

Investigative Powers

Can an investigator compel a practitioner to undergo an interview? Can the investigator require a practitioner to allow the investigator to watch the practitioner in action? On September 26, 2008, the Divisional Court of Ontario said yes in *Gore v. College of Physicians and Surgeons of Ontario*.

The case originates with the recent review of cosmetic surgery by non-specialist physicians. This review, while originating beforehand, intensified after publicity surrounding the death of a young woman undergoing a cosmetic procedure. As a part of the review, the College of Physicians and Surgeons of Ontario administered a mandatory questionnaire of a few hundred physicians it believed might be performing cosmetic surgery. As a result of the questionnaire results and some complaints from the public, the Registrar formed reasonable and probable grounds that certain physicians had engaged in professional misconduct or were incompetent. The Registrar appointed investigators including some who were physicians.

The investigators reviewed the physicians' charts. They also requested an opportunity to interview the physicians about their practices and to observe them perform cosmetic surgery. The physicians refused. The investigators issued summons under their enabling legislation (incorporating provisions of the *Public Inquiries Act*). The physicians sought judicial review challenging the validity of the summonses.

The primary issues were whether the legislation authorized the regulator to compel a practitioner to undergo an interview during the course of the investigation and to involuntarily permit the investigators to watch the practitioners in action.

The enabling statute gave the investigators the authority to "inquire into and examine the practice of the member". It also gave the investigators all of the authority of a commission under Part II of *Public Inquiries Act* (which authorizes the issuing of summonses to witnesses). In addition, the enabling statute made it an offence to "obstruct" an investigation.

The Divisional Court held that this authority was sufficient to require the practitioner to undergo an interview with the investigator and to authorize the investigator's observations of the practitioner in action. This authority has to be interpreted in light of the public interest protection mandate of the regulator. The Court was also influenced by evidence that while direct observation of the practitioner is a relatively rare investigative technique, it was appropriate for investigations into the competence of surgical procedures. Evidence that this was how surgery was taught and evaluated in medical training programs influenced the court. The absence of an effective alternative investigative technique for this sort of investigation supported the reasonableness of its use in these cases.

The Court rejected the argument that the sole purpose for seeking this type of information was to gather evidence for a discipline prosecution (i.e., self-incrimination). The Court concluded that this information is to be used first and foremost by the screening committee which has options beyond referral to discipline.

The Court did not deal with the issue of client confidentiality or whether there is any need for client consent or what should be done if a client did not wish to have the investigator present.

In addition, the Court did not address the issue of whether any statement/observation used by a physician during such a compelled setting could be used in that physician's discipline hearing (if the matter were subsequently referred to discipline).

The Court also did not deal with the issue of whether there were reasonable and probable grounds for appointing the investigator in the first place. The Court indicated that this issue was premature and it should first be raised in the discipline process if there were a referral to discipline.

At the time of writing, this case was not yet on Canlii. However it should soon be found there at: www.canlii.org.