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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 alligation 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 wan-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.

During this question session Mr. Matthew Wilton, the lawyer who moderated the entire press conference, said regarding the KPMG investigation:

The mandate of KPMG is very limited. The resources allocated are merely $140,000 and the method KPMG is using is to send out questionnaires to patients and physicians - that's the only method by which they will receive their information. We also have concerns that there is no public accountability or guarantee that the findings will be made public. Also, there are no teeth to this inquiry. There is no subpoena power - this is not like a public inquiry under the Public Inquiries Act where they could go after the evidence. They have a very limited mandate. We are not at all optimistic.

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August 2, 2001

DELIVERED BY FACSIMILE

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Re: Committee for Investigation of the College
Our File No: 980053

PROBLEMS WITH SECTION 75

A. Changes to Section 75(a) of the Code

The practice of medicine in Ontario is governed by the Medicine Act, the Health Professions Procedural Code and the Regulated Health Professions Act. Presently, Section 75(a) of the Health Professions Procedural Code allows the Registrar of the College to appoint one or more investigators to determine whether a member has committed an act of professional misconduct or is incompetent if the Registrar believes on reasonable and probable grounds that the member has committed an act of professional misconduct or is incompetent, and the Executive Committee approves the appointment.

In the past, the College of Physicians and Surgeons of Ontario (hereinafter "CPSO") has utilized this section, and its predecessor sections under previous legislation as a weapon to investigate alternative medicine practitioners, and any physician practicing medicine in a manner which the Deputy Registrar did not approve of. There should be an amendment to this provision to provide a requirement that the Registrar specify the grounds that he relies upon for his/her belief that there are reasonable and probable grounds. In addition, the underlying circumstances supporting the grounds should be set out in writing in the submission that the Registrar makes to the Executive Committee in respect of the appointment. There should be a requirement that the Registrar specify the types and categories of misconduct or incompetence that ought to be investigated.

There should also be a mechanism in place to ensure that any investigation undertaken by the Registrar is carried out in a timely fashion. Presumably, if the Registrar feels strongly enough about an issue to reach the belief that reasonable and probable grounds exist to show the member has committed an act of professional misconduct, then that should correspondingly require the College to investigate with dispatch. There should be a mechanism in place to ensure that if the investigation is not undertaken in a timely manner, then the Section 75 order is of no force or effect.

There should be a mechanism in place for a physician to test the validity of the reasonable and probable grounds. It is understandable that the College should not need to disclose the existence of the Section 75 investigation immediately, so that the investigation can be carried out without the member being alerted to the reasonable and probable grounds. However, once the investigation is completed, the physician should be in a position to receive complete disclosure of all the written grounds which the Registrar relied upon in making the recommendation to the Executive Committee.

In the past, many physicians are of the opinion that the College has used Section 75 as their strong weapon to pursue those physicians that the College does not approve of. Section 75 brings with it powers of search and seizure, which allows the College to seize a physicians' charts. Charts can be seized in a random fashion, without the patients' consent or knowledge. Thereafter, the College will pay an expert to review the charts and

focus in on any acts of professional misconduct. This means that the College can seize 100 charts and focus in on five of those charts to pursue allegations of professional misconduct. In the past, the College has taken years to pursue Section 75 investigations. Some of the investigations that are ongoing for a considerable period of time before the physician is even notified of the existence of the investigation.

Adams Case

The case of Dr. Frank Adams is a useful illustration of the dangers of Section 75. The Section 75 Order was made in Dr. Adams case in circumstances where no patient complaint had been made to the College. As a result of the investigation, patient charts were seized, and provided to a College expert. The basis for the College prosecution of Dr. Adams was the expert's opinion based on the random chart seizure authorized by Section 75. In the Adams' case, the expert who provided the report to the College to initiate a referral from the Executive Committee to the Discipline Committee was not the expert witness called at trial. In Adams' opinion that the expert opinion provided to initiate the Executive Committee referral to the Discipline Committee was extremely flawed and unreliable.

The consequences of the Adams conviction for pain practitioners are profound. Dr. Adams was convicted of professional misconduct. His pain practice methods were criticized, although his is widely recognized as one of the -premier pain practitioners in North America. Perhaps the most important aspect of the decision is that Dr. Adams

use of parenteral opioids on a long-term basis was found to be excessive, and failed to meet any recognized standards of practice.

The problem that pain physicians are now facing in Ontario is that the Registrar of the College will now have considerable ammunition with which to pursue pain doctors who practice in a manner the College does not approve of. Whether the Registrar believes on reason of probable grounds an act of professional misconduct has occurred, the Registrar can start a Section 75 investigation that may lead a physician to a discipline hearing. In the absence of a decision of the Discipline Committee establishing the standards of practice in the area, the Registrar had previously been somewhat restricted in the use of Section 75 investigations against pain practitioners. In the past, the Registrar had relied Bureau of Dangerous Drugs profiles that suggest a physician has been prescribing an overly high amount of opioidis. In the absence of a patient complaint or a complaint from another physician, the Registrar would not necessarily be in a position to pursue a physician. Now with the Adams decision, the Registrar can rely upon information that the pain physician is using parenteral opiodis in order to conclude there are reasonable grounds that an act of professional misconduct has occurred. Another example is if an insurance company physician reads clinical notes and records or a pain physician's consult report and determines that the physician did not do a complete physical examination, the insurance company doctor can phone the Registrar and tell the Registrar that he is concerned that the physician may not have

done a physical examination and the Registrar can point to the Adams decision to indicate that the absence of a complete physical examination in the area of pain practice is an act of professional misconduct. This could initiate a Section 75 investigation.

Yours very truly,

Matthew Wilton
MW/ap