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Communiqué

*for Health Industry Clients
on the Legal Retainer Program*

BOND Policy

Business Oriented New Development (“BOND”) was initially introduced by the Ministry of Health in 1982 to provide incentives to public hospitals to control costs and increase revenues subject to section 4 of the *Public Hospitals Act* (“PHA”). S.4 of the PHA states:

4. (1) 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 has first received the approval of the Minister.

(2) No institution, building or other premises or place shall be operated or used for the purposes of a hospital unless the Minister has approved the operation or use of the premises or place for that purpose.

(3) No additional building or facilities shall be added to a hospital until the plans therefor have been approved by the Minister.

(4) No land, building or other premises or place or any part thereof acquired or used for the purposes of a hospital shall be sold, leased, mortgaged or otherwise disposed of without the approval of the Minister.

(5) Any approval given or deemed to have been given under this Act in respect of a hospital may be suspended by the Minister or revoked by the Lieutenant Governor in Council if the Minister or the Lieutenant Governor in Council, as the case may be, considers it in the public interest to do so.

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In 1991 a moratorium was placed on BOND due to problems associated with high risk real-estate projects. This moratorium prevented hospitals from engaging in major revenue generating projects requiring approval under s. 4 of the PHA.

Revised BOND policy

The Ministry of Health lifted the moratorium on BOND in 1999 and made some revisions to the BOND policy. The current BOND policy reinforces hospital board accountability for patient care and fiscal management by encouraging hospitals to follow established business practices to maximize their revenue and control costs. Revenues from these activities must be applied towards operations.

The original BOND policy had the following objectives:

- Enable hospitals to expand revenue sources such as seeking revenue generating opportunities, encouraging private sector involvement in ancillary activities, and permitting hospitals to set preferred rates
- Encourage cost containment through ongoing evaluations of productivity and explore opportunities to rationalize services
- Create incentives by permitting hospitals to retain 100% of any net income or operating surplus of income over expenses earned in each fiscal year
- Introduce consolidated reporting using better developed management information to facilitate better decision-making and improved patient care

The revised BOND policy builds on these objectives and provides further direction by introducing the following requirements:

- Follow a new Management Process to report and manage risk-intensive ancillary activities
- Subject their proposal to a comprehensive risk appraisal and approval process

An ancillary activity is defined as an enterprise which is not necessary for the provision of patient care. Ancillary

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activities are deemed risk-intensive if they meet the criteria set out in the BOND policy. Such criteria include pledging greater than \$1 million of hospital assets as security, square footage of building or premises being acquired, leased or rented is greater than 5% of total square footage of hospital's premises. Examples of risk-intensive ancillary activities are hospitals entering into business activities involving real estate and leasing hospital space to retail stores.

With the release of the revised BOND policy the Ministry has the authority to request a reassessment of current ancillary revenue generating activities which meet any of the risk-intensive criteria.

Planning Guidelines

Hospital boards are expected to enact a Management Process before undertaking any risk-intensive ancillary activity. The Management Process involves a rigorous due diligence program which will ensure that the hospital is not subject to undue risk at the outset and that risk is monitored on an ongoing basis.

Ongoing communication with the Ministry is mandatory. This communication should begin at the initial stages to help a hospital to determine if a proposed activity is deemed to be "risk-intensive." Once the Ministry deems the proposed activity as risk-intensive the hospital should submit to the Ministry the following:

1. A detailed description of the proposed ancillary revenue generating activity and the intended purpose;
2. A careful analysis of the benefits and risks of the activity, clearly indicating how the rewards outweigh the risks of the activity, including a description of the impact should the hospital not proceed with the proposed ancillary activity;
3. A description of the mitigation of financial, legal and other risk to the hospital, specifically that the activity does not:
 - a. divert the hospital from the effective management of patient care;
 - b. unduly place hospital assets at risk;

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- c. contravene conflict of interest guidelines and legislation relating to board members, officers or staff;
 - d. contravene the *Canada Health Act* or any other applicable legislation
 - e. contravene any laws governing charities such as the *Charities Accounting Act* and the *Charitable Gifts Act*, if applicable;
 - f. negatively influence the hospital operating results;
 - g. lead to community criticism of unfair business practices;and
 - h. demonstrate that future patient needs as well as local hospital and health services restructuring are not compromised by the use of hospital land, building or other premises or place.
4. An explanation of the methods for ongoing monitoring and continuous risk assessment, including an outline of the evaluation criteria to ensure continued net revenues. A strategy should be described which outlines how the hospital will disengage in the risk-intensive ancillary activity should the risks outweigh the benefits
5. A single hospital board resolution certifying the existence and enforcement of a rigorous and duly diligent Management Process which covers all risk-intensive ancillary activities.

While the hospital submits the above to the Ministry the hospital will be expected to have the proposal reviewed by an external expert evaluator. The evaluation results will be the basis for the Ministry approval. The Ministry has compiled a list of qualified experts and will be distributed to a hospital upon request when you are considering a risk-intensive proposal.

Although the Ministry grants the approval to initiate the proposal, the Ministry commits no financial guarantees. The hospital will be fully accountable for the implementation of the proposed activities.

If you require more information on BOND or assistance with respect to compliance with BOND, please contact Rebecca Durcan or Alan Belaiche.

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Note: This communiqué is provided as an information service to our clients and is a summary of current legal issues of concern to Health Industry Clients. Communiqués are not meant as legal opinions and readers are cautioned not to act on information provided in this communiqué without seeking specific legal advice with respect to their unique circumstances. Your comments and suggestions are most welcome and should be directed to Kathryn Frelick, Coordinator, Legal Retainer Program.

About the Author:

Rebecca Durcan is a lawyer practicing in our Health Industry Practice Group and, along with Kathryn Frelick, is primarily responsible for the Legal Retainer Program. Rebecca's focus is on advocacy, regulatory and health policy issues.

Alan Belaiche is a lawyer at Miller Thomson LLP specializing in corporate and commercial law for clients in the health sector. He would be pleased to discuss any legal aspects of the BOND policy with you.

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Our National Health Industry Practice Group is dedicated to providing comprehensive and integrated legal services to health industry clients. For more information about our Group, visit our website at www.millerthomson.com.