

Clear Expectations on the Role of Ontario Hospital Boards and Directors

CKHA's Supervisor Rob Devitt used his first few months to understand the organization, establish relationships, revitalize the medical staff structure and stabilize operations. Looking ahead, the New Year presents a new set of challenges and opportunities. A key aspect of the work in 2017 is directly related to governance – both its structure and composition. The Supervisor's Terms of Reference clearly outline a responsibility to:

“address the management and governance issues identified in the Investigator's Report dated August 8, 2016, regarding PGH, SJH and SDH and take actions that are appropriate and necessary for the proper functioning of the hospitals, including re-establishing the Boards with the appropriate skills and competencies, reflective of the community served by the hospitals.”

To strengthen governance in future, CKHA has developed a comprehensive outline of the role of Directors. “Boards are critical leaders within health care organizations and the system as a whole. We owe it to every interested party from the applicants themselves to the patient's we serve to be fully aware of the expectations and awesome responsibility they would be accepting if invited to serve the Alliance,” indicated Supervisor Rob Devitt in addressing the need for this resource to be readily available.

Among the list of responsibilities, liabilities and requirements for boards, the document identifies:

Responsibilities: By statute, Hospital Directors are responsible for the governance and management of the Hospital's operations and are subject to the highest standard of care when making decisions on the Hospital's behalf.

Liabilities: Hospital Directors can be personally liable. For example, under the Corporations Act, a Director may be liable if the organization fails to remit vacation owing to employees. To put this liability in context, The Public General Hospital Society of Chatham currently has an accrued vacation pay liability of approximately \$3 million. Potential liability of this sort is not merely theoretical, particularly when hospitals are frequently running budgetary deficits.

Requirements: As a hospital and charity, Directors responsibilities range from the provision of quality of care to the protection of personal health information to compliance with broader public sector regulations and Income Tax laws. The breadth and depth of requirements to fulfill as a hospital board is extensive. Failure to understand and comply with numerous laws can put organizations and individuals at risk.

This document is intended to serve several purposes:

Create awareness and understanding of the role a Board and its Director serve from a legislated perspective;

Act as a reference guide for future directors and administrators; and,

Provide an outline of the skills and experiences that will be of value to CKHA going forward.

Role of a Member of the Board of Directors Memorandum

**To: Robert Devitt
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Date: November 29, 2016

From: Michael Watts

**Subject: Board of Directors: Responsibilities, Liabilities
and Governance Requirements**

TABLE OF CONTENTS

PART I: CKHA DIRECTOR RESPONSIBILITIES & LIABILITIES.....	3
RESPONSIBILITIES:	3
LIABILITIES:.....	4
SPECIAL CONSIDERATIONS FOR HOSPITAL DIRECTORS:	5
PART II: PERSONAL LIABILITY OF DIRECTORS BY STATUTE.....	8
WAGES AND RELATED BENEFITS	9
Corporations Act (Ontario).....	9
Pensions Benefits Act (Ontario)	10
SOURCE DEDUCTIONS	10
Income Tax Act (Canada).....	10
Income Tax Act (Ontario).....	11
Canada Pension Plan (Canada)	11
Employment Insurance Act (Canada).....	12
SALES TAX	12
Goods and Services Tax/Harmonized Sales Tax	12
Retail Sales Tax (Ontario)	12
WORKPLACE SAFETY AND PROTECTION	13
Criminal Code (Canada)	13
Occupational Health and Safety Act (Ontario).....	14
ENVIRONMENTAL LAW	17
Environmental Protection Act (Ontario).....	17
Ontario Water Resources Act (Ontario).....	18
PART III: HEALTH AND CHARITABLE LEGISLATION	19
HEALTH LEGISLATION	19
Commitment to the Future of Medicare Act (Ontario).....	19

Excellent Care for All Act	19
Local Health System Integration Act (Ontario).....	21
Broader Public Sector Accountability Act.....	21
Broader Public Sector Executive Compensation Act	21
Personal Health Information Protection Act (Ontario).....	22
Public Hospitals Act (Ontario).....	22
Quality of Care Information Protection Act, 2004 (Ontario)	22
CHARITABLE LEGISLATION	23
Charities Accounting Act (Ontario).....	23
Trustee Act (Ontario).....	24
Income Tax Act (Canada).....	24

The Chatham-Kent Health Alliance (“CKHA”) is an alliance of three non-profit charitable corporations incorporated under the *Corporations Act* (Ontario):¹ The Public General Hospital Society of Chatham, St. Joseph’s Health Services Association of Chatham and the Sydenham District Hospital (“Hospital,” or collectively, “Hospitals”).

CKHA has retained a tripartite governance model with each Hospital being governed by its own volunteer Board.

PART I: CKHA DIRECTOR RESPONSIBILITIES & LIABILITIES

Part I describes the responsibilities imposed on Directors and their resulting liabilities. The end of this Part describes special considerations for CKHA Directors in respect of Hospital governance best practices.

For greater clarity, wherever the term ‘Hospital’ is used in relation to a ‘Director,’ it refers to the particular CKHA Hospital with which that Director is associated.

RESPONSIBILITIES:

Service on a Hospital Board as a Director entails significant responsibilities. By statute, Directors are ultimately responsible for the governance and management of the Hospital’s operations.²

Regulation 965 of the *Public Hospitals Act* (Ontario)

2.(1) Every hospital shall be governed and managed by a board.

***Corporations Act* (Ontario)**

¹ [Corporations Act, R.S.O. 1990, Chapter C.38.](#)

² [Corporations Act, R.S.O. 1990, Chapter C.38; Public Hospitals Act, R.S.O. 1990, Chapter P.40; R.R.O. 1990, Regulation 965 Hospital Management.](#)

283.(1) The affairs of every corporation shall be managed by a board of directors howsoever designated ...

In carrying out their responsibilities, Directors are required to act honestly, in good faith and strictly in the best interests of the Hospital. These fiduciary duties are codified in s. 43(1) of the *Not-for-Profit Corporations Act* (Ontario):³

Standard of care

43. (1) Every director and officer in exercising his or her powers and discharging his or her duties to the corporation shall,

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Directors are subject to the highest standard of care when making decisions on the Hospital's behalf. By law, Directors are expected to discharge their duties at the same the standard of care as directors of corporations run for profit.⁴ There is also a subjective element to a Director's standard of care: each Director must exercise a level of skill and judgment reasonably expected of someone with their own knowledge and experience. This implies that Directors with specialized experience may be held to a higher standard of care in respect of matters requiring such expertise.

LIABILITIES:

Directors may be held personally liable if they breach their fiduciary duties or fail to meet the appropriate standard of care in discharging their fiduciary duties. Civil liability is imposed on a Director in these circumstances.

Directors may also be held personally liable for failing to comply with their own statutory obligations or failing to ensure the Hospital complies with its statutory obligations. Depending on the statute, non-compliance with a statutory obligation may result in either civil or criminal liability.

Ensuring statutory compliance is an extensive obligation for Directors. In Ontario, there are over 200 statutes that impose liability in some form or another on Directors.⁵ For example, according to section [81\(1\)](#) of the *Corporations Act*, a Director may be held personally liable if the Hospital fails to remit vacation pay owing to its employees. To put this liability in context, CHKA

³ [Not-for-Profit Corporations Act, 2010, S.O.](#); this Act is not yet in force, however, it will come into for on a day to be named by proclamation of the Lieutenant Governor.

⁴ *Wheeler v. Canada* (1999), Federal Court of Appeal 172 D.L.R. (4th) 708 at paras. 21-25.

⁵ We will provide a brief overview of some of these statutory provisions in Part II below.

currently has an accrued vacation pay liability of approximately \$3 million. Potential liability of this sort is not merely theoretical, particularly when hospitals are frequently running budgetary deficits.

However, it is important to note that Directors are afforded significant protection by s. 13(1) of the *Public Hospitals Act* (“PHA”).

Protection from Liability

13. (1) 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.

The scope of protection under s. 13(1) of the PHA is dependent on whether the Director’s actions are defensible as acts done “in good faith” under the authority of the PHA.

The seminal decision *Rosenhek v. Windsor Regional Hospital* (“*Rosenhek*”) set an important precedent that hospitals and their boards can be held civilly liable for failing to act in good faith even when exercising their statutory powers.⁶ For example, in *Rosenhek*, the failure of the hospital board to comply with their hospital’s own by-laws was considered bad faith. Therefore, Directors should note that failure to observe all their fiduciary and statutory duties, including compliance with the Hospital’s governance materials, could forfeit their protection under s. 13(1) of the PHA.

SPECIAL CONSIDERATIONS FOR HOSPITAL DIRECTORS:

In addition to their significant responsibilities and liabilities, adopting Board-wide governance best practices is now a key consideration for Directors as corporate governance has increasingly become a primary concern amongst investors,⁷ regulators⁸ and stakeholders.⁹

The trend towards greater accountability and more robust governance practices was largely in response to several corporate scandals in the United States and in Canada.¹⁰ In the United States,

⁶ *Rosenhek v. Windsor Regional Hospital*, 2010 ONCA 2013, leave to appeal to the SCC refused, 33608 (October 21, 2010).

⁷ Canadian Coalition of Good Governance: <http://www.ccg.ca>.

⁸ [National Policy 58-201](#) - Corporate Governance Guidelines.

⁹ Governance Centre of Excellence, *Guide to Good Governance* (Third Edition).

¹⁰ Enron, Worldcom, Tyco, Adelphia, HealthSouth and Hollinger.

these scandals led to the introduction of the *Sarbanes-Oxley Act*,¹¹ which in turn led to substantial changes to corporate governance guidelines and practices in both the United States and Canada. Post-*Sarbanes-Oxley*, experts have commented that the adoption of governance best practices by corporate boards is no longer a “nicety” to reassure stakeholders but a legal requirement. In other words, boards that do not adopt best practices may find themselves fighting a presumption of negligence if the failure to observe such practices was causally related to an adverse event.¹²

In the context of hospital boards, the recent enactment of the following statutes reflects the Ontario Ministry of Health and Long-Term Care’s (“MOHLTC”) heightened emphasis on accountability and transparency:

- *Commitment to the Future of Medicare Act* (Ontario);¹³ and
- *Local Health System Integration Act* (Ontario);¹⁴
- *Excellent Care for All Act*;¹⁵
- *Broader Public Sector Accountability Act*;¹⁶
- *Broader Public Sector Executive Compensation Act*;¹⁷ and
- *Freedom of Information and Protection of Privacy Act*.¹⁸

The MOHLTC also introduced the Hospital Service Accountability Agreement (“H-SAA”) whereby hospitals are required to formally define their financial accountability obligations to the

¹¹ *Sarbanes-Oxley Act* of 2002. An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes. Enacted by the Senate and House of Representatives of the United States of America.

¹² This matter surfaced in the ‘Chatham-Kent Health Alliance Investigation Report’ dated August 8, 2016, where the Investigator noted: “The Investigator believes that the best interests of SDH will, in the long term, be better served by a corporate membership that is restricted to the SDH Board of Directors. The community’s trust in such a Board will be dependent upon a robust and transparent nomination process together with a community engagement process that reflects best practices.”

¹³ [Commitment to the Future of Medicare Act, 2004, S.O. 2004, Chapter 5.](#)

¹⁴ [Local Health System Integration Act, 2006, S.O. 2006, Chapter 4.](#)

¹⁵ [Excellent Care for All Act, 2010, S.O. 2010, Chapter 14.](#)

¹⁶ [Broader Public Sector Accountability Act, 2010, S.O., Chapter 25.](#)

¹⁷ [Broader Public Sector Executive Compensation Act, 2014, S.O. 2014, Chapter 13, Schedule 1.](#)

¹⁸ [Freedom of Information and Protection of Privacy Act, R.S.O. 1990, Chapter F. 31.](#)

relevant local health integration network.¹⁹ The H-SAA must be posted publicly and is therefore available for scrutiny by all hospital stakeholders.

The complexities of governing hospitals, together with the current performance expectations of the public (increasingly seen in the form of civil lawsuits and class actions) and the legislature (evidenced by the expanded statutory liability and H-SAA) requires that all Hospital Directors be carefully selected before they are appointed to the Board.

The OHA's Guide to Good Governance emphasizes the need for hospital boards to move towards nominating and electing board members who collectively have the required skills, experience and time to govern their complex operations.²⁰

Recruitment, nomination and election best practices for directors should be consistent with recruiting a skilled, independent and qualified board. Certain practices such as accepting nominations from the floor during the annual meeting or accepting nominations from members a specific number of days prior to the annual meeting presents risk to the board that candidates with the required skills will not be elected. These practices do not constitute best practices for the election of hospital directors.

The 2008 Auditor General's Report notes the risks of adopting a community membership model rather than a skills-based model for board governance: "In certain circumstances ... community 'shareholder' members may impede the board's decisions-making ability. For example, reports commissioned by the Ministry of Health and Long Term Care indicated that the ability of hospital boards to make difficult decisions may be hindered if directors elected by the community 'shareholder' members have: a specific agenda; lack necessary knowledge, skills and experience; or become involved in disputes with the community 'shareholder' members which may impact the directors continuing membership on the board."

Moreover, in today's governance environment, selecting individuals as directors when they do not have the required skills or experience may be viewed as a negligent decision that exposes the board and nominated person to various forms of liability. In fact, recently there has been mounting concern that perhaps the riskiest committee to be on from a director's liability perspective is not the audit committee but the nominating committee.

At the Hospital, selecting the right people as Directors allows the Board to demonstrate accountability to its stakeholders by maximizing the healthcare services and outcomes the Hospital is able to provide. From a legal perspective, adopting the best practices outlined in the Ontario Securities Commission National Policy 58-201 places the Hospital Board and each individual Director at significantly less risk.²¹

¹⁹ [Hospital Service Accountability Agreement Template for 2008-10.](#)

²⁰ Governance Centre of Excellence, *Guide to Good Governance* (Third Edition).

²¹ [Ontario Securities Commission, National Policy 58-201.](#)

National Policy 58-201

3.12 Prior to nominating or appointing individuals as directors, the board should adopt a process involving the following steps:

(A) Consider what competencies and skills the board, as a whole, should possess. In doing so, the board should recognize that the particular competencies and skills required for one issuer may not be the same as those required for another.

(B) Assess what competencies and skills each existing director possesses. It is unlikely that any one director will have all the competencies and skills required by the board. Instead, the board should be considered as a group, with each individual making his or her own contribution. Attention should also be paid to the personality and other qualities of each director, as these may ultimately determine the boardroom dynamic.

The board should also consider the appropriate size of the board, with a view to facilitating effective decision-making.

In carrying out each of these functions, the board should consider the advice and input of the nominating committee.

3.13 The nominating committee should be responsible for identifying individuals qualified to become new board members and recommending to the board the new director nominees for the next annual meeting of shareholders.

3.14 In making its recommendations, the nominating committee should consider:

(a) the competencies and skills that the board considers to be necessary for the board, as a whole, to possess;

(b) the competencies and skills that the board considers each existing director to possess; and

(c) the competencies and skills each new nominee will bring to the boardroom.

The nominating committee should also consider whether or not each new nominee can devote sufficient time and resources to his or her duties as a board member.

PART II: PERSONAL LIABILITY OF DIRECTORS BY STATUTE

Part II outlines the statutory provisions imposing personal liability on directors in respect of wages and related benefits, source deductions, sales tax, workplace safety and protection and environmental law. The provisions set out below apply to all directors and officers of a corporation, including CKHA Directors.

WAGES AND RELATED BENEFITS

Directors and officers may be held personally liable to Hospital employees for unpaid wages and related benefits under federal, provincial and territorial legislation. This liability can be significant in instances where the hospital is large and has a large number of employees as is the case with the Hospitals.

Corporations Act (Ontario)

Pursuant to subsection [81\(1\)](#) of the *Corporations Act* (Ontario), Directors are jointly and severally liable to the employees, apprentices and other wage earners of the Hospital for all debts due for services performed for the Hospital, not exceeding six months' wages, and for the vacation pay accrued for not more than 12 months under the *Employment Standards Act* (Ontario)²² or any collective agreement.

Because the liability is joint and several, an individual Director may be sued for the whole amount due to the employees, apprentices, and/or other wage earners.

Liability of directors for wages

81.(1) The directors of a company are jointly and severally liable to the employees, apprentices and other wage earners thereof for all debts due while they are directors for services performed for the company, not exceeding six months wages, and for the vacation pay accrued for not more than twelve months under the *Employment Standards Act* or any predecessor thereof and the regulations thereunder or under any collective agreement made by the company.

However, subsection [81\(2\)](#) provides some limitations on the liabilities of Directors for such claims. By subsection [81\(2\)\(b\)](#), such suits must be commenced while the person is a Director or within six months after he/she ceases to be a Director. The limitation does not refer to a defence of due diligence and would seem to imply that subject to the limitations set out above, there is no defence to this provision (i.e., it creates absolute liability).

Limitation of liability

81(2) A director is liable under subsection (1) only if,

- (a) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part; or
- (b) before or after the action is commenced, the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy and Insolvency Act* (Canada), or a receiving order under that Act is made against it, and, in any such case, the claim for the debt has been proved ...

²² [Employment Standards Act, 2000, S.O. 2000, Chapter 41.](#)

Pensions Benefits Act (Ontario)

Section [110\(2\)](#) of the *Pension Benefits Act (Ontario)*²³ (“PBA”) makes it an offence to contravene the provisions requiring employers to remit contributions. The responsibilities of the Hospital and the Directors in connection with remitting employee contributions are discussed below in detail, but Directors who cause, authorize, permit, acquiesce or participate in the commission of the offence contravening such provisions or who fail to take reasonable steps to prevent the commission of an offence are guilty of an offence under the PBA. If found guilty, the court can order the Directors to pay the amount outstanding and can also impose a fine of up to \$100,000 for a first conviction.²⁴

SOURCE DEDUCTIONS

There are primarily three statutes in Ontario that govern source deductions, namely the *Canada Pension Plan (Canada)*²⁵ (“CPP”), the *Employment Insurance Act (Canada)*²⁶ (“EIA”), and the *Income Tax Act (Canada)* (“ITA”).²⁷

The Hospital is required to deduct, withhold and then remit payments on behalf of its employees. If these deductions are not made and remitted, the Directors of the Hospital can be held personally liable.

These statutes not only require the Hospital to withhold and remit amounts owing to the proper authorities, they also require that the Hospital hold the monies in trust. All three statutes also create a quasi-criminal liability that is imposed on any Directors, officers and agents of the Hospital for failure to comply with the specified provisions.

Income Tax Act (Canada)

Pursuant to subsection 227.1(1) of the *Income Tax Act (Canada)* (“ITA”), the Directors of the Hospital are jointly and severally liable for the tax amounts that the Hospital has failed to deduct and remit to Canada Revenue Agency in respect of the wages it pays its employees.

²³ [Pension Benefits Act, R.S.O. 1990, Chapter P.8.](#)

²⁴ [Section 110 PBA.](#)

²⁵ [Canada Pension Plan R.S.C., 1985, Chapter C-8.](#)

²⁶ [Employment Insurance Act, S.C. 1996, Chapter 23.](#)

²⁷ [Income Tax Act, S.C. 1985, Chapter 1.](#)

Income Tax Act (Canada)

227.1 (1) Where a corporation has failed to deduct or withhold an amount as required by subsection ... or section 153 or ..., has failed to remit such an amount or has failed to pay an amount of tax for a taxation year ..., the directors of the corporation at the time the corporation was required to deduct, withhold, remit or pay the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay that amount and any interest or penalties relating to it.

Canada Revenue Agency's Policy in respect of director personal liability is set out in Information Circular [89-2R3](#).

In addition to civil liability under section 227.1 of the ITA, the Directors of the Hospital may also be subject to criminal penalties, including fines and/or imprisonment for a term of up to 12 months.

Income Tax Act (Ontario)

Sections [38](#), [42](#) and [46](#) of the *Income Tax Act (Ontario)*²⁸ impose similar civil and criminal liability on Directors if the Hospital fails to deduct and remit the amounts required under subsection [153\(1\)](#) of the federal *Income Tax Act (Ontario)*.

Canada Pension Plan (Canada)

Section [21.1](#) of the *Canada Pension Plan*²⁹ ("CPP") imposes liability on Directors jointly and severally with the Hospital if the Hospital fails to deduct an employee's wages their annual contribution to the Canada Pension Plan.

Liability

21.1 (1) If an employer who fails to deduct or remit an amount as and when required under subsection 21(1) is a corporation, the persons who were the directors of the corporation at the time when the failure occurred are jointly and severally or solidarily liable, together with the corporation, to pay to Her Majesty that amount and any interest or penalties relating to it.

As under the ITA, directors may be subject to criminal liability (penalties/imprisonment) if the Hospital fails to remit CPP contributions (subsection 134(2)).

²⁸ [Income Tax Act, R.S.O. 1990, Chapter I.2.](#)

²⁹ [Canada Pension Plan R.S.C., 1985, Chapter C-8.](#)

Employment Insurance Act (Canada)

The civil and criminal liability of Directors for the Hospital's failure to deduct and remit employer premiums under the *Employment Insurance Act*³⁰ is the same as under the ITA (sections [83](#) and [107](#)).

SALES TAX

Directors may be held liable for retail and good and services taxes that are required to be remitted by the Hospital.

Goods and Services Tax/Harmonized Sales Tax

Subsection [323\(1\)](#) of the *Excise Tax Act (Canada)*³¹ ("ETA") provides that Directors are jointly and severally liable together with the Hospital to pay the GST/HST owing plus any interest or related penalty.

Liability of directors

323.(1) If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.

Directors may also face fines of up to \$25,000 and/or imprisonment for up to 12 months under sections [326\(1\)](#) and [330](#) of the ETA.

Officers of corporations, etc.

330. Where a person other than an individual is guilty of an offence under this Part, every officer, director or agent of the person who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and liable on conviction to the punishment provided for the offence, whether the person has been prosecuted or convicted.

Retail Sales Tax (Ontario)

The Ontario *Retail Sales Tax (Ontario)*³² ("RSTA") levies a sales tax payable on every purchase of personal property for consumption or use in Ontario and on certain services. Although the

³⁰ [Employment Insurance Act, S.C., 1996, Chapter 23.](#)

³¹ [Excise Tax Act, R.S.C., 1985, Chapter E-15.](#)

³² [Retail Sales Tax Act, R.S.O. 1990, Chapter R.31.](#)

purchaser is liable for the payment of the tax, a duty is imposed on the Hospital to collect and remit the tax and to maintain books and records and to file returns.

Pursuant to section [43](#) of RSTA, where a Hospital fails to collect or remit sales tax or to pay and related interest or penalty, the Directors of the Hospital at the time of the failure are jointly and severally liable together with the Hospital to pay such amounts.

A Director may also face fines and/or imprisonment for up to 24 months under [subsections 32\(4\), 41, 44\(8\), and 44\(2\)](#).

WORKPLACE SAFETY AND PROTECTION

Criminal Code (Canada)

The *Criminal Code (Canada)*³³ was amended on March 31, 2004 by [Bill C-45](#) to establish (a) rules for attributing criminal liability to organizations for acts of their representatives; and (b) a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public. It is therefore easier now to convict an organization of criminal liability and convict an individual of criminal negligence involving workplace safety and by analogy, patient safety, because of the new individual legal duty.

In the hospital context, it is important to note that a physician was criminally prosecuted for multiple sexual assaults that occurred in an operating room.³⁴ Together with the provisions of Bill C-45 that are set out below, this decision raises a new area of concern for Directors in relation to the scope of their oversight and its potential implications for criminal penalties. This is an especially salient concern in light of the paramountcy of the *Criminal Code* to any provincial statute, including the *Public Hospitals Act*, that could serve to limit a Director's liability.

Duty of persons directing work

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Causing death by criminal negligence

220. Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable: ...

(b) in any other case, to imprisonment for life.

³³ [Criminal Code, R.S.C. 1985, Chapter C-46.](#)

³⁴ *R v. Doodnaught*, 2013 ONSC 8022 (CanLII).

Causing bodily harm by criminal negligence

221. Everyone who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Offences of negligence - organizations

22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

- (a) acting within the scope of their authority
 - (i) one of its representatives is a party to the offence, or
 - (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

Occupational Health and Safety Act (Ontario)

Section [32](#) of the *Occupational Health and Safety Act (Ontario)*³⁵ (“OHSA”) requires that Directors and officers take all reasonable care to ensure the Hospital's compliance with the OHSA and its regulations, as well as any orders made under the OHSA.

Duties of directors and officers of a corporation

32. Every director and every officer of a corporation shall take all reasonable care to ensure that the corporation complies with,

- (a) this Act and the regulations;
- (b) orders and requirements of inspectors and Directors; and
- (c) orders of the Minister.

Section [2\(2\)](#) of the OSHA renders OSHA paramount to all other provincial statutes, including the *Public Hospitals Act*.

Other Acts

(2) Despite anything in any general or special Act, the provisions of this Act and the regulations prevail.

The statutory obligations of the Hospitals as employers under OSHA are described in further detail below. These obligations should be considered in light of not only workplace safety,

³⁵ [Occupational Health and Safety Act, R.S.O. 1990, Chapter O.1.](#)

violence and harassment but the potential for pandemics and other health-related emergent situations.

The SARS litigation is instructive in that it reinforced that hospitals should make decisions on the basis of the precautionary principle.³⁶ The precautionary principle endorses an approach that eliminates hazards before they cause harm when an activity threatens harm to human health or the environment. The lens of the precautionary principle expands the duties described in ss. 25 and 32 below.

Section 25 of the OHSA imposes obligations on employers to, among other things, ensure (i) the safety of equipment, materials and safety devices; (ii) that measures and procedures to ensure safety are carried out in the workplace; (iii) that the building is safe; and (iv) that every precaution possible is taken to ensure the safety of the workplace.

Duties of employers

25. (1) An employer shall ensure that,

- (a) the equipment, materials and protective devices as prescribed are provided;
- (b) the equipment, materials and protective devices provided by the employer are maintained in good condition;
- (c) the measures and procedures prescribed are carried out in the workplace;
- (d) the equipment, materials and protective devices provided by the employer are used as prescribed; and
- (e) a building, structure, or any part thereof, or any other part of a workplace, whether temporary or permanent, is capable of supporting any loads that may be applied to it,
 - (i) as determined by the applicable design requirements established under the version of the Building Code that was in force at the time of its construction,
 - (ii) in accordance with such other requirements as may be prescribed, or
 - (iii) in accordance with good engineering practice, if subclauses (i) and (ii) do not apply.

In addition, the OSHA has been recently amended to extensively expand an employer's duties with respect to workplace violence and harassment. Chief among these new duties is the

³⁶ *Williams v. Canada*, [2006] O.J. No. 3508; *Albuquerque v. Ontario et. al.*, [2005] O.J. No. 3804; *Jamal v. Hospitals*, [2005] O.J. No. 3506.

obligation to prepare, implement and review a policy on workplace violence and harassment, as set out in OSHA Part III.0.1. Under section [32.0.7\(1\)](#) of the OSHA, employers also have the obligation to appropriately investigate incidents and complaints of workplace violence.

Duties re harassment

32.0.7 (1) To protect a worker from workplace harassment, an employer shall ensure that,

(a) an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances;

(b) the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation;

(c) the program developed under section 32.0.6 is reviewed as often as necessary, but at least annually, to ensure that it adequately implements the policy with respect to workplace harassment required under clause 32.0.1 (1) (b); and

(d) such other duties as may be prescribed are carried out.

Due to the introduction of these expanded obligations, Hospitals are required to be more proactive in ensuring patient and staff safety. In light of OSHA's recent amendments, incidents that result in patient or staff harm, such as the incident that resulted in the death of Lori Dupont at Hotel-Dieu Grace Hospital in Windsor, Ontario, will likely lead to heavy scrutiny for Hospitals and their Directors.

The OSHA Regulations 67/93: Health Care and Residential Facilities sets out more detailed obligation for employers to establish procedures to protect workers including establishing a Joint Health and Safety Committee with a review procedure.³⁷ Additionally, the Workplace Hazardous Materials Information System³⁸ ("WHMIS") Regulation under the OHSA also impose obligations on employers with respect to the production, use or storage of hazardous substances, including biological and chemical agents. Corporate directors may be held personally liable for a breach of these regulations or the OHSA.

Failure to comply with the OHSA can result in fines of up to \$25,000 and/or imprisonment for up to 12 months upon conviction for an individual, and fines of up to \$500,000 for a corporation ([section 66](#)).

³⁷ [O. Reg. 67/93: Health Care and Residential Facilities](#) under the Occupational Health and Safety Act.

³⁸ [R.R.O. 1990, Regulation 860; Workplace Hazardous Materials Information System.](#)

ENVIRONMENTAL LAW

A Director's or officer's duty to avoid harming the environment may arise at common law or by statute.

In addition, a recent case has highlighted that directors and officers may be held personally liable for an order issued by the Ministry of the Environment ("MOE") in respect of monitoring, reporting and remediation in circumstances where the corporation becomes insolvent and proceedings are ongoing. In *Baker v. Ministry of the Environment*, the Ontario Divisional Court upheld a decision of the Ontario Environmental Review Tribunal (ERT) that held directors and officers personally liable for costs associated with an order by the MOE, even while the order was itself being appealed.³⁹ In *Baker*, this represented a liability of \$1.4 million per year.

Given the often lengthy timelines associated with the litigation of environmental matters, this represents a significant new risk for Directors serving on the Board.

Environmental Protection Act (Ontario)

The *Environmental Protection Act (Ontario)*⁴⁰ ("OEPA") makes it an offence to litter, release pollutants into the environment, and fail to give notice of a discharge, improper disposal of waste or furnish false information to ministry officials.

Pursuant to subsection 194(1) of the OEPA, Directors of the Hospital have a duty to take all reasonable care to prevent the Hospital from:

- discharging a contaminant contrary to law;
- failing to notify the Ministry of a discharge of a contaminant contrary to law;
- contravening the sections of the act dealing with transport of liquid industrial waste or hazardous waste;
- failing to mitigate or restore property on which a spill has occurred;
- obstructing a provincial officer in their duty under the Act;
- failing to ensure equipment required under a certificate of approval was installed and maintained as required; and
- contravening an order issued under the Act.

A director or officer who breaches this duty commits an offence:

³⁹ 2013 ONSC 4142 [“*Baker*”].

⁴⁰ [Environmental Protection Act, R.S.O. 1990, Chapter E.19.](#)

Offence

194(2) Every person who has a duty under subsection (1) and who fails to carry out that duty is guilty of an offence.

Penalties under the OEPA range from \$5,000 to \$10,000,000 in fines and imprisonment for [up to] five years less a day.

Ontario Water Resources Act (Ontario)

Directors may also be personally liable under the *Ontario Water Resources Act (Ontario)*⁴¹ in the event that the Hospital engages in any activity which results in a discharge that impairs water quality, and where the Director or officer fails to prevent the commission of an offence.

Duty of director or officer

116.(1) Every director or officer of a corporation has a duty to take all reasonable care to prevent the corporation from,

- (a) discharging or causing or permitting the discharge of any material, in contravention of,
 - (i) this Act or the regulations, or
 - (ii) a licence, permit or approval under this Act;
- (b) failing to notify the Ministry of a discharge of any material, in contravention of,
 - (i) this Act or the regulations, or
 - (ii) a licence, permit or approval under this Act;
- (c) contravening section 98;
- (d) failing to install, maintain, operate, replace or alter any equipment or other thing, in contravention of a licence, permit or approval under this Act; or
- (e) contravening an order, direction, notice or report under this Act, other than an order under section 84 or 106.1.

Penalties under this Act are significant; fines of up to \$4,000,000 for a first offence and \$6,000,000 for a subsequent offence can be imposed on an individual, who can also face imprisonment of up to five years less a day.

⁴¹ [Ontario Water Resources Act, R.S.O. 1990, Chapter O.40.](#)

PART III: HEALTH AND CHARITABLE LEGISLATION

Part III describes the responsibilities of the Board and Hospital as a public hospital and as a charity. Directors must ensure that the Hospital meets its responsibilities under the following legislation.

HEALTH LEGISLATION

Commitment to the Future of Medicare Act (Ontario)

The Hospital is subject to requirements contained in the *Commitment to the Future of Medicare Act* (Ontario)⁴² (“CFMA”), which sets out the relationship between the Hospital and the LHIN and the MOHLTC. These requirements specify that to receive funds from the MOHLTC for the delivery of the healthcare services, hospitals must enter into an H-SAA⁴³ with the LHIN and at all times act in accordance with the terms of that agreement. The LHIN or MOHLTC also have the ability to issue compliance directives if the Hospital does not comply with a notice issued by the LHIN or MOHLTC (section [25](#)).

Failure to comply with a service accountability agreement, a performance agreement or a compliance directive is not an offence and therefore does not trigger the penalty provisions contained in the CFMA. However, failure to comply with an order or wilfully attempting to circumvent or obstruct compliance with an order is an offence for which the maximum penalties under the CFMA are \$25,000 for a corporation and \$10,000 for an individual (section [33](#)).

Individual members of boards of directors who do not receive compensation of any kind for being a member are not subject to the penalties for failure to comply with a Minister’s order. However, individual members of boards of trustees are not exempted from liability if they fail to comply with an exceptional circumstances order (holding back, reducing, varying or requiring repayment of the CEO’s compensation) or if they violate the prohibition against topping up a CEO after an exceptional circumstances order has been issued.

Excellent Care for All Act (Ontario)

The MOHLTC introduced the *Excellent Care for All Act*⁴⁴ (“ECAA”) to promote a patient-centric health care system that is responsive and accountable to the public. The Hospital is considered a “health care organization” under the ECAA and the Hospital Board is considered the health care organization’s “responsible body” (section [1](#)).

⁴² [Commitment to the Future of Medicare Act, 2004, S.O. 2004, Chapter 5.](#)

⁴³ Ibid, section 23.

⁴⁴ [Excellent Care for All Act, S.O. 2010, Chapter 14.](#)

“responsible body” means,

- (a) with respect to a health care organization that is a hospital within the meaning of the *Public Hospitals Act*, its board within the meaning of that Act,
- (b) with respect to any other health care organization that has a board of directors, the board of directors, and
- (c) with respect to any other health care organization that does not have a board of directors, the responsible body as provided for in the regulations;

As a health care organization, the Hospital is required to meet all of its obligations under the ECAA including the obligation to: establish Quality Committees, appoint a voting member of the Board to serve as Chair of the Quality Committee, generate and implement quality improvement plans, and prepare and monitor patient care provider/staff surveys.⁴⁵

Responsibility of health care organizations

2. Every health care organization,

- (a) shall comply with every requirement established by this Act and the regulations; and
- (b) shall ensure that every quality committee it establishes and maintains complies with, and carries out its responsibilities under, this Act and the regulations.

The Hospital Board is responsible for ensuring that the Hospital meets its various obligations under the ECAA. Liability for non-compliance is imposed on “every person” who contravenes the ECAA; this implicates the Directors in addition to the Hospital. The maximum penalties under the ECAA are \$10,000 for an individual and \$25,000 for a corporation.

Offences

14. Every person who contravenes a provision of this Act or the regulations is guilty of an offence and on conviction is liable to a fine,

- (a) not exceeding \$10,000, in the case of an individual; and
- (b) not exceeding \$25,000, in the case of a corporation.

⁴⁵ [O. Reg. 445/10 under the Excellent Care for All Act.](#)

Local Health System Integration Act (Ontario)

The Board must ensure that the Hospital meets its obligations under the *Local Health System Integration Act (Ontario)*⁴⁶ (“LHSIA”). There are no penalties or fines under the LHSIA that apply to the Hospital’s Directors.

Broader Public Sector Accountability Act (Ontario)

The Board is required to ensure that the Hospital complies with all of its obligations under the *Broader Public Sector Accountability Act*⁴⁷ (“BPSAA”). The Hospital’s obligation under the BPSAA are deemed to be terms included under the H-SAA required under section 20 of the LHSIA.

Hospitals

18. Every obligation of a hospital under this Act is deemed to be an obligation it is required to comply with under the terms of the service accountability agreement required under section 20 of the Local Health System Integration Act, 2006.

The Hospital Board is required to approve a series attestations made by the Hospital that the Hospital has adequately complied with the BPSAA and any Directives issued thereunder. These Board-approved attestations must be posted publicly (section [15](#)).

Like the LHSIA, there are no penalties or fines under the BPSAA that apply to the Hospital’s Directors.

Broader Public Sector Executive Compensation Act (Ontario)

All hospitals within the meaning of the Public Hospital Act are considered employers under the *Broader Public Sector Executive Compensation Act*⁴⁸ (“BPSECA”). Under the BPSECA, and as part of its compliance and enforcement provisions, the Minister of the MOHLTC may issue a directive requiring the Hospital to submit reports concerning compliance with the BPSECA. These reports may require certain approval or attestations by the Board. If the Minister issues such a Directive, a Director that willfully fails to provide a report, statement or attestation or makes a false report, statement or attestation, will be personally liable up to the maximum amount of \$5,000 (section [16](#)).

⁴⁶ [Local Health System Integration Act, 2006, S.O. 2006, Chapter 4.](#)

⁴⁷ [Broader Public Sector Accountability Act, 201, S.O. 2010, Chapter 25.](#)

⁴⁸ [Broader Public Sector Executive Compensation Act, 2014, S.O. 2014, Chapter 13, Schedule 1.](#)

Personal Health Information Protection Act (Ontario)

*Personal Health Information Protection Act (Ontario)*⁴⁹ (“PHIPA”) establishes rules for hospitals and other “health information custodians” regarding the use, collection and disclosure of personal health information. Except as permitted by PHIPA, a health information custodian may not collect, use or disclose an individual’s personal health information without the individual’s consent.

The Board of the Hospital is responsible for developing an appropriate policy with respect to personal health information and for ensuring that a reporting mechanism is in place for any breaches of PHIPA occurring with respect to personal health information held by the Hospital.

Individuals found guilty of an offence under PHIPA may be liable to a fine of up to \$50,000. Corporations found guilty of an offence under PHIPA may be liable to a fine of up to \$250,000 (section [72\(2\)](#)).

If the Hospital commits an offence under the PHIPA, every officer, member, employee or other agent of the Hospital who authorized the offence or who had the authority to prevent the offence from being committed but knowingly refrained from doing so is a party to and guilty of the offence and is liable on conviction to the penalty up to \$50,000 for the offence, whether or not the Hospital has been prosecuted or convicted (section [72\(3\)](#)).

Public Hospitals Act (Ontario)

Pursuant to the *Public Hospitals Act (Ontario)*⁵⁰ (“PHA”), the Board is responsible for the governance and management of the Hospital’s operations. Pursuant to section [30](#) of the PHA, a Director may be held liable for a fine of up to \$1,000, if he or she contravenes the PHA or the regulations (e.g., [Regulation 965](#)). In light of the nominal fine set out in the PHA, the greater risk in respect of personal liability for the Hospital’s Directors is not from the fine, but from potential liability in civil or criminal actions relating to allegations of negligence in the performance of their statutory obligations under the PHA (or other statutes) which allegedly lead to bodily harm or death. These risks are significant (particularly as they relate to credentialing, infection control, workplace safety, etc.) but are not the subject of this document.

Quality of Care Information Protection Act, 2004 (Ontario)

Quality of care information is dealt with separately from personal health information. Disclosure of information collected or prepared for the purpose of assisting a quality of care committee of a hospital is limited to certain prescribed circumstances. The Board is responsible for ensuring that

⁴⁹ [Personal Health Information Protection Act, 2004, S.O. 2004, Chapter 3, Schedule A.](#)

⁵⁰ [Public Hospitals Act, R.S.O. 1990, Chapter P. 40.](#)

the terms of reference for the Hospital's Quality of Care Committee comply with the *Quality of Care Information Protection Act, 2004* (Ontario)⁵¹ ("QCIPA").

Individuals found guilty of an offence under QCIPA may be liable to a fine of up to \$50,000. Corporations found guilty of an offence under PHIPA may be liable to a fine of up to \$250,000 (subsection 7(2)).

If a corporation commits an offence under the QCIPA, every officer, member, employee or other agent of the corporation who authorized the offence or who had the authority to prevent the offence from being committed but knowingly refrained from doing so is a party to and guilty of the offence and is liable on conviction to the penalty for the offence, whether or not the corporation has been prosecuted or convicted (subsection 7(3)).

CHARITABLE LEGISLATION

The CKHA Hospitals are registered as charitable organizations with the Canada Revenue Agency. Charitable corporations and charitable property are regulated by the Public Guardian and Trustee ("PGT") in Ontario. In light of the *Centenary* decision,⁵² the PGT's authority over public hospitals is limited to property held in trust by the Hospital as opposed to property owned absolutely.

Directors must handle the charity's property with the care, skill and diligence that a prudent person would use and protect the property from undue risk of loss. Directors must also invest funds if they are not immediately needed to carry out the charity's purposes.⁵³ Directors must ensure that the charity's property is used for the charity's charitable purposes contained in the Hospital's Letters Patent.

Charities Accounting Act (Ontario)

The *Charities Accounting Act* (Ontario)⁵⁴ ("CAA") regulates trust funds and lands held by trustees. The Hospital's Directors may hold certain funds in trust for a designated purpose and as such may be subject to the CAA. If a trustee is in default of its obligations under the CAA, the PGT can make an application to a judge of the Superior Court of Justice, who may make an order to direct compliance. Among the various remedies available, the Court may order the trustee to pay the funds into court, remove the trustee or impose a penalty by way of fine or imprisonment not exceeding 12 months upon the executor or trustee (section [4\(k\)](#)).

⁵¹ [Quality of Care Information Protection Act, 2004, S.O. 2004, Chapter 3, Schedule B.](#)

⁵² *Re Centenary Hospital Association and Public Trustee* (1989), 69 O.R. (2d) 447, [1989] O.J. No. 2951, (1989) 60 D.L.R. (4th) 768 (H.C.J.).

⁵³ Ministry of the Attorney General, Duties, Responsibilities and Powers of Directors and Trustees of Charities.

⁵⁴ [Charities Accounting Act, R.S.O. 1990, Chapter C.10.](#)

Trustee Act (Ontario)

*Trustee Act (Ontario)*⁵⁵ regulates investment of trust funds by trustees.

Income Tax Act (Canada)

*Income Tax Act (Canada)*⁵⁶ regulates the activities of charitable organizations. The Minister may revoke the charitable registration of an organization that carries on a business that is not related to the charitable objects that guide the business of the organization, or otherwise violates the *Income Tax Act* (sections [149.1](#) and [168\(1\)](#)). We have reviewed the penalty provisions above.

⁵⁵ [Trustee Act, R.S.O. 1990, Chapter T.23.](#)

⁵⁶ [Income Tax Act \(1985\), c 1 \(5th Supp.\).](#)