

BOLD IDEAS

CHILDREN'S MENTAL HEALTH ONTARIO CONFERENCE

Legal Duties and Obligations of Directors

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2:00 PM

Hilton Toronto

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Overview

- **Fiduciary Duty**
- **Standard of Care**
- **Conflicts**
- **Understanding Director Personal Liability**
- **Duties of *Ex Officio* and Non-Voting Directors**
- **Annual Declaration**

Fiduciary Duty – What does it mean?

- **Directors are fiduciaries** – highest standard of conduct
- **Relationship of trust**
- **Duty is owed to the corporation**
- **All directors owe the same duty**

Fiduciary Duty

- **Two parts:**
 - Standard of Care
 - Rules of Fiduciary Conduct

Standard of Care

Directors must exercise the care, diligence and skill that may reasonably be expected of a person with their knowledge and skill

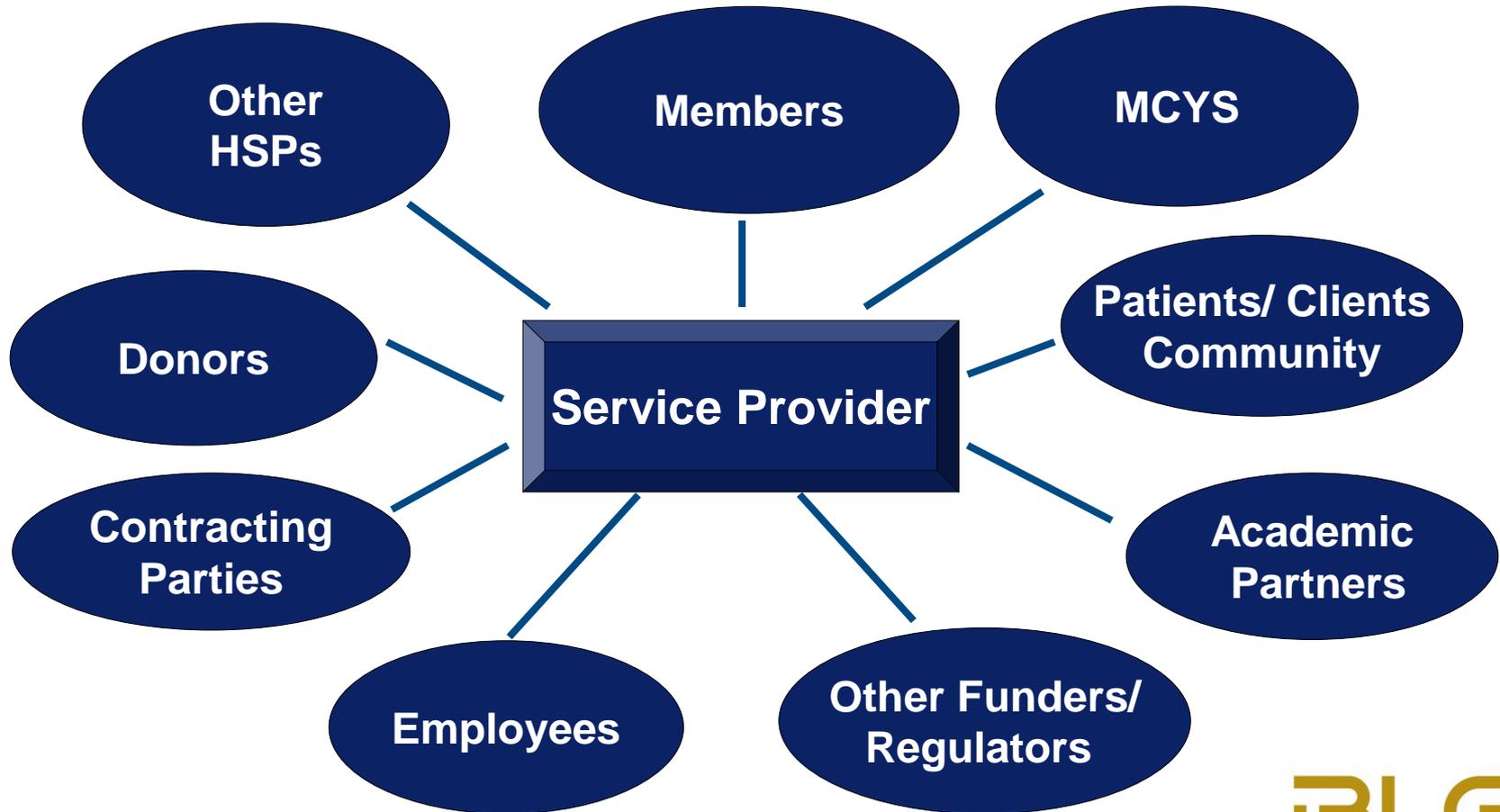
Subjective standard objectively applied

Note: Bill 154

Rules of Fiduciary Conduct

- **Loyalty**
- **Honesty**
- **Good faith**
- **Best interest of corporation (next slide)**
- **Obedience – Board Solidarity**
- **Confidentiality**
- **Avoid conflicts of interest and duty**

Understanding “Best Interest of the Corporation”



Conflicts

- **Definition**
 - Arises where relationship, interest or other duty impedes ability to act in best interests of corporation
- **General Rule**
 - Cannot have a conflict of interest and duty
- **Examples**
 - Transactions between the director and the corporation
 - Misuse of confidential information
 - Duty to disclose information of value to the corporation
 - Appropriating corporate opportunities
 - Conflicts of Duty: Competing directorships (not prohibited)

Process to Follow When Conflict Arises

- *Corporations Act*
- **By-laws**
- **Policy adopted by the Board**

Directors Transacting with the Corporation

- ***Corporations Act* Provisions – safe harbour**
 - Applies where director is directly or indirectly interested in a contract with corporation
 - Director must declare interest at first meeting when contract is discussed or when director first becomes interested in contract
 - Refrain from voting
 - Where director declares interest and refrains from voting – contract will not be voidable and director will not be personally liable for profits
 - General notice may be given

Directors Transacting with the Corporation (Continued)

- Board approved conflict of interest policy may also apply:
 - Expands Scope: actual to perceived conflicts (interest and duty)
 - Enhances Active Steps: Absence from room / no attempt to influence (not just no-vote)
- Sometimes policy also includes a conflict resolution process – board decision

Understanding Director Liability

- **General Rule – Limited Liability**
- **Exceptions to Limited Liability**
 - Breach of fiduciary duty
 - Statutory liability

Requirements to Meet Fiduciary Duty

- **Proper process**
- **Consider all relevant factors**
- **Rely on experts and on management as appropriate**
- **Apply, in good faith, your skill and judgment**
- **Properly document decisions (minutes)**

Business Judgment Rule:

- **Directors will not be held by a Court to a standard of perfection (not liable for errors of judgment) if:**
 - Follow proper process
 - Decision reasonable
 - Reliance on others

Statutory Liability

Three broad categories:

- 1. Unpaid wages (six months); accrued vacation pay (twelve months) – no defence – limitation period – while a director or within six months of ceasing to be a director (so keep a reserve)**
- 2. Withhold, deduct, remit statutes – income tax, EI, CPP, etc. – due diligence defence**
- 3. Non-compliance statutes – Environment Protection, Occupational Health and Safety, Employment Standards (etc.) – usually a due diligence defence**

Legal Protections from Personal Liability

- Insurance
- Indemnity
- Due diligence defence = good governance practices

Elements of Board Due Diligence

- **Take “all reasonable care”**
- **Question of fact – depends on context and director involvement**
- **Ensure that management has established and maintains system. Key elements of a system usually include:**
 - Delegation and reliance on management/advisors
 - Knowledge of compliance requirements
 - Set goals and/or industry standards to achieve compliance
 - Reporting system for compliance and non-compliance
 - React to problems – process to respond
 - Supervision/oversight
- **Board’s role to ensure system is in place and maintained, but must rely on management for compliance**
- **Board must monitor and exercise oversight**

Note: What is sufficient due diligence will depend on context of Board, the particular organization and director involvement

How do Boards Exercise Oversight and Monitor Compliance

Examples:

1. **CEO Supervision** - make requirement for compliance part of CEO's role
2. **Risk Identification** - Board should have a general knowledge of areas of risk from a compliance perspective
3. **Compliance Monitoring Processes** - Board should understand how the organization maintains and monitors compliance, stays abreast of new requirements and reacts to circumstance of non-compliance
4. **Understand Indicators and Metrics** - The board and/or board committees may review indicators that confirm compliance
5. **Certificates/Attestations** - Periodic compliance certificates from management; for example, that remittances and required reporting or filings are made

How do Boards Exercise Oversight and Monitor Compliance (Continued)

6. **Third Party Assurance** - External accreditation process (where applicable) may be used to verify some aspects of compliance
7. **Deep Dives** - Review with management (periodically and usually through committees) key areas of risk and how compliance in key areas is managed (environmental, building code, occupational health and safety, employment law and withholdings and remittances are usual key areas in an operating organization)
8. **Whistleblower Policy** - Ensure organization has a whistleblower policy
9. **Risk Audit** - Consider external audit of select risk areas (i.e., environmental compliance, audit where appropriate in context of organization's activities)
10. **Lead By Example** - Ensure organization has business conduct policies that set a culture of compliance

QUESTIONS?

Patients First: Lessons Learned from the Recent Transformations to Ontario Community Care

November 12, 2017

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Agenda

- 1. Why is this relevant to CMHO Members?**
- 2. *Patients First Act, 2016***
- 3. Transformation of Community Care**
 - OACCAC – HSSO Transfer
 - CCAC – LHIN Transfers
- 4. Implications for CMHO Members**
- 5. Integration Examples**

Relevance to CMHO Members

- **Scope and Speed of Change to Regulatory Environment**
- **Sovereign Power of Government**
- **Understanding what is happening to your colleague organizations who are funded by MOHLTC / LHINs**
- **Opportunities?**

Patients First Act, 2016 - Overview

- **Enacted December 2016**
- **HSPs expanded to include:**
 - Nurse practitioner clinics (non-profit)
 - Aboriginal health access centre (non-profit)
 - Primary care nursing services, maternal care or inter-professional primary care programs and services
 - Palliative care, including hospices (non-profit)
 - Physiotherapy
 - Family health teams (non-profit)
- **New planning power for LHIN re physician resources**
- **LHINs have new purposes: formal recognition of health equity, social determinants of health and prevention and promotion (among other things) as objects of LHINs**
- **LHINs have power to provide community care (to take over from CCACs)**

Patients First Act, 2016 – Overview **(Continued)**

- **New powers to LHIN and/or Minister:** Provincial standards, operational or policy directives, investigators and supervisors (details in next slides)
- **Sub Regions:** Requires sub regions within LHINs and enables changes in LHIN boundaries
- **Funding Process Changes - SAAs:** repeals parts of *Commitment to Future of Medicare Act* and replaces it with a new process for entering into service accountability agreements
- **LHIN Governance:** expanded board, etc.
- **Voluntary Integration:** Extends notice period and mandates information required for a voluntary integration
- **Primary Care:** New power to make regulations (LGIC) requiring information to support collaboration between HSPs, LHINs and physicians and others in the health system and to support planning of primary care services

Public Interest: Broadly Defined

- A number of new powers in LHSIA are exercised in the “public interest”
- A new definition of “public interest” is added to LHSIA (mirrors *Public Hospitals Act* definition):

Public interest

35. In making a decision in the public interest under this Act, the Lieutenant Governor in Council, the Minister or a local health integration network, as the case may be, may consider **any matter they regard as relevant including**, without limiting the generality of the foregoing,

(a) the quality of the management and administration of the local health integration network or the health service provider, as the case may be;

(b) the proper management of the health care system in general;

(c) the availability of financial resources for the management of the health care system and for the delivery of health care services;

(d) the accessibility to health services in the geographic area or sub-region where the local health integration network or the health service provider, as the case may be, is located; and

(e) the quality of the care and treatment of patients.

New MOHLTC Powers over HSPs

- **Minister in respect of HSPs:**
 - Minister may issue provincial standards for provision of health services provided by LHIN (i.e. Community Care) or HSPs: public interest – may be general or particular
 - No provision for consultation or prior notice

Note: provincial standards and operational or policy directives are subordinate to applicable existing Act, or rule of any applicable law

New MOHLTC Powers over LHINs

- **Minister in respect of a LHIN:**
 - May set provincial standards or issue operational or policy directives – public interest – general or particular
 - May appoint an “investigator” – investigate and report on quality of management and administration of LHIN
 - May appoint a “supervisor”
 - Appointed by LGIC on recommendation of Minister – all powers of board and officers (unless otherwise specified): Minister may issue directions to a supervisor
 - Reports of investigator and supervisor to be public

New LHIN Powers

- **LHINs in respect of HSPs:**
 - Operational or policy directives – public interest – (does not apply to public hospitals or licensee under *Long Term Care Act*) – may be general or particular: draft directive to be provided to HSP and Minister
 - Operational reviews or peer reviews (in addition to current power regarding financial audit)
 - Investigators to investigate (prior notice to HSP and Minister)
 - Quality of management
 - Quality of care and treatment
 - Any other matter in public interest (does not apply to LTC homes)
 - Supervisors (14 days prior notice) – public interest – (does not apply to private or public hospitals or LTC homes) – supervisor has powers of “governing body” (directors/officers/members)
 - LHIN may issue directions to supervisor

LHIN Funding of Community Services

- **With Ministry approval, LHINs may provide “community services” (undefined) – not community health**
- **Ministry may or may not fund LHIN for community services and if funded will enter into SAA with LHINsre same**
- **If LHIN is enabled to provide funding to service providers for community services, may only fund:**
 - Prescribed services
 - Plan of service required
 - Eligibility for funding determined by LHIN

Integrations

- **Integration – voluntary integration requires 90 days’ notice to LHIN**
(pre *Patients First*: 60 days)
 - Information to be provided is now specified and includes community engagement process used by HSP and description of issues raised (implication – at least some community engagement required before submission)
 - LHIN can request additional information and if so another 60 days applies
 - LHIN can issue decision it will not oppose integration to collapse time period

Sovereign Power of Government: CCAC and OACCAC Wind-Up

- Minister ordered the transfer of all assets, liabilities, rights, obligations and employees of a CCAC to the LHIN within the same geographic area
 - LHIN would stand in the shoes of the CCAC
 - Provisions for dissolution of CCACs and repeal of *CCAC Act*

CCAC / LHIN	Effective Date of Transfer
1. North Simcoe Muskoka	May 3, 2017
2. Hamilton Niagara Haldimand Brant	May 10, 2017
3. Waterloo Wellington	May 17, 2017
4. South East	May 17, 2017
5. South West	May 24, 2017
6. Champlain	May 24, 2017
7. Central West	May 31, 2017
8. Mississauga Halton	May 31, 2017
9. North East	May 31, 2017
10. Central	June 7, 2017
11. Toronto Central	June 7, 2017
12. Central East	June 21, 2017
13. Erie St. Clair	June 21, 2017
14. North West	June 21, 2017

Sovereign Power of Government: CCAC and OACCAC Wind-Up (Continued)

- **Ontario Association of Community Care Access Centres**
 - Transferred to Health Shared Services Ontario (March 1, 2017)
(CHRIS: Client Health Related Information System)
 - Not directly funded by Government – a private, non-profit organization
- **IMPLICATIONS:**
 - Legally effected by Minister signing orders
 - No consent of LHIN board / no consent of CCAC board required
 - No consent of OACCAC / HSSO boards required
- **Always Remember the Sovereign Power of the Government!**

Implications for CMHO Members

1. **Significant recent changes in healthcare regulatory environment**
2. **Health Services Providers have duty to take a ‘system’ view (so may be looking for collaboration / integration opportunities):**

“Each health service provider shall separately and in conjunction with each other identify opportunities to integrate the services of the local health system to provide appropriate, coordinated, effective and efficient services.”

3. **Current Government is not afraid to exercise extraordinary powers:**
 - Hospital naming directive
 - Minister’s Order re Scarborough and Rouge Hospital
 - Minister’s Order re HSSO/OACCAC transfer
 - Minister’s Orders re 14 CCAC/LHIN transfers
4. **LHINs focused on CCAC transition – Is this a moment of opportunity?**
 - Larger organizations are more stable
 - Voluntary integration is less risky than isolation/forced integration
 - Good client/patient reasons to integrate
 - “Enlightened Self-Interest!”

Integration/Collaboration – Lots of Shapes and Sizes! An opportunity?

Continuum

Informal Collaboration
(working together)



Merger/
Amalgamation

Working
Together

Sharing or
Service
Agreements

Organizational
Alliance

One
Corporation

Program-
based / pilot
projects

Shared
back
office /
resources

Integrated
Management /
Common
Governance

One Board /
One Corp

BLG

Borden Ladner Gervais

QUESTIONS?

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