Date: March 14, 2018

To: Physicians of Family Health Teams

From: Adam Farber, OMA General Counsel
Simonne Horwitz, OMA Legal Counsel

Subject: 2018 FHT Funding Agreement

The Ontario Medical Association ("OMA") has received numerous inquiries from Family Health Teams ("FHTs") regarding the FHT Funding Agreement (the "Agreement") for non-Blended Salary Model ("BSM") FHTs recently distributed by the Ministry of Health and Long-Term Care (the "Ministry"). The Ministry intends to replace the previous 2011 agreement that expires on March 31, 2018 with this new FHT Funding Agreement to fund FHTs effective April 1, 2018. The non-BSM FHT Funding Agreement funds all costs associated with operating a FHT. This Agreement does not provide funding for physician compensation. Physicians who are affiliated with FHTs instead receive compensation under a FHN, a FHO, or the RNPGA. Those agreements are not impacted by the FHT Funding Agreement. As the FHT Funding Agreement does not relate to physician compensation and associated accountabilities, OMA agreement is not required in order for the Ministry to finalize and release the Agreement. The Ministry has also presented the OMA with a draft BSM FHT Funding Agreement, which funds physician compensation. The OMA is working with Ministry staff to ensure that the physician funding terms contained in the BSM FHT Funding Agreement are the same as those previously agreed to between the OMA and the Ministry, as required under the OMA-MOHLTC Representation Rights Agreement.

The Ministry consulted with the OMA on a limited basis regarding the FHT Funding Agreement. The OMA raised several concerns regarding the drafts provided by the Ministry and was successful in achieving amendments on certain terms. However, there remain several key areas of the distributed FHT Funding Agreement that present serious legal concerns. The majority of these concerns relate to the ability of the Ministry to take unilateral action under the FHT Funding Agreement. The OMA is disappointed that the Ministry ignored many of the OMA's proposed revisions to the FHT Funding Agreement in order to address the legal concerns.

This memo comments on the significant areas of concern in the new FHT Funding Agreement. However, as every FHT is different, each FHT should obtain appropriate independent legal advice regarding how it will be impacted by the new FHT Funding Agreement. Physicians involved in Family Health Teams should insist on the FHT obtaining such legal advice. In order to fulfil their board duties, physicians who sit on Family Health Team boards will also be required to review the Agreement and consider such legal advice in assessing any organizational risks. It is important to note, though, that the Agreement binds the Family Health Team as an entity and does not bind individual physicians.

General Note: Party to the Agreement

The "Recipient" is the party to the FHT Funding Agreement. Hence, it receives the funds from the Ministry under the Agreement. In exchange, the Recipient is required to fulfill various obligations under the Agreement.

If the Recipient is incorporated, it is the legal entity that is the party to this Agreement, not the individual physicians who provide clinical services at the FHT. Thus, the legal risks and responsibilities of entering into the FHT Funding Agreement are borne by the FHT and not by physicians. The directors and officers of the corporation are not personally responsible for corporate liabilities[1], except for certain liabilities imposed by legislation, such as:

(a) *Corporations Act* (6 months' wages and up to 12 months of accrued vacation pay);
(b) *Employment Standards Act* (6 months' wages and up to 12 months of accrued vacation pay);
(c) *Income Tax Act* (unremitted withholding taxes);
(d) Employer Health Tax Act (unremitted taxes);
(e) *Employment Insurance Act* (unremitted premiums); and
(f) *Canada Pension Act* (unremitted payments).

However, FHTs can purchase insurance for such statutory liabilities.

[1] With rare exception, i.e. where a court is willing to "pierce the corporate veil", which generally only occurs in cases of directors' fraud.

FHTs that are not incorporated should consult with their legal advisors to assess their potential risk and to determine if incorporation is advisable.

Legal Concerns

The legal concerns described in this memo are limited to the OMA's concerns with respect to terms that differ from those terms included in the 2011 FHT Funding Agreement. These concerns are outlined below.

Section 3.1 – Composition

This section allows the Ministry to make recommendations to the Recipient as to how the Recipient should amend its Service Plan from time to time in order to better serve the health care needs of the community. While these recommendations are initially non-binding, the Ministry can make these recommendations binding by unilaterally causing them to become part of the terms and conditions of the FHT Funding Agreement. This creates a risk of uncertainty for FHTs since, as it is written, the Ministry has the ability to unilaterally require changes to FHTs' Service Plans, which set out the obligations that the FHT must fulfil in order to receiving funding, at any time.

Section 6.0 – Conflict of Interest

This section addresses any "actual, potential, or perceived" conflicts of interest. Whether conduct constitutes a "perceived" conflict of interest is highly subjective and vague. This creates an opportunity for proper conduct to be unfairly or unreasonably called into question and thus prohibited under the Agreement. The OMA's position is that this section should be limited to conduct that objectively creates an actual or potential conflict of interest.

Section 6.4 states that, if the Recipient discloses an "actual, potential, or perceived" conflict of interest, then the Ministry may unilaterally prescribe additional terms and conditions that the Recipient must follow in order to continue to receive funding under the Agreement. This is another example of where the ability of the Ministry to make unilateral changes to the terms of the FHT Funding Agreement creates risk and uncertainty for FHTs.

Section 7.2 – Funding and Budget

The failure of the Recipient to submit certain reports, adhere to its Service Plan, or otherwise breach the FHT Funding Agreement may result in the Ministry adjusting or suspending payment of funds to the FHT. While the Agreement states that such adjustment or suspension must be "proportional" to the relevant breach, the Ministry was unwilling to specify how proportionality will be determined, creating uncertainty in how this section will be interpreted.

Section 7.7 – Funding and Budget

While the Ministry addressed some of the OMA's concerns with respect to unilateral action in Section 7.7.2, the Agreement still permits the Ministry to, "at any time", provide the Recipient with a new Service Plan, Budget, Payment Plan, or Reports. Unilateral action by the Ministry creates risk and uncertainty for FHTs. The unilateral language in Section 7.7 and Section 7.7.1 is also inconsistent with the changes the Ministry made in Section 7.7.2 to remove unilateral action. As the Agreement is written, unilateral action by the Ministry is permitted, although it is unclear whether that was the Ministry's intention. If the OMA had been provided with an opportunity to engage in fulsome discussion with the Ministry about these provisions, the language could have been improved and clarified.

Section 9.0 – Consent by Ministry and Compliance by Recipient

The Recipient cannot take specified actions under the FHT Agreement without first obtaining the Ministry's consent.[2] In circumstances where the Ministry does provide its consent, this section allows the Ministry to unilaterally impose certain terms and conditions on the Recipient in

[2] This includes, but is not limited to, the following circumstances: unless otherwise consented to by the Ministry, all interprofessional team members and administrative staff must be employees of the Recipient (Section 4.1); the Recipient may not make any changes to its Service Plan (Section 4.2); the Recipient's name and bank account must be identical (Section 7.1); the Recipient may not make any changes to approved budget items (Section 7.3); during and for five years after the term of the Agreement the Recipient may not sell, lease or otherwise dispose of equipment valued at more than $5,000 that was purchased with funding under the Agreement (Section 7.5); and the Recipient may not assign the Agreement (Section 33.1).

connection with the consent given. Again, the ability of the Ministry to unilaterally cause the Recipient to take, or refrain from taking, certain actions creates risk and uncertainty for the FHT.

Section 11.0 – Reports, Record Retention and Information Management

Section 11.1(b) requires the Recipient to submit certain reports to the Ministry, from time to time. It would be preferable if the Agreement specified that such reports must be related to the Service Plan or to funding under the Agreement. This would ensure that the Ministry is unable to require the Recipient to expend resources to prepare reports that may be unnecessary for, or unrelated to, the FHT Funding Agreement.

If an audit is performed and non-compliance with the FHT Funding Agreement is found, the Recipient will be required to submit a detailed plan to the Ministry as to how and when it will take corrective action to achieve compliance. Section 11.6 permits the Ministry to recommend to the Recipient the steps it should take to achieve compliance. The wording of the Agreement creates uncertainty as to whether or not the Recipient's plan must include the Ministry's recommendations. This would permit the Ministry to impose recommendations that go beyond simply correcting the Recipient's breach of the Agreement.

Section 33.2 – Assignment

This section permits the Ministry to assign the FHT Funding Agreement to another government agency, such as a Local Health Integration Network ("LHIN"), without the consent of the Recipient. This means that the Ministry can unilaterally transfer all of its rights and obligations under the Agreement to a LHIN (or to another government agency). The result of such a transfer is that the LHIN would essentially "step into the shoes" of the Ministry and that the Ministry would no longer be a party to the Agreement. The LHIN would assume all of the Ministry's funding and other obligations under the Agreement and would enjoy all of the Ministry's rights under the Agreement, and the Recipient's obligations under the Agreement would be to the LHIN, rather than to the Ministry. The FHT Funding Agreement would become an agreement between the Recipient and the LHIN.

Section 19(3) of the *Local Health System Integration Act, 2006*[3] states that the Ministry may assign its rights and obligations under an agreement between the Ministry and a "health service provider" to a LHIN. A FHT is considered a "health service provider" under the *Patients First Act, 2016*[4]. The Ministry's ability to assign the FHT Funding Agreement to a LHIN is therefore already permitted by law. However, by including this section in the Agreement, it provides the Ministry with both a contractual and a legal right to take such action. It also precludes the FHT from ever being able to argue under the law that an assignment to a LHIN is void or unlawful, as it has contractually agreed to such assignment.

Schedule "A" (Service Plan) – Digital Health Requirements

Item 3 (Digital Health Requirements) requires the Recipient to make "reasonable efforts" to ensure that patients have the option of email communication, which could potentially be very costly. The Ministry somewhat addressed the OMA's concerns by clarifying that the cost to implement an electronic communication system would be funded by the Budget under the Agreement. However, the "reasonableness" standard is ambiguous and there is uncertainty surrounding what the Ministry may expect the Recipient to do to implement such a system.

Schedule "A" Appendix 1 – Governance Requirements

Item A (General) sets out certain matters that must be addressed by the Recipient's written governance structure. However, some of these matters[5] relate to operational considerations, rather than to governance matters. In discussions with the Ministry, the OMA did not understand the need to include such operational matters in a governance structure, however, the Ministry insisted on their inclusion in Item A of the Appendix. Each Recipient should therefore ensure that its governance structure appropriately addresses the specified matters, including those that are operational in nature.

[3] S.O. 2006, c. 4

[4] S.O. 2016, c. 30 – Bill 41

[5] An approval and review process for the hiring and termination of personnel (#2), any decision to terminate the Agreement (#3), and a process for monthly review and assessment of the Service Plan (#4).

Other Schedules and Appendices

There are a number of other Schedules and Appendices to the Agreement[6] that contain either template forms or blank placeholders relating to the details of FHT funding arrangements and Service Plans. The Recipient will be required to make certain proposals in order to populate these Schedules and Appendices. The OMA requested more information from the Ministry as to what criteria it would use to evaluate such proposals. The Ministry did not provide the OMA with any explanations or clarity with respect to its criteria.

Other New Terms in 2018 FHT Funding Agreement

Physicians should be aware of a couple of other terms in the new FHT Funding Agreement that were not included in the 2011 FHT Funding Agreement, outlined below. It should be recognized that the OMA does not have specific legal concerns about these new terms. However, a particular FHT may have a concern with a proposal based on its specific circumstances.

Schedule "A" Appendix 1 (Governance Requirements) specifies that the Recipient must use its best efforts to ensure that its board of directors possesses skills in specified[7] areas. Schedule "A" Appendix 2 contains a skills-based board matrix that the Recipient must complete annually. If the Recipient identifies gaps in the required skills, the Agreement provides the opportunity for the Recipient to address such gaps either through board member education or by retaining external expertise (for example, an accountant to sit on a board advisory committee). Physician leadership through representation on FHT boards has historically been important in ensuring that FHT decision-making reflects local needs and promotes quality patient care. Although the move towards skills-based boards does not necessarily preclude physician representation on FHT boards, potential reliance on non-physicians to meet certain skills requirements in the Ministry's skills matrix may risk diluting physician leadership. Note that a "best efforts" standard means that everything that can be done should be done; it is an onerous standard that imposes a high obligation exemplified by the phrase "no stone unturned".

[6] Schedule "A" Appendix 2 (Skills-Based Board Matrix), Schedule "A" Appendix 3 (Programs and Services Schedule Placeholder), Schedule "B" (Budget) and Schedule "C" (Payment Plan).

[7] Strategic planning, clinical skills, program development, human resources management, financial management, risk management, and other planning.

The Ministry has verbally advised that the above-mentioned skills requirements will not be enforced until April 1, 2019, however, this delay is not memorialized as a term of the Agreement. Any changes to the FHT's governance structure, whether related to the skills-based matrix or otherwise, must be reported to the Ministry within 30 days of the change.[8]

Schedule "A" Appendix 1 (Governance Requirements) also requires the Recipient to engage the community served by the FHT on an ongoing basis and to consider the results of such community engagement when making decisions in respect of the FHT. This requirement relates to the Ministry's overall objective of improving patient and community engagement and of providing care that is tailored to the needs of the community. The process by which the Recipient will engage the community must be outlined in the FHT's written governance structure.

Conclusions

As indicated above, the risks inherent to the FHT Funding Agreement are borne by the Recipient (and not by individual physicians). In most cases, the Recipient is a corporate entity. For the most part, physicians associated with FHTs are inherently protected by corporate FHTs.

Each FHT must review the new FHT Funding Agreement to evaluate the level of risk to which it may be exposed. If a FHT has significant concerns regarding this FHT Funding Agreement, the FHT may have to make a difficult decision as to whether it wishes to continue its participation in the FHT initiative.

[8] Section 5.1 of the Agreement.