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## Communiqué

for Health Industry Clients  
on the Legal Retainer Program

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## Public Private Partnerships

### Introduction

PPP, or P-3, refers to a so-called "**Public Private Partnership**". The P-3 model has been deployed in various jurisdictions, particularly in the United Kingdom, and is designed, at least for the health sector, to inject private funding and expertise into the development, construction and management of health care facilities.

In light of the evident fiscal and accounting advantages to PPPs for government, it appears likely that PPPs will be encouraged, if not required, for public hospitals considering construction projects. Given the provincial government's allocation of \$20 billion to the Ontario Superbuild initiative to renew, rebuild and expand Ontario's infrastructure, it is also likely that the provincial government will be using the Ontario Superbuild Corporation as the principal lead in arranging and coordinating PPPs for public hospitals.

On October 30, 2001, the Committee on Hospital Capital Development of the Ontario Hospital Association recommended that Ontario identify two or three pilot sites most suitable for the PPP structure and implement these immediately. The Committee also recommended that the Province and related stakeholders work together in the longer term to adapt and further improve the PPP structure for application in Ontario. There have already been two recent high-profile announcements in Ontario of PPPs, e.g., for the new Brampton campus of the William Osler Health Centre and for the Royal Ottawa Hospital. These presumed pilots might well be adopted as an important model for the future.

*But what are PPPs?, what should public hospitals expect PPPs to do?, and how can public hospitals both maximize the effectiveness of PPPs and minimize their risks?*

## Background

Canadian PPP models have to date borrowed largely from the UK model. Originally conceived by the British Tory government, the so-called Private Finance Initiative (“PFI”) has been continued by Mr. Blair’s Labour government. The PFI has been used fairly frequently in the UK for the design, construction, and maintenance of hospital and health care facilities, with arguably mixed results.

The model contemplates that a facility will enter into an agreement with a private sector corporation or consortium that will in turn undertake certain obligations, such as building and maintaining a facility for a period of years, in return, for example, for a long-term leasing arrangement.

From the government’s perspective, PPPs are attractive because they relieve the government from the responsibility of fronting the large initial capital costs of construction projects that would need to be funded by debt or higher taxes. PPPs allow for the capital costs to be amortized over a much longer term and treated by government budget-makers as operating costs, rather than as capital costs.

From the public hospital’s perspective, risk transference from the hospital to the private venture capital corporation or consortium is a fundamental and attractive feature of PFI arrangements. The risk of on-time, on-budget completion is fully transferred to the private sector.

Some PPPs are based on a public hospital agreeing that the private corporation will design and build a new facility or addition. The hospital will agree to give a head lease to the private corporation who will, after the facility or addition has been built, lease the facility or addition back to the public hospital for a fixed rate.

Design-build may be the arrangement of choice of many PPP developers. And, it seems attractive--firm price, construction following on the heels of design. But, for design-build to work in the hospital sector, it must deliver the unique specialized facilities that public hospitals require. Where a hospital fails to retain enough project control, or does not establish a comprehensive and frozen statement of its requirements up front, it risks living with a project that does not meet its expectations, or costs more than it should have, or both. It may also fundamentally fail to meet the health-care needs of the community it serves.

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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.*

We strongly recommend that hospitals proceed cautiously and with the specialized advice of legal counsel versed in the perils and pitfalls of development models.

Without question, PPPs represent an innovative way of tapping into private sources of capital and expertise, limiting the risk exposure of hospitals (at least in the short term), and assisting government with their fiscal books. However, it is critical that contractual arrangements pertaining to PPPs serve the hospital's best interests and work to the hospital's best advantage, over the **entire** term of the contract, and not just in the initial stages.

Miller Thomson LLP is uniquely qualified to offer clients considering PPP proposals fully specialized, integrated and comprehensive legal and consulting services tailored to the individual institution's needs. The Health and Construction Law Groups at Miller Thomson LLP, coupled with the firm's consulting arm, Miltom Consulting, offer the full array of legal expertise in real property and construction development, project management, foundation law, tax law, and financing.

### **About the author:**

**Alan Belaiche practices corporate/commercial and intellectual property law in our Health Industry Practice Group. Alan has an in-depth knowledge of corporate/commercial issues and transactions, particularly involving health professionals and hospitals.**

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