or conference the employee is required to attend.*
>
> e. *An employee invited to participate in a conference or convention in an official capacity, such as to present a formal address or to give a course related to the employee's field of employment, may be granted leave with pay for this purpose and may, in addition, be reimbursed for the payment of convention or conference registration fees and reasonable travel expenses.*
>
> f. *An employee shall not be entitled to any compensation under Article 9, Overtime, and 13, Travelling Time, in respect of hours the employee is in attendance at or travelling to or from a conference or convention under the provisions of this clause, except as provided by paragraph (d).*
>
> g. *Subject to budgetary and operational constraints, the Employer shall make every reasonable effort to accommodate shift changes or rest day changes to facilitate attendance at conferences, conventions, symposia, scientific meetings, workshops and other gatherings of a similar nature, while on duty.*

18.04 Professional Development

> a. *The parties to this Agreement share a desire to improve professional standards by giving the employees the opportunity on occasion:*
>
> i. *to participate in workshops, short courses, similar out-service programs or continuing education courses to keep up to date with knowledge and skills in their respective fields, to acquire continuing profession specific credits*

required to complete or maintain current licensing/registration standards.

ii. *to conduct research or perform work related to their normal research programs in institutions or locations other than those of the Employer, including, subject to the Employer's approval, presentation of the results of such research to external bodies.*
or

iii. *to carry out research in the employee's field of specialization not specifically related to the employee's assigned work projects when in the opinion of the Employer such research is needed to enable the employee to fill his present role more adequately including, subject to the Employer's approval, presentation of the results of such research to external bodies.*

b. *Subject to the Employer's approval an employee shall receive leave with pay in order to participate in the activities described in paragraph 18.04(a).*

c. *An employee may apply at any time for professional development under this clause, and the Employer may select an employee at any time for such professional development.*

d. *When an employee is selected by the Employer for professional development under this clause the Employer will consult with the employee before determining the locations and duration of the program of work or studies to be undertaken.*

e. *An employee selected for professional development under this clause shall continue to receive his normal compensation including any increase for which the employee may become eligible. The employee shall not be entitled to any compensation under Articles 9, Overtime, and 13, Travelling Time, while on professional development under this clause.*

f.

i. *An employee on professional development under this clause may be reimbursed for reasonable travel expenses and such other additional expenses as the Employer deems appropriate.*

Sub-paragraph (f)(ii) applies only to Health Canada's NU-CHN's *[sic]* ***in the First Nations and Inuit Health (FNIH).***

ii. *An employee on the Primary Care Skills Program shall be deemed to be on travel status.*

g. *Subject to budgetary and operational constraints, the Employer shall make every reasonable effort to accommodate shift changes or rest day changes to facilitate attendance at workshops, short courses, similar out-service programmes or continuing education courses while on duty.*

[Emphasis in the original]

[40] Mr. Racine explained that the employer considers Mainpro costs an integral part of professional development. It allows following the training that physicians have received.

[41] Mr. Racine explained that the employer does not reimburse CME tracking fees under article 21 since there is no requirement for physicians to be CFPC members. To be precise, Mainpro is not a licence, and physicians are not required to be CFPC members for it to track their training hours through Mainpro.

[42] The employer therefore reimburses the medical advisors' CPD tracking fees under article 18 of the SH collective agreement. It is of the view that those fees meet the criteria of a continuing education course that allows the medical advisors to keep up to date with knowledge and skills in their respective fields and to acquire continuing profession-specific credits required to complete or maintain current licensing or registration standards contemplated in clause 18.04(a)(i) of the SH collective agreement.

[43] At the hearing, the bargaining agent indicated that it wanted me to decide the following question: Is the employer violating article 21 of the SH collective agreement by failing to reimburse ESDC medical advisors for their CPD tracking fees, when that article mentions "… membership, registration or other related fees [paid] to organizations or governing bodies …" when the payment of the fees "… is a requirement for the continuation of the performance of the duties of the employee's position"?

[44] In support of its position that article 21 applies in this case, the bargaining agent made the following arguments.

[45] The bargaining agent referred me to paragraph 4:2120 of Brown and Beatty, *Canadian Labour Arbitration*, which reads in part as follows:

…

> *Another related general guide to interpretation is that in construing a collective agreement, it should be presumed that all of the words used were intended to have some meaning. As well, it is to be presumed that they were not intended to be in conflict. However, if the only permissible construction leads to that result, resolution of the resulting conflict may be made by applying the*

> *following presumptions: special or specific provisions will prevail over general provisions ….*

[46] The bargaining agent also brought to my attention *Canadian Federal Pilots Association v. Treasury Board*, 2017 PSLREB 13. Paragraph 26 of that decision reads as follows:

> *[26] While it is true that when applying or interpreting a collective agreement, the fundamental objective is to search for the parties' intention, one must start the analysis with the actual wording that the parties agreed to. If the wording is clear and unambiguous, then there is no need to go beyond the words, and one must give effect to the words the parties chose unless doing so leads to an absurdity.*

[47] The bargaining agent submits that the wording of article 21 is clear and unambiguous and that I should give effect to the words the parties chose unless doing so would lead to an absurdity. It submits that the plain language of article 21 ought to apply in this case. Dr. Bourassa explained that CPD tracking fees are related to "… membership, registration, or other related fees [paid] to organizations or governing bodies …". He explained that the CPSO, one of his governing bodies as he is licensed to practice medicine in both Ontario and Quebec, requires that he participate in CPD programs. Yet, the CPSO has decided that only certain organizations it recognizes can track his CPD hours; the CFPC is one of them. Dr. Bourassa stated that if his training hours were not recorded by one of those recognized organizations, it could affect his medical licence, which could be restricted or revoked. And medical advisors are required to hold a medical licence to maintain their employment as medical advisors at ESDC.

[48] The bargaining agent submits that while the employer has chosen to interpret article 21 in a way that renders it inapplicable — it reimburses CPD tracking fees to the medical advisors under article 18 — allowing its interpretation to stand would encourage a trend that would make article 21 superfluous or meaningless (unnecessary). This would lead to an absurd result, as mentioned in *Canadian Federal Pilots Association*. All the words in a collective agreement are presumed to have meaning, and all collective agreements are to be read and interpreted as a whole.

[49] In summary, according to the bargaining agent, taking into account articles 18 and 21, it is more reasonable to determine that the parties intended for article 21 to be activated when there is a link between a membership- or registration-related fee and

the requirement of the job. This is the clearest distinguishing factor between clause 18.04 and article 21. This interpretation would continue to provide meaning to the words of the SH collective agreement, including the statement under clause 1.02, which reads as follows:

> ***1.02*** *The parties to this Agreement share a desire to improve the quality of the Public Service of Canada, to maintain professional standards and to promote the well-being and increased efficiency of its employees to the end that the people of Canada will be well and effectively served. Accordingly, they are determined to establish with the framework provided by law, an effective working relationship at all levels of the public service in which members of the bargaining units are employed.*

[50] For its part, the employer brought to my attention the following passage from *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*, 2002 NBCA 30 at para. 10:

> *[10] … In short, the words of a collective agreement are to be given their ordinary and plain meaning [sic] unless there is a valid reason for adopting another. At the same time, words must be read in their immediate context and in the context of the agreement as a whole. Otherwise, the plain meaning interpretation may conflict with another provision.*

[51] In addition, the employer brought to my attention paragraph 28 of *Foote v. Treasury Board (Department of Public Works and Government Services)*, 2009 PSLRB 142, which reads as follows:

> *[28] In determining the plain and ordinary meaning, the starting point is that the parties are presumed to have intended what they have said. Occasionally, an arbitrator or adjudicator may be required to imply a term. However, that occurs only when it is necessary to give the collective agreement "business or collective agreement efficacy" and only if it is determined that the parties would have agreed to the implied term without hesitation had they been apprised of the deficiency (see Brown and Beatty, at 4:2100).*

[52] The employer submits that the CPSO has approved Mainpro, which is used to track physicians' CPD activities in Ontario. However, it submits that the evidence establishes that a physician does not need to be a member of the CFPC or other recognized organization to use Mainpro. It referred me to an excerpt from the CPSO's "Dialogue" document, which includes FAQs. One of them reads as follows:

> ***Q:*** *I am not a member of either national body* [the CFPC or the RCPSC]*. Will either College allow me to track my CPD with them?*

> *Yes. Since 2006, both the CFPC and RCPSC have developed tracking services for the several thousand physicians who do not belong to either body. If physicians choose to use one of the national bodies to track CPD, this service will map to the same requirements as members. There is a fee for this service.*
>
> [Emphasis in the original]

[53] The employer submits that the evidence demonstrates that a physician is not required to be a CFPC member to earn Mainpro credits. It has shown that medical advisors who have made Mainpro non-member participant payments in the past have been reimbursed by the employer the same way it reimburses them for attending conferences or for their training expenses under article 18 of the SH collective agreement.

[54] The employer submits that all training issues are covered by article 18, which is very comprehensive and includes several categories that are covered from clauses 18.01 to 18.07. In particular, the bargaining agent brought to my attention clause 18.04(a)(i), which addresses the issue of continuing education courses that are “required” to maintain current licensing standards. It reads as follows:

> ***18 04 Professional Development***
>
> *a. The parties to this Agreement share a desire to improve professional standards by giving the employees the opportunity on occasion:*
>
> *i. to participate in workshops, short courses, similar out-service programs or continuing education courses to keep up to date with knowledge and skills in their respective fields, to acquire continuing profession specific credits required to complete or maintain current licensing/registration standards.*
>
> [Emphasis in the original]

[55] The employer submits that tracking CPD hours is logically linked to professional development. It adds that as noted in paragraph 4:2120 of Brown and Beatty, “… special or specific provisions will prevail over general provisions …”. Thus, it submits that the bargaining agent’s argument that article 21 (the payment of membership, registration, or other related fees) should be interpreted to encompass such fees, including CPD tracking fees, is not valid since article 18 is more specific and is designated to apply to professional development.

[56] The employer adds that article 21 covers the payment of membership, registration, or other related fees, which means fees related to registration and

membership. It provided as an example some of the costs incurred by lawyers. It explained that after articling, when it hires a lawyer, it pays the lawyer's bar membership, bar exam fees, and other similar fees. It brought to my attention paragraphs 47 and 54 of *Association of Justice Counsel v. Treasury Board*, 2015 PSLREB 23. Paragraph 47 reads as follows:

> *[47] I accept the proposition of both counsel that there are three types of fees law students have to pay, as follows:*
>
> *i. application for membership;*
>
> *ii. cost of courses and examinations;*
>
> *iii. call to the bar fees.*

[57] The question in that case was whether such fees are required for the student to acquire his or her professional qualification. The Public Service Labour Relations and Employment Board determined that the membership and bar fees of law students offered permanent employment as lawyers were required for them to acquire their professional qualification.

[58] However, the employer argues that to use Mainpro, ESDC medical advisors are not required to be CFPC members (it governs Mainpro). Therefore, they can maintain their professional qualifications by using Mainpro without being CFPC members. Specifically, by using Mainpro, they benefit from the tracking of their professional development hours. Yet, CFPC membership is not "a requirement" per article 21 of the SH collective agreement. Therefore, article 21 does not apply.

[59] Therefore, the employer submits that it is more appropriate for it to reimburse CPD tracking fees under article 18 of the SH collective agreement.

[60] In response, the bargaining agent argues that the policy grievance concerns not only Mainpro costs but also all CPD tracking costs.

[61] I conclude that it is mandatory for an ESDC medical advisor holding a CPSO medical licence to report his or her CPD activities through an approved organization, like the CFPC. I acknowledge that it is not necessary for the medical advisor to be a member of the CFPC to benefit from the tracking of his or her CPD activities through the Mainpro service administered by that organization. He or she can become a Mainpro non-member participant with the CFPC and still report CME activities through Mainpro and claim Mainpro credits to the CPSO.

[62] Once again, clause 21.01, which deals with membership, registration, and other related fees, provides as follows:

> ***21.01*** *The Employer shall reimburse an employee for the payment of membership, registration or other related fees to organizations or governing bodies when the Employer is satisfied that the payment of such fees is a requirement for the continuation of the performance of the duties of the employee's position.*
>
> [Emphasis in the original]

[63] According to the employer, since membership in an organization such as the CFPC is not "a requirement" per article 21 of the SH collective agreement, article 21 does not apply.

[64] I do not agree with that view of things. Medical advisors registered with the CPSO who do not belong to any of the organizations approved in Ontario for tracking CPD hours must nevertheless pay a fee to an organization such as the CFPC as non-member participants for it to record their CPD activities with the CPSO. In other words, physicians must register with the CFPC to obtain at least a non-member participant status to have their CPD activities tracked with Mainpro for CPSO licensing purposes. That service is not free of charge — there is a registration fee. I am therefore of the opinion that the Mainpro non-member participant fees paid by ESDC medical advisors to the CFPC fall within the scope of "… membership, registration or other related fees to organizations or governing bodies …".

[65] In addition, I am of the opinion that paying these fees "… is a requirement for the continuation of the performance of the duties of the employee's position." Based on the evidence, if an ESDC medical advisor chose not to pay the Mainpro non-member participant fee (or registration fee), the approved organization would not record his or her CPD activities, and the medical advisor's medical licence would be at risk. Specifically, the bargaining agent filed evidence that specifies that for example, Dr. Bourassa is required to report his CPD activities through an approved organization and that failing to would have consequences. Specifically, on March 25, 2013, he was informed of the following, among other things, by the CPSO:

> …
>
> *Because it is a requirement for you to report your CPD activities through an approved organization, I would encourage you to review the programs of the approved organizations and join one of them to begin formally tracking your CPD activities.*

…

> *The College expects that when you complete your annual renewal in 2013, you will be in compliance with the regulation. Failure to do so will result in a review of information regarding your practice and any other relevant considerations, which will likely lead to either an assessment of your practice (at your expense) or an investigation into your lack of compliance.*

[66] Although the employer is not convinced that paying CFPC membership fees is necessary for the continued performance of the employee's (the advisors') duties, it is clear that the CPSO has ruled that a physician is required to report his or her CPD activities through an approved organization to maintain his or her licence. And to continue to perform their duties as ESDC medical advisors, the physicians must renew their licences to practice medicine every year.

[67] I acknowledge that the employer has chosen to reimburse the medical advisors' CPD tracking fees under article 18 of the SH collective agreement. It submits that CPD tracking fees are reimbursable under article 18 of the SH collective agreement because that article is a specific provision addressing CPD activities and professional development. It claims that I should interpret the two clauses, 18.04 and 21.01, according to the guidance that "… special or specific provisions shall prevail over general provisions …" (see Brown and Beatty, at paragraph 4:2120). In the employer's view, article 18 is more specific and is intended to apply to professional development.

[68] It is true that as the employer claims, tracking CPD activities is logically linked to professional development. Clause 18.04(a) is clearly about the acquisition of training. Yet, there is nothing in the clause that addresses the tracking of training. In my view, clause 18.04(a) can be viewed as specific to the acquisition of training, while clause 21.01 relates to the costs of maintaining professional registration. CME tracking fees relate to "maintaining" professional registration, not to "acquiring" training.

[69] I also agree with the bargaining agent that allowing the employer to maintain its interpretation could have a negative effect in the future. One reason is that the benefit conferred by clause 18.04(a) is granted only on an occasional basis, not on a regular basis. Clause 18.04(a) specifically provides that while both parties have in common a desire to improve professional standards, it specifies that they agreed that the employer would occasionally give employees the opportunity to do the following:

…

> i. *to participate in workshops, short courses, similar out-service programs or continuing education courses to keep up to date with knowledge and skills in their respective fields, to acquire continuing profession specific credits required to complete or maintain current licensing/registration standards.*

[70] Therefore, it is agreed that occasionally, the employer will allow employees to participate in training to maintain their knowledge and to obtain the specific credits necessary to meet or continue to meet the registration or licensing standards of their profession.

[71] On the other hand, a medical advisor is required to report annually to the CPSO on his or her CPD activities through an approved organization. The advisor cannot do it only occasionally. In addition, as noted, if a medical advisor's training hours are not recorded, it could negatively impact his or her medical licence.

[72] In sum, I find the wording of article 21 clear and unambiguous. There is no need to go beyond its words. It applies when a fee is necessary to acquire or maintain a professional registration required for the continued performance of the employee's duties.

[73] Therefore, I conclude that CPD tracking fees (or Mainpro non-member participant fees) are reimbursable under article 21 of the SH collective agreement, not under article 18.

B. Policy grievance in file no. 569-02-178

[74] The bargaining agent submits that the issues in this policy grievance (file no. 569-02-178) are 1) whether the employer is violating article 21 of the SH collective agreement by refusing to reimburse ESDC medical advisors practising in Quebec the professional liability insurance fees they pay yearly, and 2) whether, by denying that reimbursement, the employer is violating article 5 (entitled "Management Rights") and its implied duties and obligations, to which it is expected to apply its management discretion.

1. Issue 1 - Is the employer misinterpreting article 21 of the SH collective agreement by refusing to reimburse ESDC medical advisors working in Quebec their professional liability insurance fees?

[75] Dr. Bourassa explained that the liability insurance fees for physicians in Quebec vary depending on the nature of their work. For administrative work, the insurance fee

is lower. For more risky work, it is higher. Each province has a schedule of liability insurance fees.

[76] Dr. Bourassa explained that in the past, the employer reimbursed the portion of his liability insurance fee that corresponded to the administrative work that he accomplished for ESDC in Quebec. He filed in evidence documentation from 2007 to 2013 that shows that the employer reimbursed him annually for a portion of his expenses paid to the CMPA during those years.

[77] Since 2014, the employer has refused to reimburse any portion of his liability insurance fees.

[78] Specifically, on February 7, 2014, Ms. Wilson advised the ESDC medical advisors of the following:

> *The purpose of this e-mail [sic] is to clarify the provisions in the collective agreement relating to Article 21, which states;* "The Employer shall reimburse an employee for the payment of membership, registration or other related fees to organizations or governing bodies when the Employer is satisfied that the payment of such fees is a requirement for the continuation of the performance of the duties of the employee's position."
>
> ***Liability insurance fee***
> *In line with the interpretation of Article 21 of the Health Services collective agreement, there has been some consultation with Treasury Board on reimbursement of medical liability insurance. In the past, liability insurance fees were reimbursed for the Medical Advisors licensed in Quebec. However, Public Servants are already covered for personal liability, as per the* Policy on legal assistance and indemnification *pursuant to Section 7 of the* Financial Administration Act. *Accordingly, there is no requirement for the Employer to cover these costs.*
>
> *Considering these facts, liability insurance fees will no longer be reimbursed by the Employer. However, fees reimbursed in the past will not be recovered. This is effective February 7, 2014.*
>
> *If you have any questions or concerns regarding this interpretation of article 21 of the Health Services (PIPSC) collective agreement, do not hesitate to communicate with Patricia Wilson ….*
>
> [Emphasis in the original]

[79] Dr. Bourassa explained that while the employer recognized in the past that medical advisors require insurance to perform their administrative work and reimbursed them their CMPA fees (or the part of them that corresponded to the costs

associated with administrative work), it ceased reimbursing them in February 2014, and it denied the policy grievance filed by the bargaining agent.

[80] Dr. Bourassa testified that he must be a member of the FMOQ (association) and the CMPA (insurance) to do his job at ESDC in Quebec. In particular, he stated that he must demonstrate yearly to the CMQ that he has proof of insurance with the CMPA to renew his medical licence. He explained that the CMPA is not a private insurance company but that the CMQ and CPSO, his two governing bodies, have authorized it as an independent body to provide insurance to physicians.

[81] He explained that the amount of insurance required in Quebec and Ontario differs. It is lower in Quebec than in Ontario. The two provincial colleges of physicians require that physicians complete an online form each year, when their licences are renewed. Dr. Bourassa explained that he must provide his CMPA registration number to the CMQ to obtain his licence each year. The procedure in Ontario is slightly different.

[82] Dr. Bourassa explained that the CPSO has recognized the employer's "Policy on Legal Assistance and Indemnification" ("the indemnification policy") as applicable and sufficient. He explained that a CPSO directive specifies how a physician can meet the professional insurance requirement, as follows:

> …
>
> ***Declaration by Applicant:***
> ***Professional Liability Protection***
>
> *Under the College's registration regulation, applicants for registration must have professional liability protection in compliance with the College's by-laws.*
>
> *Applicants are required to sign a declaration that they comply which s. 50.2 of the by-law, as follows:*
>
> > Each member shall obtain and maintain professional liability protection that extends to all areas of the member's practice, through one or more of,
> >
> > (a) membership in the Canadian Medical Protective Association;
> >
> > (b) a policy of professional liability insurance issued by a company licensed to carry on business in Ontario that provides coverage of at least $10,000,000;

> (c) coverage under the Treasury Board Policy on Legal Assistance and Indemnification (for Crown servants of Canada).
>
> …

[83] However, since he works in Quebec, Dr. Bourassa explained that he must meet the CMQ's insurance requirement. In addition, he explained that because he holds two medical licences, one in Quebec and one in Ontario, the CMPA decides how much liability insurance he must hold. Its policy is to ensure that every physician has adequate protection, so each must subscribe to the highest insurance coverage for specific types of medical practice.

[84] Dr. Bourassa insisted that the CMQ does not recognize the indemnification policy as applicable and sufficient. On the contrary, in the rules it adopted, it states that a physician who works in a government department carries out medical activities that require him or her to take out professional insurance. Thus, he must take out professional insurance with the CMPA.

[85] Following his employer's refusal to pay part of his liability insurance fee, on March 11, 2014, Dr. Bourassa contacted the CMQ to obtain written confirmation that insurance is mandatory for maintaining a medical licence in Quebec.

[86] On March 19, 2014, the CMQ replied to Dr. Bourassa. It stated that s. 2.01 of the applicable regulation (*Regulation respecting professional liability insurance of physicians* (CQLR c M-9, r. 15; "the *Regulation*")) states that physicians must "[translation] … hold and keep in force an insurance contract providing coverage against any liability that they or their employees and agents may incur, through error or negligence committed in the practice of their profession."

[87] Dr. Bourassa explained that he must have sufficient annual professional liability insurance to cover all his activities. He explained that in his case, he must take out professional liability insurance using code 82 (in Ontario), which applies to the practice of emergency medicine. Code 20 applies to the practice of administrative medicine. As mentioned, the professional liability insurance fee associated with the practice of administrative medicine is lower than the fee associated with the practice of emergency medicine. For example, in 2018, the Ontario professional liability insurance associated with the practice of administrative medicine was $2700. Yet, because he practises emergency medicine, his professional liability insurance was $13 872.

[88] Dr. Bourassa filed in evidence the confirmation that he paid his CMPA membership fees yearly. In 2013, his professional liability insurance fee was $7812, which was associated with practising emergency medicine in Ontario. Similarly, in 2014, his CMPA membership fee was $10 992. In 2015, it was $12 852; in 2016, $12 336; in 2017, $16 644; in 2018, $13 872; and in 2019, $12 948.

[89] Dr. Bourassa explained that between 2001 and 2013, the employer reimbursed his professional liability insurance fee associated with practising administrative medicine in the province where he worked. As he has been working in Quebec since 2005, he would have been reimbursed the amount associated with practising administrative medicine there. For example, had the employer continued reimbursing him, in 2018, he would have received $1020.24, according to the applicable table.

[90] Dr. Bourassa also brought to my attention the rules governing professional liability insurance and the obligations of Quebec physicians. Specifically, the rules provide that the insurance contract must provide, in particular, the following:

> [Translation]
>
> *a) the insurer agrees to pay, in the stead of the insured person, up to the amount of the coverage, any damages-interest that the insured person may legally be required to pay to a third party with respect to a claim submitted during the period of coverage and resulting from professional services rendered or from the failure to render such services by the insured person during the exercise of the insured's duties; the agreement covers any claim submitted during the three years following the period of coverage during which an insured person dies;*
>
> *b) the insurer agrees to hold harmless and to defend the insured person in any action taken against the insured in a court of civil jurisdiction;*
>
> *c) the coverage provided by the insurer must extend to any claim submitted against the insured person for the five years following the year in which the insured person no longer is obligated to maintain liability coverage or in which the insured ceases to be a member of the College;*
>
> *d) the coverage is automatically extended, without notice to the insurer, to persons who become employees of the insured person during the period of coverage, as well as to physicians who become partners of the insured person and in that case, the partnership as formed or changed is for all purposes considered to be the insured person.*

[91] In certain cases, under these rules, a physician is not required to hold and maintain an insurance contract establishing coverage against professional liability. However, Dr. Bourassa explained that those situations do not apply to him. They are as follows:

> [Translation]
>
> ***Exemptions***
>
> *Physicians are not required to hold and maintain in force an insurance contract providing coverage against their professional liability if:*
>
> *(1) they do not exercise any of the activities stipulated in section 31 of the Medical Act under any circumstances;*
>
> *(2) they practise their profession exclusively outside Quebec.*
>
> …
>
> *For the purposes of the insurance exemption, it is best to remember that the practice of medicine is not limited to prescribing medication and examinations. Here are some other concrete examples of practising the medical profession:*
>
> …
>
> - *consulting physician (e.g., BEM, SAAQ, Department, RAMQ, CNESST).*
>
> [Emphasis in the original]

[92] Section 31 of the Quebec *Medical Act* reads as follows:

> *The practice of medicine consists in assessing and diagnosing any health deficiency in a person in interaction with their environment, in preventing and treating illness to maintain or restore health or to provide appropriate symptom relief.*
> *The following activities in the practice of medicine are reserved to physicians:*
> *(1) diagnosing illnesses;*
> *(2) prescribing diagnostic examinations;*
> *(3) using diagnostic techniques that are invasive or entail risks of injury;*
> *(4) determining medical treatment;*
> *(5) prescribing medications and other substances;*
> *(6) prescribing treatment;*
> *(7) using techniques or applying treatments that are invasive or entail risks of injury, including aesthetic procedures;*
> *(8) providing clinical monitoring of the condition of patients whose state of health is problematic;*
> *(9) providing pregnancy care and conducting deliveries;*
> *(10) making decisions as to the use of restraint measures;*
> *(11) deciding to use isolation measures in accordance with the Act respecting health services and social services (chapter S-4.2) and the Act respecting health services and social services for Cree Native persons (chapter S-5); and*

(12) administering the drug or substance allowing an end-of-life patient to obtain medical aid in dying under the Act respecting end-of-life care (chapter S-32.0001).

[93] Dr. Bourassa explained that he cannot be exempted from taking out insurance on the grounds that he "[translation] under no circumstances carries out any of the activities mentioned in Article [*sic*] 31 of the *Medical Act*". The reason is that the rules specify that practising medicine is not limited to writing prescriptions and carrying out examinations and that a consulting physician in a government department also practises the medical profession.

[94] However, on March 8, 2016, Mr. Racine sent him a letter advising him of the following:

> [Translation]
>
> …
>
> *Following up on your emailed request of February 23, 2016, about the reimbursement of your Canadian Medical Protective Association (CMPA) fees, we inform you that we cannot reimburse them, as indicated in the last two paragraphs of the letter from [sic] Ms. Debi Daviau, President of the Professional Institute of the Public Service of Canada, dated July 29, 2015.*

[95] The last paragraphs of the letter sent to the bargaining agent's president, Debi Daviau, on July 29, 2015, read as follows:

> …
>
> *Also, in reviewing the facts of the matter, I note that the fees contemplated in article 21 are direct requirements required by the Employer. The costs covered by the Employer do not extend to indirect requirements such as professional liability insurance fees.*
>
> *In addition, I note that section 3.03 of the* Regulation respecting professional liability insurance of physicians, *CQLR c M-9, r. 15 (*the Regulation), *provides that a physician is not obligated to have professional liability insurance if they do not perform any of the activities listed at section 31 of the* Medical Act. *ESDC does not require its Medical Advisors to perform any of the duties listed in section 31 of the* Medical Act *and as such Medical Advisors can complete the form in Annex 1 of the* Regulation *and report that they do not perform the activities.*
>
> *Therefore, I conclude that Medical Advisors are not entitled to be reimbursed for professional liability insurance fees as per article 21 of the SH collective agreement and the grievance is consequently denied.*

[96] Dr. Bourassa stated that he performs the activities set out in s. 31 of the Quebec *Medical Act.* He explained that although a third party (an applicant's attending physician) states the applicant's diagnosis that is presented to ESDC in the documentation provided to it, in his medical advisor role, he must specify the applicant's condition or disease. He must also specify the appropriate treatment. Therefore, he makes a prognosis that he shares with his employer.

[97] On February 1, 2019, Dr. Bourassa again emailed the CMQ. He specified that the rules on professional liability insurance specify that a consulting physician who works in a (government) department also practises the medical profession. Thus, he asked for the following:

> [Translation]
>
> …
>
> *So, I interpret this as meaning that a consulting physician working in a government department (in Quebec) is required to have CMPA-style liability insurance.*
>
> *Please confirm this by email and/or in a letter….*
>
> *Please find attached a copy (in English) of my job description. Also, if possible, confirm that this type of employment (consulting physician for a federal department, working in Quebec) requires that I also maintain CMPA-style liability insurance.*
>
> …
>
> [Emphasis in the original]

[98] The CMQ's assistant director and counsel replied to Dr. Bourassa on February 8, 2019, as follows:

> [Translation]
>
> *A physician practising solely for a private or public agency on a salaried basis may, when registering for the College's roll, complete a declaration that the physician's employer holds an insurance contract with coverage that extends specifically to the physician, provided that the insurance contract includes the minimum coverage limits specified in the Règlement sur l'assurance responsabilité* [in s. 2.02]. *However, a physician who is covered by the employer but who practises medical activities* ***outside the physician's employment must take out professional liability insurance for those activities.***
>
> [Emphasis in the original]

[99] Dr. Bourassa explained that the consequence of the employer's decision to no longer reimburse him for part of his professional liability insurance fees is that he has not received an average of $1000 per year since 2014. By 2019, this amount had reached $6000.

[100] In cross-examination, Dr. Bourassa acknowledged that it is possible for a medical advisor at ESDC to work only for that employer. However, he added that it is beneficial to the employer that medical advisors have experience practising medicine.

[101] Dr. Bourassa also acknowledged that in his ESDC role, he does not see patients. He also does not communicate a diagnosis to patients, but he reviews medical tests and available documentation and provides departmental legal counsel with prognoses on patients' conditions.

[102] According to the evidence filed, the employer reimbursed Dr. Bourassa's CMQ membership fees for 2016-2017 ($1471) and his FMOQ (association) membership fees for 2015-2016 ($1893).

[103] The following year, the employer reimbursed Dr. Bourassa his CPSO membership fees for 2018 ($1725) and his FMOQ (association) membership fees for 2017-2018 ($1951). According to an email filed in evidence, he submitted a claim for a refund of his Ontario licence that year because it is more expensive.

[104] Mr. Racine testified that an ESDC medical advisor, who works only on behalf of ESDC on a salaried basis in Quebec, when registering with the CMQ, may complete a declaration that "(translation) [her or she] has coverage with the employer that meets the requirements of the regulation." Mr. Racine stated that the indemnification policy meets the requirements of an insurance contract with coverage for the minimum limits required by the rules governing professional liability insurance. He also referred me to s. 3.02 of the *Regulation*, which reads as follows:

> [Translation]
>
> *3.02 A physician practising his or her profession solely for the account of a private or public agency on a salaried basis is deemed to comply with this Regulation if the physician sends the secretary of the College, with the physician's registration to the membership roll, a declaration that the physician's employer holds an insurance contract with coverage that extends specifically to the physician, provided that the*

> *insurance contract includes the minimum coverage limit specified in this Regulation.*

[105] Mr. Racine also brought to my attention the following provisions of the *Regulation*:

> [Translation]
>
> …
>
> *2.01 Physicians who practise their profession for their own account part-time or full-time, either alone or in partnership with other physicians, must hold and keep in force an insurance contract providing coverage against any liability that they or their employees and agents may incur, through error or negligence committed in the practice of their profession.*
>
> *In the case of a partnership of physicians, the insurance contract may be signed on behalf of the partnership, but the coverage must include each physician partner or employee personally.*
>
> *In the case of a physician employing other physicians, the coverage must include each of them personally.*
>
> …
>
> *3.03 Despite clause 2.01, physicians are not required to hold and maintain in force an insurance contract providing professional liability coverage if:*
>
> *(1) they do not exercise any of the activities stipulated in section 31 of the Medical Act (chapter M-9) under any circumstances;*
>
> *(2) they practise their profession exclusively outside Quebec.*
>
> …

[106] Mr. Racine added that ESDC medical advisors are covered by the indemnification policy, like all public service employees. He referred me to it. It provides a broad definition of a "Crown servant". He also referred me to section 5.1, which reads as follows:

> ***5.1 Objective***
>
> *The objectives of this policy are to:*
>
> - *protect Crown servants from personal financial losses or expenses incurred while they were acting within the scope of their duties or in the course of their employment, and were not acting against the interests of the Crown;*
> - *protect the Crown's interest and its potential or actual liability arising from the acts or omissions of its Crown servants; and*

- *ensure continued and effective public service to Canadians.*

[Emphasis in the original]

[107] He also brought to my attention section E of Appendix A of that policy, which states the following:

E) All other Crown Servants not mentioned above		
Requestor	*Approval Required From*	*Limits of Legal Assistance and Indemnification*
• *Both Current and Former*	*Deputy Head*	• *Indemnification—no limit* • *Legal assistance provided by Department of Justice—no limit* • *Legal assistance provided by private counsel—up to a limit of $50,000*
• *Both Current and Former*	*Minister*	• *Legal assistance provided by private counsel—over $50,000*

[Emphasis in the original]

[108] The bargaining agent contends that by not reimbursing the professional liability insurance fees of ESDC medical advisors working in Quebec, the employer is violating article 21 of the SH collective agreement, for the following reasons.

[109] The bargaining agent submits that the professional liability insurance fees paid by medical advisors are a condition of a provincial medical licence, and therefore, the employer should reimburse them under article 21 of the SH collective agreement.

[110] It submits that one interpretation principle states that if the wording of a collective agreement is clear and not ambiguous, it should be applied. On the contrary, if it is ambiguous, the ambiguity can be resolved by resorting to extrinsic evidence. It relies on Brown and Beatty at paragraph 3:4401, entitled “Ambiguity”, in the terms of the agreement. That paragraph reads in part as follows:

…

> *Where an ambiguity is patent, that is, where it appears on the face of the agreement, an arbitrator may resort to extrinsic evidence as an aid to its interpretation. Where an ambiguity is latent, that is, where it is not apparent on its face, an arbitrator may rely upon extrinsic evidence not only as an aid to resolve the ambiguity once it is established but also to disclose the ambiguity.…*

…

[111] The bargaining agent submits that while it appears that some arbitrators and adjudicators disagree, the Ontario Court of Appeal stated that a latent ambiguity can appear not just in the language of the instrument but also in its application to the facts. In this case, the bargaining agent submits that in both the wording and application, one could construe that there is a latent ambiguity in article 21 of the SH collective agreement. Initially, it may not be apparent whether the term "a requirement" applies in this case, given that the employer argues that there is no requirement for it to cover the cost under the assumption that an internal policy may fulfil the requirements of a third party.

[112] The bargaining agent submits that the question is determining who owns the requirement. It submits that the employer refuses to apply article 21 of the SH collective agreement (and that it denied a more recent attempt by a Quebec-based ESDC medical advisor to be reimbursed professional liability insurance fees) on the following grounds:

(1) article 21 does not extend to premiums paid under an insurance contract that are not of the same nature and that do not share the same characteristics as membership or registration fees;
(2) the fees contemplated in article 21 are direct requirements of the employer, and the costs it covers do not extend to indirect requirements, such as professional liability insurance fees; and
(3) ESDC medical advisors do not perform medical acts as described in s. 31 of the Quebec *Medical Act* (CQLR, c. M-9); thus, they can apply for an exemption.

[113] The bargaining agent argues that there is clearly an ambiguity with the words "a requirement". Again, the ambiguity is in the eyes of the person creating the requirement; is it a requirement as the employer perceives it, without regard to an organization's requirement, or can it be an organization's requirement?

[114] It submits that arbitrators and adjudicators have referenced the idea that an ambiguity can be established or resolved by extrinsic evidence, past practice, or the negotiating history. This concept dates to 1967. The bargaining agent referred me to paragraph 12 of *I.A.M., Local 1740 v. John Bertram & Sons Co.*, 1967 CarswellOnt 782, which reads in part as follows:

> *12 A second use of "past practice" is quite different and occurs even where there is no detrimental reliance. If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity.…*

[115] The bargaining agent submits that the evidence shows that in the past, the employer interpreted the SH collective agreement in a manner that allowed Quebec ESDC medical advisors with an outside practice to apply for reimbursement as long as there was a connection to their work. Since the type of work they did for the employer could be covered by medical insurance, for example, administrative work that was evaluated at a premium of approximately $1000, the employer reimbursed that amount of the premium.

[116] The bargaining agent states that the Board should consider the parties' conduct as an aid to clarifying the ambiguity in the article. In the past, the employer recognized its obligation to reimburse the amount at issue before it decided to stop doing so. Given the history of management's action, the employer should be barred by reason of estoppel from changing its established past practice of reimbursing Quebec medical advisors their professional liability insurance.

[117] To be precise, Dr. Bourassa testified that at the time, the employer was aware that he had an outside practice that affected his CMPA fees and that by its action, it acknowledged that a portion of the fees he paid could be reimbursed, which was equivalent to the fees charged for practising administrative medicine. It is not disputed that the medical advisors' work is administrative in nature. Mr. Racine also used the term "administrative" when describing their work, and he confirmed that the wording of article 21 of the SH collective agreement has not changed in recent years.

[118] The bargaining agent referred me to *Harper v. Canadian Food Inspection Agency*, 2002 PSSRB 87. The clause under consideration in that case concerned the registration fees allowance for the Veterinary Medicine group. The grievor, a veterinarian, sought the reimbursement of the registration fees that she had paid to the Ontario Veterinary College for the year 2001. The relevant provision of the collective agreement in that case required the employer to reimburse an employee for paying such fees when they were "… a requirement for the continuation of the performance of the duties of the employee's position." The evidence established that in the course of her duties, the grievor might have been required to use a controlled

drug to euthanize animals in distress or to sedate them, for testing. Although she did not require a veterinary licence to use the drug in question, she did require one to acquire it. As part of her duties, she was required to replace the district veterinarian during his or her absence. In that capacity, she could be called upon to acquire the controlled drug for the office, which she could not do without her veterinary licence. On that basis, the adjudicator concluded that she required her veterinary licence for the performance of her duties.

[119] The bargaining agent referred me to paragraph 54 of that decision, which reads as follows:

> *[54] Whether Dr. Harper uses a controlled drug once or all the time is of no moment; she was directed to acquire and use sodium pentobarbital. It is therefore a requirement of her job to be licensed because it would be illegal to obtain the drug if she were not licensed.*

[120] The bargaining agent submits that circumstances may arise in a job in which one may choose to act in a certain way, which may trigger a legal requirement. As mentioned in *Harper*, the following two conditions are required for a clause similar to article 21 of the SH collective agreement to apply:

> *[93] There are two conditions for the application of clause E2.01, first that the payment of registration fees be required to be licensed and second that the licence be a "requirement for the continuation of the performance of the duties of his position."*

[121] The bargaining agent submits that in the present case, these two conditions are met: (1) to be licensed, the insurance must be paid, and (2) the licence is a "… requirement for the continuation of the performance of the duties of the employee's position", per article 21 of the SH collective agreement. It adds that medical professionals must have a choice of coverage and that Dr. Bourassa explained that his firm belief is that he needs insurance coverage to be licensed in Quebec and to keep his position at ESDC. He used the words "diagnostic" and "diagnosis" in describing his work. He likened his work to making a diagnosis in the sense that he may provide a medical opinion after looking at medical evidence or that he may make a determination.

[122] With respect to interpreting article 21, the bargaining agent submits that one of the employer's findings in its decision on the grievance is problematic and that it

demonstrates an improper interpretation of the SH collective agreement. The employer decided as follows on the policy grievance:

> *Also, in reviewing the facts of the matter, I note that the fees contemplated in article 21 are direct requirements required by the Employer. The costs covered by the Employer do not extend to indirect requirements such as professional liability insurance fees.*

[123] The bargaining agent submits that no distinction is made in article 21 of the SH collective agreement between a direct and an indirect requirement. It insists that professional liability insurance fees must be paid to hold a medical licence in Quebec.

[124] With respect to the employer's conclusion that ESDC medical advisors are not obligated to hold professional liability insurance since they do not perform any of the activities listed in s. 31 of the *Medical Act*, the bargaining agent submits that the evidence shows that it is not clear whether the CMQ considers the type of work they do as the practice of medicine.

[125] In addition, the bargaining agent opposes the employer's findings that article 21 of the SH collective agreement covers "… membership, registration or fees related thereto" and that it does not extend to premiums paid under an insurance contract, which are not, in its view, in the same nature and do not share the same characteristics as membership or registration fees. The bargaining agent submits that article 21 does not describe a degree of relation. It submits that the word "related" should be given broad meaning.

[126] In response, the employer submits that this is a hearing *de novo* (starting from the beginning), in which the Board is asked to consider the evidence before it and decide the matter afresh.

[127] The employer submits that a medical advisor working at ESDC must hold a valid medical licence in one of Canada's provinces or territories. This is a condition of employment. Thus, the employer reimburses under article 21 of the SH collective agreement the payment of the medical advisor's medical licence. It reimburses the payment of the membership because it is satisfied that the payment of such fees is required for the continuation of the performance of the duties of the employee's position.

[128] However, for several reasons, the employer does not reimburse medical advisors' insurance costs.

[129] The first reason is that medical advisors are covered by the indemnification policy. The employer notes that the policy specifies three basic eligibility criteria in section 6.1.5, as follows:

> ***6.1.5 Three basic eligibility criteria****: In considering Crown servants for legal assistance or indemnification, determining whether the Crown servant:*
>
> - *acted in good faith;*
> - *did not act against the interests of the Crown; and*
> - *acted within the scope of their duties or course of employment with respect to the acts or omissions giving rise to the request.*
>
> [Emphasis in the original]

[130] According to the employer, medical advisors working for ESDC are covered by that policy and benefit from the protection it provides. And the eligibility criteria are typical of those in the insurance sector.

[131] In addition, according to the employer, section E of Appendix A states that there is no limit to the indemnification offered to Crown servants. Thus, ESDC medical advisors working in Quebec can simply fill out the declaration form and indicate that they are covered by the policy, and the CMQ accepts it. I note however that this claim is not supported by any evidence.

[132] The employer thus maintains that the bargaining agent has not provided any evidence that the indemnification policy does not apply to or cover ESDC medical advisors or that the CMQ does not accept it as valid protection. Yet, it had that burden.

[133] The employer adds that the CPSO recognizes specifically that the indemnification policy is equivalent to the protection offered by the CMPA. The CPSO's directive specifies that it recognizes that policy as valid professional liability protection. It states as follows how a physician can sign a declaration:

…

> ***Declaration by Applicant:***
> ***Professional Liability Protection***

> *Under the College's registration regulation, applicants for registration must have professional liability protection in compliance with the College's by-laws.*
>
> *Applicants are required to sign a declaration that they comply which s. 50.2 of the by-law, as follows:*
>
> > Each member shall obtain and maintain professional liability protection that extends to all areas of the member's practice, through one or more of,
> >
> > (a) membership in the Canadian Medical Protective Association;
> >
> > (b) a policy of professional liability insurance issued by a company licensed to carry on business in Ontario that provides coverage of at least $10,000,000;
> >
> > (c) coverage under the Treasury Board Policy on Legal Assistance and Indemnification (for Crown servants of Canada).
>
> …

[134] The employer adds that since the indemnification policy is recognized in Ontario, there is no reason to believe that it is not valid in Quebec.

[135] Specifically, the employer argues that Dr. Bourassa wrote to the CMQ to request clarification on his insurance coverage. It replied that a physician who practises his or her profession solely on behalf of a public body on a salaried basis may, at the time of registration, complete a declaration that his or her employer holds an insurance contract with coverage that extends specifically to himself or herself provided that the insurance contract includes coverage for the minimum limits set out in s. 2.02 of the *Regulation*. Nevertheless, it insisted that a doctor who is covered by his or her employer but who carries out medical activities outside that employment must take out professional liability insurance for his or her activities. Therefore, the CMQ has not stated that the indemnification policy is inapplicable.

[136] Furthermore, the employer claims that a Quebec ESDC medical advisor who requested the reimbursement of her liability insurance premium on April 21, 2016, which the employer refused on the grounds that the indemnification policy already offered her protection, did not inform it afterwards that the CMQ had refused to allow her to complete a declaration form. In addition, she did not file a grievance. Therefore, the employer's understanding is that the CMQ accepts signed declarations from medical advisors working at ESDC. In addition, Mr. Racine testified that he recalled a

discussion at some point with someone from the CMQ on this subject. He understood from that call that the CMQ would accept the indemnification policy as sufficient.

[137] The second reason the employer does not reimburse insurance costs for ESDC medical advisors is that the Quebec *Medical Act* specifies that physicians do not need insurance if they do not accomplish certain acts described in that Act.

[138] It submits that the tasks of the medical advisors at ESDC do not correspond to those set out in s. 31 of the Quebec *Medical Act*. According to their job description, they practise administrative medicine. They do not meet the individuals asking for benefits. They review reports written by the individuals' attending physicians. The employer stated that Dr. Bourassa believes that his review of a file is equivalent to issuing a medical opinion. However, according to the employer, medical advisors, including Dr. Bourassa, do not make diagnoses since they do not see patients. They do not prescribe treatments and medications. Therefore, since they do not practise active medicine, they do not need liability insurance.

[139] The third reason is that based on its legal interpretation, article 21 of the collective agreement covers "… membership, registration or fees related thereto". It does not extend to premiums paid under an insurance contract, which are not of the same nature and do not share the same characteristics as membership or registration fees.

[140] In addition, according to the employer, the fees contemplated in article 21 of the SH collective agreement are its direct requirements. Its position is based on the fact that the last part of the article clearly states that "… when the Employer is satisfied that the payment of such fees is a requirement for the continuation of the performance of the duties of the employee's position." Thus, the costs covered by the employer do not extend to indirect requirements such as professional liability insurance fees since being a member of the CMPA is not required for the continuation of the performance of the medical advisor's duties.

[141] The employer also brought to my attention paragraph 129 of *Association of Justice Counsel v. Treasury Board*, 2015 PSLREB 18, which includes the following:

…

> *[129] … As stated as follows at page 236 of* Cardinal Transportation B.C. Inc.*, and cited with approval in* Wamboldt *at paragraph 47:*
>
> > Where a monetary benefit is asserted, it normally falls to the Union to show in clear, specific and unequivocal terms that the monetary benefit is part of the employee's compensation package. Such an intent is not normally imposed by inference or implication….

[142] Therefore, according to the employer, for several reasons, it is not required to reimburse medical advisors for their insurance expenses. It adds that all the reasons as set out are applicable and intertwined. Thus, several conclusions are possible, including that medical advisors perform acts covered by s. 31 of the Quebec *Medical Act* but benefit from the insurance coverage provided by the indemnification policy. Another possible conclusion would be that they do not perform acts covered by s. 31 and that therefore, it is not necessary for them to be CMPA members.

[143] With respect to Dr. Bourassa, the employer argues that he requires a specific insurance policy for a very direct reason. It is not because, as mentioned in the last part of article 21 of the SH collective agreement, "… the Employer is satisfied that the payment of such fees is a requirement for the continuation of the performance of the duties of the employee's position." Instead, it is because, in addition to his ESDC medical advisor duties, he also works elsewhere as an emergency physician and as a coroner, which have nothing to do with his work at ESDC.

[144] The employer also added that despite Dr. Bourassa's assertion that his emergency physician work adds value to his medical advisor work because it allows him to keep abreast of new developments in medicine, it is not a relevant factor that must be considered under article 21 of the SH collective agreement. It submits that practising emergency medicine in a hospital setting (and acquiring CMPA membership) cannot simply enhance an employee's ability to perform his or her job. As stated in *Ells v. Treasury Board (Department of Fisheries and Oceans)*, 2013 PSLRB 120 at para. 35, the employee must have to perform the duties of the job. The paragraph reads as follows:

> *[35] The language of the collective agreement is clear. Membership in a professional organization cannot simply be something that enhances an employee's ability to perform his or her job but must be necessary for the employee to perform the duties of the job to the extent that, without it, the employee cannot continue in the position. The case law supports that interpretation.* Muller *and*

> Rosendaal et al. *are particularly apt in the circumstances of this grievance because in both those cases, as in this one, the importance of a professional designation to certification as an expert witness was advanced in support of the claim to have the professional fees reimbursed.*

[145] The employer insisted that even if Dr. Bourassa were not a CMPA member, he could still perform his medical advisor duties with ESDC, since his Quebec medical licence would still be valid. It would be valid either because he does not require insurance since he does not accomplish the activities listed in s. 31 of the Quebec *Medical Act* or because, in the alternative, the CMQ accepts signed declarations from medical advisors working at ESDC.

[146] Finally, the employer argues that its past practice is not relevant in this case. It notes that more or less, the bargaining agent seeks an order that would compel the Board to accept the employer's previous finding that it had to reimburse the portion of its medical advisors' insurance costs that corresponded to the amount associated with administrative work based on the principle of issue estoppel.

[147] The employer notes that the basic elements of the concept of issue estoppel are set out by Brown and Beatty in paragraph 2:2211 as follows:

> <u>*2:2211 — The basic elements*</u>
>
> *The concept of equitable estoppel is well developed at common law and has been expressed in the following way:*
>
>> *The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.*
>
> …
>
> [Emphasis in the original]

[148] The employer argues that the Board should not apply the principle of issue estoppel here. It maintains that Ms. Wilson informed the medical advisors in 2014 that an interpretation of the SH collective agreement had been requested from the Treasury Board on this matter. Thus, after receiving guidance from the Treasury Board, ESDC

advised the medical advisors that it would no longer pay these fees for the reasons it stated.

[149] The employer submits that the Board's role is to make a new determination of the meaning of article 21 of the SH collective agreement, not to apply the principle of issue estoppel. Once the employer gave notice to the bargaining agent that it would no longer reimburse the fees, past practice ceased to be relevant.

[150] In addition, the employer notes that it did not recover fees reimbursed to medical advisors even if its past interpretation of article 21 of the SH collective agreement was incorrect. It submits that only in the event that it attempted to recover these fees would the principle of issue estoppel be relevant. It notes that the duration of estoppel is described by Brown and Beatty as follows at paragraph 2:2213:

> *2:2213 — Duration of an estoppel*
>
> *… However, once an estoppel has arisen, arbitrators are generally agreed that the estoppel may have a limited duration. Accordingly, notice of an intent to revert to the strict terms of the agreement or conduct that indicates that there will be a reversion to the party's strict legal rights, such as the filing of a grievance, or the negotiation of settlement of a grievance, will bring the estoppel to an end.…*
>
> …
>
> [Emphasis in the original]

[151] The employer is also of the view that estoppel cannot be used directly to provide the basis for a grievance. It brought to my attention the following excerpt from Brown and Beatty, at paragraph 2:2214:

> *2:2214 — Estoppel founded upon the bargaining relationship or only on the contract*
>
> *It has been the opinion of some arbitrators and courts that the doctrine can operate only as a "shield" and not as a "sword". That is, estoppel cannot be used directly to provide the basis for a grievance but rather it can operate only to prevent an allegation of contractual breach from being successful.…*
>
> …
>
> [Emphasis in the original]

[152] Furthermore, the employer argues that it has never made an express or implied promise to medical advisors, including Dr. Bourassa, to reimburse their insurance expenses. It brought to my attention paragraphs 46 and 47 of *Dubé v. Canada*

(Attorney General), 2006 FC 796. In that decision, the Federal Court stated the principle that a promise may result in an estoppel. However, it requires that a promise has been made. Those paragraphs read as follows:

> ***46*** *In short, according to the case law, such a promissory estoppel cannot exist unless there is an express or implied promise the effects of which are clear and precise. It is also well settled that the doctrine of promissory estoppel requires that the promise led the person to whom promise [sic] was addressed to act in some other way than he or she would have acted in other circumstances: see* The Queen v. Canadian Air Traffic Control Association*, [1984] 1 F.C. 1081 (F.C.A.), at page 1085.*
>
> ***47*** *In order to meet the requirements of the doctrine of promissory estoppel, the applicants must offer evidence showing that:*
>
> *(1) by its words or actions the Department made a promise to give the applicants priority designed to alter their legal relations and encourage the performance of certain acts;*
>
> *(2) on account of that commitment, the applicants took some action or in some way changed their positions.*
>
> [Emphasis in the original]

[153] The employer submits that there cannot be an estoppel in the absence of a promise, by words or by conduct. It referred me to *Pronovost v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 93.

[154] In rebuttal, the bargaining agent abandoned its argument regarding estoppel and reiterated its request that I consider the parties' past practice as an aid to interpreting the collective agreement.

[155] I conclude from the evidence that it has been shown that the employer is misinterpreting article 21 of the SH collective agreement. As mentioned, the employer decided that all professional liability insurance fees do not fall within the scope of article 21. As a result, it does not reimburse them for its medical advisors licensed in Quebec.

[156] Again, article 21 provides as follows:

> ***21.01*** *The Employer shall reimburse an employee for the payment of membership, registration or other related fees to organizations or governing bodies when the Employer is satisfied that the payment of such fees is a requirement for the continuation of the performance of the duties of the employee's position.*
>
> [Emphasis in the original]

[157] In the French version of the collective agreement, the article, entitled "*droits d'inscription*", reads as follows:

> ***21.01*** *L'employeur rembourse à l'employé les cotisations, les droits d'inscription ou tout autre droit qu'il a versés à un ou plusieurs organismes ou corporations dans la mesure où l'employeur est convaincu qu'un tel versement est nécessaire à l'exercice continu des fonctions de l'employé.*

[158] The employer considers that it has not been established that the payment of professional liability insurance fees to the CMPA by ESDC medical advisors licensed in Quebec "… is a requirement for the continuation of the performance of the duties of the employee's position." It bases its position on the fact that the CMQ's assistant director and lawyer informed Dr. Bourassa on February 8, 2019, as follows:

> [Translation]
>
> *A physician practising solely for a private or public agency on a salaried basis may, when registering for the College's roll, complete a declaration that the physician's employer holds an insurance contract with coverage that extends specifically to the physician, provided that the insurance contract includes the minimum coverage limits specified in the Règlement sur l'assurance responsabilité* [in s. 2.02]….

[159] I note that two conditions must be met to obtain the CMQ's authorization not to contribute to professional liability insurance. First, the physician must practise his or her profession solely on behalf of a public body on a salaried basis, and second, when registering, the physician must complete a declaration that his or her employer holds an insurance contract with coverage that extends specifically to himself or herself and that covers the minimum limits prescribed in s. 2.02 of the *Regulation*.

[160] A medical advisor working exclusively for ESDC in Quebec would meet the first condition. However, in my opinion, a medical advisor working exclusively for ESDC in Quebec could not meet the second condition. The reason is that the "declaration" mentioned above refers to "an insurance contract". I do not see how a medical advisor from ESDC can make a declaration that, pursuant to ss. 2.01, 3.02, and 3.03 of the *Regulation*, his or her employer holds "… an insurance contract with coverage that extends specifically to the physician …". The reason is that the indemnification policy is not "an insurance contract".

[161] I understand that Mr. Racine has expressed the opinion that the indemnification policy provides coverage equivalent to an insurance contract. Nevertheless, no matter what the indemnification policy says, it is not “an insurance contract”. A policy is a document drafted unilaterally by the employer, and it can be changed at any time. In addition, in some cases, under the indemnification policy, the payments have to be authorized by the deputy head or minister. In theory, they can be denied. On the other hand, a contract, which is an agreement signed by two parties, is intended to be enforceable by law.

[162] Surely, the question of whether the indemnification policy provides coverage equivalent to an insurance contract for the purposes of ss. 2.01, 3.02, and 3.03 of the *Regulation* is a question for the CMQ to resolve. I do not believe that I have the jurisdiction to pronounce on the *Regulation*’s requirements. And I do not have jurisdiction to modify the wording of ss. 2.01, 3.02, and 3.03 of the *Regulation*, which refer to an “insurance contract”. The employer has not provided any evidence that the CMQ (like the CPSO) recognizes the indemnification policy as valid professional liability protection for Crown servants. Yet, it had that burden when it relied on it in its defence to the grievance. It is thus for the CMQ to decide whether the indemnification policy does have the same effect as an insurance contract and whether the coverage it provides is similar to coverage that meets the minimum limits set out in the *Regulation* (at s. 2.02).

[163] I note that the employer brought to my attention the fact that a Quebec ESDC medical advisor who requested the reimbursement of her liability insurance premium on April 21, 2016, which the employer refused on the grounds that the indemnification policy already offered her protection, did not inform it afterwards that the CMQ had refused to allow her to complete declaration forms. In addition, she did not file a grievance. This is not clear evidence that the CMQ does accept the indemnification policy as valid liability protection under the Quebec regulation. The medical advisor at issue did not testify at the hearing, and there could be other explanations for why she did not grieve the decision.

[164] In addition, even though Mr. Racine testified that he recalled at some point a discussion with an unknown representative of the CMQ who said it would accept the indemnification policy as sufficient, there is no clear evidence of this. We do not know

who that person from the CMQ was and whether this interpretation from that person of the *Regulation* (and the Quebec *Medical Act*) can be put in writing.

[165] The only two exceptions to the requirement of having or benefitting from an insurance contract are specified in s. 3.03 of the *Regulation*. Specifically, an insurance contract is required unless

- a physician does not perform any of the activities listed in s. 31 of the Quebec *Medical Act*; or
- a physician does not practise medicine in Quebec.

[166] Here, a question is whether the first possibility — which is that a physician does not perform any of the activities listed in s. 31 of the Quebec *Medical Act* — applies. The employer submits that the tasks of the medical advisors at ESDC do not correspond to those set out in s. 31 of the Quebec *Medical Act* because the medical advisors do not make diagnoses, do not see patients, and do not prescribe treatments and medications. In sum, it relies on Mr. Racine's view that since they do not practise active medicine, they do not need liability insurance. Mr. Racine was not recognized as an expert witness. Therefore, I cannot accept his point of view as an expert's opinion. Yet, no other evidence was presented to support this position. On the other hand, Dr. Bourassa testified to the contrary.

[167] I find that the decision of what is or is not a medical act under s. 31 of the Quebec *Medical Act* falls within provincial jurisdiction. It is not for me to decide this question. At the same time, I seriously question why the employer would ask that the medical advisors hold a medical licence if they really do not perform any medical acts. In any event, I can only weigh the evidence before me. The rules on professional liability insurance specify that a consulting physician who works in a (government) department also practises the medical profession. Thus, I conclude that the employer has not demonstrated that this exception — to the obligation to hold or benefit from an insurance contract — applies.

[168] With respect to the second possibility — which is that a physician does not practise medicine in Quebec — it does not apply here. The policy grievance specifically concerns ESDC medical advisors working in Quebec.

[169] With respect to Dr. Bourassa, he works for ESDC, on a salaried basis, in addition to carrying out medical activities outside his employment — he works as an emergency-room doctor and as a coroner. Given those circumstances, he must take out enough professional liability insurance protection to cover all his activities. I agree that the fact that he must take out professional liability insurance for his other activities is not "… a requirement for the continuation of the performance of …" his medical advisor duties at ESDC, as stated in article 21 of the SH collective agreement. But article 21 applies to that part of his professional activities that form part of his ESDC functions. He needs professional liability insurance to hold his medical licence in Quebec. And to continue to perform his duties as an ESDC medical advisor in Quebec, he must renew his Quebec licence to practise medicine every year.

[170] I understand that Dr. Bourassa could continue to perform his duties as an ESDC medical advisor in Quebec even if he did not hold a medical licence in Quebec but only one in Ontario (where the indemnification policy is recognized by the CPSO). But this is a policy grievance and not one filed by Dr. Bourassa. The policy grievance relates to the interpretation or application of the SH collective agreement with respect to ESDC medical advisors in Quebec.

[171] I conclude that ESDC medical advisors who hold a CMQ licence and who work in Quebec pay a fee to acquire professional liability insurance. It is the payment of a fee in the sense of "*cotisations … ou tout autre droit qu'il a versés*" from the sentence "… *les cotisations, les droits d'inscription ou tout autre droit qu'il a versés* …" in the French version of article 21 of the SH collective agreement — or in the sense of "fees" from the sentence "membership, registration or other related fees" in the English version of article 21. That fee is paid to an organization, as per article 21. And the payment of such fees — with respect to the duties of the ESDC position — is a requirement for the continuation of the medical advisors' duties. The medical advisors are required by law to file evidence of proof of their liability insurance. The way it is done in Quebec is that they must provide their CMPA registration numbers to the CMQ to renew their medical licences each year.

[172] For these reasons, I conclude that it has been demonstrated that some of the professional liability insurance costs of ESDC's medical advisors working in Quebec fall within the scope of article 21 of the SH collective agreement. Therefore, I conclude that the employer must, pursuant to article 21 of the SH collective agreement, reimburse

Quebec ESDC medical advisors the part of their professional liability insurance fees related to the performance of the duties of their position.

2. Issue 2 - By refusing to reimburse the professional liability insurance fees of ESDC medical advisors working in Quebec, is the employer misinterpreting article 5 of the SH collective agreement and its implied obligations and duties that require that management properly exercise its discretion?

[173] The bargaining agent also contends that the employer is violating article 5 of the SH collective agreement (entitled "Management Rights") by deciding not to reimburse medical advisors their professional liability insurance fees under article 21 of the SH collective agreement. The bargaining agent agrees that article 21 calls for some level of management discretion. However, it submits that the employer's discretion is not unfettered. The bargaining agent referred me to a number of principles enunciated by the arbitrator in *Bell Canada v. Unifor, Local 34-0*, 2016 CanLII 11573 (CA LA) at para. 46. Two of them read as follows:

…

> *4. the exercise of management rights, both with respect to a provision in a collective agreement or generally, is an exercise of discretion which lies at the core of collective agreement rights and obligations; that is, the exercise of management rights is fundamental to the operation of a collective agreement;*
>
> *5. as a matter fundamental to the operation and functioning of a collective agreement, any exercise of management rights discretion must be subject to challenge on the basis of reasonableness, or perhaps more specifically on the basis that the management right was exercised in an arbitrary, discriminatory or bad faith manner (which I believe effectively covers the field [sic] unreasonableness and good faith);*

…

[174] The bargaining agent believes that the employer's decision to deny its Quebec-licensed medical advisors reimbursement for their professional liability insurance fees was unreasonable and arbitrary. It believes that the employer's decision was an unreasonable exercise of its discretion under articles 5 and 21 of the collective agreement because of a number of choices, actions, or representations by management throughout the matter. For example, the indemnification policy on which the employer based its decision to deny the reimbursements in 2014 had actually been in force since 2008. The policy has always been accessible publicly. Despite that, management continued to reimburse its Quebec-licensed physicians for their professional liability insurance or CMPA fees that corresponded to work of an administrative nature under

article 21 from 2008 to 2013. It could have relied on the policy to deny the reimbursements during those years but did not. Yet, it clearly stated in February of 2014 that the policy was the reason for its denial to reimburse the fees. The employer has been inconsistent. In the past, it recognized that medical advisors needed insurance to perform their administrative work, but its opinion is now different. It cannot change its mind as it sees fit. The lack of harmonization creates confusion for medical advisors.

[175] The bargaining agent is also concerned with the different reasons the employer gave for rejecting the policy grievance. They changed from year to year. The bargaining agent submits that the reason Ms. Wilson gave in 2014 to not reimburse the fees was that Quebec medical advisors are covered by the indemnification policy; thus, the employer maintains that they benefit from an insurance coverage. Yet, Mr. Racine's reasons in 2016 were that ESDC does not require its medical advisors to perform any of the duties listed in s. 31 of the Quebec *Medical Act* and that the fees contemplated in article 21 are direct, not indirect, employer requirements.

[176] The bargaining agent considers that Ms. Wilson's 2014 email to ESDC medical advisors was recognition that coverage is needed while on the contrary, the 2016 decision on the grievance alleged that it is not needed. It considers that the employer has not been completely frank, open, and straightforward. It should have been consistent and upfront with respect to whether coverage is needed. The bargaining agent understands that the employer may argue that this is a hearing *de novo* with a purpose other than reviewing the employer's decision on the grievance. On the other hand, the bargaining agent suggests that this results in a procedural defect, which should be corrected.

[177] The bargaining agent submits that there is a need for the employer to be forthright and honest in its interpretation of the SH collective agreement. Citing ever-changing reasons for deciding that medical advisors are not entitled to the reimbursement of professional liability insurance expenses in accordance with article 21 is not a straightforward and honest way of interpreting the SH collective agreement.

[178] Finally, the bargaining agent submits that this case is of great importance as it demonstrates the devaluation or undermining of the professionalization of professionals' work in the public service. It requests that the SH collective agreement

be interpreted so that the professional status of these employees is recognized since the employer derives a benefit from the fact that they maintain their professional status.

[179] The employer, for its part, first points out that it is important to keep in mind that this is a policy grievance and not one filed by Dr. Bourassa. Therefore, it asks that I keep in mind that Dr. Bourassa's evidence is to serve to support the policy grievance.

[180] Secondly, the employer raised at the hearing an objection to this issue by invoking *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), on the grounds that in its policy grievance, the bargaining agent did not allege that by refusing to reimburse professional liability insurance fees for ESDC medical advisors working in Quebec, the employer misinterpreted article 5 of the SH collective agreement. As a result, the employer submits that the bargaining agent could not refer this matter to adjudication. In other words, the bargaining agent changed the nature of its grievance, which it should not be allowed to do.

[181] Nevertheless, citing *Canada (Attorney General) v. Lâm*, 2008 FC 874, the employer contends that article 5 of the SH collective agreement does not confer any substantive rights.

[182] I conclude that essentially, the bargaining agent added a new element to the grievance after it was referred to adjudication.

[183] According to *Burchill*, once a grievance has been processed at the different levels of the grievance process, it cannot be changed once it is referred to adjudication. As mentioned as follows at paragraph 27 of *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19: "*Burchill* reasoning is applied to prevent one party from raising a new issue at [adjudication] … that might take the other party by surprise. It is, essentially, a matter of procedural fairness."

[184] Although *Burchill* does not preclude specifying the nature of a grievance at adjudication, a fundamental change to the nature of the grievance at the level of adjudication is not permitted.

[185] I conclude that I do not have jurisdiction to deal with the present issue. It is a new issue that has not been discussed between the parties within the grievance

process, and the nature of a grievance cannot be changed after it has been referred to adjudication.

[186] As a result, the employer's objection to the second issue raised by the bargaining agent is upheld.

[187] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[188] The grievance in file no. 569-02-175 is allowed. I declare that the employer violated article 21 of the SH collective agreement. I declare that the employer shall reimburse, under article 21 of the SH collective agreement, physicians licensed by the College of Physicians and Surgeons of Ontario who work as medical advisors at Employment and Social Development Canada for the payment of continuing professional development tracking fees (i.e., Mainpro non-member participant fees).

[189] The employer's objection to the second issue raised by the bargaining agent with respect to the grievance in file no. 569-02-178 is upheld.

[190] The grievance in file no. 569-02-178 is allowed. I declare that the employer violated article 21 of the SH collective agreement. I declare that the employer shall reimburse, under article 21 of the SH collective agreement, physicians licensed by the Collège des médecins du Québec who work as medical advisors at Employment and Social Development Canada for the payment of professional liability insurance fees in relation to their administrative work.

[191] I order that the employer interpret, apply, and administer article 21 of the SH collective agreement in accordance with this decision.

November 21, 2019.

Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board