

To All Ontario Physicians:

June 25, 2009

## New Laws Crush Doctors' Rights – Part 1

One of the laws, which govern physician practice in Ontario - The Regulated Health Professionals Act or RHPA – has undergone major revision over the past two years (via Bills 141, 171 and 179). Many of the changes, which have come into force this month, give the **College of Physicians and Surgeons of Ontario** unprecedented investigative powers such that *physicians now have fewer rights than criminals*.

The OMA has expressed lukewarm "concerns" about RHPA changes and has not presented a course of action to be taken other than to participate in the process of legislative change.

Because of this, the COFP Board has sought the advice of one of the top health law firms in Ontario with respect to the impact of new provisions of the RHPA and its Procedural Code. We feel that Ontario physicians require assistance in understanding what a profound impact these changes will have on their practices.

Increasing regulations that fly in the face of our basic rights as citizens is not the way to attract or retain physicians in Ontario. In the past, we have seen the deleterious consequences of the draconian Medical Review Committee and similar results may be expected with new regulatory pressures. We hope to assist both our members and non-members by providing a legal overview that will help them anticipate the impact of these new regulations and avoid potential pitfalls.

Please read the attached newsletter, by Lonny J. Rosen, LL.B., C.S. and Elyse Sunshine, B.A., LL.B. from Gardner Roberts LLP, to see why this matter is of critical importance and watch for further comments and a firm action plan in Part 2 next week.

Yours truly,



Douglas Mark MD, President  
and the Board of the Coalition of Family Physicians of Ontario

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# NEW CHANGES TO RHPA TO AFFECT ONTARIO'S PHYSICIANS

By Lonny J. Rosen, LL.B., C.S. and Elyse Sunshine, B.A., LL.B.\*



GARDINER ROBERTS



Significant changes to the *Regulated Health Professions Act, 1991* (RHPA) and its procedural code have recently come into effect. These will dramatically affect the information about all regulated health professionals, including physicians, that is available to the public, and will provide health Colleges with sweeping new powers and access to more personal information about and from their members than ever before. Some of these changes were enacted with the passage of Bill 171 in 2007, but were not implemented until this month. Other changes were introduced and enacted this year to enhance Colleges' powers of investigation. This article will summarize some of the more significant changes to the RHPA's Procedural Code.

## Enhanced Mandatory Reporting

The RHPA and its procedural code previously imposed very limited reporting obligations. These arose only when a doctor learned in the course of his or her practice, that a patient had been sexually abused by a health professional or when a health professional's employment had been terminated or suspended because of misconduct, incompetence or incapacity.

These reporting obligations remain. Now, however, operators of a facility where one or more members practice will now be required to report to the Registrar if they believe that a member practicing at the facility is incompetent or incapacitated - regardless of whether the operator terminates the member's employment or association. As "facility" is not defined in the legislation, Colleges are likely to interpret the word broadly.

These obligations may therefore apply to any person who operates any type of practice, including a family practice or health team. If an individual fails to report in these circumstances, he or she faces a fine of up to \$25,000.00 for a first offence and could be subjected to professional misconduct charges (if he or she is a professional). As operators of a facility may have difficulty determining whether a member practicing at the facility is incapacitated or incompetent, it is important for all professionals and "facility operators" to understand the legal meaning of "incompetence" and "incapacity" and to avail themselves of legal advice before taking any steps in this regard.

Additionally as of June 4, 2009, all health professionals are required to file a report with their College if they have been found guilty of any offence. This obligation will enable Colleges to investigate members' conduct, and to determine whether the finding raises concerns relevant to their suitability to practice. Offences reported to Colleges should not appear on the public register unless there is a related finding of professional misconduct.

### **What Was Private is now Public**

While the College of Physicians and Surgeons of Ontario (CPSO) has made much of the public register available on its website for some time, it must now include more information than ever before. The result of every disciplinary and incapacity hearing, a synopsis of those decisions, all cases which have been referred to the Discipline Committee for a hearing, notations of every suspension or revocation that has been issued to a doctor and, for the first time, any finding of professional negligence or malpractice made against them by a court must now be included on the website. Doctors will now have to self-report any such findings to the CPSO.

### **Introducing the 'Inquiries, Complaints and Reports' Committee**

Each College will see its Complaints Committee replaced by the Inquiries, Complaints and Reports Committee (ICRC), which will receive all complaints, inquiries and reports about a member. Previously, if a complaint dealt with issues of standards of practice, the Complaints Committee could refer the matter to the Quality Assurance Committee for some form of assessment and/or mediation. This referral power has been eliminated but the ICRC could require a member to complete continuing education or remediation.

### **Enhanced Emergency Powers**

What is potentially most distressing for doctors is that the CPSO's ICRC now has the power to make an interim order suspending their licence, **without notice**, if there are grounds to believe that the doctor's conduct exposes, or is likely to expose, his or her patients to harm or injury and urgent intervention is needed. Previously, the CPSO Executive Committee had this authority, but could not exercise its "emergency powers" without giving the member an opportunity to comment.

### **The Past May Haunt You**

Among other concerning changes to the RHPA is a requirement that the ICRC, when considering a complaint or report about a member, consider all prior decisions about the member, including decisions in which no misconduct was found and no action was taken (except for decisions regarding a complaint that was found to be frivolous, or made in bad faith). These amendments will be troubling for all doctors who have previously been the subject of a complaint - even where no action was taken by the Complaints Committee - due to a concern that the ICRC may be reluctant to dismiss a complaint simply because a doctor has been the subject of numerous or similar allegations in the past. Further, while information about past decisions will not necessarily be disclosed to a complainant, such information may still become available in a review, appeal or subsequent proceeding.

### **Alternative Dispute Resolution**

Another change to the regulatory regime is that Alternative Dispute Resolution (ADR) is now formally available for the resolution of a complaint matter. A complaint matter may only be referred to ADR with the consent of both the complainant and the physician, as long as it does not involve an allegation of sexual abuse. If an ADR process results in resolution, the panel has discretion to accept the proposed resolution, but may reject the settlement and still continue with its investigation of the complaint! If no resolution is

reached, however, then all communications between the health professional, the complainant and any facilitator in connection with the ADR process shall remain confidential and cannot be part used in any subsequent proceeding.

### **Penalties Effective Immediately**

Presently, most Discipline Committee orders which suspend or revoke a doctor's license or impose terms, conditions or limitations on the license, will not take effect until he or she has had the opportunity to appeal and the appeal has been decided. Colleges will now be permitted to apply to the Court to have the decision of the Discipline Committee take effect immediately, notwithstanding the commencement of an appeal. Additionally, if a doctor is found guilty of certain types of sexual abuse or has his or her licence suspended or revoked on the grounds of incapacity or incompetence, the suspension or revocation takes effect immediately, despite any appeal.

### **Enhanced Powers of College Investigators**

CPSO Investigations have typically involved chart reviews and witness interviews, but rarely have investigators sought to compel the physicians under investigation to answer questions or to carry out procedures while under investigation. When the CPSO attempted to employ these investigative techniques in the course of recent investigations, some of the physicians being investigated challenged the scope of the CPSO's investigative powers. The Divisional Court accepted the CPSO's expansive interpretation of its investigative powers, but the Ontario Court of Appeal agreed to hear the physicians' appeal and did so (the decision is under reserve). In the interim, however, rather than awaiting the Court of Appeal's ruling, the Government of Ontario has enacted Bill 141, further amending the Code to authorize investigators to "make reasonable inquiries of the member who is the subject of the investigation" and to compel the member to cooperate fully with an investigator. The Code now provides for direct observation of a member in his or her practice, including the direct observation by inspectors of procedures (i.e. surgery). It appears that regardless of the Court of Appeal's determination, CPSO investigators and inspectors will have significantly greater and more intrusive powers at their disposal.

### **Conclusion**

While these amendments will no doubt allow for the CPSO, patients and members of the public to learn more about Ontario's doctors, there is no corresponding enhancement of doctors' rights or procedural protections. Such protections will still be available in connection with many proceedings, but the concern remains that doctors will find themselves embroiled in more conflicts and other proceedings as a result of the College's enhanced investigative powers and the increased information disclosure required by the new amendments. For these reasons, access to advice from lawyers who specialize in representing health professionals in regulatory proceedings will be more important than ever before.

*This column is intended to convey brief, timely, but only general information and does not constitute legal advice. Readers are encouraged to speak with legal counsel to understand how the general issues noted above apply to their particular circumstances.*

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