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HOSPITAL LAW BULLETIN

January 28, 2008

## HOSPITAL SERVICE ACCOUNTABILITY AGREEMENT FOR 2008 – 2010

### BRIEFING NOTE

This Briefing Note is prepared by Borden Ladner Gervais LLP to assist Hospital Boards and Management in understanding the terms and conditions of the Hospital Service Accountability Agreement for 2008 – 2010.

#### **Background:**

Each Local Health Integration Network ("LHIN") is required to enter into a service accountability agreement with every public hospital in Ontario that it funds. The LHINs intend to enter into Service Accountability Agreements ("SAAs") with hospitals for two fiscal years.

Under the *Local Health System Integration Act* ("LHSIA") funding the LHIN provides to a hospital must be:

- On terms the LHIN considers appropriate;
- In accordance with the terms of funding the LHIN receives from the Ministry of Health and Long-Term Care ("Ministry"); and
- In accordance with the LHIN's agreement with the Ministry.

These agreements are being entered into pursuant to the *Commitment to the Future of Medicare Act, 2004* ("CFMA").

The Ontario Hospital Association and the LHINs worked together to develop a template agreement. The new template agreement (the "Agreement") while in some ways similar to Hospital Accountability Agreements ("HAA") entered into previously, contains some material differences.

#### **Nature of the Agreement:**

Like the HAA, the Agreement has two parts: An Agreement (that is expected to be the same for all hospitals) and a number of Schedules. The Schedules contain Performance Standards (Indicators and Volumes) that are specific to a hospital. The Schedules also contain terms and conditions that are expected to be the same for all hospitals (but not all Schedules may apply to all hospitals).

The Chief Executive Officer and Chair of the Board of Directors are to sign the Agreement on behalf of the hospital.

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### **Application and Scope of Agreement:**

#### *Funding*

The Agreement will apply to funding that the LHIN provides during the 2008 - 2009 and 2009 - 2010 fiscal years. The funding is set out in Schedule C to the Agreement. As in the case of the HAA, the Agreement does not apply to other funding from the Province, the federal government, or Cancer Care Ontario.

#### *Term*

The Agreement will expire March 31, 2010 but various clauses of the Agreement will survive termination including provisions for funding adjustments, confidentiality and record retention.

#### *Planning and Negotiation*

The Agreement will also apply to the planning and negotiation process for the 2010 - 2012 fiscal years. This means the Agreement contains obligations relating to *planning* for the 2010 - 2012 fiscal years.

### **Funding Provisions:**

The Agreement sets out funding in Schedule C as "planning allocations". These are targets which will be subject to confirmation upon appropriation from the Legislature. If the final amounts are different than those set out in the funding Schedule to the Agreement, the LHIN and the hospital will negotiate new Performance Standards.

The Agreement contemplates that there may be funding increases however such increases and any terms and conditions that will apply to the increase must be mutually agreed.

Funding can be adjusted (decreased) in the following circumstances:

1. In the event that there is an overpayment error;
2. As a result of the application of penalties for late, inaccurate or incomplete filings;
3. In the event that the hospital initiates a voluntary integration and agrees on an amount of funding that should be transferred to facilitate that voluntary integration;
4. Where the LHIN issues an integration decision under Section 26 of LHSIA and the decision sets out the amount of the funding to be adjusted; and
5. Pursuant to the settlement and adjustment provisions set out in Schedule B for specific categories of funding.

The Agreement also contains a process that applies to funding adjustments. Generally speaking, the LHIN must give thirty (30) days' notice and the hospital has an opportunity to dispute the amount, reasons, term or proposed timing of the recovery of the funding.

There are number of new provisions with respect to recovery of funding that did not appear in the

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HAA. These including the following:

1. The LHIN will have a right of set-off. This means that the LHIN may deduct from future payments to the Hospital amounts that are owed by the hospital to the LHIN;
2. The LHIN may retrospectively adjust funding for a period of seven (7) years however any such adjustment must be on the terms that were applicable to the original provision of funding; and
3. The hospital is to hold amounts owing to the LHIN in an interest-bearing account.

While the Business Oriented New Development Program (“BOND”) will continue to apply to hospital surpluses, if the hospital is proposing to use surplus to start or expand clinical services the hospital must inform the LHIN.

**Hospital and LHIN Obligations:**

The LHIN and the hospital both have obligations under the Agreement. The hospital's obligations include "Performance Standards" (Indicators and Volumes) and other obligations.

***Hospital Obligations***

A hospital's obligations include the following:

- (a) Use funding under the Agreement to achieve Performance Standards for the Performance Indicators and Service Volumes the Schedules identify. The concept of performance corridors and negotiated Performance Standards continues to apply;
- (b) Use funding under the Agreement in accordance with Schedules B to H;
- (c) Not use funding under the Agreement for major renovations or construction or for direct expenses relating to research;
- (d) Not reduce, stop, start, expand, cease to provide or transfer hospital services to another hospital or to another site of the hospital *if* such action would result in the hospital being unable to achieve Performance Standards (Indicators and Volumes);
- (e) Inform the LHIN if the hospital is using surplus to start or expand clinical services;
- (f) Fulfill its obligations under the Agreement in accordance with Applicable Law (legislation that applies to hospital operations) and Applicable Provincial Policies (the parties must agree that the policies apply);
- (g) Not restrict or refuse services based on a geographic area of residence;
- (h) Communicate with the LHIN on efforts and activities in community engagement;

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- (i) Report to the LHIN or to such entity as the LHIN and hospital agree, information the LHIN requires for the purposes of the Agreement or LHSIA or that may be required under CFMA;
- (j) Retain records relevant to the hospital's performance under the Agreement for a period of seven (7) years;
- (k) Inform the LHIN if planning to significantly reduce, stop, start, expand, cease to provide or transfer services to another hospital or site of the hospital;
- (l) Comply with any standards set by Ontario Health Information Standards Council that are approved for use;
- (m) Meet due dates in the planning cycle (Schedule A to the Agreement);
- (n) Comply with the reporting requirements under the Agreement (Appendix I to Schedule B) including providing the LHIN with quarterly reports relating to its performance under the Agreement; and
- (o) Indemnify the LHIN and other defined persons or entities and maintain certain insurance showing the LHIN and Her Majesty the Queen in right of Ontario as additional insureds.

***LHIN Obligations***

The LHIN has the following three principle obligations under the Agreement:

- (a) Providing funding to the hospital;
- (b) Providing timely responses; and
- (c) Fulfilling its planning obligations.

With respect to the LHIN's obligation to provide timely responses, the Agreement differs from the HAA which provided a process that could result in deemed approval by the Ministry if the Ministry failed to respond within a specified time period.

Under the Agreement, if a delayed response from a LHIN could reasonably be expected to have a prejudicial effect on the hospital, the hospital may refer the matter to the "issue resolution" process. There are two exceptions to this referral:

1. Notices under Section 27 of LHSIA (voluntary integration) will be subject to the timelines under LHSIA; and
2. Any notice where the LHIN requires the Ministry to respond will not be subject to a referral to the issue resolution process.

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**Consequences of Not Complying with Obligations:**

The consequence to the hospital of not complying with an obligation depends on the nature of the obligation. The consequences of the different kinds of obligations are as follows:

**A. Performance Management and Improvement Process for Failure to Comply with Obligations**

The Performance Management and Improvement Process will apply to all "Performance Factors" which is defined as any matter that significantly affects the party's ability to fulfil its obligations under the Agreement. Accordingly, all obligations (see letters (a) through (o) under Hospital Obligations above) are potentially subject to the Performance Management and Improvement Process. Generally speaking, the process contemplates that either party may request a meeting at any time and each party will notify the other as soon as reasonably possible of any "Performance Factor" including a description of its actual or anticipated impact, actions being undertaken to remedy or mitigate the Performance Factor and whether or not it may be a factor beyond the hospital's control.

The purpose of the Performance Management and Improvement process is to remedy or mitigate the impact of a Performance Factor and may include a requirement that the hospital develop an Improvement Plan or an amendment of the hospital's obligations, if mutually agreed.

If the Improvement Plan does not succeed or is not acceptable to the LHIN, the LHIN may appoint an independent team to assist the hospital in revising the plan or creating a new plan. The team will include a representative from another hospital.

**B. Financial Recovery for Categories of Funding**

If a hospital fails to meet a Performance Standard relating to a non-base funding category, the LHIN may recover funding from the hospital. Schedule B to the Agreement contains a process relating to financial settlement and recovery for categories of funding. The Performance Management and Improvement process may also apply.

**C. Financial Penalties for Failure to Comply with Reporting or Planning Obligations**

If the hospital does not meet a reporting or planning obligation in addition to being subject to the Performance Management and Improvement process, the hospital may face a financial penalty.

**D. Statutory Consequences**

The LHIN may also seek recourse to statutory remedies or consequences in response to non-compliance with the Agreement (*Commitment to the Future of Medicare Act, 2004*).

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### **Other Key Terms:**

(a) Background

The Agreement includes a number of statements in the "Background" section which includes a description of the Ministry's, the LHIN's and the hospital's respective roles. A number of "relationship principles" are set out. There is also acknowledgment and support for the role of local independent hospital boards.

(b) Factors Beyond Hospital Control

The Agreement acknowledges that a factor beyond a hospital's control may lead to the hospital failing to achieve its obligations under the Agreement. The Agreement sets out a list of examples of what the LHIN may consider as a factor beyond hospital control. This is not an exhaustive list. Where the LHIN determines that a hospital's failure to meet its obligations is due to a factor beyond the hospital's control then the LHIN and the hospital will collaborate on the development of a joint response plan and the failure will not be considered a breach of the Agreement for the purposes of the CFMA to the extent that it was due to a factor beyond the hospital's control.

(c) Issue Resolution

The Agreement encourages the solving of issues and disputes in an informal manner. The Agreement requires a hospital and the LHIN to use best efforts to resolve issues and disputes in a collaborative manner. If informal efforts at resolving an issue or dispute fail, the Agreement sets out a formal process for resolution. The process involves an exchange of issue statements, referral to the LHIN and hospital CEOs and involvement of the Board Chairs or a Board member designate. The LHIN has the final authority under the Agreement to resolve the dispute or it may use the processes under the CFMA.

(d) Retention of Operating Surplus

Under the Agreement, a hospital may retain any surplus of income over expenses the hospital earns in a fiscal year in accordance with BOND. If a hospital wishes to use surplus to start or expand a clinical service it must inform the LHIN.

(e) Financial or Operational Audit

The Agreement contains new provisions that allow the LHIN to request, and the hospital will then be obligated, to permit an operational or financial audit to assist the LHIN in its review of an Improvement Plan.

(f) Service Changes

There are new provisions that impact a hospital's ability to start, expand, cease, reduce or transfer a clinical service. Generally speaking, a hospital is required to inform the LHIN of any such changes and to not start or expand a clinical service if such change will result in a hospital being unable to achieve its Performance Standards (Indicators and Volumes).

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(g) Capital

The Agreement contains a number of sections that describe the current processes for capital funding and approval. These sections are descriptive and do not contain any obligations.

(h) Denominational Hospitals

The Agreement includes language to provide that the Agreement will not be interpreted to require a hospital with a denominational mission to provide a service or perform a service in a manner contrary to that denominational mission.

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