

# MILLER THOMSON LLP

Barristers & Solicitors

## Communiqué

*for Health Industry Clients  
on the Legal Retainer Program*

August 31, 2001

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Communiqué, please contact:*

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## Respiratory Therapy Update

Further to our Communiqué dated May 16, 2001, we continue to receive many enquiries from hospitals with respect to the implications of the ongoing dispute between the College of Respiratory Therapists of Ontario (CRTO) and some of its members regarding the CRTO's mandatory quality assurance program. Attempts are being made to resolve these issues, including a proposed mediation. In the meantime, there is great anxiety about the ability of hospitals to provide services to patients should these efforts fail.

Should the mediated settlement fail, and members resign their memberships, will hospitals continue to be able to provide services to patients? Reluctantly, hospitals are exploring the ability of physicians to delegate certain functions to individuals who resign their memberships in the CRTO.

## Regulatory Framework

The ability of an unlicensed person to perform the duties of a Respiratory Therapist (RT) is limited by virtue of section 27(2) of the *Regulated Health Professions Act (RHPA)*, which sets out a number of 'controlled acts' that may only be performed by regulated health professionals. Of the thirteen controlled acts, RTs are authorized to perform four. It is an offense to perform a controlled act without being a member of a regulatory college authorized to perform that act.

The exception to this requirement is delegation. An individual authorized by a health profession act to perform a controlled act may delegate the performance of that act to an unlicensed person, if delegation is permitted under the regulations governing that profession. Physicians are entitled to perform twelve controlled acts and are permitted to delegate the performance of those acts to other registered health professionals or to unregistered individuals, so long as such delegation is performed properly.

The College of Physicians and Surgeons (CPSO) appears to be content for individual physicians to exercise their discretion to delegate controlled acts to unlicensed persons, so long as the CPSO Policy Statement on the Delegation of Controlled Acts is followed. Delegation must be done on an individual physician basis.

Among other requirements, the CPSO Guidelines provide that a physician must not delegate a controlled act to a person “whose certificate to practise any health profession is revoked or suspended by the governing body” at the time of delegation. This guideline is intended to ensure that the health professional is competent to perform the act. So long as restrictions have not been placed on the member’s certificate, the physician may delegate.

## **Medical Directives**

A number of hospitals are currently exploring the use of medical directives for the performance of certain acts, which may then be approved by the Medical Advisory Committee and issued by individual physicians. There are a number of issues that must be considered with respect to this option:

1. The hospital must have a general policy which allows for the development of medical directives. Both the College of Physicians and Surgeons and the College of Nurses have guidelines in place with respect to the measures that ought to be in place before utilizing medical directives.

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2. The health care team must identify the types of procedures that may be ordered by means of medical directives, versus those that require a direct order.
3. The hospital must develop an appropriate internal process to ensure that persons performing specific directives have appropriate training and qualifications. Both the hospital and the delegating physician may be relying upon the approval process. Each individual should receive approval before performing any tasks through medical directives.
4. The directives must comply with CPSO guidelines and other applicable standards.

The physician, hospital and the individual performing the directive all have responsibilities for medical directives that must be clearly delineated. These responsibilities and obligations must be clearly understood before any delegation takes place.

### **Holding Out**

Where an RT resigns from the CRTO, he or she may no longer use the title “respiratory therapist” or “RT”, nor may he or she be permitted to hold him or herself out as qualified to practice as an RT. Further, where the individual continues to carry out the same functions as an unregistered person, the CRTO has the ability to prosecute the individual for holding him or herself out as being a member of a regulated health profession. The hospital may also be prosecuted under the *RHPA* as the employer of the person who has contravened the act.

In terms of employees holding themselves out as RTs, the hospital must ensure that it is not assisting in any breach of this prohibition. To do so would place the hospital at risk for liability. Thus, hospitals must ensure that their policies do not sanction a practice whereby hospital employees may continue to practice as respiratory therapists, although they are no longer members of the CRTO.

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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 would be pleased to provide specific advice with respect to these issues and to assist hospitals in drafting or reviewing the development of medical directives.

**About the Authors:**

**Joshua Liswood and Kathryn Frelick are lawyers practicing in our Health Industry Practice Group, with a focus on advocacy, regulatory and health policy issues.**

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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](http://www.millerthomson.com).*