

Conflict of Interest Revisited

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A new provision in the recently released 2018-20 Hospital Service Accountability Agreement (“H-SAA”) may cause hospitals to revisit the policies and procedures they have in place for identifying and managing conflicts of interest.

New H-SAA Provision

Section 3.4 of the H-SAA provides as follows:

The Hospital has adopted (or will adopt, within 60 Days of the Effective Date) [being, April 1, 2018] and will maintain, in writing, for the term of this Agreement, a conflict of interest policy that includes requirements for disclosure and effective management of perceived, actual and potential conflict of interest and a code of conduct, for directors, officers, employees, professional staff members and volunteers. The Hospital will provide the LHIN with a copy of its conflict of interest policy upon request at any time and from time to time.

Understanding Conflict of Interest

Key principles for identifying and managing conflicts of interest are found by examining situations where individuals owe fiduciary duties. A fiduciary (one who owes fiduciary duties) is held to a very high standard of conduct. This includes a requirement to act honestly and in good faith, to fulfil the duties of loyalty and confidentiality, and to avoid conflicts of interest. Simply put, an individual who owes fiduciary duties cannot have any other interest, duty or relationship that impedes the ability to act solely in the best interest of the person to whom the fiduciary duties are owed.

Some relationships are well understood to give rise to fiduciary duties. For example: executors of estates owe a fiduciary duty to the beneficiaries of those estates, and partners of a partnership owe these duties to one another. A fiduciary relationship and the corresponding duties can also arise where a person or entity has the power to make decisions, those decisions can be made unilaterally, and they affect the rights of another person or entity that is vulnerable to those decisions.

Hospital directors and officers have a duty to avoid conflicts of interest by virtue of the fiduciary duties they owe to the hospital corporation, even in the absence of any written conflict of interest policy or code of conduct.

There may also be situations that are better described, not as a conflict of interest, but as a conflict between “duty and duty.” For example, where the duties the director owes to the corporation are in conflict with the same individual’s duties owed elsewhere, for example to another corporation.

In the case of the other individuals named in section 3.4 of the H-SAA (employees, professional staff members and volunteers), the duty to avoid conflict of interest might not arise from a fiduciary relationship but rather from other principles that apply to the workforce generally and to a hospital in particular. A hospital is a mission-driven, publicly funded charitable organization, and principles of transparency, accountability, value for money and integrity are paramount. These principles impact many aspects of hospital operations, including workplace and professional staff policies and codes of conduct that are adopted and implemented to ensure integrity of decision-making.

Identifying and Managing Conflict of Interest for Directors

Situations where a conflict of interest might arise for a director cannot be exhaustively enumerated, but include the following:

- **Transactions with the Corporation**

The *Corporations Act* (Ontario) provides a “safe harbour” for a director who is in a conflict of interest by virtue of being directly or indirectly interested in a contract or proposed contract with the corporation. Provided the director has declared the interest and refrained from voting, the director will not be accountable for any profit realized from the contract and the contract is not voidable by reason only of the director being in a fiduciary relationship with the corporation that is a party to the contract.

Under the not-yet proclaimed *Not-for-Profit Corporations Act* (Ontario) the “safe harbour” arises where a director **or officer**:

- is a party to a material contract or transaction with the corporation, or
- is a director or officer of, or has a material interest in, any person who is a party to a material contract or transaction or proposed material contract or transaction with the corporation.

- **Acting for an Improper Purpose**

It is a breach of a director’s duties if the director acts for self-interest or a collateral purpose. The courts will examine what was uppermost in the mind of the director when the decision was made, and the director’s primary motivation must be the best interests of the corporation.

- **Appropriation of Corporate Opportunity**

It is a breach of a director’s duties if the director diverts to his or her own use and benefit an opportunity in which the corporation had an interest.

- **Serving on Other Corporations**

A director who serves as a director of two corporations that are transacting with one another is in a conflict of interest.

A director who serves as a director of two corporations might also have a conflict of “duty and duty” where the corporations are competing with one another. For example, if two corporations are both seeking to take advantage of the same opportunity. A director might be in possession of confidential information received in one boardroom that is of importance to a decision being made in the other boardroom. The director cannot discharge the duty to maintain such information in confidence while at the same time discharging the duty to make disclosure.

- **Misuse of Confidential Information**

A director has a duty to hold information in confidence and to use it only for the corporation’s purposes.

Procedures When Conflicts Arise

The *Corporations Act* requires a director with a conflict of interest to disclose the nature and extent of the director’s interest and to refrain from voting. The process set out in the *Corporations Act* applies to a direct or indirect interest (usually a personal or financial interest) in a contract or proposed contract.

Whether a director must also absent him or herself from the part of the meeting where the matter is discussed will depend on the applicable legislation and any policy or rules of order that the corporation has adopted. The *Not-for-Profit Corporations Act*, once in force, will require a director to disclose the conflict, refrain from voting, and be absent during any discussion.

Not all conflicts may be addressed through these procedures. In some cases, a director may have no option but to resign.

Identifying and Managing Conflict of Interest for Employees, Professional Staff Members and Volunteers

Typically, a hospital will adopt an Employee Code of Conduct, Statement of Ethical Business Practices and/or Business Conduct and Whistleblower Policy. These policies may extend to professional staff members and volunteers. Professional staff members, in particular, typically have, as a condition of their appointment, a requirement to comply with the hospital's administrative policies.

Any such policies will address:

- the identification of situations that will pose a real, potential or perceived conflict of interest;
- processes to declare and manage these conflicts;
- processes to deal with areas of uncertainty;
- ensuring compliance with legislative requirements, including the *Broader Public Sector Accountability Act, 2010* (Ontario) and its associated Broader Public Sector ("BPS") Procurement Directive ("Directive") issued by Management Board of Cabinet, which applies to public hospitals; and
- consequences for failure to comply with the policy.

The Directive contains the following definition:

"Conflict of Interest" means a situation in which financial or other personal considerations have the potential to compromise or bias professional judgment and objectivity. An apparent conflict of interest is one in which a reasonable person would think that the professional's judgement is likely to be compromised.

The Directive contains a number of requirements, including:

- Evaluation team members must refrain from engaging in activities that may create or appear to create a conflict of interest.
- Evaluation team members must sign a conflict-of-interest declaration and non-disclosure of confidential information agreement.
- Organizations must monitor any conflict of interest that may arise as a result of the Members' of the Organization, advisors', external consultants', or suppliers' involvement with the Supply Chain Activities.
- Individuals involved with the Supply Chain Activities must declare actual or potential conflicts of interest.
- Where conflict of interest arises, it must be evaluated and an appropriate mitigating action must be taken.

In addition, the Directive requires public hospitals to adopt the Supply Chain Code of Ethics (the "Code") in accordance with their governance processes. The Code must be made

available and visible to all members of the organization as well as suppliers and other stakeholders involved with supply chain activities. The Code states that its goal is to ensure an ethical, professional and accountable BPS supply chain. A specific requirement of the Code is as follows:

“Individuals involved with Supply Chain Activities must act, and be seen to act, with integrity and professionalism. Honesty, care and due diligence must be integral to all Supply Chain Activities within and between BPS organizations, suppliers and other stakeholders. Respect must be demonstrated for each other and for the environment. Confidential information must be safeguarded. Participants must not engage in any activity that may create, or appear to create, a conflict of interest, such as accepting gifts or favours, providing preferential treatment, or publically endorsing suppliers or products.”

Recommendations

In light of the new H-SAA conflict of interest provision it is prudent for hospitals to review their policies and procedures to address conflicts of interest of directors, officers, employees, professional staff members and volunteers.

The policies should include the following:

- **Application:** The policy should include a statement on who it covers. It is common practice to have one policy apply to directors and officers, and another apply to employees and professional staff members. A judgement should be made on whether the latter policy could apply to volunteers or if there should be a specific policy for volunteers. The role of the volunteer might determine this.
- **Policy Statement:** The policy should state that those covered by the policy are not to engage in activities that create, could create, or may appear to create a conflict of interest. The wording of the prohibition will depend on who the policy covers. In the case of directors, the statement should address the *Corporations Act* requirements.
- **Definition of Conflict of Interest:** It is not possible to exhaustively define a conflict of interest; however, it is helpful to include a general statement. For example, for a policy that applies to directors might include the following statement:

“A conflict of interest arises in any situation where a director’s duty to act solely in the best interests of the corporation and adhere to his or her fiduciary duties is compromised or impeded by any other interest, relationship or duty of that director.”

It is also helpful to provide examples.

- **Process for Disclosing and Managing Conflicts:** For directors, the disclosure process must comply with the *Corporations Act* requirements or, once proclaimed in force, the *Not-for-Profit Corporations Act* requirements. Process for employees, professional staff members and volunteers will typically require disclosure to the immediate supervisor.
- **Resolution Process:** The policy should include a process for managing a perceived, actual, or potential conflict of interest. The policy may include provisions that set out consequences for non-compliance.

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