CMDS v CPSO: Conscience-Based Objections to MAID and Ontario's Effective Referral Policy

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Abstract

Medical regulators across Canada have responded to the challenge of conscience-based objections to medical assistance in dying (MAID) with divergent approaches. In Ontario, the College of Physicians and Surgeons (CPSO) has decided that physicians with a conscience-based objection to MAID must provide an "effective referral" for any patient who requests one. In the recent case of *CMDS v CPSO*, the Christian Medical and Dental Society challenged this policy, arguing that it violates their members' rights to freedom of religion and equality. The court dismissed the constitutional challenge, holding that although the policy did infringe freedom of religion, it was justified because of the need to ensure equitable access to healthcare. This paper will briefly outline the court's reasons in the case and discuss some of the implications for affected physicians.

Keywords: medical assistance in dying, MAID, conscience-based objection, effective referral

In 2015, in *Carter v Canada (Attorney General)*, the Supreme Court struck down the prohibition on medical assistance in dying (MAID)[1]. Even at that time, it was already apparent that the degree to which healthcare providers could be compelled to participate in MAID would be a significant issue going forward. The Court in *Carter* was careful to say that nothing in their decision compelled any physicians to provide MAID and observed that "the *Charter* rights of patients and physicians will need to be reconciled."[2] However, the Court also declined to "pre-empt the legislative and regulatory response" by giving more concrete guidance on the rights and responsibilities of physicians with conscience-based objections to MAID.[3] Instead, the challenge was left for another day.

The legislative and regulatory response that the Court predicted has since arrived. Across the country, different medical regulators have crafted their own approaches to the difficult question of conscience-based objections to MAID. Here in Manitoba, policy of the College of Physicians and Surgeons of Manitoba (CPSM) requires a physician with a conscience-based objection to MAID to provide patients requesting MAID with "timely access to a *resource* [emphasis added]," which will "provide accurate information about MAID."[4] The CPSM is explicit in that an objecting physician is not required to refer a patient to another physician who will provide MAID.[5] Moreover, "resource" is defined broadly, encompassing not just other healthcare providers, but also "publicly available resources" that "provide reliable information about MAID."[6] This policy greatly attenuates the role that a physician with a conscience-based objection to MAID must play in providing access to care. In contrast, the College of Physicians and Surgeons of Ontario (CPSO) has mandated that physicians with a conscience-based objection to MAID must provide an "effective referral" for any patient that requests it.[7] The CPSO defines an effective referral as one that is made "to a non-objecting, available, and accessible physician, nurse practitioner or agency."[8] This requires a physician to play a more direct role in the delivery of MAID than in Manitoba.

In this article, I will briefly discuss a recent court challenge by the Christian Medical and Dental Society (CMDS), and some of its members in Ontario (collectively, the "applicants"), to the CPSO's effective referral policy. In *CMDS v CPSO*, the applicants challenged the Ontario MAID policy by arguing that it unjustifiably infringed their rights to freedom of conscience

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[1] 2015 SCC 5, [2015] 1 SCR 331 *[Carter]*.

[2] *Ibid* at para 132.

[3] *Ibid.*

[4] College of Physicians and Surgeons of Manitoba; "Medical Assistance in Dying", online: https://cpsm.mb.ca/cjj39alckF30a/wp-content/uploads/PAD/MAIDschm.pdf

[5] *Ibid.*

[6] *Ibid.*

[7] *CMDS v CPSO*, 2018 ONSC 579 at para 12.

[8] *Ibid.*

[9] *Ibid* at para 1.

and religion as well as their equality rights.[9] The Divisional Court held that, although the policy did infringe on the applicants' freedom of religion, the infringement was justifiable given the need to ensure equitable access to healthcare services.[10] The Court also rejected the equality rights claim.[11] This decision represents an attempt to balance the competing interests of physicians with conscience-based objections and patients requesting MAID. The decision has since been upheld at the Court of Appeal for Ontario, and it is possible that it has sufficient national importance to eventually reach the Supreme Court. Nonetheless, it is still worthwhile to examine the reasoning of the Divisional Court because this case has significant implications for the constitutional protections for conscience-based objections to providing MAID across Canada. While only the Ontario policy is being challenged, if the CMDS is successful, it could lead to new constitutional limits on the power of all Canadian medical regulators in this area.

I will begin with the Court's analysis on the issue of freedom of religion. The applicants, CMDS and some individual physicians, argued that an "effective referral" would require them to be complicit in acts that they viewed as immoral or sinful, and therefore the MAID policy violated their rights to freedom of religion.[12] The CPSO argued that the policy did not impose significant burdens on the applicants for several reasons, including the fact that the act of a referral is not akin to participating in MAID and a referral does not guarantee that MAID will ultimately be performed.[13] Nonetheless, the Court agreed with the applicants and found a violation of their freedom of religion. A key theme in the Court's reasoning was a reluctance to make judicial determinations of the precise requirements of religious doctrine.[14] Although a referral may appear to be quite removed from participation from MAID to an external observer, it is difficult for courts to objectively assess the impact of even indirect participation in MAID on a person with sincerely and deeply held religious beliefs. The upshot is that courts (and presumably regulators) will not extensively scrutinize the beliefs of physicians who assert a conscience-based objection to providing a given medical treatment.

However, in Canadian constitutional law, a law is not struck down simply because the applicants establish an infringement of one of their constitutional rights. There is a subsequent analysis wherein the government has an opportunity to argue that the infringement is justified.[15] In this case, the CPSO argued that the infringement of the applicants' freedom of religion was justified because of the need to provide equitable access to health services for Ontarians. The Court accepted this objective and upheld the MAID policy despite the infringement of the applicants' freedom of religion.

There are two points in this analysis that are of more significant interest to physicians. Firstly, the applicants argued that medical regulators in other provinces have chosen to adopt less stringent policies despite their equivalent mandates to regulate the medical profession in the public interest and ensure access to health care.[16] I have already discussed the Manitoba policy above. The applicants suggested that the existence of alternative regimes meant that the Ontario policy was not minimally impairing of their right to freedom of religion. The Court rejected this argument, holding that the CPSO is not bound to adopt the least intrusive policy so long as its choices fall within a "range of reasonable alternatives."[17] This reasoning is significant for physicians because, if upheld by the appellate courts, it will mean that protections for conscience-based objections will remain province-dependent for the foreseeable future. This may also ultimately affect where physicians with conscience-based objections choose to live and practice medicine.

Secondly, the Court attached significance to the fact that, for affected physicians with the most stringent religious beliefs, the ultimate cost would be a need to change their area of practice as opposed to leaving medicine entirely.[18] The Court described these effects as "not trivial" but "less serious than an effective exclusion from the practice of medicine."[19] The Court stated:

> for these physicians, the principal, if not the only, means of addressing their concerns would be a change in the nature of their practice ... In short, they would have to focus their practice in a specialty or subspecialty that would not present circumstances in which the Policies would contemplate an obligation of "effective referral" of patients in respect of medical services to which they object. [20]

These burdens could potentially be of significance to the narrow subset of physicians who are affected. Given the novelty of the effective referral policy and MAID, it is difficult to go much beyond speculation at this point. That said, it is one thing for medical

[10] *Ibid* at para 230.
[11] *Ibid* at para 134.
[12] *Ibid* at para 86.
[13] *Ibid* at paras 102-103.
[14] See e.g. *Ibid* at para 108.
[15] There must be a pressing and substantial objective for the law, the means chosen in the law must be rationally connected to that objective, the means chosen must be minimally impairing of the right, and there must be proportionality between the salutary and deleterious effects of the law. See *R v Oakes*, [1986] 1 SCR 103 at paras 69-71.
[16] *Supra*, note 7 at para 172.
[17] *Ibid* at para 174.
[18] *Ibid* at para 207.
[19] *Ibid* at para 209.
[20] *Ibid* at para 207.

students to adjust their career plans because of these policies. However, a switch in specialty or subspecialty late in a physician's career, if even possible at all, could be a highly onerous undertaking. Moreover, for some physicians, a switch in practice area might also require other significant lifestyle changes. A rural family physician, for instance, would likely also have to relocate to a larger centre in addition to changing the nature of their practice.

In conclusion, the issue of conscience-based objections to MAID requires a consideration of competing interests. On the one hand, many physicians have deeply held beliefs that prevent them from participating, however indirectly, in the provision of MAID. On the other hand, patients seeking MAID require support from their physicians to achieve equitable access to the healthcare system. Balancing between these considerations is a difficult challenge that regulators, courts, and physicians will face for years to come.