• ONTARIO COURT LOOKS AT PUBLIC CONSULTATION REQUIREMENTS FOR LOCAL HEALTH INTEGRATED NETWORKS •

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INTRODUCTION

In an August 22, 2008 decision, the Ontario Divisional Court provided the first judicial interpretation of provisions relating to public consultation under the *Local Health System Integration Act, 2006*, S.O. 2006, c. 4, ("the Act").[1] The decision supports that where a Local Health Integration Network ("LHIN") exercises its authority over funding decisions, as opposed to its more direct powers relating to integration of health services, there is no requirement to provide opportunities for public consultation or engagement. This reflects the deference that is given to provincial funding sources over funding decisions.

THE FACTS

The decision involved a public hospital comprised of two sites ("the Hospital"), which had been operating in a deficit position for many years. In May 2007, the Hospital entered into a Hospital Accountability Agreement with the Ontario Ministry of Health and Long Term Care ("the Ministry") for the 2007/2008 fiscal year, notwithstanding that it was in a deficit position. The Minister agreed to accept the proposed operating deficit, provided that the Hospital agreed to undergo an external operational review ("Peer Review") to try to find ways to eliminate the deficit.

The Peer Review was completed in December 2007. Included in the recommendations from the review was a recommendation that the Hospital consider the consolidation and relocation of certain clinical services.

In response to the Peer Review, the Hospital engaged in a process to develop a deficit elimination plan. One of the deficit elimination measures that arose out of this process was the consolidation of inpatient mental health services at a single site, rather than continuing to operate inpatient units at both of the Hospital's two sites.

The deficit elimination plan prepared by the Hospital was presented to the LHIN in January of 2008. The LHIN and the Hospital worked together to reach a Hospital Service Accountability Agreement ("SAA") as required under the Act, incorporating this plan. The SAA was approved by both the Board of the Hospital and the Board of the LHIN in March 2008. Although not required under the Act, the LHIN Board passed a resolution requiring the Hospital to work with the LHIN prior to the implementation of the consolidation of mental health services by conducting a thirty-day community consultation process.

JUDICIAL REVIEW APPLICATION

In response to the approval of the SAA and the consolidation of inpatient mental health services, one of the unions ("the Union") representing workers impacted by the consolidation of inpatient mental health services filed an application for judicial review. In its application, the Union contended that the LHIN acted contrary to the Act by not providing an adequate opportunity for community input and consultation in approving the Hospital's SAA (three stakeholder meetings had been held, on April 9, 10 and 30, 2008). It also argued that under the common law, the LHIN ignored a legitimate expectation that there would be procedural fairness when it approved the SAA, and that the LHIN Board acted improperly by holding *in camera* sessions. It is an accepted principle of administrative law that a public authority which makes decisions that affect the rights of others is subject to a duty of procedural fairness.

Through its judicial review application, the Union sought an order quashing or setting aside the LHIN's approval of the SAA. It also sought a declaration requiring the LHIN to engage in public consultation before making any determination as to whether the consolidation of inpatient mental health services could proceed.

THE DECISION

The Divisional Court disagreed with the Union that the LHIN had an obligation to provide an opportunity for public consultation either under the Act or at common law before approving and executing the

SAA. It found that the LHIN had no such obligation and dismissed the Union's application.

The Court noted that public consultation by the LHIN is required under the Act in cases where the LHIN is developing plans and setting priorities for the delivery of health services in accordance with its planning mandate. It must also engage in public consultation where an integration decision is required by a LHIN (under s. 26 of the Act), or where the LHIN wishes to prevent a voluntary integration between two entities (under s. 27 of the Act).

In terms of the LHIN's planning activities, the Court found that the obligation for public consultation related to the development of plans and priorities for the delivery of health services as it related to the system and not in respect of a single provider. As a result, the Court found that the Act did not require public consultation during budget negotiations with individual health care providers.

The Court rejected the Union's argument that the LHIN had an obligation to issue an integration decision under the Act because this was an integration of persons or entities that was "negotiated or facilitated" by the LHIN within the meaning of s. 25(2) of the Act. The Court found that the Hospital was a single "health service provider" under the Act, operating out of two sites, and was not separate entities. The decision to consolidate inpatient mental health services was one made by the Hospital, which had the authority to decide how best to eliminate its budget deficit. The LHIN did not need to approve the specific measures proposed by the Hospital as this was an internal Hospital decision which did not require an integration decision by the LHIN.

With respect to issues relating to procedural fairness, the Court commented that the Act did not require public consultation with respect to contract or funding decisions, in contrast to specific provisions relating to integration decisions. There was no evidence that the Union or other members of the public had been consulted about the terms of an accountability agreement or Hospital funding in the past, which would give rise to an expectation of consultation in future funding decisions. The Court held that general statements about the importance of community engagement did not give rise to an enforceable right to consultation about LHIN funding decisions.

Based on the above, the Court concluded that the LHIN did not violate the Act in approving the SAA with the Hospital without public consultation.

ANALYSIS

From a policy perspective, it is perhaps understandable why a Court would not want to interfere with a funding agreement between a hospital and a LHIN by requiring public consultation. As reflected in the legislation, where the LHIN uses its funding "levers", as it did in this case, it is not required to undertake community consultation. In these circumstances, the only level at which community consultation would occur would be before the Hospital's Board.

In terms of procedural fairness, the Court did not find adequate evidence to support the argument that there was a legitimate expectation of public consultation relative to the consolidation of a Hospital's mental health service. It remains to be seen as to whether this type of argument could be successful in other situations.

The Act received Royal Assent on March 28, 2006. The purpose of the Act is to establish an integrated health system to improve the health of Ontarians through better access to quality health services, coordinated health care and effective and efficient management of the health system across the province and at the local level by LHINs. LHINs have the mandate to plan, fund and integrate the local health system, and are required to engage the community of persons in and entities involved with the local health system in planning and setting priorities for the system, including establishing formal channels for community input and consultation.

To this end, the requirements related to community engagement are becoming more robust. Under the Act, the Lieutenant Governor in Council may make regulations about the ways in which LHINs engage their communities. In the July 26, 2008 issue of the *Ontario Gazette,* the public was invited to comment on a proposed regulation relating to the engagement of the aboriginal community. Further, notice was provided in the September 13, 2008 issue of the *Ontario Gazette,* inviting the public to comment on a proposed regulation relating to the engagement of the francophone community in relation to its planning activities under the Act.

The Minister is required to publish a notice of a proposed regulation and allow at least 60 days for public comment. The proposed regulations would require each LHIN to establish committees in order to engage the aboriginal and francophone communi-

ties on the local health system. While these regulations have not yet been passed, it is clear that community engagement will continue to be scrutinized.

CONCLUSION

As experience with the legislation continues, there will be situations where health service providers have the option to voluntarily integrate services under s. 27 of the Act, or the LHIN may "facilitate" the integration under s. 25(2) of the Act. In some cases, the LHIN may request that the parties proceed one way or the other. It is important to appreciate that the s. 25(2) option will require the LHIN to issue an integration decision under s. 26 of the Act, and trigger a public consultation process. Health service providers should be cognizant of these implications when making decisions of this nature, and be mindful of any future rules concerning community engagement.

At the time of publishing, there was no word of this decision being appealed. However, a second case on parallel facts was heard in the Divisional Court on September 19, 2008, with respect to the duty, if any, for a hospital to receive recommendations of a Family Advisory Council. An update will be provided once a decision in that case has been rendered.

[*Editors' note*: Kathryn Frelick, Valerie Wise and Shane Smith are partners in the Health Industry Group at Miller Thomson LLP in Toronto.]

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1 In *Ontario Public Service Employees Union v. Central East Local Health Integrated Network* ([2008] O.J. No. 3243, Ont. Ct. file 206/8, Div. Ct.), 2008 CanLII 41820 (ON S.C.D.C.), Rouge Valley Health System ("RVHS") was added as an interested party. In this case, OPSEU represented a bargaining unit of approximately 500 employees at RVHS.