CITATION: Gore v. College of Physicians and Surgeons of Ontario, 2009 ONCA 546
DATE: 20090707
DOCKET: C49986 & C49988

COURT OF APPEAL FOR ONTARIO

Rosenberg, Feldman and Epstein JJ.A.

BETWEEN

Stanley Gore and Padma Jain

Appellants

and

College of Physicians and Surgeons of Ontario

Respondent

AND BETWEEN

Eli Judah

Appellant

and

College of Physicians and Surgeons of Ontario

Respondent

Andrew Matheson and Sarah Shody, for the appellants Stanley Gore and Padma Jain

Nina Bombier and Dena N. Varah, for the appellant Eli Judah

Paul Schabas, Lisa Brownstone and Lisa Spiegel, for the respondent College of Physicians and Surgeons of Ontario

Heard: June 10, 2009

On appeal from the order of the Divisional Court (Lederman, Kiteley and Swinton JJ.), dated September 26, 2008 and reported at 92 O.R. (3d) 195.

Rosenberg J.A.:

[1] The Registrar of the College of Physicians and Surgeons (the College) has reasonable and probable grounds to believe that the appellant physicians have committed an act of professional misconduct or are incompetent. The Registrar has therefore appointed investigators, including a physician investigator, to conduct an inquiry into the practice of the appellants. The Registrar's particular concern is invasive and high-risk cosmetic surgery performed by the appellants who are general practitioners and, it is alleged, have no special training in surgery. The College has asked that the appellants submit to an interview and to observation of their surgical practice. The appellants initially refused to comply with both requests. They now only contest the request that the inspectors observe their surgical practice. They submit that the governing legislation does not authorize such an investigation. The Divisional Court disagreed and dismissed the appellants' application for judicial review.

[2] For the following reasons, I would dismiss these appeals from the decision of the Divisional Court. Largely for the reasons given by the Divisional Court, the examination that the College seeks to undertake is authorized by the governing legislation.

THE FACTS

[3] This case turns on the interpretation of the governing legislation, the *Health Professions Procedural Code* (the Code), being Schedule 2 of the *Regulated Health*

Professions Act, 1991, S.0. 1991, c. 18 (the Act). Accordingly, only a brief description of the facts is required.

Dr. Judah

[4] Dr. Eli Judah has not completed a formal surgical residency or certification process. Nevertheless, since 1999, he has exclusively practised cosmetic surgery. In December 2006, one of his patients died two days after surgery. In April 2007, the College received a letter from the Office of the Chief Coroner advising that as a result of his investigation, he suspected that there might be an issue around the quality of care provided to the patient by Dr. Judah. In June 2007, the Registrar formed a belief, based on reasonable and probable grounds, that the appellant had committed an act of professional misconduct or was incompetent. With the approval of the College's Executive Committee, the Registrar appointed investigators under s. 75(a) of the Code. The investigators, including a physician investigator, have obtained charts from the appellant's clinic.

[5] The College informed the appellant that the Registrar's investigation would include an observation component to be undertaken by the physician investigator and another investigator. The appellant took the position that the College had no power to require him to cooperate with this request and he refused to comply. In March 2008, the College issued a summons pursuant to s. 76(1) of the Code directing the appellant to attend for questioning by the appointed investigators. The appellant also initially refused

to comply with this direction. The appellant is no longer refusing to comply with the summons. The only issue before this court is the request that the inspectors observe the appellant as he performs cosmetic surgery.

Dr. Jain and Dr. Gore

[6] Dr. Padma Jain and Dr. Stanley Gore face the same investigative process as Dr. Judah. However, the path that led to the request that inspectors observe their practice is different. In April 2007, the College's governing body, the Council, directed staff to take measures to address the proliferation of cosmetic procedures being performed in numerous facilities by numerous physicians. One of these measures involved the mailing of a document titled "Mandatory Questionnaire for Physicians Performing Cosmetic Procedures" to approximately 600 physicians.

[7] The Questionnaires completed by Drs. Jain and Gore indicated that their practices are entirely devoted to cosmetic surgery of various types. Some of these procedures are considered to be invasive and high risk. Both Dr. Jain and Dr. Gore are general practitioners and have not undergone a formal surgical residency or certification process. As a result of the analysis of the Questionnaire, the Registrar believes, on reasonable and probable grounds, that both doctors have committed an act of professional misconduct or are incompetent. With the approval of the Executive Committee, the Registrar appointed investigators under s. 75(a). In the course of investigating Drs. Jain and Gore, the College removed a selection of patient charts for review by the physician investigator.

The College also sought to have the investigators observe both doctors while they performed cosmetic surgery. Both Dr. Jain and Dr. Gore have refused to comply with that request.

THE LEGISLATION

[8] This case concerns the powers of investigation of investigators appointed under s. 75 of the Code. Those powers are contained in s. 76 of the Code and Part II of the *Public Inquiries Act*, R.S.O. 1990, c. P.41. Those provisions are as follows:

Health Professions Procedural Code:

> 76**.** (1) An investigator may inquire into and examine the practice of the member to be investigated and has, for the purposes of the investigation, all the powers of a commission under Part II of the *Public Inquiries Act*.
>
> (1.1) An investigator may make reasonable inquiries of any person, including the member who is the subject of the investigation, on matters relevant to the investigation.
>
> (2) An investigator may, on the production of his or her appointment, enter at any reasonable time the place of practice of the member and may examine anything found there that is relevant to the investigation.
>
> (3) No person shall obstruct an investigator or withhold or conceal from him or her or destroy anything that is relevant to the investigation.
>
> (3.1) A member shall co-operate fully with an investigator.
>
> (4) This section applies despite any provision in any Act relating to the confidentiality of health records.

Subsections (1.1) and (3.1) are recent amendments and were not part of the legislation when the case was before the Divisional Court.

Public Inquiries Act:

> 7. (1) A commission may require any person by summons,
>
> (a) to give evidence on oath or affirmation at an inquiry; or
>
> (b) to produce in evidence at an inquiry such documents and things as the commission may specify,
>
> relevant to the subject-matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.

[9] The appellants also rely upon other provisions of the Code that they say assist in the interpretation of s. 76. In particular they rely upon provisions that establish the Quality Assurance Program and a newly enacted regulation-making power. Those provisions are as follows:

Quality Assurance Program

> 82. (1) Every member shall co-operate with the Quality Assurance Committee and with any assessor it appoints and in particular every member shall,
>
> (a) permit the assessor to enter and inspect the premises where the member practises;
>
> (b) permit the assessor to inspect the member's records of the care of patients;
>
> (c) give the Committee or the assessor the information in respect of the care of patients or in respect of the member's

records of the care of patients the Committee or assessor requests in the form the Committee or assessor specifies;

(d) confer with the Committee or the assessor if requested to do so by either of them; and

(e) participate in a program designed to evaluate the knowledge, skill and judgment of the member, if requested to do so by the Committee.

…

83. (1) Except as provided in this section, the Quality Assurance Committee and any assessor appointed by it shall not disclose, to any other committee, information that,

(a) was given by the member; or

(b) relates to the member and was obtained under section 82.

…

83. (3) If the Quality Assurance Committee is of the opinion, based on an assessment, that a member may have committed an act of professional misconduct or may be incompetent or incapacitated, the Committee may disclose the name of the member and allegations against the member to the Executive Committee

(4) Information that was disclosed contrary to subsection (1) shall not be used against the member to whom it relates in a proceeding before the Discipline or Fitness to Practise Committees.

…

83.1 (6) Quality assurance information is not admissible in evidence in a proceeding.

Regulation-Making Power

> 95. (1) Subject to the approval of the Lieutenant Governor in Council and with prior review of the Minister, the Council may make regulations,
>
> …
>
> (h) requiring and providing for the inspection and examination of premises used in connection with the practice of the profession and of equipment, books, accounts, reports and records of members relating to their practices;
>
> (h.1) providing for the direct observation of a member in his or her practice, including the direct observation by inspectors of procedures, during the course of an inspection or examination provided for under clause (h);

THE REASONS OF THE DIVISIONAL COURT

[10] There were several issues before the Divisional Court. However, before this court, the parties only contest whether an investigator, appointed under s. 75 of the Code, has the power to compel observation of a member performing cosmetic surgery.

[11] The Divisional Court held that the power of the investigators to observe the appellants as they performed surgery is found in s. 76(1), and in particular, in the phrase, "inquire into and examine the practice of the member to be investigated". The court held that the ordinary meaning of these words encompasses observation of surgical procedures. Recognizing that under the modern rules of statutory interpretation it is not

sufficient to consider the ordinary meaning of terms in legislation, the court went on to consider the purpose of the legislation and the relevant provisions in the legislative context.

[12] The court noted that the primary purpose of the legislation is the protection of the public and that the College as a self-regulatory body has a statutory duty to serve and protect the public interest. The court was satisfied that observation of a member's treatment of patients was reasonably within that purpose, where concerns had been raised about the member's competence. As the court said at para. 40:

> In the context of medical practice, an inquiry into and examination of a member's practice reasonably includes observation of the member's treatment of patients in circumstances where there is a concern about the member's competence that requires observation of the member. Observation is particularly important in the case of surgery, where the practice is predominantly a manual one. As the affidavit evidence filed on behalf of the College indicates, the observation of surgical practice is an important tool to assess a physician's skill and competence, as well as his or her ability to deal with complications.

[13] The court also found support for this interpretation of s. 76(1) in s. 76(3), which requires that no person shall obstruct an investigator. As the court said at para. 44: "Refusal to permit an observation of clinical practice, in a case where the College has reasonable concerns about the member's conduct and competence, would, in our view, constitute obstruction of the investigator."

[14] The Divisional Court also looked at the provisions in the Code that establish the Quality Assurance Program. It was the appellants' position that the College was attempting to subject members to an assessment of their practice and competence while denying members the protection from having the results used for matters beyond assessment. In particular, the court considered ss. 82 and 83. Those provisions not only impose a positive duty on the member to co-operate with the College and its investigators but also protect the member because the results of the assessment are not admissible in a subsequent proceeding for misconduct or incompetence. The court pointed out, however, that the purposes of an assessment and an investigation are different and it was not surprising that the provisions would be different. As the court said at paras. 48 and 49:

> The College randomly selects hundreds of physicians each year for quality assessment of clinical practice. The primary aim is both evaluation and education. Therefore, physician co-operation with the process is necessary to achieve the aims of the program.
>
> In contrast, an investigation under s. 75(a) only occurs if information has been brought to the attention of the Registrar that gives him reasonable and probable grounds to believe that the member has committed an act of professional misconduct or is incompetent. The investigator appointed under s. 75(a) has wide-ranging powers to inquire into and examine the member's practice. Those powers are framed in broad and general terms in order to cover a wide range of circumstances.

[15] Finally, the court considered the physicians' argument that where a provision is ambiguous, it should be interpreted in the light of values enshrined in the *Canadian*

Charter of Rights and Freedoms. However, since the court found that the provisions of the Code were not ambiguous, it was not necessary to consider that argument.

ANALYSIS

[16] As I have indicated, I agree entirely with the reasons of the Divisional Court. The following comments are intended to address the recent amendments to the Code and the submission of the appellants that the Divisional Court failed to fully consider the entire legislative context, and failed to give sufficient weight to the privacy interests of the members' patients.

[17] The appellants do not dispute that the ordinary dictionary meaning of the term "inquire into and examine the practice of the member to be investigated" are broad enough to encompass observation of the members as they perform the various procedures that make up their practice. The principal submission of the appellants is that the Divisional Court erred in failing to consider the phrase in the legislative context. In considering this submission I start, as did the Divisional Court, with the core principle of self-regulation set out by the Supreme Court of Canada in *Pharmascience Inc. v. Binet*, [2006] 2 S.C.R. 513. Speaking for the majority, LeBel J. emphasized the onerous obligation placed on self-regulating bodies to protect the public. It follows that those given this obligation have the duty to inquire into the conduct of the members and "will have sufficiently effective means at their disposal to gather all information relevant to determining whether a complaint should be lodged": at para. 37. In view of this

principle, it would take clear words to deprive the investigator of powers necessary to carry out this important public interest.

[18] With this principle in mind I turn to the appellants' submissions. First, the appellants submit that the phrase "inquire into and examine" as found in s. 76(1) must be interpreted by taking into account the entire subsection and in particular the concluding words. For convenience, I repeat s. 76(1):

> An investigator may inquire into and examine the practice of the member to be investigated and has, for the purposes of the investigation, all the powers of a commission under Part II of the *Public Inquiries Act*.

[19] The appellants submit that the powers of inquiry and examination must be those that are capable of being enforced under Part II of the *Public Inquiries Act* and must be limited to those powers alone. Since there is no power under the *Public Inquiries Act* to compel a physician to perform surgery under observation, it follows that "inquire and examine" cannot include compelled observation.

[20] I do not accept that submission. The powers given to the investigators under the *Public Inquiries Act* are not the only powers of enforcement under the Code. Subsection (1) must be read along with the other provisions of s. 76 and in particular subsection (3), which prohibits anyone from obstructing an investigator. While not before the Divisional Court, I note that the newly enacted subsection (3.1), which requires the member to co-operate fully with an investigator, is an enforcement power that supports a broad

interpretation of “inquire and examine”. These provisions are in addition to the more cumbersome procedure under the *Public Inquiries Act.*

[21] The appellants also submit that the Divisional Court erred in failing to consider the impact of subsection (2), which provides that the investigator may, “on the production of his or her appointment, enter at any reasonable time the place of practice of the member and may examine anything found there that is relevant to the investigation”. The appellants submit that the Legislature, having expressly provided for a limited right of examination of any “thing” in the place of practice, could not have contemplated that there would be an additional power to observe the member perform surgery at the place of practice. In other words, had it intended to permit the investigator to enter and observe the member performing surgery, the Legislature would have said so expressly.

[22] Again, I cannot accept this narrow interpretation of the legislative scheme. Subsection (2) contains two distinct powers, the power to enter and the power to examine things. The power to enter is not limited to entry for the purpose of examining things. Having gained lawful entry, it would be open to the investigator to exercise any of the other powers conferred by s.76.

[23] The appellants also submit that a further indication that compelled observation was not contemplated by s. 76(1) is that no provision is made for protection of the privacy of the patient under observation. However, other provisions of the Code already contemplate significant intrusion into patient privacy and confidentiality in the interests

of conducting a proper investigation. For example, s. 76 itself provides, in subsection (4), that the section applies despite any provision in any Act relating to the confidentiality of health records. Investigations by self-regulating bodies inevitably involve some intrusion into the confidentiality of the relationship between the member and the client or patient. An investigation under s. 76 will have to take into account the patients' interests and the section does not purport to override those interests, except with respect to health records as articulated in subsection (4). The provisions of the Act that compel the member to co-operate with the investigator do not impose a similar obligation on the patient. It seems apparent that observation of a surgical procedure will have to be conducted in a manner that protects the patients' privacy interests.

[24] Further, both the Act and the Code contain explicit provisions to prevent public disclosure of confidential patient information. For example, College employees and agents are required, with limited specific exceptions, to keep confidential all information that comes to their knowledge in the course of their duties. I also find compelling the observations of McLachlin J.A. in *College of Physicians and Surgeons of B.C. v. Bishop* (1989), 56 D.L.R. (4th) 164 (B.C.S.C.), at p. 171, that "while the public has an expectation that medical records will be kept confidential, that expectation is subject to the higher need to maintain appropriate standards in the profession".

[25] The appellants' next submission on the legislative context concerns the impact of Quality Assurance provisions on the interpretation of s. 76. Those provisions provide the

College with the authority to require members to confer with their assessors and participate in programs to evaluate their knowledge, skill and judgment. As counsel for the appellant Judah put it in their factum, the provisions "expressly empower the College to conduct a general assessment of a physician, which the College is attempting to accomplish under the section 75 investigation". They submit that if the Legislature had intended to compel compliance under s. 75, it would have expressly indicated that intention as it did with respect to the Quality Assurance Program. This submission had more force prior to the recent addition of subsection (3.1) to s. 76, which now expressly requires the member to "co-operate fully" with an investigator. Whatever the situation before this amendment, it is now apparent that the s. 75 investigators have ample powers to ensure that they are able to inquire into and examine the practice of the member.

[26] The appellants also rely upon the fact that there is no protection against self-incrimination in s. 76, comparable to the protections found in ss. 83 and 83.1. The effect of those provisions is that quality assurance information is not admissible in any proceeding. However, as the Divisional Court pointed out, an investigation under s. 75 and the Quality Assurance Programs have very different objectives. The most important distinction is that quality assurance involves assessment of hundreds of physicians who are randomly selected to be assessed. The point of the program is quality assurance. In contrast, an investigation under s. 75 is not random, but initiated on the basis of reasonable and probable grounds that the member may have committed an act of professional misconduct or is incompetent. The whole purpose of the investigation is to

gather evidence. That evidence may show that the allegations are groundless or that discipline proceedings are required. Nothing in s. 76 extends protection to the member in respect of the evidence gathered through other investigative methods, for example, evidence obtained through examination of patients' records. That said, it will be for the bodies dealing with subsequent proceedings to determine the admissibility of any evidence gathered during the investigative phase.

[27] Further, as the College points out, the Quality Assurance Program is not as benign as the appellants assert. For example, under s. 80.2, the Quality Assurance Committee may direct the Registrar to impose terms, conditions or limitations on the certificate of registration of a member for a specified period to be determined by the Committee. And, under s. 83(3), if, as a result of an assessment, the Committee is of the opinion that a member may have committed an act of professional misconduct or may be incompetent, the Committee may disclose the name of the member and allegations against the member to the Executive Committee.

[28] The final legislative provision relied upon by the appellants is the newly enacted s. 95(1)(h.1), which allows the Council, subject to the approval of the Lieutenant Governor in Council, to make regulations

> [P]roviding for the direct observation of a member in his or her practice, including the direct observation by inspectors of procedures, during the course of an inspection or examination provided for under clause (h).

Clause (h) refers to regulations requiring and providing for *inter alia* the "inspection and examination of premises used in connection with the practice of the profession and of equipment, books, accounts, reports and records of members". The appellants point to clause (h.1) as proof that when the Legislature intended to permit direct observation of the member, it did so expressly.

[29] I am not convinced that this regulation-making power, designed to facilitate direct observation during inspections, should be used to limit the broad scope of the investigative power under s. 76. Such an interpretation would be inconsistent with the principle from *Pharmascience*, that requires that investigative powers be interpreted in a manner that ensures that the investigators will have sufficiently effective means at their disposal to gather all information relevant to determining whether a complaint should be lodged. Particularly when considering allegations of misconduct or incompetence in relation to surgery, the optimal means of gathering relevant information is through direct observation. I can see no principled basis for distorting the ordinary meaning of "inquire into and examine the practice" to exclude the means of investigation that in some circumstances are most likely to uncover the truth and therefore best protect the public.

[30] The appellants also submit that s. 76 should be interpreted in light of *Charter* values including protection of patient privacy and protection against self-incrimination. The appellants concede that resort to *Charter* values is only necessary where the provision is ambiguous. Like the Divisional Court, I find no ambiguity in s. 76, at least

in respect of compelled observation of physicians undertaking cosmetic surgery. Accordingly, it is not necessary to consider the question of *Charter* values: see *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 581-582.

DISPOSITION

[31] Accordingly, I would dismiss the appeal and in accordance with the agreement of the parties, there will be no order for costs.

Signed: "M. Rosenberg J.A."

"I agree K. Feldman J.A."

"I agree G. J. Epstein J.A."

RELEASED: "MR" July 7, 2009