

IN THE MATTER OF A CONCILIATION
*Under the OMA Representation Rights and Joint Negotiation and
Dispute Resolution Agreement, 2012*

BETWEEN:

THE ONTARIO MEDICAL ASSOCIATION

-AND-

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
AS REPRESENTED BY THE MINISTER OF HEALTH
AND LONG-TERM CARE**

Conciliator's Report

The Hon. Warren K. Winkler, Q.C.

December 11, 2014

The Conciliator's Report is the result of negotiations between the Ontario Medical Association ("OMA") and the Ministry of Health and Long-Term Care of Ontario ("MOHLTC" or the "Ministry") (collectively the "Parties"), which took place from November 10 to December 3, 2014. The purpose of these negotiations was to establish a 2014 Physician Services Agreement between the Parties ("2014 PSA").

1) The Parties

The OMA represents the political, clinical and economic interests of over 34,000 physicians, residents and medical students across Ontario. The OMA plays a leading role in shaping health care policy and implementing initiatives that strengthen and enhance Ontario's health care system.

The MOHLTC is the primary funder of Ontario's publicly funded health care system. The mandate of the MOHLTC is to establish, manage and maintain a patient-focused, results-driven, integrated and sustainable publicly funded health system.

2) The Physician Services Agreement

The Physician Services Agreements ("PSAs") are negotiated agreements between the OMA and the Ministry that determine central features of Ontario's health care system. The compensation for physicians for providing health care services is a major component of the PSA. The most recent PSA ("2012 PSA") was a short-term agreement reached in November 2012 that expired in March 2014. The Parties have been in negotiations to reach the 2014 PSA since January 2014.

3) Joint Process for Negotiation of the 2014 Physician Services Agreement

The OMA Representation Rights and joint Negotiation and Dispute Resolution Agreement (December 11, 2012) (the "DRA") sets out a two-phase negotiation process agreed to between the Parties for the purpose of establishing the PSA (the "Joint Process"). The Joint Process regulates the present negotiation of the 2014 PSA. Under the DRA, the Parties agree to participate in the Joint Process in good faith and to make all reasonable efforts to reach an agreement. Neither party can seek to end the negotiations before the conclusion of the Joint Process. In addition, the Minister cannot advise the Government of Ontario to unilaterally implement proposals prior to the completion of the Joint Process.

a) Phase One: Negotiation and Facilitation

In the first phase of the Joint Process, the Parties are to commence negotiations at least four months before the end of the term of the most recent PSA. The Joint Process allows for the appointment of a neutral facilitator after the Parties have negotiated bilaterally, and without assistance, for a period no greater than 120 days. If the Parties do not reach an agreement with the facilitator, the facilitator will issue written recommendations to the Parties. The facilitator's recommendations are confidential. The Parties are to resume direct negotiations within fourteen days of receipt of the facilitator's recommendations, with the aim of reaching an agreement. Failing settlement, the Parties enter phase two of the Joint Process.

On January 14, 2014, following much preparatory work, the Parties commenced negotiations for the 2014 PSA. At the end of July 2014, it was clear that the Parties could not reach agreement and the provisions for facilitation in the DRA were invoked. Dr. David Naylor (the Facilitator") was appointed as facilitator in August 2014, with the assistance of Ms. Lisa Purdy. The facilitation commenced in September 2014. By September 27, 2014, the Parties had not reached an agreement. Dr. Naylor provided his facilitator's recommendations on October 9, 2014 (the ((Facilitator's Recommendations")). The Parties resumed negotiations but were unable to reach an agreement thus triggering the second phase of the Joint Process.

b) Phase Two: Conciliation

The second phase of the Joint Process allows for the appointment of a neutral conciliator to assist in the negotiation of the PSA. The conciliator may review and consider the facilitator's recommendations. If the Parties do not reach an agreement with the conciliator within fourteen days of the conciliator's appointment, the conciliator is mandated to issue a written report. In contrast to the facilitator's report which is confidential, the conciliator's report is to be a public document. Absent a settlement resulting from conciliation, within seven days following receipt of the conciliator's report, the Parties are to reconvene for a period of ten days in a final attempt to resolve the dispute in direct bargaining.

4) The Conciliation

The Parties appointed me, the Honourable Warren K. Winkler Q.C. (the ((Conciliator")), assisted by Ms. Debra Lovinsky, to help advance the negotiations of the 2014 PSA (the ((Conciliation")). I reviewed the Facilitator's Recommendations and briefs submitted by the Parties prior to the Conciliation. The Conciliation spanned twenty-four days, including eleven days of face-to-face meetings. The first meeting took place on November 10, 2014 and the sessions concluded on December 3, 2014. At the end of the day on December 3rd, the Ministry tabled its final position (the ((Ministry's Proposal")) to the OMA. After lengthy deliberations that continued through to December 5th, the OMA advised that it was unable to accept the Ministry's Proposal. The rejection resulted in the release of this report (the ((Conciliator's Report")) in accordance with the terms of the DRA.

a) The Parties' Contributions

I would like to commend both Parties for their tireless work in an attempt to resolve the most significant and pressing public interest dispute facing Ontario and its citizens - the funding and delivery of physician services. The Parties approached the meetings with mutual respect. It was apparent that their primary and mutual concern was the continued provision of the best quality of physician services to Ontarians.

The pivotal importance of the current PSA negotiations to Ontario's health care system was reflected by the dedicated involvement of Dr. Bob Bell, the Deputy Minister of Health and Long-Term Care, and his counterpart Dr. Ron Sapsford, Chief Executive Officer of the OMA. I would like to express my gratitude for the wisdom and sound judgment that each brought to bear throughout the bargaining sessions that occurred during the Conciliation.

b) Significant Moves by the Parties

At the outset of the Conciliation, the Parties were far apart in their respective positions. In fact, no issues had been agreed upon up to that time. Constraining the Parties' ability to move forward was a fundamental disagreement regarding the baseline for the Physician Services Budget ("PSB"). At the root of this disagreement were projected savings from the 2012 PSA, which had not been realized. To further compound this problem, the Ministry was looking for significant savings in the 2014 PSA. Remarkably, the Parties were able to resolve the issue of the PSB baseline, opening the way for meaningful discussions on the threshold issue of the necessary savings required by the Ministry. I particularize these items below:

i) The Baseline for the Physician Services Budget

The PSB is the total amount of annual spending on physicians through expenditure streams or programs managed by the Ministry. Agreement on the PSB baseline is a critical foundation for the 2014 PSA. The Parties were able to agree on a PSB for fiscal year 2013/2014 of \$11.2978 billion, thus establishing a concrete baseline for the negotiation of the 2014 PSA.

ii) Cost Increase of CMPA

The Canadian Medical Protective Association (the ((CMPA")) fees for physicians are included in the PSA base. Significant increases in respect of the premium were included by the Ministry initially as a charge against the total budget. This posed a problem going forward as it intertwined with other collateral agreements between the Parties. In an effort to clear this roadblock and permit the negotiations to progress, the Ministry removed CMPA increases from the PSB for the duration of the 2014 PSA.

iii) Three-year Term

The Parties had proceeded throughout the negotiations on the assumption that the 2014 PSA would be for a two-year term. Because the 2014 fiscal year was two-thirds over, almost all of the negotiated savings to the PSB would necessarily have to be realized during the second year of the agreement. Therefore, at my instance, the Parties agreed to a three-year term for the 2014 PSA. This was a significant breakthrough. Not only did it provide a manageable time frame for the achievement of mutually agreed savings targets, but it also enabled the Parties to fashion a third year that would provide physicians with some respite from the cost containment model of the second year.

iv) Targeted Savings

The focus of the Conciliation was squarely on the savings required by the Ministry in the second year of the agreement. The Ministry's opening position, in this respect, was that it required \$740 million in savings. The Parties searched for areas in which these savings could be achieved with an emphasis on those areas that would not directly impact on physicians' fees. This latter goal could not, on any analysis, be achieved. In other words, the full savings could not be realized without impacting fees. As well, there was always disagreement as to the total amount of savings required.

Ultimately, after what I would describe as many days of very hard bargaining, the Parties agreed, contingent on an overall settlement, on targeted savings of \$650 million (of which the Ministry costed at \$580 million to the PSA while finding a further \$70 million outside the PSA). This was to be achieved by the end of the second year of the 2014 PSA.

v) Collaborative Framework

At the start of the Conciliation it became obvious to me that there was a pressing need for a collaborative dialogue analysing the current system of financing of the delivery of physicians services. My concerns stemmed from the debate between the Parties regarding the cost-savings asked for by the Ministry in the 2014 PSA. First, there was an issue arising from the reconciliation of the savings which were to have been generated by the 2012 PSA. The Ministry asserted that any agreed savings that failed to be achieved in the last agreement had to be obtained in the 2014 PSA. Secondly, the OMA stressed that the PSB failed to take into account cost increases generated by forces beyond the control of physicians, such as population growth, increased usage and an aging population. Finally, the OMA took issue with the Ministry's position that the Parties could only look for savings from within the health care system and from physicians' earnings, and not by increasing the budget or finding alternative sources of funding.

It is apparent that these positions are irreconcilable in the longer term. Absent some rationalization, the system may not be sustainable. Thus, the consensus emerged that without systemic changes to the health care system, the Parties seemed to be on a collision course so that a PSA, at some point in the future, may not be achievable.

The Parties had a window of opportunity in these negotiations to create a process whereby the present structure could be studied with a view to reform. A study of this nature requires time for research and reflection and input from a number of stakeholders. These sort of systemic issues cannot be effectively addressed in a set of PSA negotiations. Accordingly, I introduced two initiatives which were intended to be separate from the PSA: The Task Force on the Future of Physician Services in Ontario (the "Task Force") and the Minister's Roundtable on Health System Transformation (the "Minister's Roundtable"). The Parties embraced both of these suggestions.

Both the Task Force and the Minister's Roundtable would include representatives of important stakeholders in the health care system, especially the public. The purpose of the Task Force would be to conduct a long-term study and analysis of the sustainability of Ontario's health-care system with the mandate of advising and making

recommendations for systemic changes to the delivery and funding of physician services. The Minister's Roundtable would engage around matters of common interest relating to the health care system with the mandate of targeting and implementing positive and constructive improvements.

The Parties' agreement to embark on these initiatives was an important development as it enabled them to focus their discussions on the pressing matters required to agree on the 2014 PSA, with the comfort that the broader systemic issues impacting the sustainability of health care in Ontario would be appropriately and collaboratively addressed in a larger forum. I tabled language that reflected the substance of the consensus reached in these two important areas.

c) The OMA's Position

Although the OMA did not table a final position, throughout the Conciliation it pressed the Ministry to address the rising cost of practice for physicians through increases. In particular, the OMA sought a general increase in fees in year three. In addition, the OMA was adamant that it could not accept any further savings in the third year. To this point, the MOHLTC was looking for \$32.7 million in savings in year three. It was not prepared to agree to an increase to cover the cost of practice.

d) The Ministry's Proposal

The Ministry sought to address the outstanding gap between the Parties by responding in two areas: savings and the cost of practice – both in the third year. The Ministry tabled its final position (the "Ministry's Proposal") on the last day of the Conciliation. The proposal was for a three-year term. It provided for savings in the amount agreed upon by the Parties in years one and two. Importantly, in the third year, the Ministry conceded its position for a further savings of \$32.7 million. Moreover, it offered a one-time lump-sum contribution in year three to physicians' cost of practice in the amount of \$117 million (1% of the PSB). The Ministry included in its proposal the agreed upon Task Force and the Minister's Roundtable.

5) The Conciliator's Recommendations

During the Conciliation, much progress was made towards achieving a three-year PSA. A three-year PSA would be a significant win for the public, the health system and the Parties. The third year is a cost-neutral year that offers a meaningful payment toward physicians' cost of practice. It would afford the Parties the time required to focus on the Task Force, the goal of which is to collaboratively address the systemic issues threatening the sustainability of Ontario's publicly funded health system. If the Parties can take advantage of the opportunity that the Task Force provides to them, they will have provided an invaluable service to the citizens of our province.

The rejection of the Ministry's proposal means that the Parties must reconvene within seven days to work towards an agreement. In the circumstances, I would urge the OMA to reconsider its rejection of the Ministry's Proposal. Similarly I would urge the Ministry to not resile from its final offer.

I would like to express my gratitude to the Parties for their cooperation throughout

All of which is respectfully submitted,



The Honourable Warren K. Winkler, Q.C.