

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
DAVID JACOBS, MARK PRIEDITIS and) *Eric R. Hoaken and Andrew Winton for the*
ONTARIO ASSOCIATION OF) Applicants
RADIOLOGISTS)
Applicants)
- and -)
)
ONTARIO MEDICAL ASSOCIATION,) *Peter A. Downard and Christopher J. Rae*
TOM MAGYARODY and GAIL BECK) for the Respondents
Respondents)
) HEARD: August 2, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] There is an ongoing governance and political dispute between the Ontario Medical Association (“OMA” or the “Association”) and some of its members.

[2] These are my Reasons for Decision in a motion brought by the Applicants, Dr. David Jacobs, Dr. Mark Prieditis, and the Ontario Association of Radiologists (“OAR”), for interlocutory relief in the dispute. This is their second motion seeking injunctive relief.

[3] At the hearing of the first motion on July 25, 2016, I made the following endorsement:

The Applicants Dr. Jacobs, Dr. Prieditis and the Ontario Association of Radiologists, brought an application against the Ontario Medical Association (OMA) and others seeking declaratory relief and directions from the court with respect to the conduct of a general meeting to ratify or reject a Physician Services Agreement with the Ministry of Health and Long Term Care (MOH).

The Applicants also by motion sought certain interlocutory relief namely: (a) an order directing the OMA to send out a notice of a general meeting in the form of Schedule “A” of the notice of motion; (b) an order restraining the OMA from holding a referendum; and (c) an order directing the OMA to provide the Applicants with a membership list.

On the return of the motion, the OMA indicated that in accordance with the by-laws of the OMA, it was satisfied that the Applicants had validly petitioned a general meeting, and, accordingly, it would give notice of a general meeting including the aforesaid Schedule “A”, which, in turn,

would, pursuant to the by-laws, entail that the referendum not proceed. The OMA also advised that it would, in accordance with its statutory obligations, provide the Applicants within 24 hours the membership list in electronic format. The OMA submitted that the interlocutory motion was now moot and that because it was unnecessary for the Applicants to have moved for interlocutory relief, the motion should be dismissed with costs of \$50,000 all inclusive.

The Applicants, however, submitted that the motion was necessary, they had been successful, and they requested an order and costs of \$50,000 all inclusive. The parties agreed that the underlying application should be adjourned to August 2, 2016. I shall remain seized of the matter.

In my opinion, the dispute about interlocutory relief is moot, and the motion should be dismissed with each side bearing its own costs. In my opinion, while the request for interlocutory relief was necessary in the circumstances, the circumstances are in the main associated with the need for the application which remains outstanding. In other words, if there is a claim for costs, it should be associated with the application exclusively and not the interim or interlocutory relief. Practically speaking, this means that the party which is successful on the application is entitled to claim costs less the costs of this interlocutory motion, which I fix at \$25,000.

Order accordingly.

[4] At the hearing of the second motion, I made the following endorsement:

The Applicants David Jacobs, Mark Prieditis, and the Ontario Association of Radiologists bring an application under s. 332 of the *Corporations Act*, R.S.O. 1990, c. C.38, for, among other things, an injunction restraining the Respondents, Ontario Medical Association, Tom Magyarody, and Gail Beck, from seeking ratification of the Physician Services Agreement with the Ministry of Health and Long-Term Care. There was a motion for interim relief in which I made a decision on July 25, 2016. The Applicants now seek further relief, which they characterize as interlocutory, and which the Respondents characterize as determinative or final relief in the application. I regard the relief as interlocutory and shall decide this motion and adjourn the balance of the application *sine die*. I remain seized of the application.

The Applicants request the following interlocutory relief; namely:

- (1) an Order directing the OMA and Mr. Magyarody to deliver a new notice of the general meeting (which is scheduled for August 14, 2016) in the form attached to the Applicants' July 22, 2016 Notice of Motion as Schedule "A";
- (2) an Order directing the OMA to deliver a form of proxy that allows members to direct their proxyholder's vote on all of the resolutions set out in the Applicants' form of notice (i.e., the aforesaid Schedule "A");
- (3) an Order directing the OMA to provide a membership list that includes, in addition to the information already provided about names, addresses, and email addresses, information about the members' phone numbers including cellular phone numbers; and
- (4) an Order appointing a neutral chair to preside over the meeting of the members scheduled for August 14, 2016.

For written reasons to follow, I dismiss the requests with respect to the notice of meeting, the membership list, and the appointment of a neutral chair.

For written reasons to follow, I grant the request that the OMA deliver a new form of proxy. I declare that the current proxy form is void. I direct that the OMA prepare a new proxy form that revises the void form by adding two additional directions, one to come before and the other to come after the one direction currently in the void form and by deleting the following words (and highlighted text) in the current form; i.e., "Voting Recommendations are Indicated by Highlighted Text over the Boxes."

The two additional directions that are to be numbered 1 and 3 are:

1. Resolution that in the future, the Directors and/or Council should not negotiate an

agreement with the Ministry that does not include a right to refer disputes concerning implementation of the agreement to binding arbitration.

3. Resolution that in all future negotiations between the Association and the Ministry every OMA section chair should be kept fully apprised throughout the negotiations of the ongoing discussions including the issues proposed, terms, and the status and that each should be given timely and meaningful opportunities to provide input on such issues and terms as the discussions evolve and again before the Association agrees to a form of agreement.

The Applicants submit that with divided success there should be no order as to costs. The Respondents request costs. In my opinion, the Applicants are correct that there should be no order as to costs given the divided success and their own success on the important matter of the proxy.

[5] What follows are my Reasons for Decision for the second endorsement.

B. FACTUAL BACKGROUND

1. The OMA

[6] The Respondent Tom Magyarody is the Chief Executive Officer of the OMA. The Respondent Dr. Gail Beck is the Chair of the Board of Directors of the OMA. In May 2016, Dr. Virginia Walley was elected President of the OMA. The OMA is an incorporated association pursuant to the Ontario *Corporations Act*, R.S.O. 1990, c. C.38. It is governed by Parts III and VII of the *Act*, and its directors and officers are required to comply, at all times, with its letters patent and its by-laws.

[7] The OMA represents the interests of the province's medical profession, including in negotiations with the Ministry of Health and Long Term Care (the "MOH"). A 2012 Memorandum of Understanding between the OMA and the MOH recognized the OMA as the exclusive representative of the province's physicians respecting negotiations with the MOH. The OMA has approximately 42,000 members.

[8] Pursuant to By-law No. 1, which was most recently ratified by Council on May 1, 2016, the OMA is governed by a Council and a Board subject to the powers of the members at a general meeting. Article 9:1 of By-law No. 1 provides that:

9.1. The governing body of the Association, subject to the provisions hereinafter contained with regard to general meetings of members, shall be the Council of the Association.

[9] Pursuant to By-law No. 1, Article 11:1:1, the elected officers of the OMA are the Chair of the Board, the President, the President-Elect, the immediate Past President, the Honorary Treasurer and the Secretary. The duties of the President are specified by Article 11:2:1 as follows:

Duties of Officers

President

11:2:1 The President shall:

(a) enforce a due observance of the charter and by-laws of the Association and perform such other duties as usually pertain to this office,

(b) represent, or appoint a delegate to represent, the Association in all its official contacts with other medical, scientific, sociological or government bodies,

- (c) arrange for the time and place of regular and special meetings of the Board of Directors,
- (d) preside at all social functions of the Association,
- (e) be *ex officio* a member of all committees,
- (f) present a report to the Council at the annual meeting held during his or her term of office, and
- (g) act as chair at all meetings of the Executive Committee of the Board of Directors at which he or she is present.

[10] Council consists of approximately 270 delegates from designated geographical Districts and Practice Sections. Article 9:4 describes the role, powers, and duties of the Chair of Council. Article 9:4 states:

Chair of Council

9:4:1 At the annual meeting of the Council, a Chair of Council shall be elected to hold office for a one year term commencing immediately following the conclusion of the meeting. The person elected as Chair of Council must be a member of the Association but need not be a Council delegate. In conducting the election, Council shall consider any member recommended by the Committee on Nominations, but such nomination shall be treated in the same fashion as any nomination made by members of the Council. A member may only hold the Chair of Council position for a total of 10 years.

9:4:2 The duties of the Chair of Council shall be:

- (a) to preside at all meetings of the Council and to ensure that the meetings are conducted in accordance with the charter and by-laws of the Association. The Chair of Council shall, where he or she is a delegate to Council, retain his or her right to vote, but shall not be entitled to a second or casting vote.
- (b) to decide upon the relative order of all business to be presented to the Council, in consultation with the President.

....

[11] Pursuant to Article 9:6:1 of By-law No. 1, a meeting of Council is deemed to be a meeting of the members, provided that Council's powers may still be exercised by a general meeting of members. Article 9.6 specifies the powers of Council as follows:

Powers of the Council

9:6:1 Each meeting of Council shall for all purposes be deemed to be, and to have all the powers of, a meeting of the members, provided that such powers may still be exercised by a general meeting of members.

9:6:2 Council shall deal with and decide all matters as would ordinarily be dealt with by a general meeting of the Association, including, without in any way restricting the generality of the foregoing, the following:

- (a) the election from among the members of the Association of five directors of the Association, as provided in article 9:8,
- (b) the election of the President-Elect,
- (c) the election from among the members of the Association of the chair and/or members of committees of Council for a term not greater than one-year,
- (d) the reports of the Board of Directors, Committees and Sections,
- (e) any business originating in or relating to the branch societies, which is for the general

welfare of the public, the profession or the Association,

(f) business that may result from petitions, appeals, recommendations or complaints,

(g) the relations between the Association and the Canadian Medical Association,

(h) instructions for the delegates and/or appointees of the Association to other organizations or bodies, and

(i) appointment of the auditor of the Association.

[12] The 25-member Board of the OMA consists of 19 directors from the OMA's 11 Districts, a representative for Ontario's six medical schools, and five directors elected by Council. Council typically meets twice a year. The Board meets frequently and, among other things, implements the decisions of Council. Article 10.1 provides that the affairs of the OMA shall be managed by the Board of Directors.

Management of Affairs of the Association

10.1 The affairs of the Association shall be managed by a Board of Directors, all of whom shall be members of the Association. The Board shall, until altered by special resolution, be composed of up to 25 directors.

[13] Article 10:6 specifies the duties of the Board of Directors and Article 10.7 governs the meetings of the Board as follows:

Duties of the Board of Directors

10:6:1 Between the meetings of Council, the Board of Directors shall represent the Council and the members in all business affairs and shall exercise all the rights and powers of the Association. The Board of Directors shall report to Council at the annual meeting and at such other times as the Chair of Council may request.

10:6:2 The Board of Directors shall,

(a) elect from among their number a Chair of the Board, an Honorary Treasurer and a Secretary,

(b) nominate one or more candidates for the office of the President-Elect for election by Council in accordance with the criteria specified in article 11:1:3,

(c) be responsible for the appointment of the appointive officials and fix their salaries,

(d) appoint the chair and the members of committees unless otherwise specifically provided for in these by-laws,

(e) manage the financial affairs of the Association, including preparing an annual financial plan and approving such action as is required in response to the Budget Committee's review of the Association's financial performance,

(f) approve policy regarding the investment of funds, the allocation of monies to reserves, the borrowing of funds, internal control systems and Association accounting practices,

(g) report annually to Council on its management of the Association's financial affairs, and

(h) have charge of the publication of the Ontario Medical Review and all published proceedings, transactions, memoirs, essays, papers and programs of the Association. The Board may establish by resolution regulations dealing with all aspects of the Review.

Meetings of the Board

10:7:1 Meetings of the Board of Directors may be held at any place in or outside of Ontario and at any time. Meetings shall be called with at least twenty-four hours' notice in writing given or sent

to every director by the Chief Executive Officer with the authority of the Chair of the Board, or in his or her absence, the President, provided always that meetings of the Board of Directors may be held at any time without formal notice if all the directors are present or those absent have waived notice or have signified their consent in writing to the meeting being held in their absence. Notice of any meeting or any irregularity in any meeting or in the notice thereof may be waived by any director. For the first meeting of the Board of Directors to be held immediately following a general meeting of the Council, or for a meeting of the Board of Directors at which a director is appointed to fill a vacancy in the Board, no notice shall be necessary in order for the meeting to be duly constituted, provided that a quorum of the directors is present.

....

- [14] Pursuant to Article 10.8, the Board may elect an Executive Committee that may exercise the powers of the Board between the meetings of the Board of Directors. Article 10.8 states:

Executive Committee

10:8:1 The Board of Directors may elect from among the elected officers of the Association, as described in article 11, an Executive Committee who shall serve during the pleasure of the Board. The Executive Committee shall consist of no fewer than three and no more than six members, and be chaired by the President.

10:8:2 The Executive Committee may exercise the powers of the Board of Directors between meetings of the Board of Directors. The Executive Committee shall report on all actions it undertakes at the next meeting of the Board of Directors.

10:8:3 The Executive Committee of the Board of Directors may meet at any place in or outside of Ontario at any time. Meetings shall be called and chaired by the President, or in his or her absence, the President-Elect. Three members of the Committee shall constitute a quorum thereof.

....

- [15] Articles 15 and 18 govern the meeting of members as follows:

ARTICLE 15: MEETINGS OF MEMBERS

Annual Meetings

15:1 The members of the Association shall convene annually at a time and place determined by the Board of Directors.

General Meeting of Members

15:2:1 The Board of Directors may upon its own authority and shall upon presentation of a petition signed by not fewer than one-twentieth of the members in good standing of the Association give notice of a general meeting of the members of the Association. The petition and the notice shall specify the matters to be considered at such meeting or shall state that such meeting is to consider all the matters within the jurisdiction of a general meeting of members. Notice of such meeting shall be sent by the Chief Executive Officer to each member of the Association at his or her last known address within seven days of the receipt of such a petition in proper form by the Chief Executive Officer of the Association, and the meeting shall be held upon a date within three weeks of the presentation of the petition

15:2:2 From and after the issuance of a notice by the Chief Executive Officer in proper form as described above in article 15:2:1, the powers of the Council in respect of the matters designated in the notice shall be suspended and shall not be exercised by the Council again until after the date set in the notice for the general meeting of members.

15:2:3 The general meeting of members called as described above shall be entitled to exercise the powers of a general meeting on the matters specified in the petition and/or the notice and to amend, vary or reverse rulings made and decisions taken by the Council, provided that no act done

or right acquired through or under any such decision is prejudicially affected by any such amendment, variance or reversal.

Procedure

15:3 The procedure outlined in these by-laws for meeting of the Council shall apply, with necessary changes, to general meetings of members.

....

ARTICLE 18: MEETINGS

Attendance and Registration

18:1:1 All members of the Association in good standing shall be permitted to attend meetings of members and Council and to participate in discussion at such meetings. Persons who are not members of the Association may be invited to meetings of members or Council by Council or the Board of Directors. Medical practitioners and other scientists residing outside of Ontario may be invited to meetings of members or Council by the President or the Chief Executive Officer.

....

Rules of Order

18:2 All meetings of the Council, the Board of Directors, the Executive Committee, the committees of the Association, members and all other meetings of the Association, shall be conducted in accordance with the *Corporation Act* of Ontario and with these by-laws; on points not covered by the Act or by these by-laws, the latest edition of *Nathan's Company Meetings: including Rules of Order* by H.R. Nathan Q.C., will be accepted as the authority.

Voting

18:3 Voting on all matters may be by yeas and nays, show of hands, standing vote, electronic vote, or ballot at the discretion of the chair. Notwithstanding the foregoing, a motion to ballot, duly seconded and carried by a majority of those present and voting, shall direct the vote. The chair shall appoint a suitable number of scrutineers to record the vote.

....

Method of Giving Notice

18:5 Any notice, communication or other document to be given by the Association to a member, director, officer or auditor of the Association shall be effectively given,

- (a) if delivered personally to the person,
- (b) if delivered to the person's address recorded in the books of the Association,
- (c) if sent to the person by telephonic, electronic or other communication facility to their recorded address for that purpose in the books of the Association, or
- (d) if mailed to the person at their address recorded in the books of the Association.

Notices shall be deemed to have been delivered on the date,

- (a) when delivered to the person,
- (b) when delivered to the recorded address,
- (c) when transmitted to the recorded address, or
- (d) five days after the date of posting.

The Secretary may change or cause to be changed the recorded address of any member, director, officer or auditor in accordance with information believed by the Secretary to be reliable.

Conclusion of Regular Order of Business

18:6 Meetings of the Association shall be deemed to conclude at the time they in fact conclude, or at the time of the making of an announcement by the Chair of the meeting that the regular order of business has been concluded, whichever occurs earlier.

[16] It shall be important to note that pursuant to Article 15:2:2, the powers of Council are suspended in respect of the matters designated in the notice of the meeting of members. Council is prohibited from exercising its powers with respect to those matters until after the general meeting of the members is held.

2. The Applicants

[17] The applicant OAR is an incorporated association. The OAR represents a significant majority of the approximately 1,000 physicians in Ontario who specialize in medical imaging.

[18] The applicant Mark Prieditis is a radiologist at the Rouge Valley Health System, Scarborough Hospital and Muskoka Algonquin Health Care. He is a member of the OMA, the President of the OAR, and the immediate past Chair of the Diagnostic Radiology Section of the OMA.

[19] The applicant David Jacobs is a radiologist at the Humber River Regional Hospital and Thunder Bay Regional Hospital. He is a member of the OMA and the OAR, the Chair of the Diagnostic Radiology Section of the OMA, and a member of the OMA's Negotiations Advisory Committee, also known as the "Second Table".

[20] As members of the OMA, Dr. Jacobs and Dr. Prieditis agree to the conditions of membership which are set out in Article 2.4 of By-law No. 1:

Conditions of Membership

2:4 All members of the Association, as a condition of being granted membership, agree,

- (a) to accept, uphold and be governed by the Letters Patent and the by-laws of the Association, and by any amendments or additions that may be made to them after their admission to membership,
- (b) to abide by, and accept the rulings and decisions of properly-constituted authorities of the Association, and
- (c) to waive any right or claim to damages or any action for any other relief in any way arising from or relating to any ruling or decision of the properly-constituted authorities of the Association.

3. The Negotiations for a Physician Services Agreement ("PSA") and the Dispute between the OMA and some of its Members

[21] Healthcare in Ontario is paid for through a single public healthcare insurance program, the Ontario Health Insurance Plan ("OHIP"). The MOH negotiates a PSA with the OMA. A PSA provides for, among other things, the total envelope of physicians' fees, including fee for service payments, for the prescribed period. Fees for various medically necessary consultations and procedures performed by Ontario's doctors are listed in the "Schedule of Benefits", which contains more than 8,000 different fee codes. The Schedule of Benefits is updated through a negotiation process between the MOH and the OMA that is separate from the larger negotiation on a PSA.

[22] The most recent PSA was negotiated in 2012 but expired on March 31, 2014. Before the expiry of the 2012 PSA, the OMA and the MOH were in negotiations for a new agreement, but the negotiations broke down following a January 2015 “Final Offer” that the OMA Board and Council rejected. The MOH responded by unilaterally instituting cuts to physician services.

[23] In May 2015, the Board reported to Council that it had unanimously rejected the government’s Final Offer. Council passed a resolution that the OMA should seek to replace the “Facilitation-Conciliation” process agreed to in 2012 with a binding dispute resolution mechanism.

[24] Council also passed a resolution expressing its commitment to securing binding arbitration before the OMA would resume negotiations with the MOH.

[25] In October 2015, having been unable to secure the MOH’s agreement to a binding arbitration mechanism, the OMA launched a *Charter* challenge seeking: (a) an Order for a binding dispute resolution framework for Ontario physicians; (b) an Order striking down the MOH’s unilateral cuts to physician funding; and (c) an Order compensating physicians for income lost due to these unilaterally imposed cuts. That litigation is ongoing.

[26] There are competing versions of what the state of affairs as between the OMA and the MOH between October 2015 and July 2016 was. Dr. Jacobs’ version is that he and the other members of the OMA were kept busy preparing for the resumption of negotiations but he understood that there would be no negotiations with the MOH unless it was prepared to concede to binding arbitration. There were, in fact, no negotiations. However, he and others subsequently discovered that some time in the spring of 2016, the president of the OMA and others secretly resumed negotiations with the MOH and reached a tentative agreement for a new PSA.

[27] The officers of the OMA have a different account of the events but for present purposes, I need not resolve whether Dr. Jacobs’ version is a true account of affairs, and I simply note that when, on July 11, 2016, the MOH and the OMA issued a press release announcing a tentative agreement, Dr. Jacobs and others felt that they had been deceived and betrayed by the process, and they were disappointed and unsatisfied with the substance of the proposed PSA.

[28] On July 10, 2016, Dr. Jacobs was informed that the Board had approved the proposed PSA and that final approval would be sought via a vote by Council following a members’ “referendum” to be held July 27 through August 3, 2016. A meeting of Council was scheduled for August 6, 2016.

[29] On July 21, 2016, the Applicants launched a petition. The petition proposed, among other things, a motion for a resolution that the proposed PSA not be approved and that the OMA not resume negotiations with the MOH until the MOH agreed to a mechanism for binding arbitration in accordance with the resolution formerly passed by the OMA.

[30] The petitioners, led by Dr. Jacobs, petitioned for a general meeting of the membership. They specified the matters that they wanted considered at the meeting. They proposed three resolutions: (1) that the members not approve the proposed PSA; (2) that the members confirm that the Directors and/or the Council shall not have authority to negotiate an agreement with the MOH that does not include a right to refer disputes concerning implementation of the agreement to binding arbitration; and (3) that in all future negotiations between the OMA and the MOH, every OMA Section Chair shall be kept fully apprised throughout the negotiation of the ongoing discussions, including the issues, the proposed terms and the status, and that each shall be given

timely and meaningful opportunities to provide input on such issues and terms as the discussions evolve, and again before the OMA agrees to a form of agreement.

[31] Meanwhile, while the petition was circulating, on the evening of Friday, July 22, 2016, the Board convened a Physician Leader meeting. At the meeting, the Applicants allege that Board officers including Dr. Hudac, who is Chair of Council, refused to permit Dr. Swan, a life member of the OMA, a distinguished cardiologist, and a highly respected member of the medical community, to discuss the petition and the provision of the by-law that permits members to require that a general meeting be convened. Dr. Hudac referred to the petition as having been signed by a group of "fringe" members of the OMA and ruled Dr. Swan's comments out of order.

[32] Thus, after the announcement of the tentative deal with the MOH, the Applicants were mounting a vigorous effort to object to the process that had led to the PSA and to oppose the PSA and they felt that the OMA was denying them their rights as OMA members.

[33] As a part of the effort to assert their rights as members of the OMA, the Applicants commenced this application, and they sought interim interlocutory relief with three main goals in mind. They sought: (1) an order directing the OMA to send out a notice of a general meeting in the form of Schedule "A" of the notice of motion; (2) an order restraining the OMA from holding a referendum; and (3) an order directing the OMA to provide the Applicants with a membership list.

[34] By the time of the hearing of the Applicants' first motion for interlocutory relief, the executive of the OMA was satisfied that the Applicants complied with the requirements to petition a general meeting, which, in turn, would stop the referendum. The OMA submitted that with their willingness to provide the members list in accordance with s. 306 of the *Corporations Act*, the Applicants' motion was moot.

[35] I agreed that in the changed circumstances there was no need to grant interlocutory relief, and I made the endorsement set out in the introduction to these Reasons for Decision.

[36] What happened next was that on Wednesday, July 27, 2016, the OMA Executive Committee met and approved a form of notice of the general meeting, which included as Schedule "A" the text of the Applicants' petition. On Friday, July 29, 2016, the Executive Committee met again to approve the final version of the Notice, and on Saturday, July 30, 2016, the OMA delivered a Notice of General Meeting to its members. The Notice was accompanied by a sample form of proxy solicited by OMA management.

[37] The Applicants, however, submit that the notice of the general meeting sent to members by the OMA contravened OMA By-law No. 1 because: (1) the notice included a resolution to be voted on by the members that was not set out in the petition pursuant to which the meeting was called; (2) the notice of meeting attached as Schedule "A" to the Applicants' notice of motion was not included with the OMA notice; and (3) the OMA notice improperly included as one of the meeting's purposes "to transact such further or other business as may properly come before the meeting".

[38] Further, the Applicants submit that the proxy form that was distributed with the notice of meeting was not compliant with the law about proxies and should be replaced by a proper form.

[39] The impugned proxy notice that was circulated by the OMA stated, with my emphasis added:

Form of Proxy - General Meeting of Members to be held on August 14, 2016

This Proxy is solicited by and on behalf of management of the Ontario Medical Association ("OMA Management").

Notes to proxy

- 1. Every member has the right to appoint some other person of their choice, who need not be a member, to attend and act on their behalf at the meeting. If you wish to appoint a person other than the persons whose names are printed herein, please insert the name of your chosen proxyholder in the space provided (...).
- 2. This proxy should be signed by the member whose name appears on the proxy.
- 3. If this proxy is not dated, it will be deemed to bear the date on which it is received by or on behalf of the Ontario Medical Association.
- 4. This proxy will be voted as directed by the member, however, if such a direction is not made in respect of any matter and you have not appointed a person other than the persons whose names are printed herein, this proxy will be voted as recommended by OMA Management.
- 5. This proxy will be voted or withheld from voting, in accordance with the instructions of the member, on any ballot that may be called for and, if the member has specified a choice with respect to any matter to be acted on, this proxy will be voted accordingly.
- 6. This proxy confers discretionary authority in respect of amendments to matters identified in the Notice of Meeting or other matters that may properly come before the meeting.

Appointment of Proxyholder

I, being a member of the Ontario Medical Association (the "Association"), hereby **appoint**: Dr. Virginia Walley, President of the Association, or failing this person, Dr. Gail Beck, Chair of the Board of Directors of the Association

OR Print the name of the person you are appointing if this person is someone OR other than the individuals listed herein

[Empty rectangular box for name entry]

as my proxyholder with full power of substitution and to vote in accordance with the following direction (or if no directions have been given, as the proxyholder sees fit) and all other matters that may properly come before the General Meeting of members of the Association to be held at Allstream Centre, 105 Princes' Boulevard, Toronto, Ontario, on Sunday, August 14, 2016 at 12 noon (Toronto time) and at any adjournment thereof (the "Meeting") in the same manner, to the same extent, and with the same powers as if I was present at the Meeting.

VOTING RECOMMENDATIONS ARE INDICATED BY HIGHLIGHTED TEXT OVER THE BOXES.

1. Resolution to ratify the 2016 Physician Services Agreement (as defined in the Notice of Meeting). **For** Against

[40] Further still, the Applicants say that they have been advised that the OMA has designated Dr. Hudac to chair the members' meeting scheduled for August 14, 2016, and the Applicants submit that the court should appoint a neutral chair to preside at the meeting.

[41] The Applicants submit that Dr. Hudac is not authorized by By-law No. 1 to be the chair of the members' meeting and with the by-law otherwise silent, the default provision under the *Corporations Act*, is that the President of the OMA would be the chair of the meeting.

[42] However, the Applicants submit that Dr. Walley, the current President, could not fairly conduct the meeting given her support for the proposed PSA and if Dr. Hudac was authorized to be the chair, his prior conduct and treatment of Dr. Swan reveals that he would not fairly chair the meeting.

[43] The Applicants submit that in view of the content of the resolutions that the petitioners have brought forward at the meeting, a neutral chair is required to restore the appearance of fairness to this process.

[44] Before moving on to discuss the various requests made by the Applicants on this motion, the final factual matter to note is that after the motion on July 25, 2016, the OMA did deliver a membership list to the Applicants that included the names, addresses, and email addresses of the members of the OMA. The Applicants, however, subsequently discovered that the OMA also had a list with information about phone numbers and cellular phone numbers that it was using to communicate with the membership and which list had not been provided to the Applicants.

C. DISCUSSION AND ANALYSIS

Introduction

[45] At the hearing of the Applicants' second motion for interlocutory relief as noted in the endorsement set out in the introduction of these Reasons for Decision, I dismissed the requests with respect to the notice of meeting, the membership list, and the appointment of a neutral chair, and I granted the request that the OMA distribute a new proxy form. What follows are my explanations for these four decisions.

1. The Request for Another Notice of Meeting

[46] As noted above, the Applicants submit that the notice of the general meeting sent to members by the OMA contravened OMA By-law No. 1 because: (1) the notice included a resolution to be voted on by the members that was not set out in the petition pursuant to which the meeting was called; (2) the notice of meeting attached as Schedule "A" to the Applicants' notice of motion was not included with the OMA notice; and (3) the OMA notice improperly included as one of the meeting's purposes "to transact such further or other business as may properly come before the meeting".

[47] I see no merit in any of these submissions. The underlying major premise of all of these submissions is that once the OMA was properly petitioned to give notice of the general meeting, the terms of the notice and the agenda for the meeting were restricted precisely to the terms of the petition and could not be altered by the Board of the OMA or by its Executive Committee, which pursuant to Article 10:8:2 may exercise the powers of the Board of Directors between meetings of the Board of Directors.

[48] While I would agree that the Board or the Executive Committee cannot delete a matter petitioned to be considered at the general meeting, which did not occur in the immediate case, the Board or the Executive Committee is not restricted from exercising the power under Article 15:2:1 "upon its own authority ... [to] give notice of a general meeting of the members of the Association". The Executive Committee properly exercised its authority to call a general meeting.

[49] The Applicants submit that they exclusively get to specify the matters to be considered at the meeting because Article 15:2:1 provides that: "The petition and the notice shall specify the matters to be considered at such meeting or shall state that such meeting is to consider all the matters within the jurisdiction of a general meeting of members." I disagree because, as noted above, the Executive Committee is also entitled to state what matters are to be considered. In any event, apart from semantics and rhetorical manipulation, there is no difference between what the Executive Committee defined as the matters to be considered at the meeting and what the Applicants defined as the matters to be considered at the meeting.

[50] The Executive Committee also complied with the direction I made in my endorsement at the hearing of the first motion. In that endorsement, I stated that the notice was to "include" Schedule "A" to the Applicants' notice of motion, and the notice did include all of Schedule "A" verbatim.

[51] Moreover, the OMA notice also included the Applicants' communication to OMA members that had encouraged them to support the petition. The Applicants have no cause for complaint about the notice of meeting distributed by the OMA.

[52] Further, there was nothing improper in the OMA's notice including the boilerplate language "to transact such further or other business as may properly come before the meeting," which by its own language only gives notice of "other business that may properly come before the meeting".

[53] I conclude that there is no reason to require another notice of meeting to be distributed and the Applicants' request should be dismissed.

2. The Request for Another Membership List

[54] As noted above, for the first motion, the Applicants sought a membership list from the OMA. This request relied on s. 306 of the *Corporations Act* which provides:

306. (1) No shareholder or member or creditor or the agent or legal representative of any of them shall make or cause to be made a list of all or any of the shareholders or members of the corporation, unless the person has filed with the corporation or its agent an affidavit of such shareholder, member or creditor in the following form in English or French, ...

[55] This request became moot because the OMA promised and did provide a membership list to the Applicants.

[56] There never was an obligation on the OMA to provide a membership list including the phone numbers of its members. The OMA complied with its statutory obligations, and I see no reason for the court to intervene to require it to do more.

[57] I conclude that there is no reason to require another membership list to be provided and the Applicants' request should be dismissed.

3. The Request for the Appointment of a Neutral Chair

[58] The Applicants seek the removal of Dr. Hudac as chair of the upcoming general meeting of the members of the OMA. The Applicants submit that Dr. Hudac is not authorized to be the chair of the meeting under the OMA's by-laws and, in any event, he should be disqualified because it can be foreseen that he will not fairly and properly conduct the meeting. Of particular

concern to the Applicants is that the chair of the meeting has power not only over the conduct of the meeting but the chair also rules on the validity of the proxies.

[59] In my opinion, Dr. Hudac is qualified to chair the general meeting and a case has not been made for his disqualification and for the appointment of a neutral chair. I also note that given my ruling in the next section, the Applicants' concerns about the proxies should be much attenuated.

[60] Article 15:3 provides for the procedure for the general meeting of members and the Article stipulates that: "The procedure outlined in these by-laws for meeting of the Council shall apply, with necessary changes, to general meetings of members." Article 9:4:2 provides that: "The duties of the Chair of Council shall be: (a) to preside at all meetings of the Council and to ensure that the meetings are conducted in accordance with the charter and by-laws of the Association."

[61] In my opinion, it follows from Articles 15:3 and 9:4:2 that Dr. Hudac is qualified to be the chair of the general meeting and indeed it may be the case that he is required to be the chair of the meeting.

[62] [62] I will discuss below, the court's jurisdiction to intervene to supervise the governance of an association governed by the *Corporations Act*, but for immediate purposes can say there are cases where an independent chairperson has been appointed; see: *Allied Cellular Systems Ltd. v. Bidlock* [1990] B.C.J. No. 1698 (B.C.C.A.); *Shoppdex.com Corp. v. Brown*, 2010 ABQB 365; *Western Wind Energy Corp. v. Savitr Capital, LLC*, 2012 BCSC 1414, and there are cases where the court has declined to exercise its jurisdiction to appoint a neutral chairperson; see: *Maudore Minerals Ltd. v. Harbour Foundation*, 2012 ONSC 4255; *Meson Capital Partners, LLC v. Aberdeen International Inc.*, 2015 ONSC 532. These cases reveal that the jurisdiction is exercised cautiously and that courts are highly reluctant to intervene unless a strong case for intervention is demonstrated. In the immediate case, a strong case has not been demonstrated.

[63] I conclude that the Applicants' request for the appointment of a neutral chair for the general meeting of the members should be dismissed.

4. The Request for a New Proxy Form

[64] The Applicants request that the proxy form recently circulated by the OMA be voided and that the OMA circulate a new proxy form. In my opinion, there is merit to this request and notwithstanding the arguments of the OMA, the court has the jurisdiction to direct that a revised proxy form be distributed.

[65] In my opinion, the Executive Committee has abused the authority provided to it by s. 84(3) of the *Corporations Act*, which specifies the form and content of a proxy. Section 84 (3) provides, with my emphasis added:

84. (3) In addition to the requirements, where applicable, of section 88, **a proxy** shall contain the date thereof and the appointment and name of the nominee and **may contain** a revocation of a former proxy and **restrictions, limitations or instructions as to the manner in which the shares in respect of which the proxy is given are to be voted** or that may be necessary to comply with the laws of any jurisdiction in which the shares of the company are listed on a stock exchange or a restriction or limitation as to the number of shares in respect of which the proxy is given.

[66] The proxy distributed along with the notice of the general meeting contains one

restriction that would compel the proxyholder to vote for or against the resolution to ratify the 2016 PSA and contains a highlighted recommendation to vote “For” the resolution.

[67] The resolution with respect to the 2016 PSA, however, is not the only matter before the general meeting and it seems unfair and confusing if not somewhat sneaky for the OMA to make no recommendation about the other matters and to leave it to the member to make instructions about these matters: (a) especially when the proxyholder has been empowered by the proxy “to vote in accordance with the following direction (or if no directions have been given, as the proxyholder sees fit)”; and (b) especially when the notes to the proxy indicate that: “if such a direction is not made in respect of any matter and you have not appointed a person other than the persons whose names are printed herein, this proxy will be voted as recommended by OMA Management” (note 4); and “this proxy confers discretionary authority in respect of ... amendments to matters identified in the Notice of Meeting or other matters that may properly come before the meeting” (note 6).

[68] In my opinion, far fairer would have been to either: (a) provide no instructions and no recommendations for the three resolutions to be debated at the general meeting; or (b) to provide instructions and no recommendations for the three resolutions to be debated at the general meeting. The current proxy is all of unhelpful, unclear, unbalanced, and unfair. It is a catalyst for a governance meltdown at the upcoming general meeting.

[69] The current proxy is likely to compromise the fair conduct of the meeting at which the proxyholders will vote because by providing instructions for only one of the resolutions to be addressed at the meeting it provokes a controversy about how the voting should be conducted and ordered.

[70] In the Order described in my endorsement, I have addressed these problems by removing any recommendations and by providing instructions for “For” or “Against” votes not only for the one resolution contained in the current proxy but for the two other resolutions. I have directed one instruction to come before and one to come after the resolution in the current proxy. I have also made it clear by the use of the subjunctive and the words “in the future” that a vote on one resolution does not preclude a vote on any of the other resolutions. With modest wordsmithing, I have revised the language so that the OMA proxyholder members voting on the resolution are voting on matters of policy and not purporting to make findings of fact, findings of law, or findings of mixed fact and law, which are matters better addressed by a court.

[71] I reject the OMA’s argument that the court does not have the jurisdiction to vitiate the current proxy and order it to be revised. In my opinion, the court has the jurisdiction under s. 297 of the *Corporations Act*, which empowers the court to order a members’ meeting, and/or under s. 332 of the *Act*, which provides a process by which members can force a corporation and/or its directors or officers to comply with their obligations under the *Act*. These sections state:

297. If for any reason it is impracticable to call a meeting of shareholders or members of the corporation in any manner in which meetings of shareholders or members may be called or to conduct the meeting in the manner prescribed by this Act, the letters patent, supplementary letters patent or by-laws, the court may, on the application of a director or a shareholder or member who would be entitled to vote at the meeting, order a meeting to be called, held and conducted in such manner as the court thinks fit, and any meeting called, held and conducted in accordance with such an order shall for all purposes be deemed to be a meeting of shareholders or members of the corporation duly called, held and conducted.

....

332. Where a shareholder or member or creditor of a corporation is aggrieved by the failure of the corporation or a director, officer or employee of the corporation to perform any duty imposed by this Act, the shareholder, member or creditor, despite the imposition of any penalty and in addition to any other rights that he, she or it may have, may apply to the court for an order directing the corporation, director, officer or employee, as the case may be, to perform such duty, and upon such application the court may make such order or such other order as the court thinks fit.

[72] In my opinion, when a meeting has been called with a proxy form that presupposes a meeting that cannot be fairly conducted, then, to use the language of s. 297: “it is impracticable to conduct the meeting in the manner prescribed by the by-laws and the court may order a meeting to be conducted in such manner as the court thinks fit.”

[73] Further, when a meeting has been called with a proxy form that presages a meeting that cannot be fairly conducted, then to use the language of s. 332, the court may order the corporation to perform its duties under the *Act* and the court may make such order or such other order as the court thinks fit.

[74] The propriety of the proxy form is not a trivial matter in corporate law. The proxy system is a fundamental instrument of shareholder or member participation in the affairs of the corporation, be it a business corporation, a not-for-profit organization, a non-governmental organization, or an association like the OMA that plays an extremely important role in civil society. In *Montreal Trust Co. of Canada v Call-Net Enterprises Inc.*, [2002] O.J. No. 292 (S.C.J.) at para. 22, Justice Lax explained the vitally important role played by the proxy system as follows:

22. The relationship between a proxyholder and a shareholder is one of agency. It is essentially an administrative mechanism to facilitate shareholder participation in the corporate decision-making process. As explained by Professor Cote in her text, *The Proxy System in Canadian Corporations: A Critical Analysis*:

The proxy form represents, as do other proxy materials sent by management prior to a general meeting, a fundamental instrument of shareholder participation in the corporate decision-making process. Not only does it serve as an informative device similar to the notice of meeting and the information circular but it also enables shareholders to exercise their voting rights. Through the proxy form, shareholders may create an agency agreement or mandate by which they appoint a person, namely the proxyholder, to act.

[75] Maintaining the integrity of the proxy system is particularly important in the immediate case where the exercise of the members of their democratic rights, voting rights, and rights of the OMA will affect the entire population of Ontario.

[76] There are cases that have given the phrase “for any reason it is impracticable to call a meeting” a liberal and generous interpretation; see *Athabasca Holdings Ltd. v. ENA Datasystems Inc.* (1980), 30 O.R. (2d) 527 (H.C.J.); *B. Love Ltd. v Bulk Steel & Salvage Ltd.*, [1982] O.J. No. 3578 (H.C.J.). However, in submitting that that the court did not have jurisdiction to intervene to ensure the integrity of the proxy system, the OMA relied on a series of cases about s. 297 of the *Corporations Act* or comparable legislation that are authority for the propositions that courts have interpreted the phrase narrowly and cautiously and will not order a shareholders’ meetings only in exceptional circumstances. See: *Re Morris Funeral Service Ltd.*, [1957] O.J. No. 80 (C.A.); *Airline Industry Revitalization Co. v. Air Canada* (1999), 45 O.R. (3d) 370 (S.C.J.); *Montreal and Canadian Diocese of the Russian Orthodox Church Outside of Russia Inc. v. Protection of the Holy Virgin Russian Orthodox Church (Outside of Russia) in Ottawa Inc.*, [2002] O.J. No. 4698 (S.C.J.); *Ebrahim v. Continental Precious Minerals*, 2012 ONSC 2918.

[77] The OMA submits that since it responded to the Applicants' petition and called a meeting, the court's authority under s. 297 of the *Corporations Act* is spent and there is no remaining jurisdiction.

[78] I disagree because calling a general members meeting with unfair proxy forms, reveals a matter that would make it impractical to call the members' meeting. In *Allied Cellular Systems Ltd. v. Bidlock, supra*, Justice Hinkson, as he then was, stated:

... Mr. Donohoe on behalf of the applicants contends that the judge was not entitled to proceed pursuant to the provisions of s. 173 [similar to Ontario's s. 297 of the *Corporations Act*] because it had not been shown in the evidence that it was impracticable to call a General Meeting. But, in my view, that is too narrow a reading of s. 173. It grants a wide discretion to the Court for any reason the Court considers appropriate and in appropriate circumstances on its own motion to grant relief pursuant to that section.

[79] In *Airline Industry Revitalization Co. v. Air Canada, supra*, at para. 54, Justice Blair observed that: "The Court's role is to decide issues of a procedural or substantive nature which need to be determined to enable the process to proceed in a proper and timely fashion, but otherwise to remain apart from the battle." I agree, and his observation explains why I declined to order a new notice of meeting and a neutral chair for the upcoming general meeting and why I am ordering a revised proxy to so that the general meeting can proceed in a proper and timely fashion.

[80] In any event, pursuant to s. 332 of the *Corporations Act*, the court has jurisdiction to make an order voiding the proxy used by the OMA and ordering that it distribute a revised proxy. In *Singh v. Sadhu*, 2013 ONSC 3230 at para. 116 and *Noori v. Abdin*, [2011] O.J. No. 6316 (S.C.J.), Justice D.M. Brown and Justice Quigley, respectively, ruled that the combination of sections 297 and 332 of the *Corporations Act* empowered the court to provide direction in governance disputes by exercising its remedial power to make such orders that are just and necessary in the circumstances.

[81] In *Goldhar v. D'Aragon Mines Ltd.* (1977), 15 O.R. (2d) 80 (H.C.J.), after finding that the proxy form was unfair and confusing, Justice R.E. Holland, applied a similar provision and concluded that the form of management proxy did not comply with the *Corporations Act* and he declared that the proxy was null and void. I see no purpose to be served by waiting until the damage is done by allowing an unfair proxy to be used at the upcoming general meeting.

D. CONCLUSION

[82] For the above reasons, I made the endorsement set out in the introduction to these Reasons for Decision.

Perell, J.

Perell, J.

CITATION: Jacobs v. Ontario Medical Association, 2016 ONSC 4977
COURT FILE NO.: CV-16-557199
DATE: 20160804

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DAVID JACOBS, MARK PRIEDITIS and ONTARIO
ASSOCIATION OF RADIOLOGISTS

Applicants

– and –

ONTARIO MEDICAL ASSOCIATION, TOM
MAGYARODY and GAIL BECK

Respondents

REASONS FOR DECISION

PERELL J.

Released: August 4, 2016