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Frank Addario, Steven M. Barrett, Andrea Bowker, Dona L. Campbell, Michael Code, Benson Cowan, Jonathan Dawe, Sean Dewart, Howard Goldblatt, Melvyn Green, Michael Kainer, Stephen Krashinsky, Cathy Lace, Kathleen J. Martin, Judith McCormack, James K. McDonald, Natasha Meissner, C. Michael Mitchell, Luiza L. Monteiro, Vanessa Payne, Cynthia Petersen, Ethan Poskanzer, Lorne A. Richmond, Jeffrey Sack, Q.C, Mark Wright

20 Dundas Street West, Suite 1130. P.O. Box 180
Toronto, Ontario M5G 2G8
Tel: (416) 977-6070
Fax: (416) 591-7333,

MEMORANDUM

TO: WHOM IT MAY CONCERN

DATE: August 20, 1999

RE: THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO (C.P.S.O.)

On August 16, 1998 a group of Ontario physicians met at the Rothbart Pain Management Clinic in Toronto. The purpose of the meeting was to consider whether steps should be taken to inquire into alleged misconduct by C.P.S.O. officials in the course of its disciplinary investigations of Ontario physicians.

The conclusion of the meeting was that the group of physicians should form a committee and retain legal counsel. They retained Michael Code and instructed him to examine documentation in relation to a number of representative cases and provide a legal opinion as to whether there was evidence of misconduct by C.P.S.O. officials.

Mr. Code has practiced law in Ontario for over 18 years, he was Assistant Deputy Attorney General (Criminal Law) from 1991-1996, he has taught evidence law at Osgoode Hall Law School and currently teaches criminal procedure at the University of Toronto Law School. He is a leading member of the criminal bar.

Mr. Code examined extensive documentation in relation to the dealings between C.P.S.O. and nine Ontario physicians. He then provided four lengthy written opinions to the committee of physicians who had retained him. The opinions are dated March 12, June 9, July 19, and July 26, 1999. In addition, he made an oral report to the committee when it met again on August 6, 1999.

Mr. Code's conclusions were as follows:

- (i) In the case of Dr. Smith there was prima facie evidence that C.P.S.O. officials may have committed the criminal offence of obstructing justice by repeatedly misleading the Executive Committee as to the true state of the evidence in this case;
- (ii) In the case of Dr. Krop there was possible evidence of obstructing justice in relation to the destruction of relevant documents by C.P.S.O. officials and there was strong evidence of "systematic unfairness and repeated abuse and misuse of power" by C.P.S.O. officials;
- (iii) In the cases of Dr. Gale and Dr. Rothbart there was evidence of abuse and misuse of power by C.P.S.O. officials as s.75 disciplinary investigations and office searches of medical files were commenced in the absence of a proper basis to justify the exercise of these very serious statutory powers;
- (iv) In the cases of Dr. Leyton, Dr. Ravikovich, Dr. Kidd and Dr. Dean there was evidence of a consistent pattern of unfairness, bias, abuse and misuse of power by C.P.S.O. officials when dealing with these doctors who practice innovative and unconventional forms of medicine;
- (v) In Dr. Sutherland's case, there were serious allegations of misconduct against C.P.S.O. officials but it was difficult to evaluate them as many of the allegations were dated and there was a general absence of proof.

When the committee re-convened on August 6, 1999, and evaluated the opinions provided by Mr. Code, it was resolved that action must be taken to effect a comprehensive review of C.P.S.O. such that these allegations of official misconduct could be evaluated and C.P.S.O. could be brought within the rule of law.

Mr. Code's four opinions and his c.v. can be provided by the committee on request.

Transcript of statement made by Mr. Michael Code on May 10th, 2000 at the press conference hosted by *Citizens For Choice in Health Care* at Queen's Park, media room. Words in cursive print were emphasized during his presentation.

By way of introduction, let me say that I came to this exercise without having ever represented a doctor before the College of Physicians and Surgeons. I don't appear before the College, I don't have any doctors as clients, in the past or in the future. The intent was, that I would be somewhat of a neutral, independent outsider who would take a look at some real cases of doctors who had a grievance with the College and provide written

opinions as to the fairness, unfairness, competence or incompetence that I saw in the processes of their particular files.

I met with this particular group of doctors in August of 1998. They were all of them angry with the College, having felt that they had been dealt with very unfairly. They were all - I think it is fair to say - doctors one would regard as innovators. They were not practising medicine in the main stream. They were engaged in new areas of practice trying to find new solutions to new problems, and they felt that there was extraordinary bias and unfairness in the College focusing on them on the first place and in the way they were dealt with by the College.

I spent about a year reviewing approximately 10 files involving complaints against 10 doctors. Let me refer briefly to a number of them and I will refer to them by name. But what I think is more important is the overall impression that these 10 files left me with. There is no doubt in my mind that these doctors have legitimate grievances about the way they were dealt with. I reviewed both the submissions made by these doctors and the replies to them from the College which revealed to me a consistent pattern of unfairness in the way they were dealt with and a consistent pattern of improper use of powers and - arguably in some cases - even an abusive way of using powers. And, finally, what came through loud and clear was a very strong bias against doctors working in innovative areas of medicine, areas that one would say where on the cutting edge of their profession and trying to find new solutions to new problems. The documents I saw showed that College officials took a very severe view of doctors practising in innovative areas and targeted them for very close scrutiny.

So, the overall pattern that emerged was an alarming one and one that clearly - in the public interest - bears close scrutiny. I would certainly invite the responsible government officials to look closely at whether the College is exercising its powers appropriately; whether this is the kind of Ontario, and the kind of medical climate, and medical community that we would all like to live in, whether it is appropriate that doctors are treated in this fashion. Let me refer to some of these cases without going into all of them in detail.

Perhaps one of the most - if not the most - disturbing cases was the one of Dr. [Michael] Smith [of Almont, Ontario] whose widow, I believe, will be speaking to you shortly. Dr. Michael Smith is a classic example of a doctor who was involved in leading-edge, controversial areas of medicine. He was practising bioenergetics as well as forms of acupuncture. Whatever he was doing with one or two of his patients may or may not have been appropriate - I am not here to judge that. What I do know is that the College expert investigator described him as having achieved exceptional results with many of his patients who were all exceptionally difficult - patients for whom he had been the last resort, patients who had been through many doctor. They came to Dr. Smith as a final helper to deal with their problems and he used unusual and innovative methods and achieved - as the investigator concluded - exceptional results in many of these cases.

And yet, the way he was described in the College documents, when his license was taken away from him before a hearing - the College invoked its very exceptional powers to take away this doctor's license before any of the disciplinary allegation had even be heard (it's somewhat akin to what we call a bail hearing when, before you have had your trial hearing, you are deprived of your liberty and locked up). This is like a bail hearing for a doctor where he has his license taken away even before the case is even heard. **The summaries of the allegations made against him, that CPSO officials placed before the executive committee resulting in suspension and loss of his license, were repeatedly misleading and unfair.** There is simply no question about that in my mind. I have compared the actual original statements of the complainants with the summaries by the CPSO officials, and they were **consistently unfair and misleading.** At the same time, the **original statements were withheld from Dr. Smith and his lawyers,** and having lost his license and faced with lengthy litigation to get it back, Dr. Smith very tragically committed suicide.

So, it is, therefore, appropriate to lead this discussion with this case because of the extraordinary events that resulted from it and because of its **marked degree of unfairness.** The case is illustrative as well of the **overall systemic pattern of bias against practitioners practising unusual and unconventional medicine.**

Dr. Jozef Krop is the second case I might mention. Dr. Jozef Krop practices environmental med which deals with the question whether toxins in our ecology, in our environment, are the proximate cause of various symptoms and illnesses. Again, by definition a new form of medicine - we haven't had awareness of environmental toxins in our society until very recently - by definition this is going to be a new form of medicine involving many innovative, new methods. In reviewing the extraordinary disciplinary proceeding that were brought against Dr. Krop over a ten Year period from 1989 to 1999 - again, what emerged in my opinion is **a consistent pattern of unfairness and bias and improper use of powers by CPSO officials. And the irony of this case is, of course, that at the end of the day not a single patient had been harmed by Dr. Krop.** The disciplinary committee acknowledged that and that this form of medicine he was practising had not harmed any patient - and yet, **he was pursued with a zeal that one would expect where somebody had done serious harm to members of the public in this province.**

Two further cases I might mention are Dr. George Gale and Dr. Peter Rothbart who are interesting cases because Dr. Gale and Dr. Rothbart are specialists. They are both anaesthetists, highly trained experts who practised in the leading teaching hospitals in this province and are acknowledged and renowned in their specialty. They decided late in their careers to embark on innovative practices in pain management. They set up the Rothbart Pain Clinic in North York. They have come under very close scrutiny by the College, again because the area they are practising in is a somewhat unconventional and cutting edge branch of their profession.

Once again, examining their files **I was struck by the absence of any proper basis to invoke the disciplinary process in their cases.** The law in this province requires the CPSO

to meet a fairly high standard of reasonable and probable cause before subjecting a doctor to a search, seizure of all their files, and examination of their patient records. Its very much akin to the search w-an-ant powers in the criminal law. Before you invade the privacy of a doctor's office and seize all their files and subject him to a disciplinary process, you have to show "reasonable and probable grounds". And yet, when you look at the basis for CPSO's examination of these doctors, it doesn't begin to approach reasonable and probable grounds, in my opinion. Once again, these would be matters that would justify careful examination by the government, in my opinion.

Finally, let me mention a group - I can bunch them together: Dr. Ted Leyton, Dr. Robert Kidd, Dr. Felix Ravikovich, and Dr. Carolyn Dean - who once again were all doctors practising unusual, new, innovate medicine trying to find new solutions to new problems in the health care of the people in this province. and all four were subjected to processes by the CPSO that once again, in ray respectful opinion, are of a consistent pattern of unfairness, bias and misuse of powers. I won't go into these cases in detail, because they simply repeat the same theme that we have already seen before. In conclusion, it is my view that there is a very serious public policy issue here that the government ought to look at carefully, to see if the people of this province are being served properly by CPSO officials, in the way in which they investigate and target their doctors. These doctors may be future heroes, future Einsteins, their discoveries of new practices may be of enormous benefit to us in the future - on the other hand, they may not. they may fail. What is remarkable is the absence of any harm by what they are doing. I think. what they are asking for is that they be treated fairly. What I have seen is that they have not been treated fairly.

During question period by reporters the following comments were also made by Mr. Code:

If you read what the Deputy Registrar, Dr. Carlisle wrote in Dr. Krop's case - he read you parts of some of Dr. Carlisle's letters. I will read you another letter that Dr. Krop did not read out. [He writes] "We are with regard to Dr. Krop and his patients not interested in receiving affidavits from patients who are satisfied or any other testimonials. We do not for a moment mean to suggest that these parties are not telling the truth or are exaggerating, but merely that testimonials are of no value in establishing scientific principle." That's his analytical methodology: that the actual satisfaction of the patients - whether the treatment actually seems to help - is of no value in establishing scientific principles.

When asked what Mr. Code's concerns might be regarding the KPMG investigation he replied.

You can see that the problem with this block of cases is that they often are not based on complaints. So, to send out a questionnaire is not going to get anywhere at all! These are not complaint driven cases, they are college driven cases.