
ONTARIO COURT OF APPEAL AFFIRMS PATIENTS’ RIGHT TO EFFECTIVE REFERRAL

*By Jennifer M. Leddy**

A. INTRODUCTION

On May 15, 2019, the Court of Appeal for Ontario released its decision in *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*,¹ dismissing the appeal from the Divisional Court with regard to the constitutional validity of two policies of the College of Physicians and Surgeons of Ontario (“CPSO”), requiring physicians, even those who object on the basis of religion or conscience, to provide patients with an “effective referral” for services and resources, such as abortion and medical assistance in dying (the “CPSO Policies”). An effective referral in the CPSO Policies is defined as “a referral made in good faith, to a non-objecting, available and accessible physician, other health care professional, or agency.”

B. DECISION BY THE COURT OF APPEAL

The focus of the appeal was a review of the analysis done by the Divisional Court on whether the limits imposed by the CPSO Policies on the appellants’ religious freedom were justified under section 1 of the *Canadian Charter of Rights and Freedoms* (the “Charter”).² The Divisional Court decision held that the physicians’ freedom of religion under section 2(a) of the *Charter* was infringed by the CPSO Policies in a manner that was not “trivial or insubstantial” because they sincerely believed that complying with the effective referral policies would make them complicit in the medical procedures to which they objected.

* Jennifer M. Leddy, B.A., LL.B. is a partner practicing charity and not-for-profit law with the Ottawa office of Carters Professional Corporation.

¹ 2019 ONCA 393.

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

The infringement was saved by section 1 of the *Charter* as a reasonable limit, demonstrably justified in a free and democratic society.³

The appellants argued that the effective referral requirements in the CPSO Policies unreasonably impair their right to freedom of religion because less impairing alternative measures, such as “a generalized information” model, instead of a “direct individualized referral”, would achieve the same objective of informing patients about publicly-available resources and services while respecting objecting physicians’ freedom of religion. The “generalized information” model proposed by the appellants would have involved giving patients the telephone number of Ontario’s Care Co-ordination Service, established in Ontario to provide information on end-of-life options and Telehealth, which provides information on a variety of health services. The appellants also argued that the Divisional Court’s balancing of the salutary and deleterious effects of the CPSO Policies was flawed by its erroneous assumption that objecting physicians can change their specialty or sub-specialty to avoid the conflict between the CPSO Policies and their religious beliefs.

The Court of Appeal found that the Divisional Court did not err in its section 1 analysis, including the “proportionality test”, and agreed with the Divisional Court that requiring objecting physicians to give an effective referral will promote patients’ equitable access to health care services available to them. In this regard, the Court of Appeal found that the appellants failed to demonstrate how a “generalized information” model, like other “self-referral” models, would address the needs of vulnerable patients seeking information about resources and services. According to the Court of Appeal, the alternatives proposed by the appellants and some of the interveners would only minimize the burden imposed by the CPSO Policies on objecting physicians by compromising the goal of equitable access to health care because “it will enable objecting physicians to abandon their role as patient navigators without an appropriate transfer of the patient to another physician or service.”⁴ As well, the Court of Appeal agreed with the Divisional Court in finding that the CPSO Policies provided a “compromise” that was neither optimal for patients nor for the objecting physicians, but that the individual sacrifices of objecting

³ For further information on the Divisional Court decision, see Jennifer M Leddy, *Church Law Bulletin No. 53*, “Reconciling Physician and Patient Rights” (27 February 2018), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/church/2018/chchlb53.pdf>>.

⁴ *Supra* note 1 at para 160.

physicians did not outweigh the harm to vulnerable patients that would be caused by any reasonable alternative.

C. CONCLUSION

While it is currently unknown whether the appellants will seek leave to appeal to the Supreme Court of Canada, it is unlikely that we have heard the last of this issue, as the Ontario Medical Association supports the position of the appellants,⁵ and other jurisdictions have different policies that in the opinion of the appellants would be less impairing of the physician's right to religious freedom.



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⁵ *Ibid* at para 12.