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CATEGORY:	Part V-B – Governance Process	**PAGE:**	1 of 8
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 in fulfilling the Board's responsibilities as a whole. These legal duties are derived from a number of sources, including but not limited to:

- the *Public Hospitals Act* and the Hospital Management Regulations made thereunder;
- the Ontario *Not-for-Profit Corporations Act, 2010* (ONCA);
- Articles of Incorporation (formerly Letters Patent);
- the Hospital's Administrative and Professional Staff By-Laws;
- other health care-related legislation;
- other general legislation that imposes obligations on the directors of a corporation; and

In addition, general principles of common law impose additional duties on the Directors. The most fundamental of these have been codified in ONCA.

B. Fiduciary Duties

Directors stand in a fiduciary relationship to the corporation they serve. The fiduciary duties of a director are owed only to the corporation and not to any one particular stakeholder or other interest group. These duties are among the highest standard of conduct that the law imposes.

All directors, including *ex-officio* directors, owe the same duties and are subject to the same obligations, regardless of how they may have been elected or appointed to the Board.

Directors are required to discharge the standard of care applicable to them in their capacity as a fiduciary and to also adhere to the rules of fiduciary conduct.

Standard of Care

ONCA has set out a statutory standard of care that applies to directors and officers. It is an objective standard of care that requires the director or officer to: act honestly and in good faith with a view to the best interests of the Corporation; and exercise the care, diligence and skill that a reasonable prudent person would exercise in comparable circumstances.

In fulfilling the duty of care, directors are expected to:

- Attend meetings regularly and come prepared, having reviewed materials in advance;
- Request clarification or additional information when required to make an informed decision;
- Rely on professional and expert advice when appropriate; and
- Participate actively and respectfully in Board deliberations.

ONCA also includes a duty for all directors and officers to comply with the Act and regulations thereto, the corporation's articles (formerly letters patent) and by-laws.

Rules of Fiduciary Conduct

In addition to the standard of care, directors are required to abide by the rules of fiduciary conduct. These rules include the following duties: acting in the best interests of the corporation; acting in good faith; exercising power honestly; maintaining loyalty; respecting confidentiality; obedience; and avoiding conflicts of interest.

a) Best Interests of the Corporation

Unlike a for-profit corporation, where best interests will be defined with reference to enhancing shareholder value, determining what is in the best interests of a mission-driven, not-for-profit corporation such as a hospital requires a clear understanding of the hospital's mission, vision, values (or equivalent(s)), as well as its accountabilities.

Directors must act in the best interests of the corporation as a whole and, in doing so, must take into account all relevant factors. A director breaches his or her duty to act in the best interests of the corporation where the director prefers the interests of a particular group, person or entity over the interests of the corporation as a whole. This does not mean that the directors cannot take into account the interests of particular groups that may be affected by board decisions, but they cannot act solely in the interests of one group if to do so would not be in the best interests of the corporation as a whole.

b) Acting in Good Faith

The duty of good faith requires directors to act for a proper purpose and not to exercise their powers for a collateral purpose.

c) Acting Honestly
Directors are required to exercise their powers honestly. For example, directors are not permitted to exercise their powers for a personal benefit.

d) Maintaining Loyalty
The duty of loyalty requires the directors to act in the interests of the hospital corporation and not in the interests of any party that they may feel they represent. It is important that all directors, including *ex-officio* directors, recognize that their duty of loyalty is to the hospital corporation.

e) Respecting Confidentiality
For individual board members, the duty of confidentiality means they must respect the confidentiality of matters that are not, or will not be, disclosed to the public, especially matters that are dealt with in camera.

It is also important for directors to recognize that the board has an official spokesperson and, notwithstanding that a meeting may have been opened to the public, only the board chair or another officer or director designated by the board can speak on behalf of the board. Directors must respect policies regarding communications with the media and, while they may see themselves as representatives of the organization in the community, they must be careful that they do not disclose confidential information or be seen to be speaking publicly on behalf of the board.

Directors should also be sensitive to the privacy protections provided for personal health information in the *Personal Health Information Protection Act*.

f) Obedience / Board Solidarity
The duty of corporate obedience is often described as the duty of board solidarity.
Boards are considered to be democratic in nature. The decision of the majority governs, and all directors have a duty to support the will of the majority. A director who is opposed to a corporate decision that has been validly taken has a duty to respect and adhere to that decision. Directors must support Board decisions publicly and refrain from expressing personal disagreement outside the boardroom. Once a decision is made, the Board speaks with one voice.

The duty of obedience also includes obligations to ensure that the corporation operates within the laws to which it is subject. It is the duty of the board chair to ensure that meetings and board proceedings follow a proper process and are conducted in accordance with the by-laws and rules of order. It is the duty of each board member to respect the role and authority of the chair in this regard.

g) Avoiding Conflict of Interest
A director must not personally profit from his or her position as a director.

A conflict of interest includes a situation where a director has a direct or indirect financial interest in a matter or transaction with the corporation. However, a conflict of interest is broader and includes improper use of information or appropriation of an opportunity that belongs to the corporation.

Under ONCA, a director or officer who is a party to a material contract or transaction, a proposed material contract or transaction, or who is a director or officer of, or has a material interest in, a party to a material contract or transaction or proposed material contract or transition with the corporation, is required to:

- Make disclosure, or request to have entered in the minutes the nature and extent of the interest;
- Refrain from voting; and
- Subject to some limited exceptions, not attend any part of the meeting where the contract or transaction is discussed.

C. Protection of Directors from Legal Liability

Section 6.6 of the Administrative By-Law 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.

Corporations are considered to be separate legal entities from their members and directors and, accordingly, the principle of limited liability applies. The principle of limited liability means that the directors and members are not personally liable for corporate obligations. Only the assets of the hospital can be looked to in order to satisfy the liabilities of the hospital.

There are, however, some exceptions to the principle of limited liability. Directors and, in some cases officers, can be personally liable if liability is imposed by statute, if civil liability is imposed upon them, or if a court chooses to "pierce the corporate veil".

a) Liability Imposed by Statute
There are a number of statutes that potentially expose directors and sometimes officers to personal liability. The potential for personal liability arising under statute generally falls into three categories:

i. Liability for unpaid wages
ii. Liability for amounts the corporation has failed to deduct, withhold and/or remit under the *Income Tax Ac*t, *Canada Pension Plan* and other similar statutes
iii. Liability for non-compliance with specific legislation or where the director or officer has authorized, consented to, acquiesced, or participated in the

commission of an offence by the corporation under a specific statute such as the *Environmental Protection Act*, the *Occupational Health and Safety Act* or the *Employment Standards Act.*

Directors and officers may be able to avail themselves of a due diligence defence for most statutory offences, except in the case of liability arising for non-payment of wages. This means that a director will not be liable, even in circumstances where the corporation may have committed an offence, if it can be demonstrated that the director exercised due diligence to prevent the occurrence of the offence. What steps will constitute due diligence will depend on the circumstances of each case and the particular action that has given rise to the potential liability.

In addition to a due diligence defence, directors can be protected against personal liability through insurance. 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.

b) Civil Liability
Directors have been found to be personally liable when they engage in conduct that is contrary to the "reasonable person" standard. For example, directors who make representations that they know, or ought to know are not true can be found personally liable, even if the acts were done at the behest of the corporation.

Consequently, a director acting on behalf of a hospital corporation should ensure that he/she has a reasonable basis on which to act for the hospital, and should ensure that it is clear to any party that the acts undertaken by the director are on behalf of the hospital and not in the director's personal capacity.

Directors can similarly be protected against such personal liability through insurance.

c) Piercing the Corporate Veil
This common law principle refers to circumstances in which a court will disregard the separate legal existence of the corporation and look to the directors to hold them personally liable for actions that have been undertaken by the corporation.

Although not likely to arise in a hospital context, a court will pierce the corporate veil when it views the corporation as a mere sham or formed for the purposes of fraud. The situations in which this will arise are usually fact-specific.

The courts can also look to the directors for corporate obligations when the corporation is seen as an agent for the directors or has been formed for the purposes of an illegal activity or has been used for fraudulent purposes. It is unlikely that the circumstances would apply to a not-for-profit corporation such as a hospital.

References and Related Documents

HSN Administrative By-Laws, sections 6.6, 6.7
HSN Board Code of Conduct, Policy V-B-2
HSN Conduct of Interest, Policy V_B-17
Ontario *Not-for-Profit Corporations Act, 2010*
Public Hospitals Act
Ontario Hospital Association, "Understanding Your Legal Accountabilities: A Guide for Ontario Hospitals" (2022)

Policy Review Log

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