

SPECIAL REPORT No. 16 December 1994
to
The Legislative Assembly of British Columbia

THE NIKKI MERRY CASE

An Investigation of a Complaint to the
College of Physicians and Surgeons of British Columbia

Ombudsman
Province of British Columbia

INTRODUCTION

The Ombudsman was given jurisdiction over the governing bodies of professional and occupational associations in October 1993. The College of Physicians and Surgeons is the self-regulating governing body for physicians in British Columbia. The College operates under the *Medical Practitioners Act*. One of the reasons government establishes self-regulating professions is to ensure that the public is served by competent and ethical members and is protected from harm. It is very important that government and the public have confidence in these bodies to serve the public rather than their members. In order to generate and sustain this confidence the public must be accurately informed and have access to fair complaint processes and outcomes. Throughout this investigation the College and its staff have demonstrated a commitment to this goal.

In November 1993, after the matter was aired publicly, the Honourable Paul Ramsey, Minister of Health and Responsible for Seniors, voiced his concerns to the Ombudsman regarding Ms. Nikki Merry's complaint to the College of Physicians and Surgeons. The Office of the Ombudsman approached Ms. Merry to see if she would consent to, and participate in, an investigation by our Office into the handling of her complaint against Dr. B.C. Thomson by the College. After obtaining consent from the complainant, the Ombudsman gave notice to the College of her intention to investigate the handling of Nikki Merry's complaint to the College about Dr. Thomson, the physician who sexually assaulted her. The incidents that are the subject of this investigation involve the initial intake stage of processing Ms. Merry's complaint by the College and its subsequent preliminary investigation. The findings and recommendations contained in this report are restricted to the matters raised in the specific complaint filed by Nikki Merry with the Office of the Ombudsman about the College.

Our recommended changes are meant to improve the College's investigative process and are not meant to reflect negatively on the professionalism of the individual investigators involved in this matter. Their conduct throughout was consistent with the expectations of the College at that time.

Summary of the Complaint Details:

Ms. Merry's complaint can be summarized as follows:

1. Ms. Merry states that the College did not act appropriately, the particulars of which are:
 - a) A climate of trust was not built between her and the College investigator because at the initial meeting she was required to answer personal questions and she was not encouraged to discuss her complaint against Dr. Thomson except briefly at the end of the interview;
 - b) The lawyer accompanying the investigator appeared to be judgmental;
 - c) The transcript of the tape provided by the College was inaccurate and she felt it would discredit her;
 - d) Some of the information the College obtained from the Medical Services Plan pertaining to the material dates of incidents with Dr. Thomson was incomplete; and
 - e) She felt harassed by the College staff when they sent letters to her home asking her to contact them when they knew criminal charges had been laid against Dr. Thomson and that she had been advised not to talk to them.
2. Once Dr. Thomson was charged with the first count of sexual assault under the provisions of the *Criminal Code of Canada*, the College failed to take appropriate and immediate action with respect to Dr. Thomson; and,
3. The College failed to review or monitor Dr. Thomson's drug prescribing and administering habits.

Summary of Events Related to Ms. Nikki Merry's Complaint:

Ms. Merry contacted the College of Physicians and Surgeons by telephone on March 19, 1992. She spoke to the College's senior investigator. According to the investigator's notes to file, Ms. Merry reported that her physician, Dr. Thomson, had prescribed Librium and Halcion for her, to the point that she had become addicted. She also reported that the doctor had made numerous visits to her home at night and on these occasions Dr. Thomson had made sexual advances and there had been physical contact. In telephone calls to the College, Ms. Merry also indicated that she had an audio-tape of a conversation with the doctor and a record of flowers that she had received from him.

The investigator arranged to interview Ms. Merry. According to his notes, he asked Ms. Merry to come to the College for the interview. Due to babysitting problems, Ms. Merry asked him to come to her home. The interview was scheduled for the following week on March 26, 1992.

The investigator decided that, given the nature of the complaint, it would be beneficial to have a woman accompany him at this interview. Consequently, he talked with the College's Registrar about the possibility of having a woman accompany him. The Registrar made arrangements with the legal firm representing the College and a female lawyer went with the investigator to Ms. Merry's home on March 26, 1992.

Early on during the interview, the investigator asked Ms. Merry questions about her family background and life situation prior to asking her about her complaint against Dr. Thomson.

At the conclusion of the interview, Ms. Merry gave the investigator the tape of the conversation that she had made during one of Dr. Thomson's house calls. Because the tape was extremely difficult to understand, the investigator offered

to have it transcribed by someone in his office. Ms. Merry also showed the investigator a note from Dr. Thomson that was written on his prescription pad, a 4" x 6" photo of Dr. Thomson taken at her home and a card that had accompanied flowers he had sent her. They both agreed that the College would not contact Dr. Thomson at that time.

When the investigator returned to the office, he requested billing information related to Dr. Thomson's practice from the Medical Services Plan (MSP). The investigator requested this information specifically in order to assist Ms. Merry in clarifying possible dates of contact she had with Dr. Thomson. He subsequently wrote a memorandum to file recording his interview with Ms. Merry. The memorandum to file outlines information of a very personal nature which relates to the complainant's life. The memorandum briefly outlines Ms. Merry's history with Dr. Thomson. No statement of complaint was prepared at this time because not all the information was available from Ms. Merry.

On May 21, 1992 the complaint file for Ms. Merry was then passed on to another investigator who had recently been hired by the College. According to this investigator, he received the requested billing information from the MSP immediately upon assuming responsibility for the file. He asked one of the office staff to transcribe the tape Ms. Merry had given the original investigator. A member of the College's clerical staff states that she did not know who was recorded on the tape nor its contents at the time she was asked to transcribe it. In addition, the College arranged to have the tape transcribed by Bodnaruk Investigation Services Ltd.

The second investigator telephoned Ms. Merry to set up an appointment to meet with her in order to further discuss her complaint in detail. The meeting was rescheduled for June 24, 1992 because Ms. Merry was unavailable until that date.

At the June 24th meeting at Ms. Merry's house, she told the investigator that Dr. Thomson had recently arrived at her door and that she was afraid a representative of the College had told Dr. Thomson about her complaint. He assured her that no information had been given to Dr. Thomson. She was also

concerned about the cross-examination she would have to undergo at a hearing. The investigator advised Ms. Merry that the best option would be for her to meet with counsel for the College to discuss the inquiry process, as the lawyer was in the best position to explain the process at a hearing. In order to give Ms. Merry an opportunity to review the information gathered to date, he left with her a copy of the transcript from the tape, prepared by the College employee, a copy of the records he had obtained from the MSP and the original investigator's notes to file. Ms. Merry was to review this information and then get back to him to set up another appointment.

After this meeting, the investigator tried to call Ms. Merry several times to set up a time to meet. He talked to her on one occasion and she said that she had not had the time to review the material he had left her but that she would call him.

In July, the investigator received a telephone call from the RCMP informing him that criminal charges had been laid against Dr. Thomson based on information provided to the police by Ms. Merry. Upon receiving this information, the investigator tried to contact Ms. Merry but was unsuccessful. Subsequently, he was advised by the police officer in charge of the case that Ms. Merry had been counselled not to speak to the College.

Following the laying of charges against Dr. Thomson, he contacted the College and requested a meeting with the College. On July 22, 1992, Dr. Thomson met with the Registrar in order to discuss the criminal charges against him. At the conclusion of this meeting, the College suggested and Dr. Thomson agreed to sign a formal, voluntary undertaking which stipulated that he would withdraw from practice effective noon the same day. He also agreed, in writing, to advise any hospital where he was a member of the medical staff that he had voluntarily withdrawn from practice.

On August 17, 1992, a lawyer from the Criminal Justice Branch, Ministry of the Attorney General, wrote to the Registrar of the College to advise him that Dr. Thomson had been charged with three counts of sexual assault. In the letter the lawyer wrote:

“In the event you wish to contact the complainant or any of the Crown witnesses, could you kindly do so through Constable ... of the Coquitlam RCMP.”

Both the College investigator and the constable confirmed to our Office that they had frequent contact with each other over the telephone during this period. Neither the College files nor the RCMP files, however, show any documentation of these interactions. Based on memory, the College investigator told our Office that he had asked the constable to ask Nikki Merry to give him a call. The College investigator assumed that the constable had done so. The constable cannot remember passing along any messages from the College investigator to Ms. Merry but said he certainly would have had he been asked to do so.

On August 27, 1992, the College investigator sent a double-registered letter to Ms. Merry advising her that the College would like to proceed with her complaint and asked her to call him in order to arrange a meeting with the College's counsel.

On September 10, 1992, the College's counsel sent Ms. Merry a letter asking her to contact him in order to assist the College in its investigation of Dr. Thomson.

On October 21, 1992, the College's investigator advised the College's counsel that he had spoken to the officer in charge of Nikki Merry's case and had been advised that Ms. Merry was still a willing complainant for the purpose of the complaint to the College. The constable, however, indicated that Nikki Merry was under instructions from her lawyer not to speak to the College at that time. Ms. Merry had chosen not to pursue her complaint with the College once criminal charges had been laid but neither she nor her lawyer communicated that decision to the College.

On October 29, 1992, a further letter was sent by the College's counsel to Ms. Merry asking her to call or have her lawyer call to advise him of her intentions in regard to her complaint with the College.

The dates for the preliminary inquiry for the criminal charges against Dr. Thomson were February 24, 1993, March 11, 1993 and April 5, 1993.

On October 26, 1993, Dr. Thomson was convicted of one count of sexual assault and on December 8, 1993 he was sentenced to 2 years less 1 day. Dr. Thomson has appealed his conviction to the B. C. Court of Appeal. The appeal was scheduled for November 28, 1994 but has been adjourned to February 2, 1995.

On November 5, 1993, the College of Physicians and Surgeons, pursuant to s.47 of the *Medical Practitioners Act*, set a hearing date of January 14, 1994 for Dr. Thomson to show cause why his name should not be permanently erased from the Medical Register. On January 14, 1994, Dr. Thomson attended the College hearing with his lawyer. The College decided at this hearing to erase Dr. Thomson's name from the register.

Review and Disposition of Nikki Merry's Complaints

1. *Ms. Merry states that the College did not act appropriately, the particulars of which are:*

- a) **A climate of trust was not built between Ms. Merry and the College investigator because at the initial meeting she was required to answer personal questions and she was not encouraged to discuss her complaint against Dr. Thomson except briefly at the end of the interview.**

i. Particulars

At the material time, the College had no written investigative policies and procedures. According to the investigator who first interviewed Ms. Merry, it was his practice to determine on a case-by-case basis when he would ask questions about the person's background. In most cases, this, he indicated, was carried out at the end of the interview. The informal practice was that the College investigator informed the complainant about the need to obtain personal information on the basis that there may be a formal hearing process that involves lawyers who may ask probing questions. For this reason the investigator felt obligated to ask personal questions, at some stage, related to the complainant's life history so that the complainant would be aware of what she may face if her complaint should reach the formal hearing stage. Gaining an understanding of a complainant's background was designed to enable the investigator to measure and report on the credibility of the complainant.

ii. Discussion

Upon examining the complaint-handling process, we found the investigator's role lacked clarity and was ill-defined, particularly as it is not outlined in written policy. An appropriate investigation process includes fact-finding, analysis and the testing of those facts. The role of an investigator, as opposed to a prosecutor, is to gather and analyze facts. College lawyers can later test the complainant as to her credibility and the facts as reported by her for their veracity. The fact that Ms. Merry was asked to respond to personal questions related to her life history right at the beginning of the intake process led her to believe the College was being judgmental, was not interested in her complaint and did not believe her. She thought the College was trying to dissuade her from making a complaint. By asking questions in anticipation of cross-examination by counsel, the College investigator effectively impeded his own investigation. Such questioning by an investigator could hamper his or her ability to obtain all the facts relevant to the case at the appropriate time. Critical to gaining full and accurate information at this stage in an investigation involving sexual misconduct is establishing a relationship based on trust.

The initial interview with the complainant is very important because it sets the tone for the rest of the investigation. It is, therefore, critical that a relationship based on trust be established and that an atmosphere which allows the complainant to express herself freely be created as early as possible. Questions asked by the investigator at the outset which may be relevant during cross-examination at the hearing phase may impede, if not eliminate, the possibility of complete and frank disclosure by the complainant. The questions about her personal history were not asked for any improper purpose but nevertheless made the complainant feel demeaned and threatened. The experience of being placed on the defensive may, understandably, have caused the complainant to lose confidence in the complaint process with the College.

iii. Finding

This aspect of Ms. Merry's complaint is substantiated. In any investigation involving a complaint of sexual misconduct, the initial meeting should be one that focuses primarily on building up a trusting relationship. The initial interview should be free flowing and the complainant should have considerable control over how the interview proceeds. Subsequent interview(s) can focus on obtaining and clarifying the facts. Also, an investigator should not attempt to rush the complainant but should move along at the complainant's pace and ensure that all of the facts are obtained in a supportive manner. There may be facts disclosed at this stage by the complainant that are not totally relevant. This free flow by the complainant should be encouraged and not overly constrained by the investigator at the outset. For this reason, in cases such as these, the investigator should have discretion when to formalize the complaint in writing. Sufficient time should be allotted for the complainant to have the opportunity to review, correct and approve the statement.

Again, our findings are not meant to be critical of the College's investigator's tact or professionalism, and instead are meant as policy development guidelines for the College. Indeed, Ms. Merry had no personal criticism of the individual investigators who attended her home.

We find that a relationship based on trust had not fully developed between the complainant and the College investigators. For the College to address this issue, investigative policies and procedures need to be developed in order to establish guidelines for all College investigations that make clear reference to the conduct and process expected for the initial interview. These should include a proviso that if personal information is to be solicited it be done in a clear and respectful manner. These must, however, pass the test of relevance, the criteria for which should also be identified in the policy.

- b) The lawyer accompanying the investigator appeared to Ms. Merry to be judgmental.

i. Particulars

There is disagreement amongst those in attendance at the meeting about this allegation. Neither the initial College investigator nor the lawyer herself can recall anything about her conduct that could have been perceived as “judgmental.” However, the lawyer indicates that she introduced herself to the complainant as counsel to the College. The lawyer clearly understood that she was not there specifically as an advocate or support person for Ms. Merry. Although the College did not advise her what her role was to be, she felt it was understood and “pretty common knowledge.” She said she felt she was there to make Ms. Merry feel more comfortable by providing a female presence and also to provide protection for the male investigator. She describes herself as sometimes being more serious than she ought to have been but she considers this to be “in line with her profession.” She did not participate much in the interview *per se* and specifically remembers spending time playing with Ms. Merry’s child. The lawyer states that she had no intention of doing anything other than her job. She said that she was sensitive to the situation and alert to making the interview as comfortable as possible for Ms. Merry.

ii. Discussion

There are two issues raised by this aspect of the complaint. The first involves the perceived power imbalance experienced by Ms. Merry due to the investigator being accompanied by a female lawyer.

Although perceptions are often not measurable, they do influence how an individual reacts in a given situation. When evaluating College staff roles and actions which potentially influence the complainant’s perception of the College’s investigation of their complaint, it is necessary to rely on an appropriate standard. Within the common law in

North America, the “reasonable woman” standard as distinct from the traditional reasonable person test, is emerging. This test can be used to set a standard for measuring the appropriateness of the perceptions of women in certain situations and how those assist to measure the conduct of others. This test needs to be explained within the investigative policy of the College.

The law has recognized the need to create different standards of reasonableness for people in different circumstances. When considering this case in particular, it is important for the College to invoke a standard that encourages a sensitivity on the part of those working for the College and an understanding of how a reasonable woman may perceive any given situation.

Complainants often perceive a power imbalance between themselves and an authority such as the College. Much attention needs to be given by the authority to being empathetic and supportive. It can not be overlooked that people will often perceive the investigator’s first allegiance to be with his or her employer.

A review of the facts here is helpful. A female lawyer from the law firm that represents the College arrived at the home of the complainant with a male College investigator. The College indicates their intention was to provide a female presence at the interview. The role of the female lawyer is never made clear to the complainant other than to let her know that she acts for the College. Ms. Merry did not consider her to be there to provide support to her. The reasonable woman in the position of Ms. Merry could view her presence as intimidating, particularly given the imbalance of power between herself and the lawyer for the College. This, in turn, may have led Ms. Merry to believe that the lawyer was somehow “judgmental.” While that may not be a reasonable conclusion, it is reasonable that a woman in Ms. Merry’s position would be confused as to the lawyer’s role and might be intimidated by a lawyer’s presence.

It is important to develop clear, written investigative policies and procedures to reinforce the necessity for investigators to act in a manner which will be seen, as much as possible, as being neutral and supportive. This is necessary because ultimately the role of the College investigators and College lawyers is to support the disciplining of those doctors who offend. In their efforts to meet that important objective, they may overlook some of the essential elements of an investigation, which include establishing a safe and supportive environment for the complainant.

The College should continue to encourage and invite the use of a "support person" in any case where the individual complainant or the facts surrounding the complaint indicate that it would be appropriate. This role needs to be clarified in written policy and the policy made available to all complainants, in order to avoid any confusion or misunderstanding. This should include making it clear that the complainant is able to choose her or his own support person.

iii. Finding

The complaint that the lawyer was judgmental is not substantiated. However, it has raised an important issue about a female complainant's perception of the College's investigation processes. It is important for the College to adopt a standard that is cognizant of how a reasonable woman in a case such as this might perceive a given situation or action by the College. By having policies that encourage investigators to be empathetic, objective and neutral and which offer the opportunity for complainants to have support persons of their choice available throughout the investigation will resolve this complaint. Documentation of these policies by the College will enhance their administrative practices.

- c) The transcript of the tape provided by the College was inaccurate and she felt it would discredit her.**

i. Particulars

Ms. Merry had made a tape of conversations she had with the doctor about whose conduct she was complaining. She made the tape available to the investigator for the College. The tape was transcribed by the College; once by its own administrative staff and a second time by an independent agency.

ii. Discussion

Our Office reviewed the typed transcript produced by the College from the tape recording provided by Ms. Merry to the College. In addition, and by way of comparison, we reviewed the typed transcript produced by Bodnaruk Investigation Services Ltd., an independent service hired by the College to review the tape recording.

The transcripts produced by the College and the independent service were very similar. The person responsible for the transcription at the College was given no instructions by the College regarding the contents of the tape other than simply to transcribe its contents to the best of her ability.

iii. Finding

We find this aspect of Ms. Merry's complaint not substantiated. We find that neither the tape nor its transcribed version were inaccurate or inconsistent with Ms. Merry's versions of the contents, nor was the tape used for any improper purpose by the College. The College treated the tape as relevant evidence for the purpose of Ms. Merry's complaint.

- d) Some of the information the College obtained from the MSP pertaining to the material dates of incidents with Dr. Thomson was incomplete.**

i. Particulars

After the initial interview of Ms. Merry the College requested billing information from the Medical Services Plan ("MSP"). The records were requested and reviewed in order to determine the dates for which Dr. Thomson had billed MSP in relation to his medical treatment of his patient, Ms. Merry. These records were specifically requested by the College in the course of their investigation in order to assist Ms. Merry to remember some of the dates and times of the incidents about which she had complained and which formed the substance of her complaint.

ii. Discussion

We reviewed the information the College received from the MSP. The College takes the position that the MSP records were never intended to be used as reflective of all the times Dr. Thomson met with Ms. Merry. These records were gathered to enable the complainant to use them as one possible tool to assist her in pinpointing certain times and dates that Dr. Thomson had visited her in her home.

iii. Finding

We find this aspect of Ms. Merry's complaint not substantiated. We believe any inaccuracies found in the MSP information by Ms. Merry were not considered by the College to be germane to their investigation. The records were obtained and used for a proper purpose.

- e) **She felt harassed by the College when they sent letters to her home asking her to contact them when the College knew criminal charges had been laid against Dr. Thomson and that she had been advised not to talk to them.**

i. Particulars

On August 17, 1992, a Barrister and Solicitor from the Criminal Justice Branch, Ministry of the Attorney General, wrote to the Registrar of the College to advise him that Dr. Thomson had been charged with three counts of sexual assault. In the letter, the lawyer wrote:

“In the event you wish to contact the complainant or any of the Crown witnesses, could you kindly do so through Constable ... of the Coquitlam RCMP.”

The lawyer who wrote the above letter informed our Office that the paragraph quoted above was not meant to be a cease and desist order. It was included as a courtesy to the complainant so that she would not receive unexpected calls from the College. It was apparently standard Crown policy at the time to include a paragraph of this nature.

Both the College investigator and the constable confirmed to our Office that they were frequently in contact with each other over the telephone during this period. Neither the College files nor the RCMP files, however, show any documentation of these interactions. Based on memory, the College investigator told our Office that he had asked the constable to ask Nikki Merry to give him a call. The College investigator assumed that the constable had passed along his message. The constable cannot remember passing along any messages from the College investigator to Ms. Merry but said he certainly would have had he been asked to do so.

On August 27, 1992, the College investigator sent a double-registered letter to Ms. Merry advising her that the College would like to proceed with her complaint and asked her to call him in order to arrange a meeting with the College's counsel.

On September 10, 1992, the College's counsel sent Ms. Merry a letter asking her to contact him in order to assist the College in its investigation of Dr. Thomson.

On October 21, 1992, the College's investigator advised the College's counsel that he had spoken to the constable in charge of Nikki Merry's case and had been advised that Ms. Merry was still a willing complainant. The constable, however, indicated that Nikki Merry was under instructions from her lawyer not to speak to the College at that time.

On October 29, 1992, a further letter was sent by the College's counsel to Ms. Merry asking her to call or have her lawyer call to advise him whether she intended to pursue her complaint with the College.

ii. Discussion

Upon learning of Dr. Thomson being charged with a criminal offense, the College repeatedly attempted contact with the complainant. The primary means of contact was through the mail. Ms. Merry perceived the letters she received from the College as a form of harassment. She knew the College had been informed that there was an ongoing criminal investigation, that charges had been laid, and that she had been advised by her lawyer not to speak to the College. The College felt it was important to contact Ms. Merry in order to obtain her cooperation. In order for the College to carry out an investigation of the allegations of professional misconduct levied against Dr. Thomson, Ms. Merry's cooperation was required.

We believe the letters sent out by the College were not intended to harass Ms. Merry but rather to elicit her cooperation in order for the College to move ahead with its investigation of Dr. Thomson. At that time, the College could only restrict the activities of its member by obtaining a voluntary undertaking. Since that time, the governing statute has been amended to enable the College to suspend a member. Whether

or not the College ought to permit a criminal investigation and court proceedings to run their course prior to completing its own is a question to be decided in each particular case. In the Merry case, the College was interested in pursuing its own investigation to come to a determination as to whether or not Dr. Thomson should be removed from the registry. The College considers their role important and this explains why they continued to send letters to the complainant. The difficulty arises because the College did not make it clear to Ms. Merry why it was important for her to keep in contact with the College. Ms. Merry had been told by her own lawyer that she did not have to speak to the College. The Office of the Crown Counsel had advised the College and the police that communications to Ms. Merry were to be directed through the officer in charge of the criminal investigation. The College made several contacts with the officer in charge but were unable to make contact with Ms. Merry.

iii. Finding

Ms. Merry's complaint that the College harassed her by continuing to contact her by mail after the criminal charges had been laid is not substantiated. The College had a legitimate role to fulfill in pursuing its investigation of its member. The College required Ms. Merry's cooperation. They were having difficulty determining from her the status of her complaint. However, from Ms. Merry's perspective, after she had been advised not to make contact with the College by her lawyer, continuing to receive letters could easily be misinterpreted by her.

Whether or not the College ought to suspend its investigation where criminal charges have been laid against a physician is an issue that requires clarification. At present, there is a policy of the Criminal Justice Branch that addresses the issue of when it is appropriate for Crown Counsel to provide information obtained in a criminal investigation to a professional governing body. That policy is presently undergoing review in light of the *Freedom of Information and*

Protection of Privacy Act. We suggest that as part of that policy review, the municipal police departments and the RCMP develop a protocol for improving communications and sharing information between the police agencies and the professional governing body. This protocol should also clearly identify how a decision to suspend an investigation by the governing body will be made and by whom, and who will be responsible to communicate this information to a complainant/victim. We recommend that this protocol be developed in consultation with members of the Criminal Justice Branch.

2. *Once Dr. Thomson was charged with the first count of sexual assault under the provisions of the Criminal Code of Canada, the College failed to take appropriate and immediate action with respect to Dr. Thomson.*

- i. Particulars

The initial interview with Ms. Merry took place in March 1992, the same month the complainant first contacted the College. The Merry file was transferred to the second College investigator on May 21, 1992. The second investigator met with Ms. Merry in June. The College was advised of criminal charges being laid against Dr. Thomson as a result of Ms. Merry's allegations in July. On July 22, 1992, Dr. Thomson met with the Registrar and the investigator to discuss the criminal charges he was facing.

On that date, on the initiative of the College, Dr. Thomson signed a formal voluntary undertaking which stipulated that he would withdraw from practice effective noon the same day. He agreed to advise, in writing, any hospital where he was a member of the medical staff that he had voluntarily withdrawn from practice. In addition, he agreed to seek treatment for substance abuse from physicians found acceptable to the Registrar and to give his consent that regular reports would be submitted by these doctors to the College for their review. The College had no statutory authority at the material time to suspend a member prior to his or her being convicted of a criminal offense.

In the event a conviction resulted, as in this case, the College could act expeditiously to protect the public and to discipline its member pursuant to s.47 of the *Medical Practitioners Act* which allows the College to erase a member's name from the Register upon conviction of an indictable offense. At that time, pending the outcome of the criminal proceedings, the College could attempt to protect the public by ensuring that a voluntary undertaking was respected. Now the College has the power to suspend the member immediately after a charge is laid. If, at the end of the criminal proceedings, a conviction did not result, the College's investigation in regards to professional misconduct or impropriety could resume.

ii. Discussion

The position of the College in response to this complaint is that they took immediate action against Dr. Thomson after he was charged. They consider that they acted appropriately and in accordance with procedures they had in place at that time.

The College was able to get Dr. Thomson to sign a formal, voluntary undertaking that he would withdraw from practice effective July 22, 1992. When considering voluntary undertakings, we believe that the College's current voluntary undertaking disciplinary option, despite the good intentions of all parties involved, relies heavily on the belief that the physician under discipline will adhere strictly to the undertaking. In order to make this disciplinary option credible, the College should review this option to determine if this procedure is workable and considered reliable by the public. This review should include the adequacy of how the College monitors the conduct of physicians under any form of disciplinary action imposed by the College.

iii. Findings

The complaint by Ms. Merry that the College failed to take immediate and appropriate action once Dr. Thomson was charged is not substantiated. We find that the College acted in a timely way once certain information was available to them about the conduct of their member. The action taken by way of a voluntary undertaking, given the seriousness of the allegations, may not be an appropriate or adequate remedy for the College to cease the practice of its member. However, this was the only action open to the College. This problem has been rectified by an amendment to the governing statute. Section 50.6 of the *Medical Practitioners Act*, which was proclaimed on October 18, 1993, enables the College to suspend a physician pending the outcome of a criminal investigation or trial and College investigation. This new legislation may make voluntary undertakings, for the most part, unnecessary, particularly where the criminal charges arise out of the same facts as the complaint of professional misconduct.

It should be noted that although s.50.6 was proclaimed on October 18, 1993, the College was not officially notified by the Ministry of Health of this important amendment in a timely manner. The College had ongoing discussions with the Ministry in the spring of 1993 and as late as September received notice that the amendment was proceeding. However, after proclamation and only on their own initiative did the College determine that this remedy was available to them. We suggest that it is appropriate in the case of professional bodies, that Ministers charged with the administration of the governing statute, ensure that their ministry staff notify the professional bodies affected by legislative change as soon as practicable, once it has been proclaimed.

3. *The College failed to review or monitor Dr. Thomson's prescribing and administering habits.*

i. Particulars

The Bureau of Dangerous Drugs is responsible for monitoring prescription sales and purchases of narcotic and controlled drugs by pharmacists, practitioners, and licensed dealers. In this case, prior to Ms. Merry complaining to the College, the Bureau contacted the College to advise that Dr. Thomson's prescribing privileges had been curtailed in relation to the prescription of narcotic and controlled drugs. A Resolution passed by the College on March 23, 1990 which resulted in placing Dr. Thomson's name on the Temporary Register, included the following:

- **"that in the future Dr. Thomson will practice medicine in a manner that is beyond reproach in all respects;**
- **that Dr. Thomson will not prescribe any drug classified as a narcotic or verbal prescription narcotic under federal and/or provincial legislation and will not prescribe Methlyphenidate;**
- **that Dr. Thomson's practice will be reviewed by such person or persons as the Executive Committee shall appoint subsequent to the anniversary of this Resolution."**

Unbeknownst to the Bureau and the College, Dr. Thomson subsequently interpreted the conditions to mean he could administer drugs to his patients but not prescribe them. Subsequent to the imposition of the conditions to curtail his practice, Dr. Thomson administered controlled drugs to Ms. Merry. While steps were taken by the College in this case to enforce and review the conditions imposed on Dr. Thomson, they were not sufficient to control Dr. Thomson's administration of controlled and narcotic drugs. The steps taken by the College included notification of the Resolution to all major media outlets, the Minister of Health, Medical Services Commission and the B.C. Medical Association and reliance on the monitoring roles of the

Bureau of Dangerous Drugs and the Triplicate Prescription Program. Both the Bureau and the Triplicate Prescription Program give notice on an ongoing basis to the College of prescription habits of practicing physicians. Notwithstanding the wide public circulation of the Thomson notice, the circulation does not include notification by the College of a doctor's patients.

ii. Discussion

Physicians with restricted prescribing practices have, in the past, been investigated by the College. These investigations would often lead to a Resolution passed by the College which would outline condition(s) pertaining to the physician's practice. In this particular case, after the College Registrar had advised the College that information was provided by the Bureau of Dangerous Drugs which suggested an unusual pattern of prescribing narcotic and controlled drugs by Dr. Thomson, a Resolution was passed by the College to investigate his practice of medicine.

The 1990 College Resolution did not prevent Dr. Thomson from going against the spirit of the above restriction by interpreting it to mean he could administer the drugs banned to him. The importance of follow-up for the Resolutions passed is crucial for ensuring the public that these disciplinary measures are considered credible and reliable disciplinary tools.

iii. Finding

This aspect of the complaint is found to be substantiated in part. The College failed to adequately monitor the conditions imposed on Dr. Thomson's practice. This case demonstrates the devastating consequences to a member of the public who becomes victimized by a physician who abuses his medical privileges. However, there are limits to what a governing body can do to prevent a physician from engaging in illegal conduct of this kind.

The primary responsibility for monitoring the acquisition, security and administration of any narcotics by Dr. Thomson still fell under the Bureau of Dangerous Drugs, in that the Bureau maintains responsibility for narcotic medications in Canada. Nevertheless, the College also had an obligation to monitor the conditions imposed on Dr. Thomson's practice by the College's resolution. This was done to the extent of using the College's Triplicate Prescription Program, which commenced in January 1990, to monitor his prescribing, but that could only detect narcotics acquired by the doctor's own prescribing. While Triplicate Prescription Programs, developed by provincial medical councils to supplement and reinforce monitoring procedures of the Bureau of Dangerous Drugs, have become widely adopted as the most up to date method of detecting prescribing aberrations, they are not foolproof in detecting inappropriate administration of drugs. The College's resolution provided for a peer review of Dr. Thomson's practice subsequent to the anniversary date of the resolution. The type of review contemplated would not have been specifically aimed at detecting the type of misconduct indulged in by Dr. Thomson, which was not suspected, and, since he would be unlikely to record or display other suspicious evidence, it may well have failed to do so. However, because of the possibility that something unacceptable might be found, such peer reviews should be done as soon as possible following the stated period. Therefore, to the extent that the effectiveness of the College's monitoring might have been improved by a more timely peer review of Dr. Thomson's practice, this aspect of the complaint is substantiated.

This case demonstrates the need for the College to explore new and improved ways to provide greater protection for those being served by members of the medical profession with conditions or restrictions imposed on their practice.

- to prevent the kind of interpretation Dr. Thomson placed on prescribing restrictions, future College resolutions should be specific

with regard to both “prescribing” and “administration” of medications;

- more effective methods of providing the public with ongoing notice of a physician’s practice restrictions should be explored;
- ways of ensuring the most timely follow up peer review should be developed;
- ways of obtaining input from the doctor’s patients about a restricted physician’s conduct should be explored.

It is recognized that there is no guaranteed method of monitoring conduct, with the possible exception of constant accompaniment of a reliable chaperone, and that some of these recommendations may be found to have practical limitations. The need for complainants to inform and cooperate with the College will still remain. Nonetheless, these additional avenues of possible improvement in public protection should be thoroughly pursued by the College in accordance with this report.

Recommendations:

The College of Physicians and Surgeons acted in good faith, conscientiously and in a manner consistent with the law. Certain procedures and processes used by them in this case resulted in some unfairness to this complainant. The following recommendations are provided pursuant to s.22 of the *Ombudsman Act* and are based on our findings and discussions on each of the matters raised by this complaint. Because of the importance of the issues raised, this report will be tabled with the Legislative Assembly pursuant to s.30(2) of the *Ombudsman Act*.

1. Written investigative policies and procedures should be developed by the College in order to clarify and define the College investigator's role and responsibilities during investigations. In developing comprehensive *written* investigative policies and procedures, the following should be incorporated:
 - a) College investigators should gather facts only and leave the testing of facts to the counsel of the College in preparation for a hearing. Questions likely to be asked during cross-examination at the hearing, if one is held, should not be asked at the fact gathering stage;
 - b) The College should establish as part of its written investigation policy that within a reasonable period of time after the initial interviews, the investigator will formalize the complaint in writing. The time period should be sufficient for the investigator to gather the relevant information and for the complainant to have the opportunity to review, correct and approve the complaint statement;
 - c) The role of College staff and support person should be clarified and defined by the College in order to avoid confusion for all parties involved;
 - d) The College should adopt a policy to clarify (1) when a support person can be utilized by a complainant; (2) that the investigator will advise the

complainant of her right to a support person in the appropriate situations outlined in the policy and provide a copy of the policy; and (3) that the complainant may choose the support person. Where the complainant does not have a support person available, if she agrees, the investigator may rely on the female intake person referred to in Recommendations 43-48 of "Crossing the Boundaries";

- e) The College should instruct its investigators on when the "reasonable woman" standard may be relevant and important to adopt;
 - f) The College should develop investigation policy standards for interviewing complainants. The standards should include the need to establish trust during the initial interview, the skill required to ensure a free flowing discussion by the complainant occurs at the initial interview, and the need to be empathetic and objective throughout the investigation. Notwithstanding the need to adopt a victim-centered approach, there may be occasions when the speed of the investigation will be altered out of necessity, such as for the protection of the complainant or other patients. The policy should outline criteria for when personal information is solicited and for how to determine relevance.
- 2. The College should invoke the power to suspend a member pursuant to the new s.50.6 of the *Medical Practitioners Act* as the preferred approach for managing a physician who has been complained against for major misconduct rather than relying on voluntary undertakings. If voluntary undertakings continue to be relied upon by the College in any circumstance, then policy about how to monitor behaviour should be developed and publicly available.
 - 3. The Ministry of Health and the Attorney General should recognize the importance of keeping the College apprised of all proposed and proclaimed amendments to their governing statute and explore a new method of improving communications with the College to ensure this recommendation is implemented.

4. The process undertaken by the College to develop relevant resource materials to assist the public in understanding the College's complaint-handling should be continued. The importance of providing the public with appropriate, comprehensive and understandable brochures and videotapes describing the College's complaint-handling process cannot be understated.¹
5. The College should pursue new and improved ways to provide greater protection for the members of the public being served by the medical profession where conditions or restrictions are imposed by way of Resolution, for example:
 - make a clear distinction in conditions of practice in Resolutions between "prescription" and "administration" of controlled and narcotic drugs;
 - explore ways to give effective notice to the public about restrictions placed on a physician's practice;
 - adopt more timely peer review where a physician's practice is restricted;
 - explore ways to obtain direct patient input about a physician's conduct.
6. The Office of the Crown Counsel should include, as part of their review of the policy entitled "Professional Organization - Allegations of Criminal Offenses by Members", an examination of ways to achieve an improved exchange of information among the investigating police agency, the Criminal Justice Branch, and the College of Physicians and Surgeons, in order to ensure that the College is able to fulfill its obligation to investigate all complaints received from the public in a timely manner. Any protocol developed in this regard should clearly identify the process to be followed to establish if the College should cease investigating a matter pending any criminal investigation and/or prosecution of which they are made aware.

¹ We note that the College's Review and Implementation Committee concurs with this recommendations and that the College is presently developing additional handouts and is exploring various avenues for creating appropriate videotapes.

The protocol should also identify who is responsible for communicating with the complainant/victim when a decision is made to cease an investigation by the College pending a criminal investigation and/or prosecution.