11. One Local Funding Problem

An example of a recent dispute between a local Board of Health and the local Medical Officer of Health on the one hand and the municipalities they served on the other hand, reveals the fight many jurisdictions have to go through for public funding. Although this occurred before SARS, and is not directly related to the response to the outbreak, it nevertheless reveals systemic weaknesses and tensions in Ontario's public health system.

In 2002, a local Medical Officer of Health in Ontario went to the Board of Health and requested a 27-per-cent increase in their budget. The Medical Officer of Health argued that the increase was necessary due to a 25-per-cent reduction in the budget between 1991 and 2001 and a 30-per-cent reduction in staffing during that same period of time. Based on the material presented by the local Medical Officer of Health, the Board of Health supported the increase in funding and approved the request. This meant an increase in the levy to those affected municipalities.

Under the *Health Protection and Promotion Act*, a local Board of Health has responsibility for ensuring the delivery of health services and programs in accordance with the *Act* and Regulations. The Board of Health was legally required to prepare an annual estimate of expenses for the next year[151] and then transmit it to the obligated municipalities by written notice. The *Act* provides that upon receipt of the written notice the obligated municipality "shall pay to the Board of Health the amounts required by notice at the times required by the notice."[152] The provision is mandatory; there is no discretion not to pay.[153] Moreover, the *Act* requires that obligated municipalities in a health unit shall ensure that the amount paid is sufficient to enable the Board of Health to provide or ensure the provision of health programs and services in accordance with the mandatory health programs and services and to comply in all other respects with the *Act* and the regulations.[154] The accountability for public funds is

151. *Health Protection and Promotion Act*, S. 59(2)(c). (This document is to be subsequently referred to by the initials *HPPA*.)
152. S. 72(8) *HPPA*
153. S. 72(8) *HPPA*
154. S. 72(2) *HPPA*

ensured by the presence on the Board of Health of a majority of members appointed by the elected municipal councils.

One of the obligated municipalities, in a budget report, noted:

> The City Solicitor has confirmed that the *Health Protection and Promotion Act* requires an obligated municipality to pay expenses incurred by the Board of Health of the Health Unit, and that there is no discretion under the *Act* in favour of the municipality

Despite this appreciation that the municipality was legally obligated to pay, the councils of the obligated municipalities went on to move that the health unit budget not be approved and that staff meet with the Board of Health and report back to the councils. Thus, although the Board of Health had approved the increase and the statute required that the municipalities pay it, the municipality refused.

The obligated municipalities asked the province to intervene. The deadlock continued, with the municipalities refusing to pay. On June 14, 2002, the Association of Local Public Health Agencies (aLPHA) expressed its concerns to the then Minister of Health:

> As you know, all Boards of Health and Medical Officers of Health are required to comply with the minimum general and program standards embodied in the Guidelines. Local funding pressures not only prevent many boards of health from meeting minimum requirements, but puts additional pressures on them when emerging issues such as bioterrorism, drinking water quality, pandemic influenza, West Nile virus, etc. increase demands on resources.
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> This situation received significant attention during the inquiry into the Walkerton tragedy. One of the outcomes of this inquiry was the key and explicit recommendation to the Minister of Health and Long-Term Care to ensure that Boards of Health comply with the Guidelines.
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> We are very concerned that any movement toward excusing obligated municipalities from their statutory requirements runs counter to the HPPA itself, Commissioner O'Connor's recommendations, and advice received from time to time from the Chief Medical Officer of Health. It would set a precedent that would be extremely detrimental to the ability of all Ontario boards of health and medical officers of health to obtain

> the necessary resources required to execute their duties. This would be a significant step backwards in time when the importance of strengthening public health programs has been made abundantly clear.
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> Your government has already committed to implementing the recommendations of the O'Connor Commission, including ensuring that all boards of health are able to comply with your Ministry's Guidelines. We hope that you as Ontario's Minister of Health and Long-Term Care will realize that refusal by obligated municipalities to pay for local public health program constitutes a serious impediment to this ability.

The response from the province, signed by the then Chief Medical Officer of Health, was to advise aLPHA that he had met with the Board of Health and representatives from the obligated municipalities to discuss the budget and that the "ministry would facilitate further meetings of representatives of the Board of Health and obligated municipalities." It is difficult to understand the need for further meetings. One cannot help but wonder why the Ministry of Health did not simply state the obvious to the councils: the law requires the local Board of Health, an independent entity, to set the budget, they have done so and you are obligated to pay.

On August 19, 2002, the Chair of the Board of Health wrote to the then Minister of Health. The letter summarized what had transpired following the setting of the budget by the Board of Health. The Chair noted that:

> . . . members of the municipal councils of our obligated municipalities have met with you and your assistants over the past while, to express their concerns with the budget that has been passed by the Board of Health. We have met with members of the Ministry, as well as the Chief Medical Officer of Health, and the Mayors of our obligated municipalities in order to attempt to clarify for the Mayors our budget and budget process. I would also point out that while information has been provided to the obligated municipalities concerning the budget well before its passage, in fact, the Board of Health is comprised of twelve members, eight of whom are appointed by their respective municipalities, and these municipal representatives participated in our budget deliberations.

In the same letter, the Chair made the following comments about the proposed increase in the budget:

> The Board of Health, in passing the budget that it did, approved expenditures that move the Health Unit in a minimally acceptable manner, forward, towards meeting the mandatory programs and standards set by the Ministry. The Board of Health, and not the obligated municipalities, is the body responsible for ensuring that the Health Unit takes reasonable and responsible measures to move towards compliance, mindful of the significant pressures placed on all of our Health Units in light of the Walkerton tragedy and other significant emerging issues such as West Nile virus, food premises inspection, bioterrorism, etc.

The Chair went on to note that, although the Board of Health was confident that it had available the legal means necessary to enforce the levies, it wanted to know, before moving in that direction, whether the Ministry was prepared to fund the short-fall between the levy and what the municipalities had paid, and whether the province intended to amend the *Act* to delete the mandatory programmes. The Chair noted that they raised this issue "in light of the apparent continuing receptive ear that the Ministry has given to these defaulting obligated municipalities."

The Ministry of Health responded that there were no plans to change the current funding practice and there were no plans to amend the *Act*. The letter from the Ministry of Health went on to state:

> I would take this time to remind you how critically important it is for boards of health to foster a good working relationship with its stakeholders at the local level. The preamble to the Mandatory Health Programs and Services Guidelines encourages all parties involved in the delivery of public health programs and services to engage in mutually constructive dialogue. I encourage you to seek out a resolution to the current impasse with the municipalities of your area. The only solution that is sustainable is one that is worked out locally. I am of the opinion that to maintain an adversarial relationship with the municipalities can only be detrimental to the public health system.

The impasse continued. Rather than enforce the municipalities' legal requirements to pay, the Ministry of Health appointed a mediator to try to explore the potential for compromise and a billing adjustment. In effect, they were seeking to negotiate around a clear breach of the law. On September 10, 2002, the mediator proposed that the Board of Health reduce its 2002 budget request by 50 per cent for levy purposes only. This would require a partial refund to those municipalities who had already paid the levy in full. The letter states:

> The mayors who have been resisting the budget increase have agreed that this gesture on the Board's part will result in a reestablishment of meaningful dialogue between the parties respecting the current and future year needs of the health unit.
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> I realize that it is difficult for the Board of Health to relax its principles, but we believe that by taking this step, the board will send a clear message that it is willing to voluntarily suspend its legislated right, in an effort to build a harmonious relationship with its partners.
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> The alternative it appears, is for the board to pursue legal means of recovering the unpaid funds resulting in a potentially lengthy and expensive process, which further damages the already fractured relationships, and shifts the board's focus and energy from addressing the health unit's pressing public health issues and working towards mandatory program compliance.
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> We would strongly urge the Board of Health to consider this last ditch effort to restore the partnership, since we are convinced that they only sustainable solution is one reached locally.

The obvious question here is why a process was set up by the Ministry to help a local municipality shirk its legal responsibility to pay for core public health programmes.

Following the letter from the mediator, the Board of Health wrote to the mayors of the obligated municipalities and invited them to attend an information session with the Medical Officer of Health and the Board of Health to discuss a possible resolution. The Board of Health went on to state that they had received a legal opinion that they were in a position to request that the court compel the municipalities to make payment in accordance with their budget but that they did not want to take that drastic step without meeting to discuss any other alternatives. In a subsequent letter, the Board of Health stated that they would be prepared to agree to put any surplus available from the 2002 year to the 2003 levy.

In a response, one local obligated municipality refused to attend the meeting, because they felt that the Board of Health had made it "crystal clear that your client is adamantly opposed to any budgetary adjustment whatsoever" and that the involvement of the Minister and his staff "in seeking an amicable and sensible solution resolution of the issues has obviously been foreclosed."

As of October 2002, the Ministry continued to communicate with the municipalities and to retain the services of a facilitator.

On October 18, 2002, the Board of Health issued an ultimatum to the municipalities: pay within 15 days or they will commence litigation. In the letter to the obligated municipalities, the Board of Health noted that the position taken by the municipalities had already resulted in significant delays in hiring staff thereby delaying addressing non-compliance with mandatory public health programmes. Moreover, the Board of Health understood that the reduction proposed by the facilitator would mean a reduction in funds from the province, since the province only matched funds actually received by a Board of Health. This meant that the Board of Health would be even further impaired in its ability to comply with mandatory programs and services. It also put the province in a conflict of interest because it benefited fiscally, by a reduction in the matching provincial grant, from any diminution in the municipal contribution. In the October 18, 2002 letter, the Board went on to point out that the proposal of the facilitator fundamentally affected the independent statutory mandate of the Board of Health and the Medical Officer of Health:

> Further, of more significant concern to the Board of Health, and what seems to be ignored by [the facilitator] in his proposals, is that the position of the Municipalities at present fundamentally affects the independence of the Board of Health and the Medical Officer of Health. If this process of passing the budget, and requiring that the levy be paid by the Municipalities is altered in this case, it will be impossible to return to a system where the budgets are set by the Board of Health and paid by the Municipalities and the Ministry in accordance with the *Act*. It will allow municipal politicians and their councils to continue to interfere with the statutory obligations of the Board of Health. This is a particularly perverse result when 8 of the 11 current members of the Board of Health are from the member Municipalities who, on behalf of those Municipalities, pass the budget and approve the procedural by-laws in the first place. Further, at least one of the Municipalities has a legal opinion confirming that it is required to pay. There has been no legal opinion provided, by anyone in this case, indicating an alternative to the opinion. The Board of Health is extremely concerned that to allow the Municipalities to do anything but pay the amounts they are required to by statute, will undermine the independence of this Board and effectively all the Boards of Health throughout the Province. This is a significant and critical public health issue which seems to be entirely ignored in the negations in this matter.

> It is critical that public health officials must be free to speak and act in the interests of public health. Unfortunately, the process that is being suggested by you will severely limit the independence of the Medical Officer of Health in protecting the public health in this area. The Board of Health has decided not to allow that to happen.
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> In the end, the Board of Health rejected your suggestion to write the Minister as we do not believe the Minister, or anyone on his staff, has any authority to change this process short of changing the *Act*. You will recall that in an interest to resolve this matter, the Chair of the Board of Health wrote to the Minister some months ago, asking for relief from mandatory programs to allow for cost saving. This was rejected out of hand by the Minister and, as such, we find ourselves in the present position.

On October 31, 2002, in a final attempt to persuade the obligated municipalities to pay the levy without having to resort to litigation, the local Medical Officer of Health made a presentation to the mayors of the obligated municipalities, appealing to them to pay the increased levy. During the presentation, the Medical Officer of Health eloquently posed the question:

> What would the consequences be of reducing the budget? We would be gambling with people's health – even their lives. That is not a gamble I am willing to take as your Medical Officer of Health. Especially for less than the price of a postage stamp per month per person . . .[155]
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> We have heard about how our Health Unit should act as a business and make cuts rather than increase its budget. But the mission of a business is to deliver customer satisfaction at a profit. We do not have the option of eliminating programs to improve our bottom line. Our bottom line is the health of our population. If public health programs are eliminated or reduced, the health of our population will be adversely affected. We can't say, for example, that we will stop accepting any of the thousands of water samples that are brought to us. Our programs must be accessible to all. Charging for public health programs and services would limit participation by those groups of people within our population who most need them.

155. The estimated increase in the municipal share amounted to $5 per person per year, less than the cost of one first class postage stamp per month.

The Medical Officer of Health concluded:

> Our mission as I said at the outset is to protect and promote the health of our community. We are not your adversaries. We are your partners.

Finally, in November 2002, following this meeting and after making it clear to the obligated municipalities that the next step on the part of the Board of Health would be litigation, the obligated municipalities agreed to pay the levy, with the understanding that the municipal share of the Board of Health budget surplus from 2002 would be credited to the first billing for the 2003 levy.

In the meantime, as this battle was taking place, the local health unit had to continue to deliver programmes and services, in the midst of the uncertainty surrounding its resources. Because the province refused to insist that the law be followed, the Medical Officer of Health and the local Board of Health spent the better part of a year arguing about whether or not the municipalities had to follow the law. Unfortunately, the battle did not end there. In January 2003, two months before SARS hit, one of the mayors involved in this dispute was quoted in the media to the effect that although the battle to reduce the 2002 budget was lost, the fight would continue into 2003. Another mayor, in October 2003, listed one of his accomplishments on a campaign flyer as reducing the health unit levy. That same flyer noted that the mayor had improved roads in 2003. While improving roads is a laudable goal, roads should not be improved at the expense of public health protection measures that are required by law.

This story painfully reveals the importance of ensuring that funding for local health activities is not left to the mercies of any intransigent local council that fails to live up to its legal responsibilities in respect of public health protection. Basic protection against disease should not have to compete for money with potholes and hockey arenas. Even if most municipalities respect their public health obligations under the *HPPA,* it only takes one weak link to break the chain of protection against infectious disease. Should an infectious disease outbreak spread throughout Ontario, the municipality that cannot or will not properly resource public health protection may be the weak link that affects the entire province and beyond.