

**HEALTH LAW BULLETIN**

August 2006

The following is the first of a two-part series on open and closed board meetings and *in camera* and informal sessions.

**HOSPITAL GOVERNANCE: OPEN AND CLOSED BOARD MEETINGS****OPEN AND CLOSED BOARD MEETINGS**

In December 2001, the government of British Columbia altered the way in which it manages and delivers health care services in the province. As part of those changes, the government created the Northern Health Authority along with four other regional health boards. The regional health boards conducted their first board meeting as an *in camera* session. In *Hospital Employees' Union v. Northern Health Authority*<sup>1</sup> the union challenged the use of the *in camera* session claiming it was contrary to section 8(3) of the *Health Authorities Act*<sup>2</sup>, which provides that meetings are to be held in public unless the desirability of avoiding disclosure of information outweighs the desirability of public disclosure of the information. The Northern Health Authority defended its choice by stating “{T}he presence of the public can inhibit the free and open discussion and debate and can discourage innovative planning...”. The Supreme Court of British Columbia held “that statement shows...a cynical favouring of the interest of bureaucracy over the public...”, and that although the health authority may have been within its rights to hold an *in camera* session, it must specifically address its decision to do so.

Directors have the collective responsibility of governing the business and affairs of a corporation. Board meetings are central to the collective decision-making process as they provide directors with an opportunity to express their views.<sup>3</sup> By statute, many public institutions such as schools<sup>4</sup>, municipalities<sup>5</sup> and police services<sup>6</sup> must hold board meetings that are open to the public. There is a common misconception that the board of a hospital also falls within the category of public institution and therefore must conduct open board meetings. However, public hospitals are private corporations. Under current Ontario law, there is no obligation for hospital boards to hold meetings that are open to the hospitals' corporate members, the press or the general public.

Recently, in the interests of enhancing transparency and accountability, there has been a demand for public access to hospital board meetings. In 1998, the OHA established a policy of open hospital board meetings and, over the past four years, four bills have been introduced to require that all hospital board and committee meetings be accessible to the public.<sup>7</sup> None of these bills have been passed.

Hospital board practice across the province is not uniform; however, many hospitals voluntarily hold open board meetings and only move *in camera* to discuss sensitive or confidential matters. *Hospital Employees' Union v. Northern Health Authority*, as discussed above, demonstrates the current tension between the desire for transparency and a hospital board's need for free and open discussions at board meetings. However, it is not clear that opening board meetings to allow community and media presence are the appropriate solution in the hospital sector.

<sup>1</sup> (2003), 15 B.C.L.R. (4th) 173.

<sup>2</sup> R.S.B.C. 1996, c.180.

<sup>3</sup> C.A. Hansell, *Directors and Officers in Canada: Law and Practice*, looseleaf (Scarborough: Carswell, 1999).

<sup>4</sup> *Education Act*, R.S.O. 1990, c. E.2.

<sup>5</sup> *Municipal Act, 2001*, S.O. 2001, c. 25.

<sup>6</sup> *Police Services Act*, R.S.O. 1990, c. P.15.

<sup>7</sup> The most recent of these bills is Bill 123, *Transparency in Public Matters Act, 2004*, which received the support of all three political parties at second reading. The order for the Bill's third reading was discharged and the Bill was withdrawn by order of the House in April, 2006.

## THE CASE FOR OPEN BOARD MEETINGS

The Sarnia Central Neighbourhood Association was formed in response to certain action taken by the Lambton Hospitals Group in Sarnia. According to the Association, the Lambton Hospitals Group began assembling land without public consultation, and most of the money spent on real estate was spent in years when the hospitals were having difficulty financing the health care needs of the community. The Association claims that by withholding board minutes from the public, public bodies can spend public money without accountability.<sup>8</sup>

Many potential issues arise when decisions are made behind “closed doors”. The veil of secrecy that is created when a board goes *in camera* to conduct all or a portion of a meeting raises questions of accountability and transparency. The hospital board of directors bears the ultimate authority for the administration of the hospital. As such, hospital boards are held to a high standard of conduct and are generally subject to the same basic duties of stewardship imposed on directors of business corporations and other non-profit corporations. Since most health care facilities are funded almost entirely by government funds, board members are also in a position of public trust. As a result, the demand for accountability and transparency has reached a pinnacle within the hospital sector.

Open board meetings have been touted as the solution to this demand as they provide numerous potential benefits, including:

- portraying the board as open and accountable;
- allowing for public opinion and input after the meeting;
- keeping the public informed of initiatives and development;
- communicating the work of the board to the community; and
- providing a method to understand the needs of the community.

The proponents of open board meetings contend that opening meetings to the community and media could have led to other results in the Lambton Hospitals Group example. Had the decisions of the board been subject to public scrutiny and input it is suggested that the board might have put government funding to other use.

## THE CASE FOR CLOSED BOARD MEETINGS

The composition of the board of directors of a hospital is different than the board of directors of a private corporation. The members of a hospital board of directors:

- serve on a voluntary basis;
- are typically laypersons who have limited practical experience in health care; and
- are typically appointed because of their connections within a community, ability to raise funds and outside experience that they can bring to the health care facility.<sup>9</sup>

The unique characteristics of a hospital board are often overlooked in the suggestion that open board meetings are appropriate within the hospital sector. In addition to the general role and responsibilities of directors in any corporation, hospital board members have the added responsibility of ensuring that activities within the corporate structure comply with government regulations. The hospital board is not only accountable to the public but also has fiduciary obligations to the Ministry of Health and Long-Term Care and soon the Local Health Integration Network.

The most important aspect of board meetings is that they provide directors with an opportunity to express their views and provoke a full and frank discussion of the issues relevant to hospital governance. By opening up the board meetings to the public and media, volunteer directors may be reluctant to voice their opinion. The threat of immediate public scrutiny may also be intimidating for a director with little practical experience in the health care sector.

---

<sup>8</sup> Excerpted from Michael Chopcian’s submission to the Standing Committee on Public Accounts, November 29, 2001, online: Legislative Assembly of Ontario <[http://www.ontla.on.ca/hansard/committee\\_debates/37\\_parl/Session2/ accounts/P010.htm](http://www.ontla.on.ca/hansard/committee_debates/37_parl/Session2/ accounts/P010.htm)>.

<sup>9</sup> J.J. Morris, *Law for Canadian Health Care Administrators* (Markham: Butterworths, 1996) at 4.

Open board meetings also raise the following concerns:

- open board meetings contribute to and reinforce the misconception that the hospital board is accountable only to the community and undermines the board's focus on its fiduciary obligations and accountability to the Ministry<sup>10</sup> and the LHIN;
- where sensitive matters are discussed in an open meeting there is often a reluctance to engage in full discussion;
- if the hospital board regularly conducts open board meeting and only moves *in camera* for specific issues it is likely that issues will be inappropriately discussed in either forum;
- board members may become political and play to the public audience instead of making necessary and potentially unpopular decisions;
- public witnessing of a divisive debate may lead to a misguided loss of confidence in the board;
- the security of a closed environment to voice opinions may help build capacity in the volunteer sector; and
- if there is limited public attendance, then open board meetings provide limited value as a means of communicating with the community.<sup>11</sup>

As a private corporation, the hospital board is not currently required to conduct open board meetings. However, because of its position of public trust, the hospital board must find an alternate means of communicating with the community in order to ensure the hospital is governed so as to meet the community's needs.

#### **BEST PRACTICES FOR OPEN AND CLOSED MEETINGS**

Whether the policy of the hospital is to hold open board meetings and move *in camera* for sensitive matters or to hold closed board meetings as a matter of course, the manner in which the meeting is conducted is crucial to avoid implications of impropriety. Except for the absence of specified people or groups, there should be no procedural differences between an open meeting and a closed meeting. There should be an agenda, and decisions should be made and recorded in the minutes. The same decision-making process takes place at closed meetings, and the board has the same fiduciary responsibility it has at any other time. It is vitally important that minutes be recorded during an *in camera* session. Minutes are an integral part of any board meeting, as they record the business transacted by directors at a board meeting, and are a means of preserving evidence of the board's decisions and debates. This function provides protection for directors against potential liability. The minutes do not have to be, and should not be, made public if they contain sensitive information, however, they must be kept and maintained. In order to maintain and assure accountability and transparency every hospital board should establish standard procedures and policies for conducting closed board meetings.

*Written by Lydia Wakulowsky and Graham W.S. Scott, CM, QC*

---

<sup>10</sup> M.A. Quigley & G.W.S. Scott, *Hospital Governance and Accountability in Ontario, A Report for the Ontario Hospital Association* at 37.

<sup>11</sup> *Ibid.* states "experience has shown limited attendance at open board meetings by internal and external stakeholders".

---

*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

---

© Copyright 2006 McMillan Binch Mendelsohn

**McMILLAN BINCH MENDELSON**

---

TORONTO | TEL: 416.865.7000 | FAX: 416.865.7048

MONTRÉAL | TEL: 514.987.5000 | FAX: 514.987.1213

www.mcmbm.com