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FASKEN MARTINEAU

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**Charitable Implications of the  
LHIN Legislation**

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**A. CHARITABLE IMPLICATIONS FOR LHINs**

- LHINs are agents of the Crown under subsection 4(1)
- As such, a LHIN is a qualified donee under the *Income Tax Act* and can both receive a gift 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 *Income Tax Act*
  - Make charitable donations, except as authorized by the *Act*

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- In addition, subsection 4(4) states that the property of a LHIN is not charitable property
- Subsection 4(3) states that the *Charities Accounting Act* and the *Charitable Gifts Act* do not apply to the LHIN, its directors, officers, employees or agents

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**B. WHAT IS A HEALTH SERVICE PROVIDER?**

- A “Health Service Provider” means:
  - 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
    - A prison or penitentiary operated or maintained by the Government of Canada

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- The University of Ottawa Heart Institute
  - An approved corporation within the meaning of the *Charitable Institutions Act* 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*
  - A community care access corporation
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- A person or entity approved under the *Long-Term Care Act, 1994* to provide community services
  - A not-for-profit corporation without share capital incorporated under Part III of the *Corporations Act* that operates a community health centre
  - A not-for-profit entity that provides community mental health and addiction services
  - Any other person or entity or class of persons or entities that is prescribed
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- By implication, a Health Service Provider therefore does not include:
    - Hospital foundations
    - Other types of parallel foundations
    - Community foundations
    - Testamentary charitable trusts
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**C. INTEGRATION BY A HEALTH SERVICE PROVIDER**

- A Health Service Provider may integrate its services with those of another person or entity in accordance with Section 27
- Subsection 27(6) enables a LHIN to issue a decision to prevent integration by a Health Service Provider

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**D. INTEGRATION DECISIONS BY A LHIN**

- Subsection 25(1) enables a LHIN to integrate the local health system by, in part, issuing 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 do any one or more of the following:
  - Paragraphs 1 to 5 – deals with transfer of services between Health Service Providers

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- Paragraph 6 provides as follows:
  - 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.
- Subsection 26(2) states that a LHIN may not do certain things, including:

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(c) require a Health Service Provider to cease operating or carrying on business or to dissolve or wind up its operations or business

...

(e) require two or more Health Service Providers to amalgamate

(f) unjustifiably, as determined under section 1 of the *Canada 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

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(g) 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

(h) 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, and

(i) require a Health Service Provider to do anything that is prescribed in addition to the restrictions set out in clauses (a) to (h) above

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**E. INTEGRATION ORDERS BY THE MINISTER**

- Subsection 28(1) enables the Minister of Health and Long Term Care 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:
  1. Cease operating, to dissolve or to wind up its operations
  2. To amalgamate with one or more Health Service Providers that receive funding from a LHIN

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3. To transfer all or substantially all of its operations to one or more persons or entities

4. To do anything or refrain from doing anything necessary for the Health Service Provider to achieve anything under any of paragraphs 1 to 3 above, including to transfer property to or to receive property from another person or entity in respect of operations affected by the order

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- This provision originally only applied to not-for-profit Health Service Providers but has been extended to apply to for-profit Health Service Providers
- 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

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- Homes for the aged and nursing homes are exempt from integration orders by the Minister under subsection 28(2.1)
- Under paragraphs 28(2.1)(d) and (e), not-for-profits cannot be amalgamated with for-profits or be ordered to transfer their operations to a Health Service Provider that carries on its operations on a for-profit basis
- Subsection 28(3) prohibits the Minister's order from requiring charitable property to be transferred to a person or entity that is not a charity, or from requiring a Health Service Provider that is not a charity to hold property for a charitable purpose

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- Subsection 29(2) deems the transferee entity to have the corporate authority to comply with the integration decision or Minister’s order
  - But only applies to entities that are incorporated provincially
  - Therefore does not appear to apply to entities that are federally incorporated

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**F. TRANSFER OF PROPERTY HELD FOR CHARITABLE PURPOSE**

- Subsection 30(1) provides as follows:
  - If an integration decision or a Minister’s order made under s. 28 directs a Health Service Provider to transfer to a transferee property that it holds for a charitable purpose, all gifts, trusts, bequests, devises and grants of property that form part of the property being transferred shall be deemed to be gifts, trusts, bequests, devises and grants of property to the transferee

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- Subsection 30(2) provides as follows:
  - If a will, deed or other document by which a gift, trust, bequest, devise or grant mentioned in subsection (1) is made indicates that the property being transferred is to be used for a specified purpose, the transferee shall use it for the specified purpose
- These two provisions apply to gifts, trusts, bequests, devises or grants made before or after section 30 comes into force

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- Under subsection 31(1), 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 an integration decision or Minister's order
- Under subsection 31(2), 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 an integration decision or Minister's order

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- Under subsection 31(3), if an integration decision or Minister's 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 the value of the property that was not acquired with money received from the Government of Ontario or an agency of the Government
- Nothing in the Act, or done or not done in accordance with the Act, constitutes expropriation or injurious affection

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- G. FINANCIAL DISCLOSURE BY HOSPITAL FOUNDATIONS**
- First Reading version of legislation proposed amendments to the *Public Hospital Acts* that would enable the Minister to require hospital subsidiaries and hospital foundations to provide financial reports and returns to the Minister and LHINs
  - This amendment has been struck from the proposed Bill prior to Third Reading

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**H. OUTSTANDING ISSUES INVOLVING CHARITABLE PROPERTY**

- **Lack of clarity for protection of religious organizations**
  - Paragraph 26(2)(f) and subsection 28(2) state that an integration decision or Minister’s order 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

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- Presumably, section 1 of the *Charter* jurisprudence would apply, and the following elements would therefore need to be proven:
  - The requirement places reasonable limits on the Health Service Provider’s freedom of religion
  - The requirement is prescribed by law
  - The requirement is demonstrably justified in a free and democratic society:

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- There is a pressing and substantial objective
- The means are proportional
  - The means are rationally connected to the objective
  - There is minimal impairment of rights
  - There is proportionality between the salutary and deleterious effects of the requirement

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- No definition of what a “religious organization” is
- No explanation of when the provision of a service will be “contrary to the religion related to the organization”
- Providing a service that is “contrary to the religion” related to an organization is not the same thing as providing a service that is “contrary to the religious teachings” of an organization

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- Prohibition on the transfer of property from a “charity” under paragraphs 26(2)(g) and (h) and section 28(3) to a person or entity that is not a “charity” or an amalgamation or transfer of operations involving a “not-for-profit” does not equate with a “registered charity” under the *Income Tax Act*
- Not clear how present and future rights, privileges and liabilities involving the transfer of property under an integration decision or a Minister’s order will be addressed
  - Paragraph 36(1)(j) contemplates future regulations in this regard

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- Compensation under subsection 31(3):
  - Compensation must be prescribed
  - Lieutenant Governor in Council has power under paragraph 36(1)(k) to make regulations governing the compensation that will be payable under subsection 31(3), including:
    - Who pays the compensation
    - The amount payable
    - How the loss is to be determined
    - How the portion of the value of the property that was not acquired with money from the government is to be determined

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– No draft regulations have been provided to date

– Legislation provides little guidance on who would constitute a “person who suffers a loss resulting from the transfer”

- Legislation appears to suggest “an entity” will not be entitled to compensation under subsection 31(3), in that the legislation distinguishes between persons and entities
- Does a “person” preclude compensation to a Health Service Provider that is either a transferor or transferee?
- Does a “person” include a donor?

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– Legislation does not address what happens to compensation funds

- Can these funds become the subject of future transfer decisions or orders?
- What are the compensation funds to be used for, i.e. is it subject to the same restriction as the original gift?
- May be necessary to ensure that integration orders address these issues

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– Limited number of parties to look to for compensation

- The government
- LHINs
- Transferee

– Not clear how a LHIN will determine the portion of the property that is acquired from donated funds and therefore may be subject to compensation

– As such, all persons or entities potentially affected by integration orders will have to wait and see what the implications will be with respect to compensation issues

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- **Compliance with Donor Restrictions**
  - Subsection 30(2) requires transferee to comply with a “specified purpose,” but it is not clear what constitutes a “specified purpose” and who makes that determination
    - Terminology of “specified purpose” is different from terminology used for restricted gifts in subsection 5.1(2) of the *Charities Accounting Act* of “restricted or special purposes”

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- Is the threshold as low as that found in subsection 4(d) of the *Charities Accounting Act* (“in the manner directed”) or as high as the *Christian Brothers* litigation (requiring the restricted gifts use the words “in trust”)?
- The impact of implicit versus explicit donor restrictions and their enforceability is not addressed by the legislation
  - i.e. Donations to a religious Health Service Provider may only have an implicit donor restriction regarding how funds are to be used

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- Donor may not have originally contemplated the donation being transferred to another entity, and therefore no need for explicit restriction
- Donor may have established donor restrictions that cannot be fulfilled if the property in question is transferred, i.e.
  - Geographical limitations
    - Little impact on GTA Health Service Providers
    - More significance for locations outside GTA, and particularly in Northern Ontario

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- Delivery of the services specifically tied into a named charity
- Religious restriction that gift must be used by a religious organization for a health service that is not contrary to religious teachings

– In such situations, it may be impossible or impractical for a transferee to comply with the restriction notwithstanding that subsection 30(2) requires it to comply with the restriction

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– This in turn may lead to the necessity of a *cy près* court application

– If *cy près* court application fails, then the gift will be defeated and will revert back to the donor

– The legislation also does not address the right of the donor at either common law or under sections 4(d), 6 or 10 of the *Charities Accounting Act* to seek redress

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- *Income Tax Act* (Canada) implications
  - *ITA* considerations will still need to be addressed
  - Question whether the transfer or amalgamation will be to a qualified donee as required by the *ITA*
  - Inter-charity transfer issues involving disbursement quota requirements will need to be addressed
    - Transfer of ordinary gifts
    - Transfer of specified gifts
    - Transfer of enduring property
  - Will need to factor *ITA* considerations into the integration decisions or orders

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**F. WHAT SHOULD HEALTH SERVICE PROVIDERS AND FOUNDATIONS DO?**

- Need to move assets from Health Service Providers into parallel foundations to avoid future transfer orders
  - But cannot move funds received from Government
- Need to keep track of money given to a Health Service Provider in order to maintain the possibility of compensation for transferred property
  - Avoid commingling of funds where possible

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**G. WHAT SHOULD GIFT PLANNERS DO?**

- Discuss implications of legislation with potential donors to a Health Service Provider
- Look at giving to a parallel foundation or community foundation instead of directly to the Health Service Provider
- Need to look at ways to enforce donor intent
- For instance, may need to narrowly structure a gift so that any future transfer order will render the gift defeated by means of
  - Condition subsequent
  - Restrictions that cannot be complied with by a transferee, i.e. geographic restrictions or religious restrictions

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