New approval protocol for Ontario hospitals under Section 4 of the Public Hospitals Act

April 27, 2022

The Ontario Ministry of Health recently published an updated approval protocol for hospitals regarding certain decisions such as the use of land, buildings, facilities and other premises for health care, integrations, and the new requirement that the Minister approve hospital articles before they are filed. In a separate memorandum, it postponed to September 2022 the end of a waiver and blanket approval in effect during the COVID-19 pandemic.

Background and context

The *Public Hospitals Act* (the PHA) establishes the regulatory framework within which public hospitals operate in Ontario. Section 4 of the PHA imposes a number of requirements on hospitals, including the approval of certain decisions by the minister of Health (the Minister), such as the use of premises for the purposes of a hospital.

In October 2021, Section 4 of the PHA was amended to include a new requirement that the Minister provide approval of hospital articles before they are filed under the new *Not-for-Profit Corporations Act, 2010* (ONCA).

The *Connecting Care Act, 2019* (the CCA) governs the funding, oversight, coordination, integration and accountability of publicly funded health service providers.

Hospitals governed by the PHA are also health service providers under the CCA. Subsection 35(1) of the CCA governs integration activities that are initiated by one or more health service providers which relate to services that are funded in whole or in part by Ontario Health. Where a voluntary integration of a corporate nature is being proposed, hospitals are required to obtain the Minister's approval under both Section 4 of the PHA and Section 35 of the CCA.

Recently, the Ontario Ministry of Health (the Ministry) provided an updated protocol for obtaining approvals under Section 4 of the PHA (the Protocol), which now includes the process for hospitals to obtain approvals under Section 35 of the CCA, where voluntary corporate integration is proposed which engages Subsection 4(1) or 4(1.1) of the PHA. The Protocol applies to hospitals which are governed by the PHA, as well as the Ministry of Health and Ontario Health.[1]

The Ministry had waived submission requirements relating to certain approval requests under Subsection 4(2) of the PHA and granted temporary blanket approval for a hospital to enter into a licence or lease to operate and use a building or premises for the purpose of a hospital, provided that certain conditions were met (including that the purpose be to address the hospital's need to create greater capacity for the treatment of patients arising from the COVID-19 virus). This approval and waiver was set to expire on March 31, 2022, but was extended until September 30, 2022. If the building or premises are intended to be used for the purpose of a hospital beyond September 30, 2022, a new application following the Protocol will be required.

The below provides a high-level summary of changes to the Protocol. The Protocol recommends that hospitals seek independent legal advice when pursuing voluntary integrations.[2]

What is new?

Delegation

On April 1, 2021, the health system planning and funding functions of the Local Health Integration Networks (the LHINs) transferred into Ontario Health.[3] The Protocol reflects this change.

The Protocol indicates that the Minister has delegated to Ontario Health all of the Minister's powers and duties relating to voluntary integrations under Section 35 of the CCA save for integrations, which require the Minister's approval under Subsection 4(1) or 4(1.1) of the PHA, as discussed below. The Minister has also delegated the powers of approval under Subsections 4(2), 4(3) and 4(4) of the PHA to public servants occupying various positions within the Ministry.[4]

The Protocol confirms that any integration proposal involving a hospital that is *not* subject to Subsection 4(1) or 4(1.1) of the PHA would be directed to Ontario Health acting as the Minister's delegate under Section 35 of the CCA.

Subsections 4(1) and 4(1.1) of the PHA

The key changes to Section 4 of the PHA coincide with the coming into force of ONCA.

Previously, Subsection 4(1) provided that "no application to incorporate a hospital or amalgamate two or more hospitals under the *Corporations Act* or under a private Act shall be proceeded with until it first received the approval of the Minister". The new Subsection 4(1) provides that the Minister's approval is first required before articles in respect of a hospital can be filed under ONCA.[5] "Articles" are defined broadly and include articles of incorporation, articles of amendment, articles of amalgamation and articles of continuance. CCA approval is not required with respect to Subsection 4(1) proposals that do not involve a voluntary integration (for example, approval of articles of amendment where the changes do not relate to a service integration).

The Protocol includes a new process for requests to approve hospital articles under the new Section 4(1) when there is no incorporation or amalgamation. The hospital is required to submit the proposed articles, an explanatory document highlighting the

changes, and a copy of the current articles, at least 60 business days before a decision is required. The Ministry will endeavour to respond approximately 30 business days after receiving the proposed articles, and may require additional information from the hospital.

The new Subsection 4(1.1) has been amended to require the Minister's approval before an application can proceed to amalgamate two or more hospitals under a private bill/special act or to amend a private act in respect of a hospital. The Protocol instructs hospitals to contact the Hospitals Branch when applying for a private bill that does not relate to hospital incorporation or amalgamation.

Where Subsections 4(1) or 4(1.1) apply and there is a voluntary integration contemplated, the hospital must obtain the Minister's approval pursuant to both the PHA and Section 35 of the CCA, by way of the procedures set out in the Protocol. Previously, the Protocol applied only to Section 4 PHA approvals, as mandatory submissions were made to the LHINs with respect to incorporating or amalgamating two or more hospitals. Now, in these circumstances, both PHA and CCA submissions are made to the Minister.

The written notice requirements have been updated to include, among other things, information with respect to naming for each site.[6] The amendments in Subsections 4(1) and 4(1.1) of the PHA effectively mean that the Minister has approval power over public hospitals' corporate names. Accordingly, the Protocol now outlines the Ministry's expectations related to hospital naming activities, which mirror the expectations listed in the latest iteration of the Ministry's Hospital Naming Directive. In summary:

- Each hospital should have a naming policy;
- Meaningful consultation with stakeholders and the community is required;
- A decision to adopt a new corporate or business name in recognition of philanthropy should be made where the level of philanthropy corresponds to the value of the asset; and
- Any agreement concerning the adoption of a corporation or business name should not include a term to the effect that a hospital will use a name indefinitely.

Under the Protocol, the Ministry may now seek *input* from Ontario Health on a proposal received by the Minister under Subsections 4(1) or 4(1.1) of the PHA and Section 35 of the CCA.

Following a voluntary integration proposal from a hospital pursuant to Subsection 4(1) or 4(1.1) of the PHA and Section 35 of the CCA, the Minister will have 90 days to consider the proposed integration, and then may potentially request further information, with a total response time of up to 150 days to render a decision on the proposal (previously, the turnaround time was 60 business days). If the Minister objects to the proposal, the hospital and any member of the public will be invited to make written submissions within 30 days of the Minister making the proposed decision available to the public. Any submissions received by the Ministry about a proposed decision must be considered by the Minister before issuing a final decision.

Subsection 4(3) of the PHA

Subsection 4(3) of the PHA provides that all public hospitals are required to obtain the Minister's approval to add a building or new facilities to the hospital, regardless of the funding source. The business case requirements to accompany the approval request have been updated to include, among other things, a proposed name for the site and a description of the programs that will be operated on the site. The Protocol continues to provide for review and advice to the Ministry, now by Ontario Health. The Protocol also continues to caution that, while there are no provisions in the PHA that require hospitals to obtain approval to purchase property, it would be prudent for a hospital to submit a business case to the Ministry, and now Ontario Health, for consideration prior to proceeding with any purchase.

The Protocol previously referenced the Ministry-LHIN Accountability Agreement, which set out the general provisions for Ministry and LHINs related to capital initiatives. The Protocol now requires that hospitals follow the Capital Planning Process as outlined by the Ministry.

Subsection 4(4) of the PHA

Subsection 4(4) of the PHA provides that all public hospitals are required to obtain the Minister's approval to sell, lease, mortgage or otherwise dispose of land, building or premises acquired or used for the purpose of a hospital. The business case requirements to accompany the approval request have been updated to include consideration of all relevant protocols. The Protocol continues to provide for review and advice to the Ministry, now by Ontario Health.

Subsection 4(5) of the PHA

Subsection 4(5) of the PHA provides that any approval given under the PHA in respect of a hospital may be suspended by the Minister, or revoked by the Lieutenant Governor in Council, if it is considered in the public interest to do so. Previously, the Protocol stated that it was not Ministry practice to revoke or suspend approvals under this Subsection 4(5) of the PHA. Rather, it was the Ministry's position that the approval of a hospital site lapses upon the sale or lease of the site to a non-hospital entity. Although Subsection 4(5) of the PHA continues in force, mention of Subsection 4(5) of the PHA has been removed from the Protocol.

Timelines under the Protocol

The following table provides a high-level overview of timelines pursuant to the Protocol.

Subsection 4(1): Requesting approval for articles under the *Not-for-Profit Corporations Act, 2010* – Excluding incorporations and amalgamations	
Step 1: Hospital submits proposed articles and explanatory document	The request should be made at least 60 business days before a decision is required to allow for the Ministry review.
Step 2: Ministry review	The Ministry will endeavour to review and provide a written response within approximately 30 business days of receiving the proposed articles.

Subsection 4(1) or 4(1.1) of the PHA and Section 35 of the CCA: Proposals for incorporation of a hospital or amalgamation in respect of a hospital	
Step 1: Hospital provides notice of the proposed integration	The hospital must provide written notice to the Minister and include the information prescribed.
Step 2: Ministry reviews proposal and, if necessary, seeks input from Ontario Health	If the Ministry decides to request input from Ontario Health on a proposal received by the Minister under Subsection 4(1) or 4(1.1) of the PHA and Section 35 of the CCA, the Ministry will provide all of the notice materials to the Ontario Health Chief Regional Officer where the hospital(s) is located. The Ministry will specify a deadline by which the Chief Regional Officer or other Ontario Health official will be expected to respond, which shall be no sooner than 14 days following the date of the request.
Step 3: Minister considers proposal and issues a decision	Following the receipt of a proposal from a hospital under Subsection 4(1) or 4(1.1) of the PHA and Section 35 of the CCA, the Minister will have 90 days to: (i) approve the proposal; (ii) notify the hospital that the Minister intends to reject the proposal; or (iii) request more information about the proposed integration.
Potential step: Minister's request for additional information about the proposed integration	If the Minister requests additional information about the proposal, the hospital will be required to provide the information within 30 days of the Minister's request. In such cases, the Minister will gain an additional 60 days in which to issue a decision on the proposal, effectively extending the maximum 90-day response period to 150 days.
Potential step: Minister objects to the proposal	If the Minister objects to the proposal, in whole or in part, the Minister is required to provide the parties with a copy of the proposed decision and to publish it on a website. The hospital and any member of the public will be invited to make written submissions within 30 days of the Minister making the proposed decision available to the public.
Section 4(2): Requesting approval to operate an institution, building or premises as a hospital	
Step 1: Hospital submits business case	A hospital requesting approval to operate an institution, building or premises as a hospital should prepare and submit a business case to its Ontario Health Chief Regional Officer. The request should be made at least 60 business days before a decision is required to allow for Ontario Health and

	Ministry review.
Step 2: Ontario Health review and advice to Ministry	Upon receiving the proposal from the hospital, Ontario Health will review it and provide written advice to the Ministry. Ontario Health should forward the business case and its written advice to the Ministry within 30 business days of the receipt of the hospital's request.
Step 3: Ministry review	The Ministry will review the business case and oversee the preparation of any necessary documents for approval consideration. The Ministry will endeavour to review and provide a written response within approximately 30 business days of receiving the application.
Section 4(3): Requesting approval to add buildings or facilities to a hospital	
Capital Planning Process	All public hospitals are required to obtain approval by the Ministry to add building(s) or facilities to the hospital. Hospitals are required to follow the Capital Planning Process as outlined by the Health Capital Investment Branch of the Ministry.
Section 4(4): Requesting approval to lease or sell hospital property	
Step 1: Hospital submits business case	A hospital requesting approval to lease, sell or otherwise dispose of hospital property should prepare and submit a business case to their Ontario Chief Regional Officer at least 60 business days before a decision is required to allow for Ontario Health and Ministry review.
Step 2: Ontario Health review and advice to Ministry	Upon receiving the proposal from the hospital, Ontario Health will review it and provide written advice to the Ministry. Ontario Health should forward the business case and its written advice to the Ministry within 30 business days of the receipt of the hospital's request.
Step 3: Ministry review	The Ministry will review the business case and oversee the preparation of any necessary documents for approval consideration. The Ministry will endeavour to review and provide a written response within approximately 30 business days of receiving the application.

Extension of general approval under Subsection 4(2) of the PHA

In a memorandum dated March 26, 2020, in response to the COVID-19 pandemic, the Ministry waived submission requirements relating to certain approval requests under Subsection 4(2) of the PHA and granted temporary blanket approval for a hospital to enter into a licence or lease to operate and use a building or premises for the purpose of a hospital, provided that certain conditions were met (including that the purpose be to address the hospital's need to create greater capacity for the treatment of patients arising from the COVID-19 virus). This approval and waiver was set to expire on March 31, 2022.

Given the ongoing and evolving pressures on Ontario's hospitals, the Ministry recently extended the waiver and approval until September 30, 2022. If the building or premises are intended to be used for the purpose of a hospital beyond September 30, 2022, a new application following the Protocol will be required. In accordance with the timelines set out above, such application should be submitted no later than July 6, 2022.

Please reach out to any of the contacts below for further information or advice on this topic.

[1] Under s. 1 of the PHA, a hospital is defined as any institution, building or other premises or place that is established for the purposes of the treatment of patients and that is approved under the PHA as a public hospital.

[2] This Insight is intended to provide general information relating to the process for obtaining Ministry approvals under Section 4 of the PHA and Section 35 of the CCA, and should not be construed as legal advice. The contents of this Insight are subject to the PHA, CCA, other applicable legislation, the provisions of relevant collective agreements, the terms and conditions set out in a hospital's service accountability agreement with Ontario Health and any other directives, agreements or policies that may apply to any given proposal. This Insight does not address related protocols that have been recently updated, including the Protocol for Assigning Hospitals to Groups under the *Public Hospitals Act* and the Protocol for New and Amended Psychiatric Facility Designations under the *Mental Health Act*.

[3] "Facts about Home and Community Care Support Services", *Ministry of Health*, online.

[4] Previously, Section 4(2) and 4(4) approval powers were delegated to the Director, LHIN Liaison Branch, Health System Accountability and Performance Division, and Section 4(3) approval powers were delegated to the Assistant Deputy Minister, Health System information Management and Investment Division.

[5] PHA, *supra* note 1 at s. 4(1).

[6] The Protocol now indicates that hospitals may reuse material from ministry-approved business cases that were used for the Capital Planning Process, referred to under the Subsection 4(3) heading.

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