

BREAKING CASE LAW

*Christian Medical
and Dental Society
of Canada v. College
of Physicians and
Surgeons of Ontario,
2019 ONCA 393*



This Issue

The Intersection Between Professional Regulation and Religious Freedom

Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario, 2019 ONCA 393

This appeal involved devout, religious Christian physicians (the Physicians) who challenged policies imposed by the College of Physicians and Surgeons (CPSO) on constitutional grounds. The challenged policies required physicians to make an “effective referral” for patients requiring a medical procedure or pharmaceutical that the Physicians objected to base on their religious beliefs.

The Court of Appeal held that the challenged policies infringed the Physicians’ rights to religious freedom under the Charter, but that these infringements were justified under section 1 of the Charter. The Court stated that the Physicians have no constitutional right to practice medicine, and they are subject to requirements that focus on the public interest rather than their interests. The challenged policies’ “effective referral” requirement represents a compromise between the physician and their patient, as the vulnerable patient is losing the support of their chosen physician. The Court stated:

“...Ordinarily, where a conflict arises between a physician’s interest and a patient’s interest, the interest of the patient prevails. The default expectation is that the physician is to personally provide their patient with all clinically appropriate services or to provide a formal referral. Patients expect that their physicians will do so. However, the Policies do not require this. They represent a compromise. They strike a reasonable balance between patients’ interests and physicians’ Charter-protected religious freedom. In short, they are reasonable limits prescribed by law that are demonstrably justified in a free and democratic society.”

Background

The CPSO enacted two policies which required a physician to make an “effective referral” if they objected to performing a procedure or providing particular pharmaceuticals to a patient. An “effective referral” requires a physician to refer a patient to a non-objecting, available, and accessible physician, other health-care professional, or agency, instead of performing the procedure themselves.

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The appeal was dismissed for two reasons. First, the Court of Appeal found that the policies' "effective referral" requirement infringed the Appellant's Charter rights to religious freedom. Next, the Court considered whether the infringement could be justified under section 1 of the Charter, and found that it could.

The requirement to be "prescribed by law" was not in dispute, as the parties agreed that the challenged policies were made by the CPSO in accordance with its statutory mandate.

The Court of Appeal found that the objective was sufficiently important, and adopted the lower Court's rationale that the absence of the "effective referral" requirement would result in a risk of a deprivation of equitable access to healthcare.

The Court held that there is a rational connection between the objective of the challenged policies and the means of achieving the objective. The limits on the Physicians' religious freedom further the goal of the "effective referral" requirement, which is to promote equitable patient access to health care services when the physician objects to perform such procedures themselves.

The Physicians argued that a "generalized information" model, which would permit physicians to provide patients with information resources to enable patients to locate a non-objecting physician, was a less impairing alternative. However, the Court stated that this model was insufficient and would not achieve the objective of ensuring equitable access to health care.

The Court stated that the salutary effects of the effective referral requirements are that it enhances equitable access healthcare and it reduces or eliminate barriers, delays, anxiety and stigmatization of vulnerable patients. The deleterious effects of the requirements for objecting physicians are that the burden and anxiety associated with a choice between their religious beliefs and complicity in acts which the Physicians regard as sinful.

The Physicians argued that the challenged policies would force physicians to leave family practice, move to other practice areas, leave Canada, or even cease practicing medicine altogether and therefore the challenged policies would harm the public. In response, CPSO argued that the impact of the challenged policies is minimal and does not require physicians to change their specialty. The burden is one of practice management and can be addressed through administrative measures such as implementing a system to triage specific patient requests, partnering with another non-objecting physician, or hiring support staff. Physicians who cannot implement such measures have the option to change the scope of their practice, an action which does not require retraining.

The Court of Appeal agreed with the CPSO. Patients should not bear the burden of managing the consequences of physicians' religious objections. Further, the "compromise" arrived at by the CPSO is not optimal for patients, who must accept being referred for the medical procedures if their physician objects to the procedure. The burden imposed by the challenged policies is minimal and is acceptable.

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