



Hospital and Foundations Seminar Series
**Hospital and Foundations
in Transition**
January 22, 2004



**Employment Law:
Issues for 2004**
Brian A. O'Byrne
January 22, 2004


Employment Law - Issues For 2004

1. Union Negotiations
2. Human Rights Issues
 - The Duty To Accommodate
3. Labour Relations Issues
 - Parry Sound Decision
 - Insurance Disputes
 - Nurse Practitioner
 - Contracting Out




Union Negotiations

- ONA and OPSEU expire March 31, 2004
- CUPE and SEIU expire September/October, 2004
- CAW (mainly in SW Ontario) - expire at various dates in 2004

FASKEN
MARTINEAU 


Union Negotiations

- ONA will be the leader
- Will try to be first out of the gate
- Will likely look for large wage increases
- OPSEU will want parity with ONA

FASKEN
MARTINEAU 

Union Negotiations

- CUPE, SEIU and CAW will likely look to get the same increases as ONA


FASKEN
MARTINEAU 

Union Negotiations

- Ontario Ministry of Labour Statistics - percentage increases negotiated in 2003


	1st Quarter	2nd Quarter	3rd Quarter	YTD November
Private Sector	3.0%	0.9%	2.2%	1.9%
Public Sector	3.2%	3.6%	3.5%	3.5%

- Public Sector increases largely accounted for by the Education Sector

**FASKEN
MARTINEAU** 

Union Negotiations


- CAW negotiated a 3-year contract with St. Mary's General Hospital - Kitchener - (service unit) - 3% each year
- Recent statements of Premier McGuinty advising doctors, nurses and other health care unions that now is not the time for big increases

**FASKEN
MARTINEAU** 

Human Rights Issues

The Duty to Accommodate


- While the duty extends to other prohibited grounds of discrimination as well, e.g. religious beliefs, family status etc., most frequent application of the duty is in regard to persons suffering from a disability

**FASKEN
MARTINEAU** 

Human Rights Issues

The Duty to Accommodate


- Probably more accommodation cases going to arbitration today than any other subject matter

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate


- Law is very much evolving in this area and perhaps that is one of the reasons why there are so many cases
- Typical case: employee suffers injury; cannot do her own job anymore; wants accommodation

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate - Original View


- 1) Have to be able to perform the essential duties of own job
- 2) If cannot, then no violation of Human Rights Code

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate - Original View


3) However, adjudicator not entitled to make a finding that an individual was unable to perform the essential duties of his job unless he is satisfied that all reasonable steps to accommodate the employee up to the point of undue hardship had been taken and the employee still unable to perform the essential duties of the job

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate - Original View

- Taxi example - stereotypes
- Paraplegic mechanic example


FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate - Evolution of the Duty

- *Better Beef* case - Arbitrator Welling


1) If cannot perform essential duties of own job even with accommodation, look for other vacant positions in the bargaining unit

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate - Evolution of the Duty


- *Better Beef* case - Arbitrator Welling
 - 2) No obligation on an employer to create a job
 - 3) Cannot bump out an incumbent from an existing job

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate - Latest Evolution


- *Essex Police* case - Arbitrator Goodfellow
 - Can bump out a less senior incumbent from another job

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate - Latest Evolution


- If no existing job that the employee can do, employer has an obligation to bundle together a number of duties from other jobs to form a new job provided it is meaningful job

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate


- Not all arbitrators are buying the Goodfellow approach although he has a number of followers
- No definitive decision from the courts giving guidance as to how far, exactly, the duty to accommodate extends

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate


- Current uncertainty in the law creating real problems
- How far does the hospital have to go to accommodate?

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate


- Management by arbitrators rather than by hospital leadership
- Principle is supposed to be equality of treatment - not better treatment

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate - Undue Hardship


- How to interpret this is narrowly circumscribed under the Ontario Human Rights Code
- Can only look at costs, outside sources of funding and health and safety requirements

FASKEN
MARTINEAU 

Human Rights Issues

The Duty to Accommodate - Undue Hardship


- Not so narrowly circumscribed in other jurisdictions including jurisdictions where the most liberal cases are coming from which, in turn, have influenced Goodfellow and others

FASKEN
MARTINEAU 

Labour Relations Issues

Parry Sound Decision of SCC


- Gives arbitrators broad jurisdiction to interpret and apply not only the terms of the collective agreement under which is appointed, but also all human rights and employment related statutes irrespective of whether there is any conflict between those statutes and the collective agreement

FASKEN
MARTINEAU 

Labour Relations Issues

Parry Sound Decision of SCC


- Enormous powers for arbitrators
- Left undecided, however, is who has primary jurisdiction - the arbitrator or the adjudicator under the specific statute

FASKEN
MARTINEAU 

Labour Relations Issues

Insurance Disputes


- Very bad provision now contained in virtually all centrally negotiated collective agreements allows employee to take to arbitration for adjudication, an issue involving entitlement to LTD

FASKEN
MARTINEAU 

Labour Relations Issues

Insurance Disputes


- Purpose of buying insurance in the first instance was to ensure that any disputes over entitlement would be dealt with between the insurer and the employee

FASKEN
MARTINEAU 

Labour Relations Issues

Insurance Disputes


- Whenever the insurer turns down a claim, almost invariably a grievance is filed and now the hospital finds itself fighting the entitlement issue
- Hospital will be the party ordered to pay if entitlement is found since the insurer is not a party to the collective agreement

FASKEN
MARTINEAU 

Labour Relations Issues

Nurse Practitioner


- Issue is whether the nurse practitioner comes within the ONA bargaining unit or not
- Conflicting decisions

FASKEN
MARTINEAU 

Labour Relations Issues

Contracting Out


- Major issue especially with service employees
- Unions are increasingly focused on job security concerns
- Attempting to expand the definition of contracting out
- London Health Sciences Centre and CAW

FASKEN
MARTINEAU 

Labour Relations Issues

Contracting Out


- Existing service employee language in CUPE, SEIU and some CAW agreements allows for contracting out so long as no layoffs occur as a result of the contracting out

FASKEN
MARTINEAU 

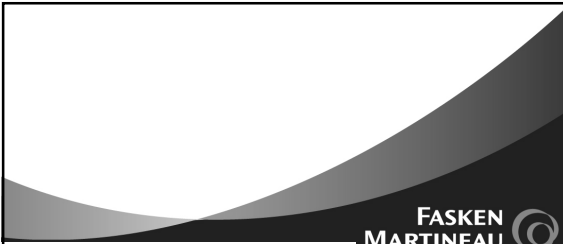
Labour Relations Issues


Contracting Out

- Unions likely to press for a total ban on contracting out in the upcoming negotiations

FASKEN
MARTINEAU 

FASKEN
MARTINEAU 

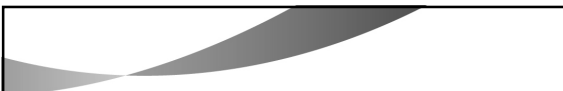


**FASKEN
MARTINEAU** 

Health Privacy in Ontario


Sara Levine
January 22, 2004


© 2004 Fasken Martineau DuMoulin LLP




Subjects Covered

- Laws and Duties re: Privacy
- Bill 31: Schedule A: *Personal Health Information Protection Act*
 - Application
 - Risks
 - Obligations
- Bill 31: Schedule B: *Quality of Care Information Act*
- Privacy Compliance Program

**FASKEN
MARTINEAU** 




Laws and Duties Re: Privacy

**FASKEN
MARTINEAU** 


Existing Privacy or Confidentiality Obligations

- Common law duty of confidentiality
 - e.g. McInerney v. MacDonald (SCC): fiduciary duty between physician & patient
- Professional codes of ethics & practice
 - e.g. Article 22 of CMA Code of Ethics: confidentiality
 - e.g. CMA Health Information Privacy Code; Cdn Health Record Association codes
- Non-privacy federal legislation
 - e.g. Narcotic Control Regulations (i.e. content/duration)

**FASKEN
MARTINEAU** 


Personal Information Protection and Electronic Documents Act (PIPEDA)

- Applies to PHI collected/used/ disclosed in course of commercial activities, EXCEPT in province with “substantially similar” legislation
- specifically includes selling/bartering/leasing of donor/ membership/ fundraising lists
- private health clinics, pharmacies, laboratory service companies, contractors & service providers, and medical practitioners
 - “From whom the profit is received is a secondary concern, so doctors’ offices would be covered, laboratories would be covered, a range of clinics would be covered, pharmacies would be covered.” (Privacy Commissioner)

**FASKEN
MARTINEAU** 


PIPEDA and Hospitals

- Collections, uses, and disclosures in the course of “commercial activities”:
 - commercial joint ventures (e.g. research)
 - paid involvement in clinical testing
 - fundraising
 - gift shop
 - pharmacy
 - TV rentals
 - upgrades
 - parking
 - cafeteria, leasing - credit checks?

**FASKEN
MARTINEAU** 


Provincial Health Sector Privacy Laws

- B.C.
 - *Freedom of Information and Protection of Privacy Act*
- Alberta
 - *Health Information Act*
- Manitoba
 - *Personal Health Information Act*
- Saskatchewan
 - *Health Information Protection Act*
- Ontario
 - Proposed: Bill 31 - Personal Health Information Protection Act

**FASKEN
MARTINEAU** 


Recent History In Ontario

- June 1996:
 - Consultation Paper: A Legal Framework for Health Information
- November 1997:
 - Consultation draft: the Personal Health Information Protection Act, 1997
- October 2000:
 - Consultation paper: Proposed Personal Health Information Privacy Legislation
- December 2000:
 - the Personal Health Information Privacy Act, 2000 (Bill 159) received first reading; died on the order paper
- February 2002:
 - Consultation draft: the Privacy of Personal Information Act; general privacy law; never introduced

**FASKEN
MARTINEAU** 


Bill 31: *The Health Information Protection Act, 2003*

- December 17, 2003 : Bill 31 introduced
 - Schedule A: The *Personal Health Information Protection Act, 2003*
 - date in force: July 1, 2004 (s. 95)
 - Schedule B: the *Quality of Care Information Protection Act, 2003*
 - date in force: on the earlier of July 1, 2004 and a day to be named by proclamation of Lieutenant Governor

**FASKEN
MARTINEAU** 


Schedule A: *The Personal Health Information Protection Act, 2003*

Who is covered?
 What are the risks?
 What are the obligations?

FASKEN
MARTINEAU 


The Purposes of the Act

- to establish rules for the collection, use and disclosure of PHI in order to protect confidentiality and privacy while facilitating the effective provision of health care
- to provide a right of access to individuals, subject to limited exceptions
- to provide individual a right to require correction or amendment of PHI, subject to limited exceptions
- to provide for independent review and resolution of complaints with respect to PHI
- to provide effective remedies for contravention

FASKEN
MARTINEAU 


Application

- Applies to
 - Collection, use and disclosure of Personal Health Information ("PHI")
 - Health Information Custodians ("HIC")
 - Non-HICs who use and disclose PHI received from HICs, regardless of when non-HIC received the information
 - Collection, use or disclosure of a health number by any person
- Does not apply to:
 - collections that happened before the Act comes into force:
 - not required to go back and get consent

FASKEN
MARTINEAU 


Personal Health Information (“PHI”)

- “Identifying information about an individual in recorded or oral form, if the information”:
 - relates to the physical or mental health of the individual, including information that consists of the medical history of the individual’s family
 - relates to the providing of health care to the individual
 - is a plan of service within the meaning of the *Long Term Care Act*
 - relates to payments or eligibility for health care
 - relates to donation of body part or substance or anything derived from same
 - is the individual’s health number
 - identifies the individual’s health care provider or substitute decision maker

**FASKEN
MARTINEAU** 


Health Information Custodian (“HIC”)

- A health care practitioner
- Public hospitals, private hospitals, psychiatric facilities
- Rest homes, homes for the aged, nursing homes and care homes
- Pharmacies, laboratories, ambulance services
- Community health services
- Evaluators (under *Health Care Consent Act*) and assessors (under *Substitute Decisions Act*)
- Medical officer of health, boards of health
- The Minister and the Ministry

**FASKEN
MARTINEAU** 


Enforcement - Mechanisms

- Information and Privacy Commissioner of Ontario
 - Complaints
 - Reviews
 - Comment
- Ontario Courts
 - civil actions grounded on findings of IPC
 - quasi-criminal prosecutions

**FASKEN
MARTINEAU** 


Enforcement - Powers and Remedies

- Commissioner may:
 - review upon own initiative or upon complaint,
 - require mediation,
 - search, seize, require answers under oath and appoint inspectors, which have search & seizure powers;
 - make orders, which may be filed with the Court - enforceable as a court order
- Courts:
 - action for damages for actual harm and mental anguish
 - where defendants actions were willful or reckless, court may also award maximum of \$10,000 damages for mental anguish in addition to any award for actual harm

**FASKEN
MARTINEAU** 


Enforcement: Offences - Penalties

- Offences
 - for breach of any of the privacy protections
 - attempt to obstruct/mislead Commission
 - willful failure to comply with Order
 - retaliate against whistle-blower
- Liability as a principal or a party
 - natural persons: fine up to \$50,000
 - organizations: fine up to \$250,000
 - officer, member, employee or other agent who authorized or acquiesced in the offence is a party and may be liable regardless of whether the corporation is prosecuted
- No liability where act or omission done in good faith and reasonably in circs

**FASKEN
MARTINEAU** 


Enforcement - Complaints to Commission

- “Any Person who has reasonable grounds to believe that another person has contravened or is about to contravene a provision of this Act”
 - No requirement for the complainant to have an interest in subject matter (but Commissioner may decline to review)
 - No requirement for the complaint to relate to any PHI
 - No requirement for actual breach to have occurred
- Limitation period
 - Six months for complaints re refusal of Access or Correction
 - One year for all others; or
 - as permitted by Commissioner

**FASKEN
MARTINEAU** 


Complaints: Commissioner's Powers

- May require settlement negotiations or mediation prior to deciding whether to review
- Review is an administrative hearing
- Grounds for decision not to review:
 - HIC has responded adequately
 - other more appropriate procedure exists
 - delay between date of complaint and subject matter
 - complainant does not have sufficient personal interest in the subject matter of the complaint
 - frivolous, vexatious, bad faith

**FASKEN
MARTINEAU** 


Obligations Imposed

- HICs must
 - have information practices that comply with PHIPA; and
 - comply with their information practices
- Practices must encompass the following:
 - Accuracy
 - Security
 - Accountability and Openness
 - Consent
 - Collection, Use, Disclosure, Retention, Modification and Destruction of PHI
 - Inquiries, Complaints, Access and Correction

**FASKEN
MARTINEAU** 


Accuracy

- HIC that uses PHI shall take reasonable steps to ensure:
 - the information is as accurate, complete and up to date as is necessary for the purpose for which it is being used
- HIC that discloses PHI shall take reasonable steps to ensure:
 - the information is as accurate, complete and up to date as is necessary for the purposes of the disclosure that are known to the HIC at the time
 - the recipient is clearly advised of any limitations on accuracy, completeness or up to date character of information

**FASKEN
MARTINEAU** 


Security

- HIC shall
 - take steps that are reasonable in the circumstances to ensure that
 - the PHI in the HIC's custody OR control is protected against unauthorized use, disclosure, copying, modification, or destruction
 - Health records are retained, transferred and disposed of in a secure manner
- Notice of loss or unauthorized access
 - HIC that has custody or control of PHI shall notify the individual at the first reasonable opportunity if the information is lost, stolen or accessed by unauthorized persons

**FASKEN
MARTINEAU** 


Accountability and Openness

- Organizations shall (and individuals may) designate a contact person who
 - facilitates compliance
 - ensures that all agents of the HIC know their duties
 - responds to inquiries, requests for access or correction, receives complaints
- HICs shall make available to the public a written statement
 - general description of HIC's information practices
 - contact information for contact person
 - how to make a complaint to the HIC and the Commissioner

**FASKEN
MARTINEAU** 


Consent - Key Elements

- A valid consent
 - is knowledgeable
 - relates to the information
 - is provided by the individual or the individual substitute decision maker's; and
 - is not obtained through deception or coercion
- "Knowledgeable" means:
 - if it is reasonable to believe that the individual knows the purposes of the collection, use or disclosure by the HIC and that they may provide or withhold consent

**FASKEN
MARTINEAU** 


“Reasonable to Believe”

- This req’t can be satisfied with a *Notice of the Purposes*, posted in a central area:
 - “unless it is not reasonable in the circumstances, ...if HIC posts a notice describing the purposes where it is likely to come to the individual’s attention or provides the individual with such a notice
- Consider using this document to satisfy Openness req’t as well - include req’d info

FASKEN
MARTINEAU 


Consent - Express or Implied

- Implied
 - HIC that receives PHI for the purpose of providing health care or assisting in the provision of health care
 - is entitled to assume that it has implied consent to collect, use or disclose for that purpose unless advised otherwise
- Express
 - required for HIC to collect, use or disclose PHI for the purposes of
 - fundraising, marketing, market research
 - and c. u. d. is subject to prescribed requirements and restrictions, if any

FASKEN
MARTINEAU 


Consent - Key Elements

- Withdrawal
 - whether express or implied, consent may be withdrawn by providing notice to the HIC
- Assumption of validity
 - HIC is entitled to assume that any consent provided by the individual or any document purporting to record a consent is valid, fulfills the requirements of the Act and has not been withdrawn
 - When disclosing to another HIC, must advise if no consent for all PHI being disclosed

FASKEN
MARTINEAU 


Collection, Use, Disclosure - General Rules

- HICs shall not collect, use or disclose PHI
 - unless have consent and is necessary for a lawful purpose or where it is otherwise permitted or required by this Act
 - if other information will serve the purpose
 - more than that which is reasonably necessary for the purposes; or
 - unless required by law
- Fee? Not for collecting/using; reasonable cost recovery for disclosure
- health card or health card number: only for specified purposes (also provisions for Non-HICs)

FASKEN
MARTINEAU 


Indirect Collection - Permissible Circumstances

- Consent to collection and manner of collection
- Info collected is reasonably necessary for providing health care or assisting in providing health care, and it is not reasonably possible to directly collect PHI
 - that can reasonably be relied on as accurate; or
 - in timely manner
- HIC is an institution under M/FIPPA and is collecting for specified purposes

FASKEN
MARTINEAU 


Indirect Collection - Permissible Circumstances

- Commissioner authorizes
- HIC collects from a person permitted or required by law to disclose it to the HIC
- as otherwise permitted by law

FASKEN
MARTINEAU 


Use - Permissible Purposes

- For the purpose for which it was collected or created and for all functions reasonably necessary for carrying out that purpose
 - unless the information was collected with consent and the individual expressly instructs otherwise
- For enumerated administrative purposes
 - eg., delivering services, allocating resources, risk or error management, detection of fraud, education, payment
- Research conducted by the custodian
 - subject to REB approval
- as otherwise permitted by law

**FASKEN
MARTINEAU** 


Notification of Inconsistent Use

- If a HIC uses or discloses PHI in a manner that is outside the scope of the custodian's description of its information practices and without consent:
 - must inform the individual at the first reasonable opportunity (with limited exceptions)
 - make a note of the uses and disclosures
 - keep the note as a part of the health records of the individual or in form linked to those records

**FASKEN
MARTINEAU** 


Permitted Disclosure - Recipients

- If reasonably necessary for the provision of health care and it is not reasonably possible to obtain the individual's consent in a timely manner, except if HIC is expressly instructed otherwise, to:
 - a health care practitioner, a public or private hospital or psychiatric facility
 - a rest home, home for the aged, nursing home, care home, home for special care
 - a pharmacy, lab or specimen collection centre
 - an ambulance service
 - community health or mental health centre, program or service whose primary purpose is the provision of health care

**FASKEN
MARTINEAU** 


Permitted Disclosure - Deceased Individual

- HIC may disclose PHI of individual who is or is believed to be deceased, for the purpose of
 - identifying the individual
 - informing any person who it is reasonable to inform that the individual is or believed to be deceased
 - to the spouse/partner, sibling or child if they require the PHI to make decisions about their own or their child's health care, having regard to any known views of the deceased

**FASKEN
MARTINEAU** 


Permitted Disclosure - Other

- Determine funding for HIC
- Contacting next of kin
- Confirming status of patient upon inquiry
- Eligibility for care
- Public Health
- Health data institutes
- Legal/administrative proceedings

**FASKEN
MARTINEAU** 


REB Shall Consider

- whether the objectives of the research can reasonably be accomplished without using the PHI that is to be disclosed
- whether adequate safeguards will be in place to protect the privacy of individuals and preserve the confidentiality of information
- the public interest in conducting the research and in protecting the privacy of the individuals whose PHI is being disclosed
- whether obtaining consent would be impractical

**FASKEN
MARTINEAU** 


REB

- REB must provide written reasons for decision and if approved, what conditions, if any, are imposed.
- Researcher shall enter into an agreement with the HIC agreeing to comply with conditions and restrictions the HIC imposes, if any re Use, Security, Disclosure, Return or Disposal
- THIS SECTION EXPLICITLY TRUMPS OTHER ACTS incl. FIPPA

**FASKEN
MARTINEAU** 


Right of Access

- Individuals may access a record containing their PHI in the custody or control of HIC
- Access request must be made in writing, and be detailed
- 30 DAYS plus extensions (with notice) to reply
- HIC must
 - assist the individual to re-formulate request that is insufficiently detailed
 - authenticate identity of individual
 - make record available for examination, explain any term, code or abbreviation
 - give written reasons if cannot locate or refuse disclosure

**FASKEN
MARTINEAU** 


Exceptions to Right of Access

- If severable, must be severed:
 - legal privilege, disclosure prohibited by another Act or court order
 - information collected for purpose of proceeding or for specified investigatory purposes and all proceedings not yet concluded
 - risk of serious harm to treatment or recovery of individual or serious bodily harm to individual or other
 - would identify person required by law to provide info to HIC; or
 - the person who provided the information in confidence if the custodian considers it appropriate to keep name confidential

**FASKEN
MARTINEAU** 


Access (Cont'd)

- Other exceptions to access right:
 - FIPPA/MFIPPA exceptions would apply
 - quality of care and quality assurance info
 - raw data from standardized psych. tests/assessments
- HICs should remember:
 - Informal access still permissible
 - May charge a fee: must not exceed reasonable cost recovery or prescribed amount
 - Any reliance on exceptions should generally be with legal advice

**FASKEN
MARTINEAU** 


Correction - Request in Writing

- 30 DAYS to reply (plus extensions)
- HIC shall correct if
 - individual demonstrates to the satisfaction of HIC that the record is incomplete or inaccurate for the purposes for which it is used and individual gives HIC info necessary to correct the record
- Not required to correct if record
 - not originally created by HIC and HIC doesn't have sufficient knowledge, expertise or authority; or
 - is professional opinion or observation made in good faith by HIC

**FASKEN
MARTINEAU** 


Correction - HIC's Other Duties

- Upon granting request for correction:
 - record correct info and strike out incorrect info in a manner that does not obliterate or sever and store incorrect info separately
 - give written notice to individual
 - upon request, notify persons to whom information was disclosed, where reasonably possible
 - unless correction cannot reasonably be expected to have ongoing effect on health care or other benefits


**FASKEN
MARTINEAU** 

Notice of Refusal and Right of Disagreement

- HIC shall give written reasons for refusal and inform individual of entitlement to:
 - prepare a concise statement of disagreement setting out correction sought
 - require statement to be attached to record and disclosed with info to which it relates
 - require HIC to make reasonable efforts to disclose statement to persons who received incorrect info
 - complain to Commissioner
- If individual does so, HIC must comply


FASKEN
MARTINEAU 

**Quality of Care
Information Protection Act, 2003**

FASKEN
MARTINEAU 


Schedule B: *The Quality of Care Information Protection Act, 2003*

- Quality of care info defined:
 - info collected by or prepared for a quality of care committee for the sole or primary purpose of assisting the committee to carry out its functions
 - relates solely or primarily to activities of committee
 - satisfies criteria specified by regs.
- BUT NOT
 - info in record maintained for purpose of providing health care to indiv.
 - Info in incident record or other record req'd by law
 - as specified in regs

FASKEN
MARTINEAU 

Schedule B: The Quality of Care Information Protection Act, 2003


- Designed to promote the public interest in thorough review of quality of care
- Prohibits disclosure of quality of care info except in specified circs., for purposes of
 - improving the quality of health care provided in the facility or entity;
 - eliminating or reducing significant risk of serious bodily harm
- Quality of care information is inadmissible in a proceeding
- Offence to disclose in contravention, and to retaliate

**FASKEN
MARTINEAU** 

Key Components of Compliance Program

1. Assessment

- review and assess your organization's collection, use, disclosure, retention and destruction of personal information
 - what do you get
 - why do you get it
 - how do you get it
 - where do you keep it (location and format)
 - how do you secure it
 - who do you give it to (internal AND external)
 - what do they do with it

**FASKEN
MARTINEAU** 


Key Components of Compliance Program

2. Documentation

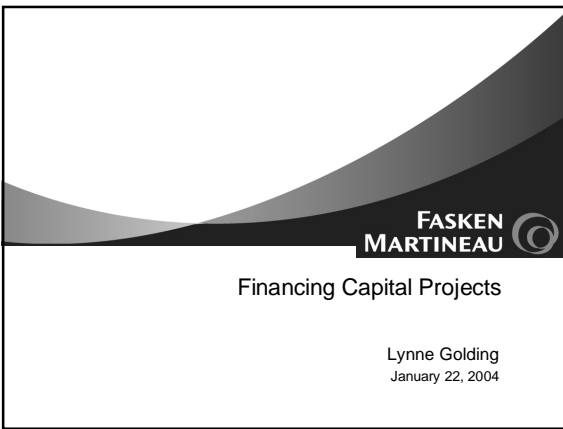
- Privacy Policy: cornerstone document
- Internal Practices & Procedures: Must be implemented
- Public informational documents - simple and clear
- Amend third party agreements: ensure partners are compliant - negotiate and protect yourself!

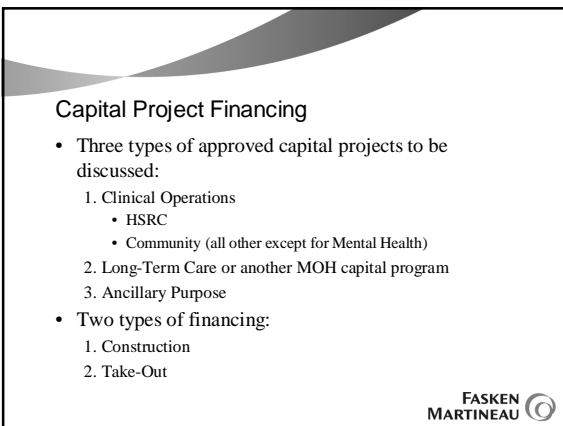
3. Maintenance

- Stay up to date on recent developments
- Respond to Privacy Commissioner audits/ investigations

**FASKEN
MARTINEAU** 








Step 1 - Form a Committee


- Composition
- Advisors
 1. Lawyers
 2. Financial Consultants
 3. Investment Banker

**FASKEN
MARTINEAU** 

Step 2 - Conduct Preliminary Committee Work

1. Consider:


- what you bring to the project
 - land
 - equity
 - foundation commitment
 - guarantee / support letters
- how much risk you are willing to take
 - cost overruns
 - interest rates
 - term
- revenue stream
- expertise
- time
- recourse
- payment obligations
- innovation

**FASKEN
MARTINEAU** 

Step 2 - Conduct Preliminary Committee Work


2. Become educated about alternatives

- traditional borrowing
 - bank
 - life insurance companies
 - pension funds
- bond offerings
- lease back arrangements
- 3P

**FASKEN
MARTINEAU** 


Step 3 - Tender the Financing

- Process issues
 - key indicators and weight
 - timing
 - list of recipients
 - rules
 - degree of formality
 - meetings
 - second round of submissions
- Scope of tender

**FASKEN
MARTINEAU** 

Step 3 - Tender the Financing


- Evaluation criteria
 - security
 - negative pledge
 - guarantees
 - recourse
 - covenants
 - rates and type (fixed or floating)
 - amortization
 - nature of loan (demand or term)
 - term (construction and take-out)
 - fees
 - most favoured nations
 - escrow accounts
 - other obligations

**FASKEN
MARTINEAU** 

Step 4 - Obtain Internal Consents

Consider:


- letters patent/incorporating statute
- general administrative by-law
- borrowing by-law
- SWAP/Derivative transactions policy
- board resolution
- members resolution, if necessary

**FASKEN
MARTINEAU** 

Step 5 - Obtain External Consents


Consider:

- MOH
 - Programmatic
 - Conditions of funding
 - Section 4
 - B.O.N.D policy
- Municipal
 - Zoning
 - Severance
 - Site plan approval
 - Building permit
- Others

**FASKEN
MARTINEAU** 


Step 6 - Close Transaction

- Legal documentation
- Conditions to closing
 - Environmental audit (Phase I at least) and assignment
 - Insurance certificates and satisfaction with type and amount
 - Certificate of architect and cost consultant
 - Assignment of all contracts (issues with construction mgmt)
 - Opinions
 - All consents referred to above

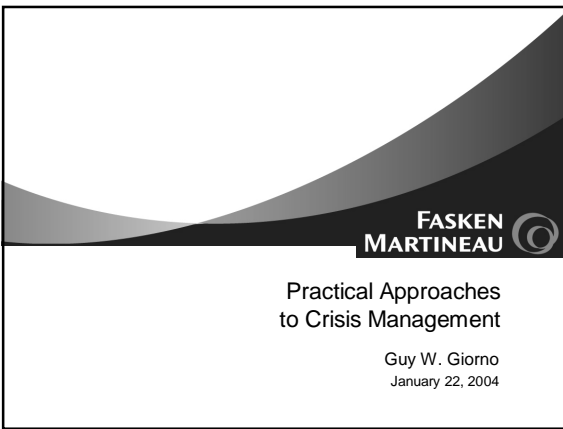
**FASKEN
MARTINEAU** 

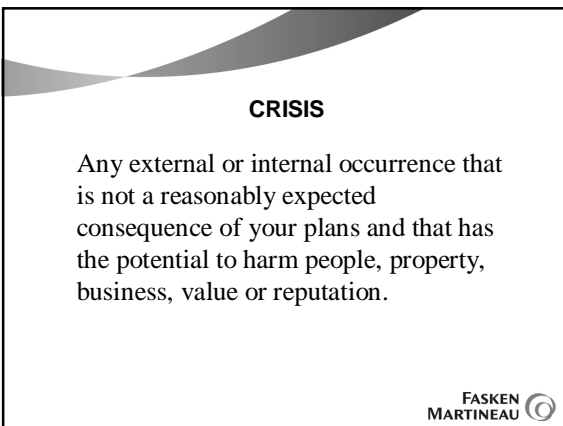
Post-Closing

- Monthly drawdowns and opinions (during construction)
- Regular certificates of compliance


**FASKEN
MARTINEAU** 








**12 RULES OF CRISIS
MANAGEMENT**

FASKEN
MARTINEAU 


RULE #1

Making the problem go away is
different than remedying its
consequences.

Both must be tackled immediately.

FASKEN
MARTINEAU 


- In responding to the immediate consequences, it's easy to lose sight of the need to fix the underlying problem.
- Consider assigning different people to these two different goals.

FASKEN
MARTINEAU 


RULE #2

Practise *quick response*, with the emphasis on *quick*.

Corollary: Don't let the perfect become the enemy of the good.


FASKEN
MARTINEAU 


- By definition, every moment lost to crisis management is valuable time when you could be advancing your agenda.
- Aim to have the crisis resolved within the minimum time possible — ideally, a single business day.

FASKEN
MARTINEAU 


RULE #3

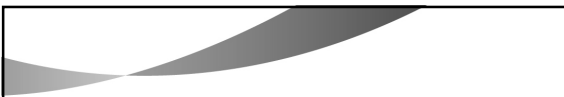
Protect people before property.

FASKEN
MARTINEAU 




- In a crisis, to put business interests ahead of the public interest risks damaging both.

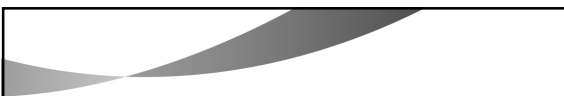
FASKEN
MARTINEAU 




RULE #4

Gather a crisis management team that represents all relevant departments and whose members' time is dedicated to managing the crisis.

FASKEN
MARTINEAU 




- Crisis management isn't something to be "fit in" among other duties.


FASKEN
MARTINEAU 

RULE #5

Already have identified the outside professionals you will use during a crisis.


FASKEN
MARTINEAU 

- Don't scramble to retain legal, accounting, environmental or technical expertise.
- Have your crisis-management professionals designated in advance.


FASKEN
MARTINEAU 

RULE #6

Require system-wide co-operation with the crisis management team.


FASKEN
MARTINEAU 

• Everyone must understand that when the crisis team calls, it needs immediate results.

FASKEN
MARTINEAU 


RULE #7

Caveat: To the extent possible, those not responsible for crisis management should avoid distraction and carry on with their duties.

FASKEN
MARTINEAU 


• The goal of crisis management is to minimize lost productivity and get the organization back to implementing its business plan.

• One reason for having a crisis management team is so that everyone else can stay focused on business.


FASKEN
MARTINEAU 

RULE #8

Establish a rapid, “one window” process for obtaining approval of the few decisions that your crisis management team cannot make on its own.


FASKEN
MARTINEAU 


- A crisis allows no time for long, complicated decision-making processes.
- Also, if too many of the team’s decisions require approval from another level, then you don’t have the right people on the team.

FASKEN
MARTINEAU 


RULE #9


Gather all the facts — complete and accurate facts — as quickly as possible.

FASKEN
MARTINEAU 




- Basing decisions on the wrong information can be disastrous.
- So can giving inaccurate facts to the media and public.
- Also, nothing beats information you collect first-hand. Consider visiting the site yourself.

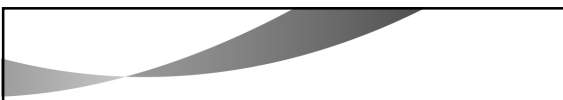
FASKEN
MARTINEAU 




RULE #10

Identify a single external spokesman.

FASKEN
MARTINEAU 




- Consistent, disciplined messaging is essential.

FASKEN
MARTINEAU 


RULE #11

Be open and up front with the public and the media.

Corollary: Communicate bad news on your own terms, before others do it for you.


FASKEN
MARTINEAU 

- The issue is not whether bad news will get out, but when and how.
- Don't allow others to put their spin on your story.
- "No comment" doesn't prevent news coverage.
- It just keeps people from hearing your side of the story.


FASKEN
MARTINEAU 

RULE #12

Communicate with motive. Tell people what you are doing for them, not what this means to you.


FASKEN
MARTINEAU 

• Let everyone know that your priority is protecting people (e.g., employees, consumers, members of the public) and that you are doing everything you can to fix the problem.

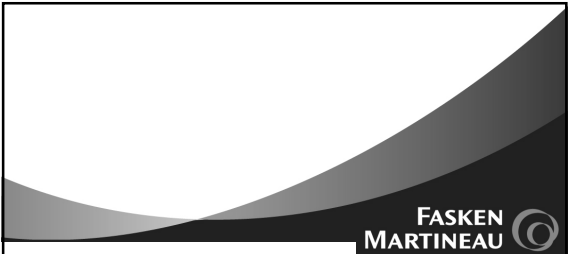
FASKEN
MARTINEAU 


Always exercise due diligence, take precautions and focus on prevention.

After all, the best-managed crisis is the one you avoid!

FASKEN
MARTINEAU 

FASKEN
MARTINEAU 



FASKEN
MARTINEAU 

New Principles of Good Governance:
Hospitals and Foundations

George C. Glover, Jr.
January 22, 2004



Governance is Hot!

- U.S., European and Canadian scandals
- Tidal wave of new legislation and regulation
- Significant restructuring of Boards, auditors and other relationships

FASKEN
MARTINEAU 




Foci of Governance Reforms

- Independence of directors and auditors
- Heightened disclosure and transparency
- Stronger conflicts rules
- Competence - certification - oversight
- Vigorous enforcement
- Civil liability

FASKEN
MARTINEAU 

Application to the Not-for-Profit Sector

- Different legislative regime
 - Fiduciary duties - common law
 - Oversight of Public Trustee and Official Guardian
 - CCRA
 - No shareholders - multiple stakeholders
 - Separation of Chair and CEO
 - Generally independent directors - exceptions
 - Generally less risk of self-dealing/conflicts of interest
 - Generally more conflicts of duty

**FASKEN
MARTINEAU** 


Hospital Governance

- "Every hospital shall be governed and managed by a Board" - PHA Reg. 2(1)
- Size issues
- Representational issues - ex officio appointments
- Accountability issues - patients, community, staff, government, universities, researchers, members
- Delegation/abdication issues
- Budget issues
- Strategic planning issues

**FASKEN
MARTINEAU** 


Hospital Governance (continued)

- Roles of hospital boards
 - Strategic planning - What? For whom? How? When?
 - Hiring, firing, evaluation and compensation of the CEO
 - Risk management
 - Fiscal responsibility
 - Board and Management succession; evaluation
 - Advocacy
 - Quality/standards

**FASKEN
MARTINEAU** 


Challenges for Hospital Boards

- Government Funding
 - Deficits
 - One-time adjustments
 - Delays
 - No multi-year funding
- Constraints on Boards
 - Difficult to reduce/adjust services
 - "Politics"/advocacy
 - Collective agreements and labour laws

FASKEN
MARTINEAU 


Challenges for Hospital Boards (continued)

- Approvals
 - Government
 - "Silos"
- Physicians as independent contractors
- Threat of inspectors/supervisors - PHA

FASKEN
MARTINEAU 


Some Suggestions

- Reduce Board size
- Reduce Committees - Committees must be "value added"
- Eliminate or restrict "members"
- Consider a Governance Committee

FASKEN
MARTINEAU 


Some Suggestions (continued)

- Ensure there are:
 - Mission Statement
 - Strategic Plan
 - CEO assessment/compensation policies
 - Current procedures and policies
 - Orientation and education for new and all Board members
 - Risk management processes - checks and balances
 - Board succession/recruitment - skills matrix
 - Director/Committee job descriptions - duties, responsibilities; ensure committees have a proper role

**FASKEN
MARTINEAU** 


Some Suggestions (continued)

- Board assessment/self-assessment
- Quality assurance standards and external benchmarks
- Openness to engaging third party advice
- Up-to-date indemnity by-law and adequate D&O/E&O insurance for directors through HIROC
- Culture of fearless directors, free and open discussion and debate - followed by clear resolutions supported by the full Board

**FASKEN
MARTINEAU** 


Special Issues Between Hospitals and Foundations

- Recent litigation
- Conflicts
 - Short term versus long term
 - Priorities
 - Cross appointments
 - Whose money is it anyway?
- Risk of cross liability - protection of resources
- "Control" - CCRA - collateral income
 - Cross liability

**FASKEN
MARTINEAU** 


Special Issues Between Hospitals and Foundations (continued)

- Use of letters patent and by-laws to confine objects
- Circumscribed membership structure
- Independent management and administration
- Joint planning - open communication
- Management of donor expectations
- Privacy/confidentiality

**FASKEN
MARTINEAU** 


The Big Picture

- Alternative governance options
- Continuance of the voluntary system
- Advocacy
- Regional models - with or without funding powers
- Joint ventures, partnerships, outsourcing
 - Management
 - Risk management
 - Controls
 - Conflicts


**FASKEN
MARTINEAU** 

The Big Picture (continued)

- More mergers - voluntary, mandatory
- Tighter MOHLTC controls? Performance contracts
- Rationalization of services and resources
- Multi-year funding
- Hearing and acting upon the voice of the stakeholders
- Borrowing from the private sector
 - Auditor independence/Audit Committee role in oversight
 - Director independence
 - CEO/CFO certification
 - Financially literate directors

**FASKEN
MARTINEAU** 

Conclusion

FASKEN
MARTINEAU 

FASKEN
MARTINEAU 
