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SUBJECT:	LEGAL DUTIES AND PROTECTIONS OF DIRECTORS		

A. Background

Legal Duties

The Directors have legal duties to the Hospital in carrying out their individual responsibilities to the corporation and the Board's responsibilities as a whole. These legal duties are derived from a number of sources, including but not limited to:

- *Public Hospitals Act* and the Hospital Management Regulations made thereunder
- *Corporations Act*
- Letters Patent of Amalgamation
- Hospital By-Laws
- Other health care-related legislation
- Other general legislation that imposes obligations on directors of corporations

Detailed sections of particular interest pertaining to each of the above are attached as Appendix A. In addition, general principles of common law impose additional duties on the Directors. The most fundamental of these have been codified in the *Corporations Act*.

B. Duty of Care, Diligence and Skill

The Directors are fiduciaries of the Hospital. This long-standing common law principle governs all aspects of a Director's relationship with the Hospital. In discharging their duties, Directors must act honestly and in good faith with a view to the best interests of the Hospital and must exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. This standard of care can be achieved by any Director who devotes reasonable time and attention to the affairs of the Hospital and exercises informed business judgement. Reasonable delegation is permitted with certain exceptions, but responsibility for major decisions and the exercise of general discretion will always be that of the Directors. The Directors cannot contract out of their fiduciary duty and duty of care and may be personally liable for any breach of these duties.

Duty of Care

The required standard of care is measured against the objective standard of what a reasonably prudent person would do in comparable circumstances. This requires the Directors to devote the necessary time and attention to bring their own judgement to bear on a matter and make an informed decision. The Directors must use common

sense in their decision-making and should be careful, deliberate and cautious. They have a duty to be aware of information that reasonable care and diligence would have revealed, and they should try to foresee the probable consequences of their proposed course of action.

Duty of Diligence

The concept of diligence implies attentiveness, persistence and vigilant activity. This means that attention to the purpose and policies, delegation of authority and the operations of the Hospital is essential. :

- i. A Director should attend as many Board meetings as possible and, in any event, not less than as may be set out in the Administrative By-Laws and/or attendance policy. A Director who has not attended Board meetings must show diligence by examination of Hospital reports, discussion with other Directors, and otherwise by being sufficiently familiar with the Hospital's activities so that he or she does not suffer as a result of non-attendance.
- ii. A Director must scrutinize recommendations coming to the Board for review and ultimate decision as to their sufficiency. A Director must ultimately exercise his or her own judgment.
- iii. The Directors should place reliance on outside experts as required. The Directors should be reasonably assured that the person(s) from whom they seek advice are truly qualified to give the advice sought. Such experts should be independent of the Directors.
- iv. If a Director is aware that meetings are not being held or that duties are not being discharged, he or she must act to correct such omissions by bringing them to the attention of the Chair. Where such omissions relate to the Chair, they may be brought to the attention of the Vice Chair.
- v. If a Director becomes aware of wrongful conduct, he or she should take immediate and effective steps to honour his or her duty to the Hospital and do whatever is reasonably necessary to correct the wrong or bring it to the attention of the appropriate group(s) and/or individual(s), and in any event should bring the matter to the attention of the Chair. Where the matter relates to the Chair, it may be brought to the attention of the Vice Chair.

Duty of Skill

The test for skill is a subjective test determined by the skills and knowledge possessed by an individual Director. A Director has a duty to employ the skills and knowledge that he or she possesses. The greater the skills of a Director, the higher the standard of care that will be expected of the individual. Thus, the required standard of care will depend

upon the knowledge, qualities or characteristics that the Director brings to the Hospital relative to the particular matter under consideration.

C. Other Related Duties

In addition to the foregoing general duties, the Directors should be aware of the following specific duties, which derive from the general duties:

Duty to Act for a Proper Purpose

The Directors must act in the best interests of the Hospital. Other interests may legitimately be considered, including those of the employees, patients, creditors, governments and the public-at-large; however, these cannot be paramount and cannot ultimately lead to action contrary to the best interests of the Hospital.

The duty to act for a proper purpose also means that the Directors cannot misapply the Hospital's property. A Director may be liable if he or she knew or ought to have known that property was being misapplied. In this context, "property" includes valuable confidential information, such as personal health information, salaries of employees or intellectual property.

Duty Regarding Investment Powers

The Directors are responsible for the appropriate management of investments, establishing policy governing acceptable levels of risk and ensuring compliance.

Duty to Develop Policy

Policymaking is a continuous and dynamic responsibility, which demands response to community needs as well as current environmental factors. Close monitoring, evaluation and revisions, if necessary, of established policies by the Board are essential to the survival of the Hospital. The Board has the responsibility to formulate policies under which the Hospital functions, and then to delegate to the Chief Executive Officer the operational responsibility for implementing those policies.

Corporations Act Duties

The *Corporations Act* imposes a statutory duty and standard of care on Directors. The statutory duty codifies the duty to act honestly and in good faith with a view to the best interests of the corporation, and with the standard of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The *Corporations Act* contains sanctions for Directors who make false entries in minutes of meetings or other records, traffic in the list of members, deny access to important Hospital records (e.g. financial records) to another Director or deny members or creditors access to certain corporate records.

D. Protection of Directors from Legal Liability

Section 6.6 of the Administrative By-Laws provides that the Hospital will indemnify the Directors, and section 6.7 provides that the Hospital will purchase Director's liability insurance to ensure that Directors are indemnified in accordance with the By-Laws. Details of available insurance may be obtained from the senior staff of the Hospital. It is worth noting that in accordance with the *Corporations Act*, the Hospital may maintain liability insurance for Directors, except where the liability relates to a Director's "failure to act honestly and in good faith with a view to the best interests of the corporation".

Directors may be able to avail themselves of a due diligence defence for most statutory offences, except in the case of liability arising from non-payment of wages. This means that a Director will not be liable, even in circumstances where the corporations may have committed an offence, if it can be demonstrated that the Director exercised due diligence to prevent the occurrence of the offence.

There is also a limited immunity for acts done in good faith in the execution or intended execution of a duty or authority under the *Public Hospitals Act* or the regulations thereunder, or for any neglect or default in the execution in good faith of any such duty or authority.

References and Related Documents

HSN Administrative By-Laws, sections 6.6, 6.7

Corporations Act

Public Hospitals Act

OHA, "Understanding Your Legal Accountabilities: A Guide for Ontario Hospitals" (2019)

Appendix A

Relevant Provisions in Statutes, Regulations and Hospital's Constating Documents

Public Hospitals Act

Directors of public hospitals in Ontario are afforded some protection from personal liability for their acts or omissions as directors by s. 13(1) of the *Public Hospitals Act*, which provides:

“No action or other proceeding for damages or otherwise shall be instituted against any member of a committee of the medical staff of a hospital or of a board or of the staff thereof for any act done in good faith in the execution or intended execution of any duty or authority under this Act or the regulations or for any alleged neglect or default in the execution in good faith of any such duty or authority.”

This section would provide protection from any claim made against a Director provided the Director was acting in good faith and provided the act or omission complained of was an act or omission that was done by the individual in his or her capacity as a Director.

In addition to this statutory protection, the Hospital provides an indemnity to the Directors in its Administrative By-Laws and carries directors' and officers' liability insurance.

The *Public Hospitals Act* and regulations thereunder provide the board of directors of a public hospital with certain powers and duties, and outline duties and responsibilities with respect to the following:

- Approvals
- Funding
- Directions
- Appointments of Supervisor
- By-Laws
- Directors
- Medical Records

Outlined below are highlights of the duties and responsibilities of the Directors as provided for in the *Public Hospitals Act* and the regulations thereunder:

Section 35(1): Every board shall establish a medical advisory committee composed of such elected and appointed members of the medical staff as are prescribed by the regulations.

Section 35(2): The medical advisory committee shall consider and make recommendations to the board [with respect to applications for appointment or reappointment to any group of the medical staff of the Hospital or for changes in privileges].

Sections 36: The board may

- a) appoint physicians to a group of the medical staff of the hospital established by the by-laws;
- b) determine the hospital privileges to be attached to the appointment of a member of the staff; and
- c) revoke or suspend the appointment of or refuse to reappoint a member of the medical staff.

Sections 37 to 39 set out detailed procedures dealing with the consideration to be given to an application for appointment or reappointment and physicians' rights to appeal to the Board.

Section 39(4) provides that Board members taking part in a hearing with respect to privileges must not have taken part in any investigation or consideration of the subject-matter of the hearing and shall not communicate in relation to the subject-matter with any party.

Section 41 provides that any applicant for appointment or reappointment to the medical staff of the Hospital who was a party to a proceeding before the Board and who considers himself or herself aggrieved by a decision rejecting his or her appointment or reappointment is entitled to written reasons for the decision of the Board and subsequently, a hearing before the Health Professionals Appeal and Review Board.

Hospital Management Regulations

Section 2(1) stipulates that every hospital shall be governed and managed by a board. Other Board responsibilities are set out in sections 4, 5, 15, 21, 22, 25 and 34.

Section 4(1) provides that every board shall pass by-laws that,

- a) provide for the management and administration of the hospital,
- b) provide for the organization of the medical staff and set out duties of the medical staff,
- c) where the hospital has dental, midwifery or extended class nursing staff, provide for the organization of such staff and set out duties of such staff,
- d) establish and provide for the operation of an occupational health and safety program,
- e) establish and provide for the operation of a health surveillance program including a communicable disease surveillance program in respect of all persons carrying on activities in the hospital,
- f) provide for the participation of the chief nursing executive, nurses who are managers and staff nurses in decision-making related to administrative, financial, operational and planning matters in the hospital, and the participation at the committee level of the chief nursing executive and of staff nurses and nurses who are managers, including the election by staff nurses of representative to committees and the election or appointment to committees of nurses who are managers, and

- g) provide for the establishment of procedures to encourage the donation of organs and tissues.

Section 5 requires that every board shall establish a fiscal advisory committee.

Section 9 requires the board to hold an annual meeting between April 1st and July 31st of each year.

Section 15 requires the Board to ensure that the Hospital provides for the proper isolation of patients in circumstances involving dangerous or infectious patients.

Sections 21, 22, 25 and 34 set out requirements and procedures with respect to content, non-disclosure and destruction of electronic or other medical records or records of personal health information, which the Board is to ensure are followed by the Hospital.

Corporations Act

The board of directors of a public hospital is the governing body of the hospital, and is vested with the power to operate, manage and control its affairs. The directors have certain duties that are owed to the hospital corporation in the exercise of their power. Part III of the *Corporations Act* governs the Hospital.

Section 283(1) states that the affairs of every corporation shall be managed by a board of directors howsoever designated.

Sections 283(5) states that a corporation may purchase and maintain insurance for a director or officer of the corporation against any liability incurred by the director or officer, in the capacity as a director or officer of the corporation, except where the liability relates to the person's failure to act honestly and in good faith with a view to the best interests of the corporation.

Letters Patent of Amalgamation

The duties and powers of the Directors should also be exercised with a view to fulfilling the objects of the Hospital as set out in its letters patent of amalgamation.

By-Laws of the Hospital

A copy of the Administrative By-Laws and the Credentialed Professional Staff By-Law of the Hospital have been provided to each Director. Directors should familiarize themselves with these by-laws.

Other Potentially Relevant Health Care-Related Legislation

- *The People's Health Care Act, 2019*
- *Connecting Care Act, 2019*
- *Broader Public Sector Accountability Act, 2010*
- *Long-Term Care Homes Act, 2007*

- *Local Health System Integration Act, 2006*
- *Regulated Health Professions Act, 1991*
- *Mental Health Act*
- *Excellent Care for All Act, 2010*
- Applicable Privacy Legislation

Statutes of General Application Creating Potential Liability for Directors

Officers and directors have a personal responsibility to monitor and ensure corporate compliance with legislative regulations. Statutes that may impose liability include:

- *Employer Health Tax Act*
- *Occupational Health and Safety Act*
- *Employment Standards Act, 2000*
- *Pension Benefits Act*
- *Construction Lien Act*
- *Environmental Protection Act*
- *Income Tax Act*
- *Employment Insurance Act*
- *Canada Pension Plan*
- *Excise Tax Act (GST)*
- *Taxation Act, 2007*