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IMPLICATIONS OF NEW ONTARIO HEALTH LEGISLATION FOR CHARITIES

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A. INTRODUCTION

Significant changes were made to Ontario's health care system on March 1, 2006, with the passage of Bill 36, the *Local Health System Integration Act, 2006* ("Bill 36" or the "Act").[1] This "made in Ontario" model of health care is based on the principle of community-based care that is intended to be more capable of responding to local health care needs. As such, the management of local health services will devolve to a series of 14 local health integration networks ("LHINs"). Bill 36 recently passed third reading on March 1, 2006, with only limited opposition or discussion, despite the potential for significant impacts on health service providers, registered charities and non-profit organizations who work in the health care field in Ontario. This *Charity Law Bulletin* reviews Bill 36 and discusses the implications and outstanding issues that affect registered charities.

B. LHINS AND HEALTH SERVICE PROVIDERS

Fourteen LHINs had previously been incorporated by letters patent in June 2005 under the *Corporations Act.*[2] Bill 36 continues the 14 LHINs as special act corporations. The objects for these corporations are set out in the Act in detail, but are basically to plan, fund and integrate health services within the LHINs' geographic area. Subsection 4(1) of the Act provides that LHINs are agents of the Crown. As such, a LHIN

[1] At the time of writing, Royal Assent had not yet been given to Bill 36.
[2] R.S.O. 1990, c. C.38.

is a "qualified donee" under the *Income Tax Act* ("ITA"),[3] and can receive gifts from other registered charities and issue charitable receipts without having to be a registered charity. However, pursuant to subsection 6(5), a LHIN cannot, without the approval of the Minister, apply to become a registered charity under the ITA, or make charitable donations, except as authorized by the Act. Subsection 4(4) of the Act states that the property of the LHINs are not charitable property, and subsection 4(3) states that the *Charities Accounting Act*[4] and the *Charitable Gifts Act*[5] do not apply to the LHINs, their directors, officers, employees or agents.

The LHINs and the Minister of Health and Long-Term Care are empowered to exercise prescribed authority over entities that come within the definition of a "Health Service Provider" in subsection 2(2) of the Act, defined as follows:

- A person or entity that operates a hospital or a private hospital;
- A person or entity that operates a psychiatric facility, except if the facility is
    - An institution within the meaning of the *Mental Hospitals Act*;
    - A correctional institution operated or maintained by a member of the Executive Council, other than the Minister; or
    - A prison or penitentiary operated or maintained by the Government of Canada;
- The University of Ottawa Heart Institute;
- An approved corporation within the meaning of the *Charitable Institutions Act*[6] that operates and maintains an approved charitable home for the aged;
- Each municipality or a board of management maintaining a home for the aged or a joint home for the aged;
- A licensee within the meaning of the *Nursing Homes Act*[7];
- A community care access corporation;
- A person or entity approved under the *Long-Term Care Act, 1994*,[8] to provide community services;
- A not-for-profit corporation without share capital incorporated under Part III of the *Corporations Act*[9] that operates a community health centre;
- A not-for-profit entity that provides community mental health and addition services; and
- Any other person or entity or class of persons or entities that is prescribed.

[3] R.S.C. 1985, c. 1 (5th Supp.) ("ITA").
[4] R.S.O. 1990, c. C.10.
[5] R.S.O. 1990, c. C.8.
[6] R.S.O. 1990, c. C.9.
[7] R.S.O. 1990, c. N.7.
[8] S.O. 1994, c. 26.
[9] R.S.C. 1970, c. C-32.

By implication, a Health Service Provider does not include hospital foundations or other types of parallel foundations, community foundations or testamentary charitable trusts.

C. INTEGRATION BY A HEALTH SERVICE PROVIDER

Bill 36 contemplates that Health Service Providers can undertake some aspects of integration on their own. In this regard, section 27 of the Act enables a Health Service Provider to voluntarily integrate its services with those of another person or entity. Despite this, the Act enables a LHIN under section 27(6) to issue a decision to prevent a Health Service Provider from proceeding with the proposed integration or a part of the integration, if it considers it in the public interest to do so.

D. INTEGRATION DECISIONS BY A LHIN

The power granted to a LHIN to integrate the local health system is found in section 25, which enables a LHIN to issue an integration decision under section 26. Subsection 26(1) enables a LHIN to make a decision requiring one or more Health Service Providers to which it provides funding to: (para. 1) to provide all or part of a service or to cease to provide all or part of a service; (para. 2) to provide a service to a certain level, quantity or extent; (para. 3) to transfer all or part of a service from one location to another; (para. 4) to transfer all or part of a service to or to receive all or part of a service from another person or entity; and (para. 5) to carry out another type of integration of services as prescribed. Paragraph 6 empowers a LHIN to "do anything or refrain from doing anything necessary for the Health Service Providers to achieve anything under any of paragraphs 1 to 5, including to transfer property to or to receive property from another person or entity in respect of the services affected by the decision."

Limitations are placed on the powers of the LHINs through subsection 26(2). In this regard, a LHIN may not do certain things, including:

- Require a Health Service Provider to cease operating or carrying on business or to dissolve or wind up its operations or business;
- Require a Health Service Provider to change the composition or structure of its membership or board of directors;
- Require two or more Health Service Providers to amalgamate;
- To unjustifiably, as determined under section 1 of the *Canadian Charter of Rights and Freedoms*, require a Health Service Provider that is a religious organization to provide a service that is contrary to the religion related to the organization;

- Require a Health Service Provider to transfer property that it holds for a charitable purpose to a person or entity that is not a charity;
- Require a Health Service Provider that is not a charity to receive property from a person or entity that is a charity and to hold the property for a charitable purpose; or
- Require a Health Service Provider to do anything that is prescribed in addition to these restrictions.

E. INTEGRATION ORDERS BY THE MINISTER

The Act gives the Minister for Health and Long-Term Care the power to order the closure, amalgamation or transfer of services of a Health Service Provider. Subsection 28(1) enables the Minister to order a Health Service Provider that receives funding from a LHIN and carries on its operations on a for-profit or not-for-profit basis to do any of the following:

- Cease operating, to dissolve or to wind up its operations;
- To amalgamate with one or more Health Service Providers that receive funding from a LHIN;
- To transfer all or substantially all of its operations to one or more persons or entities; or
- To do anything or refrain from doing anything necessary for the Health Service Provider to achieve any of the three items above, including to transfer property to or to receive property from another person or entity in respect of operations affected by the order.

This provision originally applied to not-for-profit Health Service Providers, but has been extended to apply to for-profit Health Service Providers as well following submissions made to the government.

Similar to the protections for religious Health Service Providers and charitable property in relation to integration decisions by LHINs, section 28 contains protections in relation to an integration order by the Minister. Subsection 28(2) states that an integration order by the Minister shall not unjustifiably, as determined under section 1 of the *Canadian Charter of Rights and Freedoms*, require a Health Service Provider that is a religious organization to provide a service that is contrary to the religion related to the organization. Subsection 28(3) applies the restrictions found in paragraphs 26(2)(g) and (h) with respect to the transfer of charitable property between different entities to the Minister's integration orders, namely a Minister's integration order shall not require a Health Service Provider to transfer property that it holds for a charitable purpose to a person or entity that is not a charity, nor shall it require a Health Service Provider that is not a charity to receive property from a person or entity that is a charity and to hold the property for a charitable purpose.

Homes for the aged and nursing homes are the only Health Service Providers who are exempt from integration orders by the Minister pursuant to subsection 28(2.1). The subsection also prohibits the amalgamation of a Health Service Provider that carries on operations on a not for profit basis with one or more Health Service Providers that carries on operations on a for profit basis (28(2.1)(d)), or the transfer of all or substantially all of the operations between such parties (28(2.1)(e)).

The Act provides transferee entities with the corporate authority in order to comply with the integration decision from a LHIN or an integration order from the Minister under section 29. However, it appears that this provision only applies to entities that are incorporated under provincial legislation, not to those that are incorporated federally or in another province.

F. TRANSFER OF PROPERTY HELD FOR CHARITABLE PURPOSE

The transfer of property held for a charitable purpose is governed by the provisions of sections 30 and 31 of the Act. Subsection 30(1) provides that if a LHIN's integration decision or a Minister's integration order calls for the transfer of property that the transferor holds for a charitable purpose, then all gifts, trusts, bequests, devises and grants that form part of the property being transferred will be deemed to be gifts, trusts, bequests, devises or grants of property to the transferee. Subsection 30(2) provides that should any of the charitable property be held by the transferor for a specified purpose as specified in a will, deed or other document by which the gift, trust, bequest, devise or grant was made, the transferee entity will be required to use the property for such specified purpose. This applies to all gifts, trusts, bequests, devises or grants of property made pursuant to wills, deeds or other documents, regardless of whether they were made before or after section 30 comes into force.

Both the LHINs and the government are insulated from liability as a result of any actions taken or not taken or decisions made in accordance with the Act. In addition, subject to a discreet exemption found in subsection 31(3) described below, the Act does not provide for compensation for any loss or damages that may arise as a result of a LHIN's integration decision or a Minister's integration order. Further, the Act states that nothing done or not done in accordance with the Act will constitute expropriation or injurious affection. Subsection 31(1) provides that a Health Service Provider is not entitled to compensation for any loss or damages, including loss of revenue or loss of profit arising from any direct or indirect action that the Minister or a LHIN takes under the Act, including a LHIN's integration decision or a Minister's integration order.

Subsection 31(2), provides that no person or entity, including a Health Service Provider, is entitled to compensation for any loss or damages, including loss of use, loss of revenue and loss of profit, arising from the transfer of property under a LHIN's integration decision or a Minister's integration order.

A limited exemption is found in subsection 31(3), which provides that if a LHIN's integration decision or a Minister's integration order directs a Health Service Provider to transfer property to or to receive property from a person or entity, a person who suffers a loss resulting from the transfer is entitled to compensation "as prescribed in respect of the portion of the loss that relates to the portion of value of the property that was not acquired with money received from the Government of Ontario or an agency of the Government." Under paragraph 36(1)(k), the Lieutenant Governor in Council is given the power to make regulations governing the compensation that will be payable, including determining who pays the compensation, the amount payable, how the loss is to be determined and how the portion of the value of the property that was not acquired with government money is to be determined. No draft regulations have been provided to date.

G. FINANCIAL DISCLOSURE BY HOSPITAL FOUNDATIONS

The First Reading version of the Act proposed amendments to the *Public Hospitals Act* that would enable the Minister to require hospital subsidiaries and hospital foundations to provide financial reports and returns to the Minister and the LHINs. These provisions were similar to proposed amendments made several years ago that were scrapped after discussions with the government. Once again, the government has backed down on implementing such measures and struck the proposed amendments from Bill 36 prior to Third Reading.

H. OUTSTANDING ISSUES INVOLVING CHARITABLE PROPERTY

1. Protection for religious organizations

   As discussed above, subsections 26(2) and 28(2) prohibit a LHIN's integration decision or a Minister's integration order from "unjustifiably" requiring a Health Service Provider that is a religious organization to provide a service that is contrary to the religion related to the organization. Whether a decision or order is unjustifiable will need to be determined in relation to section 1 of the *Canadian Charter of Rights and Freedoms*, which guarantees the rights and freedoms subject to such reasonable limits as

prescribed by law as can be demonstrably justified in a free and democratic society. Presumably, section 1 jurisprudence[10] would apply, requiring a number of elements to be proven:

- That the requirement places reasonable limits on the Health Service Provider's freedom of religion;
- That the requirement is prescribed by law;
- That the requirement is demonstrably justified in a free and democratic society;
- That there is a pressing and substantial objective;
- That the means are proportional;
    - The means are rationally connected to the objective;
    - There is minimal impairment of rights; and
    - There is proportionality between the salutary and deleterious effects of the requirement.

Despite the assurances suggested by subsections 26(2) and 28(2), these provisions remain vague and as such may not provide the protection that religious Health Service Providers may have hoped for. For instance, there is no definition of what a "religious organization" is, neither is there an explanation of when the provision of a service will be "contrary to the religion related to the organization." With regard to this last point, the provision of a service that is "contrary to the ***religion*** related to an organization" may very well be different and possibly much harder to prove than providing a service that is contrary to the ***religious teachings*** of an organization. As such, religious Health Service Providers may want to review their constitutional and gifting documentation in order to ensure that the organization is in fact a "religious organization" under the Act, whatever that means, and that whatever services that they do not want to perform, such as abortions, is clearly documented as being "contrary to the religion" of that organization, not just contrary to the teachings of the religion of that organization.

2. Prohibitions on transfers from charities to non-charities

Although the Act contains prohibitions on (1) the transfer of property held for a charitable purpose from a Health Service Provider to a person or entity that is not a charity, and (2) the transfer of operations from a Health Service Provider that is operated on a not-for-profit basis and one that is operated on a for-profit basis, or an amalgamation between them, the Act does not address the fact that a "charity" under the Act is not necessarily the same as a "registered charity" or a "qualified donee" under the ITA. This is because the Act does not define what a "charity" means, although, presumably, it

[10] See *e.g. R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713; *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295.

would appear to mean a charity at common law. This could therefore lead to a mandatory transfer of charitable property from a registered charity to a charity at common law which is not a registered charity for income tax purposes. Such a transfer would be contrary to the ITA, and as such could result in the loss of charitable status for the transferor. Specifically, section 149.1 of the ITA provides that the transfer of property from a registered charity to an entity that is not a "qualified donee" may result in the revocation of its charitable registration. Included in the list of qualified donees are other registered charities, the Queen in right of Canada or the provinces, and municipalities, among others, but does not include charities at common law that are not registered charities, or non-profit organizations. In addition, it is also not clear what the phrase "carries on operations on a not for profit basis" means. For example, are entities that carry on operations on a "not for profit" basis intended to be equivalent to "non-profit organizations" under paragraph 149(1)(l) of the ITA? If not, what would criteria would be used to define what these entities are?

3. Compensation

Although subsection 31(3) provides an exemption in relation to the prohibition on compensation, it is limited to "persons" only and not to an entity. However, the Act provides little guidance on who would constitute a "person who suffers a loss resulting from the transfer." The question of whether the use of the word "person" precludes compensation to an incorporated Health Service Provider that is either a transferor or transferee, and whether "person" includes the donor remains to be seen.

The Act also fails to address the future status of the compensation funds. For example, can compensation funds become the subject of future transfer decisions or orders, and would the funds become subject to the same restriction as the original gift? Without guidance in the Act, all persons or entities potentially affected by integration decisions or orders will need to ensure that these matters are addressed in the integration decisions and/or orders, or if they are not, then legal advice should be sought.

4. Compliance with Donor Restrictions

The transferee that receives property given for a specified purpose is required by subsection 30(2) to use the property for that same specified purpose. However, it is not clear what constitutes a "specified purpose" under the Act and who it is that is to make that determination. It should be noted that the

terminology of "specified purpose" is different from terminology used for restricted gifts in subsection 5.1(2) of the *Charities Accounting Act*, which uses the terms "restricted or special purposes." The question also remains whether the threshold for determining whether a "specified purpose" exists will be as low as that which is found in subsection 4(d) of the *Charities Accounting Act*, which uses the phrase "in the manner directed," or as high as that set out in the *Christian Brothers* case, [11] which suggests that the use of the words "in trust" may be necessary in order to create a restricted gift.

Another consideration is whether the original "specified purpose" will be recognized if it was only explicit, or whether an implicit restriction on the use of the gift will be recognized. A requirement that funds only be used to fund heart research would arguably constitute an explicit "specified purpose." However, a donation to a religious Health Service Provider may only have an implicit donor restriction attached to it regarding how funds are to be used because the donor did not originally contemplate the donation being transferred to another entity, and therefore did not see a need for an explicit restriction.

What is to happen to property that is subject to a "specified purpose" that cannot be complied with is also not addressed in the Act. Geographical limitations are one example of a restriction that may not be able to be fulfilled by a transferee Health Service Provider. Geographic restrictions may have little impact on Health Service Providers in the Greater Toronto Area, for instance, but could have a significant impact for areas outside of the GTA, in particular in Northern Ontario, i.e. where an endowed gift to a hospital in North Bay that is restricted for use in the North Bay area is ordered transferred to a Sudbury hospital by an integration decision or a Minister's integration order. Other restrictions that might also result in an inability of the transferee to comply with the specified purpose would be restrictions that require the delivery of services that are specific to a named charity, or gifts that are subject to specific religious purpose restrictions.

The imposition of such restrictions could in turn mean that a *cy-près* court application may need to be brought if the transferee charity is unable to comply with the restriction because the restriction is now

[11] See *e.g.* Terrance S. Carter, "Donor-Restricted Charitable Gifts: A Practical Overview Revisited II" (2003) *The Philanthropist*, Vol. 18 No. 1 and 2, available at www.charitylaw.ca; Terrance S. Carter, "Supreme Court's Refusal to Grant Leave to Appeal in Christian Brother Case Prejudices Charities" in *Charity Law Bulletin No. 3* (26 March 2001), available at www.charitylaw.ca; Terrance S. Carter and R. Johanna Blom, "Update on Christian Brothers" in *Charity Law Bulletin No. 24* (30 September 2003), available at www.charitylaw.ca; Terrance S. Carter, M. Elena Hoffstein and Edgar A. Frechette, "Endowed and Restricted Gifts: What the Gift Planner Needs to Know," available at www.charitylaw.ca.

either impossible or impracticable to comply with. If a *cy-près* application subsequently fails, then the gift would be defeated and the gift would generally revert back to the donor, unless the terms of the original gift provides for a gift over to another charity, something that neither the Health Service Provider or the LHIN may have contemplated, but which a donor may in fact want if the donor is dissatisfied with the result of an integration decision of a LHIN or a Minister's integration order. The Act also does not address the right of donors under either common law or under sections 4(d), 6 or 10 of the *Charities Accounting Act* that would otherwise allow donors or the Public Guardian and Trustee of Ontario to seek court assistance in ensuring that a gift is used for the intended restricted purpose in question.

5. *Income Tax Act* Implications

Notwithstanding the statutory obligation to comply with an integration decision of a LHIN or a Minister's integration order, consideration must still be given to compliance issues under the ITA. The fact that provincial legislation may require a registered charity to transfer charitable assets does not preclude the registered charity from having to comply with the requirements under the ITA. As such, a number of issues under the ITA would need to be considered, for example:

- Will a registered charity be required to transfer its charitable property to, or to amalgamate with, a qualified donee as required by the ITA?
- What will be the impact of the transfer of property on the disbursement quota calculation of the transferor registered charity, especially if the property transferred involves an enduring property as defined under the ITA?[12]

Health Service Providers that are registered charities will therefore need to carefully review the requirements under the ITA when determining how to comply with an integration decision of a LHIN or a Minister's integration order.

[12] See e.g. Theresa L.M. Man and Terrance S. Carter, "Effect of Inter-Charity Transfers on Disbursement Quota Calculation" in *Charity Law Bulletin No. 69* (12 April 2005), available at www.charitylaw.ca.

I. WHAT SHOULD HEALTH SERVICE PROVIDERS AND FOUNDATIONS DO?

With the introduction of Bill 36, consideration may need to be given to transferring assets that were acquired with non-governmental funds from a Health Service Provider to a parallel foundation in order to avoid future transfer orders involving donated charitable property. Foundations supporting Health Service Providers will also need to keep track of money given to Health Service Providers in order to maintain the option in the future of being able to seek compensation for property that is the subject matter of a transfer order under an integration decision by a LHIN or a Minister's integration order. As such, Health Service Providers should avoid commingling of government funds with donated funds as much as possible in order to be able to track donated funds in the future.

J. WHAT SHOULD GIFT PLANNERS DO?

Gift planners will need to carefully discuss the implications of Bill 36 with potential donors to a Health Service Provider or a parallel foundation in order to ensure the donors understand the possible risk that their gift may not be used in the manner that they were intending. Gifts made to parallel foundations or community foundations instead of directly to a Health Service Provider will likely become the norm, if that is not already the case. The overall focus will now need to be directed at finding a way to respect and enforce donor intent. For example, gift planners will need to carefully structure a gift so that any future transfer orders involving the gift will cause the gift to be either defeated or gifted over to another charity by using a provision such as a condition subsequent or imposing a restriction that cannot be complied with by a transferee, i.e. a geographic limitation in which the funds can only be used in a certain geographic area. An example of such a restriction in a religious context might be a gift to a Catholic Hospital with a restriction that the funds in question must only be used within a Catholic Health Service Provider and in a manner that is not contrary to the teachings of the Catholic Church.

K. CONCLUSION

Although Bill 36 has passed Third Reading, Health Service Providers, registered charities, non-profit organizations and those who advise them will need more time to determine the most appropriate way to properly manage the risk to the assets of the charity and ensure that donors are confident that their intent will be respected by the Health Service Providers, their parallel foundations, LHINs and the government. As the full implications of the LHIN legislation will likely be carefully scrutinized over the ensuing months, the government may find, subject to what may be achievable through regulation, that it may be necessary to consider amendments to the Act in order to address some of the outstanding issues involving charitable property.

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