Justice Centre
for Constitutional Freedoms

In Defence of *Charter* Freedoms

A legal analysis of the constitutionality of the draft policy

"Professional Obligations and Human Rights"

A submission to the

College of Physicians and Surgeons of Ontario

by

and the

Justice Centre for Constitutional Freedoms

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Contents

Summary

The draft Policy "Professional Obligations and Human Rights" (the "Draft Policy") proposed to the College of Physicians and Surgeons of Ontario (the "College") contains a number of critical legal errors, which render the affected portions of the Draft Policy constitutionally indefensible.

The Draft Policy incorrectly assumes that patients enjoy a legal right to access even controversial medical services from any and every physician. In fact, patients have virtually no legal rights to medical care. The Courts have expressly stated that there is no *Charter* right to health care, or to any particular health services. Conversely, the *Charter* expressly protects physicians' religious and conscience rights. The civil government, and government bodies such as the College, cannot violate physicians' *Charter* rights to freedom of conscience and religion unless such violation is demonstrably justified. In light of the context of health services in Ontario, the purposes of eliminating discrimination and promoting access to health care, while praiseworthy, do not justify the Draft Policy's violation of physicians' *Charter* rights.

The Draft Policy purports to address discrimination in the provision of health services, and repeatedly references Ontario's *Human Rights Code*. However, a physician who is unable to provide or refer a patient for a particular health service on account of the physician's sincere religious or conscientious belief is not engaging in discrimination; this inability or refusal does not violate the *Code*. The inability to provide or refer for that health service is not based on or related to the patient's personal characteristics (e.g. age, gender, religion, disability, etc.). Rather, this inability to provide a particular service or referral stems from the physician's religious or conscientious belief that the service in question causes harm.

Promoting access to health services is a commendable objective. No one could deny that in many areas health services are subject to undesirable even unacceptable delays. And despite the Supreme Court's ruling in *Chaoulli c. Quebec*,[1] the effective prohibition of private health insurance impedes many Canadians in accessing timely health services. However, there is no basis on which to conclude that physicians, by exercising their freedom of conscience, actually impede access to health care. Some patients may occasionally experience minor inconvenience when informed by a physician that reasons of conscience prevent the physician from providing or referring with respect to a desired service. However, with an abundance of physicians and facilities available to perform such controversial services,[2] patients will still receive these services in timely manner. The Draft Policy neither provides nor points to any evidence showing that controversial services such as abortion suffer greater delays in access to care than non-controversial services, such as knee surgery.

The clinical aspect of the practice of medicine cannot be separated from the moral, religious and ethical beliefs of physicians that form an essential part of providing health services to other human beings. The Draft Policy's attempt to separate the "clinical" from the "moral" in the practice of medicine is a dangerous and destructive step that contradicts the ethical foundations of medicine that have existed for millennia.

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[1] *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35 [*Chaoulli*].

[2] We recognize that since assisted suicide was only recently legalized in *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter*], there is currently no access to assisted suicide in Canada.

Government bodies such as the College have an obligation under the *Charter* and Ontario's *Human Rights Code* to accommodate the religious and conscientious beliefs of physicians to the point of undue hardship. The Draft Policy ignores this obligation entirely, while incorrectly asserting a need to "balance" *Charter* rights with the wishes and desires of patients. These wishes and desires are not legal rights.

The Draft Policy's requirement that physicians provide referrals for, and in some cases perform, services which they sincerely believe are morally wrong is grossly deficient from a *Charter* perspective, and if adopted would be found unconstitutional by a court. A referral is not a morally neutral action, as the College itself recognizes. Further, the drastic measure of forcing physicians to violate their consciences by performing services they believe are wrong is vague and subjective, making it impossible to qualify as a reasonable limit on physicians' conscience rights. The College cannot point to evidence of a pressing need that would justify these requirements.

The College should seek to support physicians' adherence to their own individual consciences. Alternative measures which reasonably accommodate physicians with religious or conscientious objections should be developed and implemented.

Providing health services without discrimination

The Draft Policy claims that it "articulates physicians' professional and legal obligations to provide health services without discrimination." Under the heading of "Limiting Health Services for Legitimate Reasons", the Draft Policy later states that "[t]he duty to refrain from discrimination does not prevent physicians from limiting the health services they provide for legitimate reasons."

The Draft Policy recognizes that discrimination occurs in relation to the patient's own individual characteristics, such as race, gender or disability, and defines discrimination as follows:

> Discrimination may be described as an act, decision or communication that results in the unfair treatment of a person or group by either imposing a burden on them, or denying them a right, privilege, benefit or opportunity enjoyed by others. Discrimination may be direct and intentional. Alternatively, discrimination may be entirely unintentional, where rules, practices or procedures appear neutral, but may have the effect of disadvantaging certain groups of people.

However, the Draft Policy errs when it suggests that Ontario's *Human Rights Code* (the "*Code*") entitles patients to receive certain (or any) medical services. The *Code* does not do so.

Rather, the *Code* prohibits treating some patients differently from other patients on account of an enumerated personal characteristic *of the patient*. Contrary to what the Draft Policy states, refusing to provide or refer for a particular medical service does not constitute discrimination under the *Code*. Thus, if a doctor prescribes contraception measures only to patients of a certain

nationality, and not to patients of a different nationality, that doctor is discriminating. Such action is prohibited by the *Code*. However, if a physician refuses to provide contraception measures to all of her patients, because the physician herself believes such measures are physically harmful or morally wrong, or that there are better methods a patient should pursue, such action is not discrimination under the *Code*. Rather, for this physician to follow her conscience is an exercise of her fundamental freedom, protected under section 2(a) of the *Charter*.

The legal rights of patients

The Draft Policy implies that patients have a right to health services under the *Charter* and the *Code*, stating:

> Where physicians choose to limit the health services they provide for moral or religious reasons, this may impede access to care resulting in a violation of patient rights under the *Charter* and the *Code*.

Patients have no *Charter* right to health services

The *Charter* places no obligation on the government to provide people with health care, even of a minimum standard.[3] In *Flora v. Ontario Health Insurance Plan*, the Ontario Court of Appeal rejected the argument that "s. 7 imposes a positive obligation on the state to provide life-saving medical treatments".[4]

If the *Charter* does not even require the government to provide *life-saving* treatments to patients, then the *Charter* certainly does not give patients a right to access any health care procedure from any individual physician.

The Draft Policy incorrectly cites *R. v. Morgentaler*[5] as authority for the proposition that patients' have a *Charter* right to health services that can be violated by individual physicians. In fact, the Court in *Morgentaler* struck down a federal law that caused delays in receiving abortion. Since these delays and consequent risks to the health of women were caused by the government statute,[6] the government was found to be impeding access to abortion without a rational justification, thus infringing the patient's right to security of the person under section 7 of the *Charter*. The Court in *Morgentaler* did not establish a right to abortion, nor did it establish an obligation on the part of physicians to provide or refer for abortions. More

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[3] See *Chaoulli* at para. 104: "The *Charter* does not confer a freestanding constitutional right to health care"; *Gosselin c. Québec (Procureur général)*, 2002 SCC 84 at para. 81: "Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to *deprive* people of these."

[4] *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538 at paras. 93, 108 [*Flora*]: "On the law at present, the reach of s. 7 does not extend to the imposition of a positive constitutional obligation on the Ontario government to fund out-of-country medical treatments even where the treatment in question proves to be life-saving in nature."

[5] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at pp. 58-61 [*Morgentaler*].

[6] *Morgentaler* at pp. 59, 73.

specifically, *Morgentaler* did not establish any *Charter* right to health services for patients. Like the Court's decision in *Chaoulli*, the Court in *Morgentaler* struck down a law because it impeded access to health services, not because the law failed to provide health services to patients.

The Draft Policy also fails to recognize that the *Charter* applies to government, and to government bodies like the College of Physicians and Surgeons, but not to individual physicians. Every statute enacted must comply with the *Charter*, and every government body must comply with the *Charter* when creating its policies, as required under s. 32.[7] However, individual doctors, in their determination of what health services are the best for their patients, are not subject to the government's obligations under the *Charter*. It is no coincidence that the Draft Policy does not cite any authority for its assumption that the *Charter* governs a physician's relationship with her patient.

An individual physician whose beliefs restrict her from providing or referring for abortions or certain forms of contraception simply does not violate the *Charter* rights of any patient. The College errs when it asserts that "competing rights" need to be "balanced", because there are no competing rights in this scenario.

Patients have no right to health services under the *Code*

The Draft Policy assumes, incorrectly, that the *Code* provides patients with a legal right to receive whatever health services they want.

The *Code* does no such thing.

As explained above ("Providing health services without discrimination"), the *Code* prohibits a physician from discriminating against a patient on the basis of an enumerated personal characteristic that patient may possess (e.g. age, gender, handicap, race, etc.). However, a physician unable to perform or prescribe certain medical treatments or procedures because of her moral, religious or ethical beliefs is not discriminating against any patient on the basis of an enumerated personal characteristic.

Further, the College has not provided any evidence to support the conclusion that physicians exercising their conscience rights cause harm. Instead, the College operates in the rather nebulous realm of a general perception, ignoring the necessity of specific evidence of harmful discriminatory conduct.[8]

Legal arguments aside, the reality is that patients' access to medical services is only affected in a very minimal way, if at all, by physicians exercising their conscience rights. Consider, for example, the uproar in 2014 about *three* Ottawa doctors who objected to prescribing contraceptives when there were *3,921 other physicians* in the Ottawa area. Even the young

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[7] "This Charter applies (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

[8] See *Trinity Western University v. B.C. College of Teachers*, 2001 SCC 35 at para. 38 [*TWU v. BCCT*].

woman at the centre of the sensational story was able to go around the block and promptly obtain a prescription from another clinic.

Permitting a physician to exercise her *Charter* right to not participate directly or indirectly in health services that violate her conscience will not affect patient access to controversial services such as contraception or abortion. Patients in Ontario can obtain these services by a self-referral from public health clinics.

The misleading claim of "impeding" access to care

The Draft Policy frequently warns physicians that the exercise of their religious and conscience rights could "impede" patients' access to care. For example, the Draft Policy states:

> Where physicians choose to limit the health services they provide for moral or religious reasons, this may impede access to care resulting in a violation of patient rights under the *Charter* and the *Code*. [Emphasis added]

The use of the term "impede" in reference to individual physicians' exercise of their freedom of conscience of religion is inappropriate and misleading. The dictionary definition of "impede", quoted by the Ontario Court of Appeal in *R. v. Meszaros*, is to "obstruct or hinder".[9] The facts of *Meszaros* give a dramatic example of "impeding" in violation of section 265(1) of the *Criminal Code*:

> The appellant fired the shotgun. Whether he fired it in the air or in the direction of the poachers is immaterial: he used the firearm. He ordered Thorne to remain, accosting and impeding him from leaving the premises; and he did so while carrying the gun. Whether the gun was pointing at Thorne or was pointing in the air is also immaterial.[10]

In *Flora*, the Court held that a provincial regulation did not "prohibit or impede anyone from seeking medical treatment" despite the fact that the regulation specifically denied funding treatments that were not "generally accepted in Ontario as appropriate for a person in the same medical circumstances as the insured person."[11] This regulation denied Mr. Flora funding for the life-saving treatment that he needed. Fortunately, Mr. Flora scraped together $450,000 to pay for saving his own life through treatment in the United Kingdom. The Ontario Court of Appeal held that this regulation, which denied funding for life-saving care, did not impede Mr. Flora:

> In contrast to the legislative provisions at issue in *Chaoulli*, *Morgentaler* and *Rodriguez*, s. 28.4(2) of the Regulation does not prohibit or impede anyone from seeking medical treatment.[12]

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[9] *R. v. Meszaros*, 2013 ONCA 682 at para. 47 [*Meszaro*], citing *The Oxford English Dictionary*, 2d ed.
[10] *Meszaros* at para 36.
[11] *Flora* at para 6.
[12] *Flora* at para 101.

To obstruct, impede, or hinder a person connotes an active intention. If a physician explains to a patient that the physician has a moral, ethical, or religious objection to a treatment or procedure, that physician is not "impeding" that patient's access to such medical services. Neither are those physicians who proactively take steps to notify potential patients that they do not provide certain controversial services. There is no active intention to obstruct or hinder the patient from receiving such care, just an explanation that the physician cannot participate in providing it.

As an analogous example, if a customer goes to a butcher to buy some pork chops and discovers that the butcher is a devout Muslim or Jew who refuses to sell pork, and even refuses to direct customers to other butchers offering pork, that butcher is not "impeding" the potential customer's access to pork. Rather, the butcher is merely refusing to participate in, or facilitate, the potential customer's purchase of pork. If however, the Muslim or Jewish butcher prevented the pork-loving customer from leaving the store to go elsewhere, this would be "impeding" the customer from purchasing pork.

That no physician should impede patients' access to care is indisputable. The Draft Policy twists and distorts the term "impede" by using this term in reference to a physician expressing religious or moral objections to certain health services. The Draft Policy incorrectly and unfairly attributes to such physicians an active intention to obstruct or hinder patients' access to those health services.

The clinical and moral practice of medicine

The Draft Policy creates an artificial and dangerous division between "clinical" reasons on the one hand, and "moral" and "religious" reasons on the other.[13] Without foundation or explanation, the Draft Policy proclaims a hierarchy of beliefs, with "clinical" beliefs deserving unquestioning deference, in contrast to moral, ethical and religious beliefs that can be readily dismissed.

The Draft Policy provides no basis for breaking down the practice of medicine into purely "clinical" as opposed to "moral" or "religious" decisions. The impropriety of such a distinction is demonstrated by the moral (even religious) presuppositions and values found in the Hippocratic Oath, which has guided physicians for millennia. Likewise, the Canadian Medical Association *Code of Ethics* also promotes the moral practice of medicine, exhorting physicians to "[r]esist any influence or interference that could undermine your professional integrity", "[r]efuse to participate in or support practices that violate basic human rights" and "[r]ecommend only those diagnostic and therapeutic services that you consider to be beneficial to your patient or to others."[14]

The Physician's Oath in the Declaration of Geneva[15] provides further examples of the importance of morality and ethics to the practice of medicine:

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[13] See Draft Policy, lines 81-84; 138-141; 152-154.
[14] Available at http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD0 Co4-06.pdf.
[15] Available at http://www.wma.net/en/30publications/10policies/g1/.

I solemnly pledge to consecrate my life to the service of humanity;

I will give to my teachers the respect and gratitude that is their due;

I will practise my profession with conscience and dignity;

The health of my patient will be my first consideration;

I will respect the secrets that are confided in me, even after the patient has died;

I will maintain by all the means in my power, the honour and the noble traditions of the medical profession;

My colleagues will be my sisters and brothers;

I will not permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene between my duty and my patient;

I will maintain the utmost respect for human life;

I will not use my medical knowledge to violate human rights and civil liberties, even under threat;

I make these promises solemnly, freely and upon my honour.

The Declaration of Geneva is based on the grave concerns arising from the purely scientific use of medical training by Nazi Germany and Imperial Japan, unhinged from guiding values of religion, ethics, and morality.

Members of the medical profession apply the moral values of the Physician's Oath every day. Relegating moral and religious principles to a diminished status in the practice of medicine, as the Draft Policy appears to do, ignores the fact that the practice of medicine is an inseparably moral exercise.

Courts and physicians recognize that you cannot remove morality from medicine. In *Flora*, the Ontario Court of Appeal repeated the testimony of Dr. Peter Singer, an Ontario professor of medicine, a bio-ethicist and the Director of the University of Toronto Joint Centre for Bioethics. Dr. Singer had testified that "the appropriateness of a proposed medical treatment for a particular patient is 'not purely a medical concept'. To the contrary, 'a physician's determination about whether treatment is appropriate includes not only medical facts like the projected chance of success but also ethical considerations.'"[16] The Court also noted that "[i]n their evidence before the Board, Mr. Flora's U.K. doctors and Dr. Wall also confirmed that ethical considerations form an essential part of medical decision-making concerning patient selection for a LRLT [a living-related liver transplantation]."[17] In the case before it, the Court found, that "the thesis that the

[16] *Flora*, at para. 75.
[17] *Flora*, at para. 75.

appropriateness of a LRLT turns solely on its medical efficacy brushes aside the centrality of ethical considerations in transplant decision-making."[18]

The ability of a physician to practise medicine with a free conscience should be promoted and encouraged. Attempting to draw a line in medical practice between the required "clinical" and the optional "moral" (which can be, but need not be, informed by religious beliefs) is misguided if not dangerous. Science can inform physicians as to what dosage of which drug will end the patient's life. Science provides no guidance as to whether doing so is right or wrong, or under what conditions. A physician who is guided only by science, to the exclusion of morality, religion and ethics, is inherently untrustworthy.

The College, as government, must comply with the *Charter*

The College, as the statutorily-enacted governing body of a self-regulating profession, is a state actor. [19] The College must respect the *Charter* rights physicians.

Since Courts have ruled expressly that patients do not enjoy a *Charter* right to receive health services, the College does not need to engage in any "balancing" of *Charter* rights.

The Draft Policy treats physicians' conscience rights as merely a personal choice[20] and not an essential part of the physician's personal makeup. The Draft Policy repeatedly indicates that physicians' religious convictions are merely a basis on which some physicians are "unwilling to provide certain elements of care" and thus "choose to limit the health services they provide".[21] This ignores the fact that religious belief is recognized as an important personal characteristic, expressly protected by both section 2(a) and section 15(1) of the *Charter*, which prohibits discrimination on basis of religion and other personal characteristics.

The Supreme Court of Canada has held that "the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom and to eliminate any possibility of a person being treated in substance as 'less worthy' than others."[22] The Court continued, quoting its earlier decision in *Miron v. Trudel*:

> This principle recognizes the dignity of each human being and each person's freedom to develop his body and spirit as he or she desires, subject to such limitations as may be justified by the interests of the community as a whole. It recognizes that society is based on individuals who are different from each other, and that a free and democratic society must accommodate and respect these differences. [23]

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[18] *Flora*, at para 76.
[19] See *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25.
[20] See Draft Policy, lines 12-13; 118-119; 129-135.
[21] Draft Policy, lines 131-141;
[22] *Droit de la famille – 091768*, 2013 SCC 5 at para. 138 [*Droit de la famille*] [internal quotes omitted].
[23] *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 145.

The Draft Policy fails to respect physicians' *Charter*-protected religious convictions as an integral personal characteristic, and dismisses them as simply a personal "choice". Justice Charron, in *Multani c. Marguerite-Bourgeoys (Commission scolaire)*, stated that a view which ignores the religious obligations that dictate the actions in question (e.g. equating wearing a chador with others wearing a ball cap) "is indicative of a simplistic view of freedom of religion that is incompatible with the *Canadian Charter*."[24]

This kind of dismissive approach can been seen in the comments of Dr. Marc Gabel, the chair of the working group which created the Draft Policy, who has been quoted as suggesting that pro-life physicians should probably not be family physicians. The pro-life views of physicians, which are often (though not always) founded on religious or conscientious beliefs, must be recognized, respected and accommodated as a personal characteristic of the physician.

"Under the *Charter*, it is unfair to limit an individual's full participation in society solely because the individual has one of these personal characteristics [i.e. religion under *Charter* section 15] . . . Likewise, it is unacceptable to refuse on the basis of these characteristics to treat a person as a full member of society who deserves to realize his or her full human potential".[25] The Supreme Court held in *TWU v. BCCT* that "freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society."[26] In the same way that a person's religious beliefs and practices cannot be used to deny that person entry into the teaching profession, the College cannot deny a person entry into the practice of family medicine because of that person's moral or ethical beliefs.

The *Charter* protects freedom of conscience and religion

Foundational principles concerning freedom of religion were laid down by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*: [27]

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. ... The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. *If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.* ... [C]oercion includes indirect forms of control which determine or limit alternative courses of conduct available to others...

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[24] *Multani c. Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6 at para. 74 [*Multani*].
[25] *Droit de la famille*, at para. 140.
[26] *TWU v. BCCT*, at para. 35.
[27] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 336-37 [*Big M Drug Mart*].

> *What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not ... be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority*". [Emphasis added].

Medicine is one of many public spheres in which an individual can choose to work. The fact that a person provides services to the public, and the fact that some or all of those services are paid for directly or indirectly by government, does not remove *Charter* protection from individuals who serve the public. In particular, a person providing services to the public does not lose her *Charter* section 2(a) freedom of conscience and religion.

The government's duty to accommodate physicians

The Draft Policy notes that physicians are expected to accommodate patients up to the point of undue hardship by enabling access by those with mobility limitations, permitting guide dogs on their premises, allowing sign-language interpreters, being considerate of those with communication barriers, and being flexible in scheduling appointments for those with family-related needs. This is well and good, but incomplete, because it ignores the *Charter* freedoms of physicians.

The Draft Policy fails to recognize the government's legal duty to accommodate physicians, in particular physicians' conscience and religious rights. The College must accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.[28]

Accommodation Required under Employment Law

Acting as an employer, the government has a duty to accommodate the conscientious and religious beliefs of physicians.

Employers must reasonably accommodate their employees to the point of undue hardship. A seminal case on "reasonable accommodation" was *Ont. Human Rights Comm. v. Simpsons-Sears*,[29] where the complainant, Mrs. O'Malley, was a member of the Seventh-Day Adventist Church. She was required by her employer, Simpson-Sears, to work on Saturdays, contrary to her religious faith that required her to observe the Saturday Sabbath.

The Court introduced the concept of reasonable accommodation as follows:

> The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate

[28] *Big M Drug Mart Ltd.* at 336.
[29] *Ont. Human Rights Comm. v. Simpsons-Sears* [1985] 2 SCR 536 [referred to as "*O'Malley*"].

> without undue interference in the operation of the employer's business and without undue expense to the employer.[30]

Accommodation Required by the *Charter*

Accommodation is not limited to employment matters, but can be found in *Charter* jurisprudence relating to s. 1 of the *Charter*, under which government must justify its violation of rights and freedoms if it wants its law or policy to be upheld. The concept of accommodation will apply even to otherwise valid policies or legislation where there is interference with a *Charter* or human right.

In *Multani*, the Supreme Court found there to be a logical correspondence between the legal principles of the duty to accommodate from employment law and the minimal impairment test under s. 1 of the *Charter*.[31] The Court described the duty to accommodate as "a duty to make reasonable accommodation for individuals who are adversely affected by a Policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it."[32]

Draft Policy provisions that violate physicians' *Charter* freedoms

With the above principles and considerations in view, we turn to consider the specific requirements of the Draft Policy that violate physicians' *Charter* rights.

Requiring an "Effective Referral"

The Draft Policy requires that a physician who is "unwilling" to provide certain health services on account of "moral or religious beliefs" must provide "an effective referral" to another health care provider, who is "non-objecting, available and accessible".[33]

People understand that providing a referral for a certain services is not a morally neutral action. The College itself recognizes that if a procedure is wrong, referring for that procedure is also wrong. For example, the College expressly prohibits physicians from not only performing, but also referring for, female genital cutting/mutilation (FGC/M).[34] The College's policy states:

> Physicians must not perform any FGC/M procedures. Further, physicians must not refer patients to any person for the performance of FGC/M procedures.
>
> The performance of, or referral for, FGC/M procedures by a physician will be regarded by the College as professional misconduct.

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[30] *O'Malley* at para. 23.
[31] *Multani* at paras. 52-53.
[32] *Multani* at para. 53.
[33] Draft Policy, lines 156-164.
[34] Available at http://www.cpso.on.ca/policies-publications/policy/female-genital-cutting-%28mutilation%29.

Likewise, where physicians have religious or conscientious beliefs that a certain health service is morally wrong, forcing them to provide a referral for that service violates their freedom of conscience and religion.

Under the principles enunciated above, a court would not find as demonstrably justified the requirement that each and every physician, regardless of the physician's conscientious or religious beliefs, provide an "effective referral" for any desired health services. What "undue hardship" would be caused by accommodating those few physicians whose sincere religious or conscientious beliefs prevent them from referring for certain controversial health services? With respect, the College could not defend this violation of conscience rights under section 1 of the *Charter* as "demonstrably justified in a free and democratic society."

Requiring the provision of services that conflict with moral or religious beliefs

The Draft Policy's requirement that physicians provide "urgent or otherwise necessary" care to prevent "imminent harm, suffering, and/or deterioration, even when that care conflicts with their religious or moral beliefs"[35] is troubling in light of the *Charter*'s protection for the individual to act on her or his conscience.

While many physicians would be willing to give a patient information about controversial forms of care, or even be willing to provide a referral to another physician who would provide such care, in many cases, those same physicians would be prohibited by their own conscientious or religious beliefs from providing such care themselves.

Providing services such as abortion or assisted suicide conflict with the common religious proscription against killing, as well as the moral principles outlined in the traditional Hippocratic Oath. There are likely many doctors who have sincere religious or conscientious beliefs that would prohibit them from performing such medical procedures, regardless of whether others deem such procedures "urgent" or "necessary." Yet, this requirement forces physicians to perform procedures that directly contradict their conscientious or religious beliefs, clearly interfering with the practice of those beliefs. Thus, a violation of such physicians' *Charter* right to freedom of conscience and religion is established.

The Supreme Court of Canada, in finding that the government prohibition on assisted suicide violated patients' section 7 rights to security of the person and life in certain circumstances, specifically warned about compelling physicians to participate in assisted suicide:

> In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures. However, we note — as did Beetz J. in addressing the topic of physician participation in abortion in *R. v. Morgentaler* — that a physician's decision to participate in

[35] Draft Policy, lines 168-169.

assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96).[36]

The terms employed by the Draft Policy in stating this requirement are ambiguous and open to subjective interpretation. What makes a certain type of health service "urgent"? What does "necessary" mean in this context? Does "harm" refer to any kind of harm or only serious harm? Is "harm" physical or psychological as well? What constitutes "deterioration"? Who defines such terms?

With such subjectivity in the terms of this requirement, it is doubtful whether it could even qualify as a "limit prescribed in law" under section 1 of the *Charter*. A reasonable doctor would not have certainty about what procedures are, or are not, required.

The wide-spread availability of controversial medical procedures is relevant. There is no indication that access to abortion is more limited than access to health services generally. The fact that there are clinics that provide abortions without referrals undercuts the argument that all family physicians should be willing to provide abortions in certain circumstances. It is possible and even likely that a similar practice and speciality as currently exists for abortion will develop for assisted suicide.

One can argue that preventing "imminent harm, suffering and/or deterioration" is a sufficiently pressing and substantial objective to justify violating physicians' conscientious and religious rights. However, the fact remains that patients do not have a *Charter* right to obtain from every physician whatever medical service they may desire. Conversely, physicians *do* have a *Charter* right to act on, and be guided by, their moral, ethical or religious beliefs, without this freedom being violated by a government body like the College.

The direct violation of many physicians' *Charter* freedom of conscience and religion outweighs the benefits, if any, that may result from requiring all physicians to perform controversial treatments rather than permitting physicians to provide alternative, non-controversial treatments that do not violate their conscientious or religious beliefs. In the relevant context, which is that controversial medical services are readily available from the majority of physicians, there is no rational connection to support a requirement that *every* doctor be available to perform, or refer for, every health service. This requirement does not appear to be directed by, or based on, reality or practical needs, but instead appears to be driven by ideology.

Further, physicians unable to provide certain services on account of their beliefs do not abandon their patients. Rather, they continue to provided care and alternative health services such as NFP for family planning, non-abortive obstetrical care for pregnancy-related issues, and palliative care for end of life suffering.

Along with the rest of the Draft Policy, this requirement is void of any recognition of the government's duty to accommodate the religious and conscientious beliefs of physicians.

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[36] *Carter* at para 132.

Consequently, this requirement provides a stark example of a violation of physicians' *Charter* freedom of conscience and religion.

Conclusion

The College has failed to explain why it would be necessary to require every doctor in Ontario to provide or refer for abortion, assisted suicide, and other controversial health services. The College provides no rationale for failing to accommodate the moral, ethical, religious or conscientious objections of physicians who disagree with these services.

The College must accommodate the religious and conscientious objections of doctors unless doing so would impose undue hardship on the College.

In the Draft Policy, no recognition is given of the government's duty to accommodate physicians without incurring undue hardship to the medical system.

This failure to recognize the government's duty to accommodate physicians results in the College taking a dismissive approach to physicians' *Charter* rights and infringing those rights in the name of encouraging access to health services.

In order to justify any infringement of a physician's conscience rights under section 2(a) of the *Charter*, the College would need to act on specific evidence of harm to others. Erroneous assumptions that physicians exercising their conscience rights impede access to care or constitute discrimination do not justify the provisions of the Draft Policy that violate physicians' conscience rights.

About the Justice Centre for Constitutional Freedoms

The Justice Centre for Constitutional Freedoms ("JCCF ") is a registered charitable organization, independent and non-partisan, with a mission to promote and defend the constitutional freedoms of Canadians through litigation and education. To carry out its mission, the JCCF relies entirely on voluntary donations from thousands of individual donors across Canada, as well as support from charitable foundations. The JCCF does not ask for, or receive, any funding from government.

The JCCF's Board of Directors and Advisory Council include lawyers, law professors, academics and others active in the realm of Canadian public policy. Our Board of Directors and Advisory Council serve to significantly enhance the JCCF's experience and expertise in Canadian constitutional matters. Further, the JCCF maintains collaborative relationships with approximately 30 lawyers across Canada, including law professors and retired judges, who are involved on a *pro bono* basis with the JCCF's litigation files.

The focus of the JCCF's advocacy is on sections 2 and 7 of the *Canadian Charter of Rights and Freedoms*. The JCCF's activities, both in education and litigation, foster its expertise and unique perspective on the application of the *Charter*. The JCCF acts for citizens whose *Charter* rights and freedoms have been infringed by government