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MEMORANDUM

To	Coalition of Ontario Doctors		
Date	June 2, 2017	**Our File No.**	92803
Re	Draft OMA Framework Appendix for Negotiation, Mediation, and Arbitration		

This memorandum replies to the communication from Goldblatt Partners, circulated by the OMA on May 28, 2017.

The Perpetual Entrenchment of the OMA

Goldblatt Partners argue that nothing in the Binding Arbitration Framework ("BAF")[1] "establishes the OMA role as bargaining agent". However, that was not the point of the previous memorandum. The point is that the BAF entrenches the OMA as the exclusive bargaining agent on a permanent basis.

Goldblatt Partners point out that the OMA has been identified in provincial legislation since 1986 as the body representing physicians in negotiating amounts payable for insured services. However, that legislation has long incorporated the flexibility to substitute a different bargaining agent. In current form, it provides:

> 12. (1) The Minister of Health and Long-Term Care may enter into agreements with the associations mentioned in subsection (2), as representatives of physicians, dentists and optometrists, to provide for methods of negotiating and determining the amounts payable under the Plan in respect of the rendering of insured services to insured persons.
>
> (2) The associations representing physicians, dentists and optometrists are,
>
> (a) the Ontario Medical Association, in respect of physicians…
>
> (3) The Lieutenant Governor in Council may make a regulation providing that the Minister may enter into an agreement under subsection (1) **with a specified person or organization other than an association mentioned in subsection (2)**.[2]

[1] In the previous memorandum, I referred to the "Framework Appendix". This memorandum adopts the term used by Goldblatt Partners for ease of reference.
[2] *Commitment to the Future of Medicare Act*, s.12.

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In other words, the legislation permits bodies other than the OMA to negotiate on behalf of physicians.

The RRJNDRA recognizes the OMA as the exclusive bargaining agent for physicians in Ontario, and the BAF now makes that "perpetual".

Goldblatt Partners say that "nothing in the BAF expressly modifies the RRJNDRA to provide that its term is perpetual". In fact, the BAF, on p.13, item c) under "Additional Agreed Matters", states:

> Amend paragraph 21 of the RRJNDRA, by adding the following:
>
> "This Agreement, including the Appendices, is perpetual."

So the BAF, together with the RRJNDRA, do indeed entrench the OMA as the exclusive representative of physicians in Ontario on a permanent basis.

Recognition of a representative for a specific term, or even on an ongoing basis, is not the same as permanent entrenchment. As mentioned in the previous memorandum, the ability to change representatives is an important right.

It is also a right that is protected by the *Charter*. Goldblatt Partners argue that it is beyond doubt that the OMA's exclusive and permanent status would be upheld by the courts, because the Supreme Court has said that the regime for teachers may be acceptable.[3] But Goldblatt Partners know very well that in *Charter* cases, context is everything. Physicians operate in a very different world from teachers, and have their own unique history and concerns. The issue of conflicting interests is a very real part of that context.

Goldblatt Partners argue that the OMA's role is to reconcile competing interests, and that this is not unique to the OMA. However, the extent to which conflicting interests are likely to arise, as the OMA potentially enters into the world of concession bargaining and addressing "responsibility" for payments exceeding the PSB, is unusual.

Physicians should continue to think about whether the OMA's representation serves them well, and whether the OMA's structure makes it sufficiently accountable.

The OMA's Role in Management of the Physician Services Budget

Goldblatt Partners argue that the broad scope of bargaining, and potentially arbitration, over the components, baseline, and changes to the PSB, as well as the consequences if physician services expenditures exceed the PSB, are a positive feature of the BAF.

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[3] *MPAO* case, para. 95. The Court was careful not to express a final conclusion.

In the previous memorandum, I did not express a view on whether this broad scope was positive or negative. However, I pointed out that the OMA's potential role, particularly in negotiating over the consequences if the PSB is exceeded, increased the potential for conflicts in the OMA's representation of physicians. That in turn increases the need for OMA accountability, and for a representation structure that allows for separate interests to be separately represented.

I did not, as claimed, assume "that the BAF provides for a hard cap". However, the BAF spells out that the OMA and government will be jointly responsible for overseeing the PSB, and if the PSB is exceeded, the OMA may bear some responsibility and will negotiate (at the Physicians Services Committee) "on the steps to take to manage expenditures beyond those for which the government is responsible." That certainly has the potential to raise conflicts between the different interests represented by the OMA.

Separate representation for separate interests may, to some extent, take place under the umbrella of the OMA. That may be one form of accountability mechanism.

The Permanent Entrenchment of Mediation/Arbitration

Goldblatt Partners point out that Med/Arb is widely used in the labour context. That was also a point I made in the previous memorandum.

However, whatever the advantages and disadvantages of Med/Arb may be, it is undeniably less transparent than keeping the mediation and arbitration functions separate. When there is a high level of trust in the bargaining representative, and no pronounced conflict in the interests represented, Med/Arb may well be the most effective and appropriate way to proceed. When those conditions are absent, however, it may be less appropriate. When the mediator does not sit on the arbitration board, members have the assurance of knowing that everything that the arbitration board has been told has been conveyed to them in an open and transparent process.

The Criteria for Arbitration, Including Relativity

Goldblatt Partners argue that it would have been odd not to recognize relativity and appropriateness as mandatory criteria for arbitration. They argue that nothing requires them to be addressed in a PSA, or specifies how they are to be determined, and that the OMA will have to determine the relative priority of these factors in establishing its negotiation priorities with its members.

If it would have been odd not to list relativity and appropriateness as mandatory criteria, then it must be equally odd that other potential cost-saving mechanisms are not listed.

While it is true that a PSA does not need to address relativity and appropriateness, the BAF takes the parties some distance down the road towards considering and implementing relativity adjustments. There is particular reason to be concerned that if savings must be found and the parties cannot reach an agreement as to how this is to be done, an arbitration board will go first to the specified permanent mandatory criteria in preference to other potential mechanisms that are not mentioned. The explanation from Goldblatt Partners has not refuted that concern.

Goldblatt Partners again incorrectly asserts that I assumed that relativity/appropriateness "can only be viewed or implemented as a government 'cost-cutting measure'". That is not the case. But anyone who assumes that in the present climate (and for the foreseeable future) it will not be raised as a potential cost-cutting measure, is suffering from an excess of optimism.

One of the co-authors of the Goldblatt Partners communication, Steven Barrett, is also on record as having strongly supported the tPSA.[4] At that time, he warned that an arbitration board could impose a worse outcome than the tPSA. Consistent with that warning, physicians have good reason to be concerned with the specific permanent mandatory criteria that an arbitration board will be required to consider under the BAF.

Bargaining over CMPA Payment Subsidization

I accept the explanation from Goldblatt Partners that specifying that CMPA subsidization after 2023 should be included in the scope of negotiation/arbitration was considered to be necessary, as a protection against unilateral government action, because otherwise it was not clear that the arbitration board would have the power to deal with this issue.

Nevertheless it remains true that the bargaining climate in the years ahead could well call for concession bargaining in light of fiscal and demographic pressures, and that the CMPA subsidy may well be a target. How the OMA (or potentially other bargaining representatives) determines its position and reconciles conflicts with respect to the trade-offs that are likely to be put forward, should be a matter of concern for all physicians.

[4] S. Barrett, "You Can't Always Get What You Want: An Assessment of the Tentative 2016 Physician Services Agreement", *Healthy Debate*, Aug. 5, 2016.