
RECONCILING PHYSICIAN AND PATIENT RIGHTS

*By Jennifer M. Leddy**

A. INTRODUCTION

On January 31, 2018, the Divisional Court of Ontario released its long and detailed decision in *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*.¹ Two applications were brought by a group of individual physicians and organizations (the “Applicants”) challenging the constitutional validity of two policies of the College of Physicians and Surgeons of Ontario (the “CPSO”), the medical profession’s provincial self-governing body. The challenged policies require physicians, even those who object to certain procedures (e.g. abortions, medical assistance in dying) on moral or religious grounds, to provide patients with an “effective referral”, meaning a timely referral, in good faith, to a non-objecting, available, and accessible physician, other health-care professional or agency (the “CPSO Policies”). This Bulletin reviews how the court concluded that the CPSO Policies infringed the physicians’ right to freedom of religion under the *Charter of Rights and Freedoms* (the “Charter”)² but could be justified under section 1 of the *Charter* as reasonable limits demonstrably justified in a free and democratic society.

B. SUMMARY OF CHARTER CONCLUSIONS

The court held that the CPSO Policies engaged a constitutional question of law of general importance to our legal system: “the appropriate balance between the right of religious freedom or equality rights of a

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¹ 2018 ONSC 579.

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

medical professional and the right of patients to equitable access to health care services.”³ Regarding a patient’s right to equitable access to health care, the decision stated that while there is no freestanding constitutional right to health care, section 7 of the *Charter* “confers a right to equitable access to such medical services as are legally available in Ontario and provided under the provincial healthcare system.”⁴ The court stated this right to equitable access to health care had to be viewed in the context of a “single payor, publicly funded healthcare system [...] structured on the basis of patient-centered care”,⁵ which requires physicians to place the interests of their patients ahead of their own personal interests in the event of a conflict, that physicians respect patient autonomy and the right of patients to decide upon the treatment plan that best suits their health care needs and goals, and the physicians’ duty not to abandon a patient.⁶

1. Freedom of Religion Infringed

Following the robust definition of freedom of religion established by Supreme Court of Canada precedents, the court held that the Applicant’s rights under the *Charter* were infringed. In this regard, the court held that the CPSO Policies interfered, in a way that was neither trivial nor insubstantial, with the Applicants’ sincerely held belief that the provision of medical services such as abortion and medically-assisted death is contrary to their religion and their belief that referral of a patient requesting such services to a non-objecting physician constitutes participation or complicity in the provision of such procedures.

In response to the CPSO’s argument that a referral is not the same as direct participation in the medical service or endorsement of the service, the Court stated it was not for it to determine what is “complicity” or “participation”, quoting with approval the following paragraph from Justice Iacobucci in the Supreme Court of Canada decision of *Syndicat Northcrest v Amselem*⁷:

In my view, the state is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, “obligation”, precept, “commandment”, custom or ritual. Secular judicial determinations of theological or religious

³ *Supra* note 1 at para 64.

⁴ *Ibid* at para 195.

⁵ *Ibid* at para 197.

⁶ *Idem*.

⁷ 2004 SCC 47.

disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.⁸

2. Infringement Justified under section 1 of the *Charter*

In determining whether the infringement of freedom of religion was justified under the *Charter*, the court followed the two-part analysis established by the Supreme Court of Canada in *R v Oakes*.⁹ The first part of the analysis was whether the CPSO Policies were of sufficient importance to warrant overriding the constitutionally protected right to freedom of religion. In this regard, the court found that the CPSO Policies' objective of ensuring access to controversial procedures and pharmaceuticals was sufficiently important to warrant overriding the Applicants' rights of religious freedom.¹⁰ The court accepted the CPSO's claim that:

underlying this purpose is the context of a [publicly] funded health care system and a patient-centered environment. In this environment, physicians perform a positive role for their patients as “gatekeepers” to health care services and are subject to the obligation of non-abandonment, as well as the obligation to put the interests of their patient ahead of their own. It is entirely consistent with this environment and these obligations that the [CPSO Policies] seek to ensure that the religious and conscientious objections of physicians do not become a barrier to health care for patients who seek healthcare services to which particular physicians may object.¹¹

The second part of the analysis considered whether the means chosen were reasonable and demonstrably justified, and involved a three-part test known as the proportionality test. This proportionality test balances the interests of society with those of the individuals and groups whose rights are being infringed. In this respect, the court found that: i) there is a rational connection between the objective of ensuring access to health care and the means of achieving that objective by the CPSO Policies;¹² ii) the rights of the Applicants are impaired no more than necessary to achieve that objective, considering other proposed alternatives such as “self-referral” and a “transfer of care”, which could result in abandoning the patient, particularly those who are most vulnerable;¹³ and iii) the salutary effects of the effective referral requirement in the CPSO Policies, aimed at ensuring equitable access to health care in Ontario, is

⁸ *Ibid* at para 53.

⁹ [1986] 1 SCR 103.

¹⁰ *Supra* note 1 at para 140.

¹¹ *Ibid* at para 146.

¹² *Ibid* at para 154.

¹³ *Ibid* at paras 167-177.

proportionate to the deleterious effects of those CPSO Policies on the Applicants' and other religious physicians' right of freedom of religion.¹⁴

C. CONCLUSION

Charities and not-for-profits engaged in the provision of health care services in Ontario will want to take note of this decision. Even though it arose in the context of physicians' professional obligation to provide their patients with effective referrals for certain medical services available in Ontario, which the Applicants in this case objected to on moral or religious grounds, and did not deal with the obligation of hospitals to facilitate effective referrals, it is an important precedent balancing the right to freedom of religion against the right of patients to equitable access to health care.

¹⁴ *Ibid* at paras 191-211.