POTENTIAL IMPLICATIONS OF PROPOSED ONTARIO LONG-TERM CARE HOMES LEGISLATION FOR DIRECTORS AND OFFICERS

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Bill 140, the *Long Term Care Homes Act, 2006* (LTCHA) was introduced by the Ontario government with the stated purpose of enhancing the quality of life for residents of long-term care homes (“homes”) by strengthening enforcement, improving care and increasing accountability. In terms of enforcement, for example, the legislation promotes zero tolerance of abuse and neglect of LTC residents and whistle-blowing protection for staff who report. The standards of care for residents are quite prescriptive, and set out standards for care, service, staffing, training, operations and the like.

There are rather onerous accountability obligations for directors and officers of homes that are corporations and for members of the Committee of Management or Board of Management for Municipal and First Nations homes under the proposed LTCHA. Directors and officers each have a duty to “take all reasonable care” to ensure that the home complies with all requirements under the Act. It is an offence to fail to comply with this obligation.

Many homes have expressed concerns about their ability to fulfill these obligations, given their limited resources. Directors and officers are concerned about their potential personal liability should the home be unable to meet legislative requirements. Upon conviction of an offence under this proposed legislation, an individual is liable on first offence to a fine not exceeding $25,000 and/or 12 months imprisonment; and on a subsequent offence to a fine not exceeding $50,000 and/or 12 months imprisonment.

There is no immunity provision under the LTCHA for a director relating to non-compliance with the Act, nor is there any protection for individual directors for civil actions resulting from findings of negligence on the part of the Corporation. By contrast, section 13 of the *Public Hospitals Act* provides (sensibly in our view):

No action or other proceeding for damages or otherwise shall be instituted against any member of a committee of the medical staff of a hospital or of a board or of the staff thereof for any act done in good faith in the execution or intended execution of any duty or authority under this Act or the regulations or for any alleged neglect or default in the execution in good faith of any such duty or authority.

In the light of the contrasting language of these two statutes, it is not entirely clear how far directors and officers must go to be able to demonstrate that they have complied with the duty under the LTCHA to “take all reasonable care”.

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Having said this, depending upon the legislation governing the institution, there may be some statutory protections available, for example, under the Corporations Act (Ontario).

Charitable organizations governed by the Corporations Act and the Charities Accounting Act are permitted to obtain insurance to indemnify individual directors and officers against personal liability arising out of the execution of their duties, as long as they perform their duties in good faith and do not impair the purposes of the charitable corporation. As such, it will be important to determine what insurance coverage may be available for directors and officers in relation to their statutory obligations under the LTCHA.

**Corporations Act and the Charities Accounting Act**

Members (as such) of the corporation operating a home are afforded protection from liability with respect to obligations or liabilities of the home pursuant to section 122 of the Corporations Act. Further, under section 80 of the Corporations Act, directors and officers may be indemnified and saved harmless out of the funds of the corporation operating a home with respect to any law suits or proceedings that are brought in respect of any act or omission done in the execution of their duties of office, provided that the membership of the corporation consents. This is the case provided that the damage is not a result of the willful neglect or default of the director or officer.

In the case of a charitable corporation, section 2 of Regulation 4/01 made under the Charities Accounting Act provides, in part:

(1) In the circumstances and subject to the restrictions set out in this section, each director or officer of the corporation may be indemnified for personal liability arising from their acts or omissions in performing their duties as … director or officer.

(3) In the circumstances and subject to the restrictions set out in this section, insurance may be purchased to indemnify the executor, trustee, director or officer for the personal liability described in subsection (1).

The primary restriction on indemnification for is for liability "that relates to their failure to act honestly and in good faith in performing their duties" (other restrictions include a prohibition against giving the indemnity, or against the insurance purchase, if either acts would make the corporation insolvent; and a prohibition against a purchase of insurance if that would impair carrying out the purpose of the corporation).

Subsection 2(5) of this Regulation prescribes the factors to be considered before giving an indemnity or purchasing insurance:

1. The degree of risk to which the executor, trustee, director or officer is or may be exposed.
2. Whether, in practice, the risk cannot be eliminated or significantly reduced by means other than the indemnity or insurance.
3. Whether the amount or cost of the insurance is reasonable in relation to the risk.
4. Whether the cost of the insurance is reasonable in relation to the revenue available to the executor or trustee.
5. Whether it advances the administration and management of the property to give the indemnity or purchase the insurance.

**Summary**

Thus, while there is no specific protection for individual directors and officers relating to their obligations under the LTCHA, the Corporations Act and Charities Accounting Act allow for the indemnification of directors and officers by the Corporation itself where personal liability may arise out of the duties or obligations of such persons, provided these persons act honestly and in good faith in the performance of their duties. The home should be able to purchase insurance to protect against these potential liabilities, subject to any coverage restrictions.
Recommendation

It is our recommendation that directors and officers of the Board protect themselves from personal liability by taking, and causing the corporation to take, all preventative measures possible with respect to this Act. In order to do so, they must be aware of the legislation as it is relevant to both the home and the Board, and comply with all portions set out in the Act. Such awareness could be raised through Board education sessions at regular board meetings and through distribution to all board members of information and materials.

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