Justice Centre
for Constitutional Freedoms

In Defence of *Charter* Freedoms

A legal analysis of the constitutionality of the

"Policy – Conscientious Refusal"

A submission to the

College of Physicians and Surgeons of Saskatchewan

by the

Justice Centre for Constitutional Freedoms

March 2015

Mail: #253, 7620 Elbow Drive SW, Calgary, AB T2V 1K2
Web: www.jccf.ca • E-mail: info@jccf.ca • Phone: 403-475-3622
CRA registered charity number 81717 4865 RR0001

Contents

Summary

The Policy – Conscientious Refusal (the "Policy") proposed to the College of Physicians and Surgeons of Saskatchewan (the "College") contains a number of critical legal errors, which render the affected portions of the Policy constitutionally indefensible.

The Policy incorrectly assumes that patients enjoy a legal right to access even controversial medical services *from any and every physician*. In fact, patients have a very limited right to medical care, as defined by politicians and bureaucrats who decide which health services will, or will not, be provided by the Saskatchewan government's monopoly health care system. Canadian Courts have expressly stated that there is no *Charter* right to health care, or to any particular health services.

Further, while claiming to be concerned about patients' rights, the Policy is strangely silent about a patient's interest in receiving medical services from a physician who respects human life at all stages of development, from conception to natural death. There are patients in Saskatchewan (and other provinces) who do not feel comfortable receiving *any* medical services from a physician who does not fully respect human life at all stages. The Policy does not explore, or even consider, what rights such patients may have.

Conversely, the *Charter* expressly protects physicians' religious and conscience rights. The provincial and federal governments, and government bodies such as the College, cannot violate physicians' *Charter* rights to freedom of conscience and religion unless such violation is shown to be as necessary to meet a pressing and substantial public concern. In the context of health services provided through the Saskatchewan government's health care monopoly, the purposes of eliminating discrimination and promoting access to health care do not require or justify the Policy's violation of physicians' *Charter* rights.

The Policy purports to address discrimination in the provision of health services. However, a physician who is unable to provide or refer a patient for a particular health service on account of the physician's religious or conscientious belief is not engaging in discrimination; this inability or refusal does not violate the *Saskatchewan Human Rights 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] current provincial laws interfere with accessing timely health services. However, there is no basis on which to conclude that physicians, by exercising their freedom of conscience, actually obstruct 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.

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

However, with an abundance of physicians and facilities available to perform such controversial services,[2] patients will still receive these services in a timely manner. The 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 patients. The Policy's attempt to separate "clinical competence" from the moral, religious and ethical aspects of the practice of medicine is a dangerous and destructive step that contradicts the ethical foundations of medicine that have existed for millennia.

Government bodies such as the College have an obligation under the *Charter* and *The Saskatchewan Human Rights Code* to accommodate the religious and conscientious beliefs of physicians to the point of undue hardship. The Policy ignores this obligation entirely, while incorrectly assuming that patients have a legal right to obtain any and all medical services from every physician.

The Policy's requirement that physicians provide referrals for, and in some cases perform, services which they 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. 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 Policy states correctly that "Physicians have an obligation to provide health information, referrals, and health services to their patients in a non-discriminatory fashion."

Unfortunately, the Policy fails to clarify the application of *The Saskatchewan Human Rights Code* (hereafter the "*Code*") to physicians, leaving the impression that the *Code*'s requirement to refrain from discriminating against patients applies to the kind or type of medical services that a patient requests.

The *Code* prohibits discrimination "on the basis of a prohibited ground". Among the enumerated personal characteristics that constitute a "prohibited ground" are "religion" and "creed."

---

[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.

It is important that physicians understand that the *Code* does not entitle patients to receive certain (or any) medical services. A physician's refusal to provide or refer for a particular medical service does not constitute discrimination.

Rather, the *Code* prohibits treating some patients differently from other patients on account of an enumerated personal characteristic *of the patient*. 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 (for example) 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*. Further, 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 Policy implies that patients have a legal right to receive health services. In Saskatchewan (and other provinces), a patient's right to receive health care is strictly limited to whichever health services Saskatchewan's politicians and bureaucrats choose to include in the government's health care system, which operates as a *de facto* monopoly. In *Chaoulli c. Quebec*, the Supreme Court of Canada was unanimous in holding that the government's legislated monopoly over health care, when it subjects patients to long waiting lists which cause suffering and create a risk of death and irreparable damage to health, violates the *Charter* section 7 right to life, liberty and security of the person. It is incumbent upon the College to advocate for patients' constitutional right to access health care outside of the government's health care system, if that system operates as a *de facto* monopoly over the provision of health services to patients and also inflicts pain, suffering, and the risk of irreparable harm on the patient.

Further, while claiming to be concerned about patients' rights, the Policy is strangely silent about a patient's interest in receiving medical services from a physician who respects human life at all stages of development, from conception to natural death. There are patients in Saskatchewan (and other provinces) who do not feel comfortable receiving *any* medical services from a physician who does not fully respect human life at all stages. The Policy does not explore, or even consider, what rights such patients may have.

As explained further here below, patients do not have a constitutional or legal right to access whatever health services they may desire, or to obtain them from every physician.

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*[4], the court upheld the validity of a regulation that specifically denied Mr. Flora funding for the life-saving treatment that he needed. Mr. Flora had scraped together $450,000 to save his life through treatment in the United Kingdom. The Ontario Court of Appeal rejected the argument that "s. 7 imposes a positive obligation on the state to provide life-saving medical treatments."

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

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

The *Code* does not provide patients with a legal right to receive whatever health services they may want, or to receive them from every physician in Saskatchewan.

As explained above (see "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 own moral, religious or ethical beliefs is not discriminating against any patient on the basis of an enumerated personal characteristic of that patient.

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.[5]

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. 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. For example, patients in Saskatchewan can self-refer for an abortion at the Women's Health Centre at the General Hospital in Regina, or receive a referral from Sexual Health Centre of Saskatoon.

---

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

In summary, an individual physician whose beliefs restrict her from providing or referring for abortions or certain forms of contraception does not violate the *Charter* rights of any patient, nor does she violate her patient's human rights as protected by the *Code*.

The misleading claim of "interference and obstruction"

The Policy suggests that when physicians exercise their religious and conscience rights they might "interfere with or obstruct" a patient's right to access health services.

The use of the terms "interfere with or obstruct" in reference to individual physicians exercising their freedom of conscience of religion is inappropriate and misleading. An applicable dictionary definition of "interfere" is "to interpose in a way that hinders or impedes."[6] The dictionary definition of "obstruct" is "to hinder from passage, action, or operation."[7]

In *Flora*, the Court considered the terms "prohibit or impede" rather than "interfere with or obstruct" but the Court's reasoning is relevant and applicable to the Policy. 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 for treatments that were not "generally accepted in Ontario as appropriate for a person in the same medical circumstances as the insured person."[8] As described above, this regulation denied Mr. Flora funding for the life-saving treatment that he needed, which he obtained at his own expense in the U.K. for $450,000. 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.[9]

To "interfere with or obstruct," or to "prohibit or impede" 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 "interfering with" or "obstructing" that patient's access to such medical services. Neither are those physicians "interfering with" or "obstructing" patients' access when they proactively take steps to notify potential patients that they do not provide certain controversial services. There is no active intention to interfere with or obstruct the patient from receiving such care, but rather 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 "interfering with" or "obstructing" the potential customer's access to pork. Rather, the butcher is merely refusing to participate in,

---

[6] *Meriam-Webster Dictionary* definition, available at http://www.merriam-webster.com/dictionary/interfere.
[7] *Meriam-Webster Dictionary* definition, available at http://www.merriam-webster.com/dictionary/obstruct.
[8] *Flora* at para 6.
[9] *Flora* at para 101.

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 "interfering with or obstructing" the customer from purchasing pork.

That no physician should interfere with or obstruct a patient's access to care is indisputable. The Policy twists and distorts these terms by using them in reference to a physician refusing to participate in providing abortion, assisted suicied or other controversial medical services. The Policy incorrectly and unfairly attributes to such physicians an active intention to interfere with or obstruct a patient's access to those health services.

The clinical and moral practice of medicine

The Policy creates an artificial and dangerous division between reasons pertaining to "clinical competence" on the one hand, and "moral" and "religious" reasons on the other.[10] Without foundation or explanation, the Policy proclaims a hierarchy of beliefs, with beliefs relating to "clinical competence" deserving unquestioning deference, in contrast to moral, ethical and religious beliefs that can be readily dismissed.

The 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."[11]

The Physician's Oath in the Declaration of Geneva[12] provides further examples of the importance of morality and ethics to the practice of medicine:

> 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;

---

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

> 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 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.'"[13] 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]."[14] In the case before it, the Court found, that "the thesis that the appropriateness of a LRLT turns solely on its medical efficacy brushes aside the centrality of ethical considerations in transplant decision-making."[15]

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 competence" 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

---

[13] *Flora*, at para. 75.
[14] *Flora*, at para. 75.
[15] *Flora*, at para 76.

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. [16] The Policy fails to recognize that the *Charter* applies to government, and to government bodies like the College of Physicians and Surgeons. Every statute enacted must comply with the *Charter*, and every government body must comply with the *Charter* when creating its policies.[17] Therefore, the College must fully respect the *Charter* rights physicians.

In contrast, 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*.

Since Courts have ruled expressly in *Chaoulli*, *Flora* and other cases 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 Policy appears to treat physicians' conscience rights as merely a personal choice and not an essential part of the physician's personal makeup. This ignores the fact that Canadian Courts recognize religious belief 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."[18] 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. [19]

The Policy fails to respect physicians' *Charter*-protected religious convictions as an integral personal characteristic, and appears to dismiss them as simply a personal choice. Justice

---

[16] See *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25.

[17] Section 32 of the *Charter* states: "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."

[18] *Droit de la famille – 091768*, 2013 SCC 5 at para. 138 [*Droit de la famille*] [internal quotes omitted].

[19] *Miron v. Trudel*, [1995] 2 S.C.R. 418 at para. 145.

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*."[20] The *Charter* requires the College to recognize, respect and accommodate the pro-life views of physicians, which are often (though not always) founded on religious or conscientious beliefs, 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".[21] 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."[22] 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.*: [23]

> 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...
>
> *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].

---

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

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.

In conjunction with the College's legal obligation to protect the *Charter* section 2(a) freedom of religion and conscience, a government body is precluded from imposing any one belief about what constitutes human dignity or the good life. In *Québec (Curateur public) c. Syndicat national des employés de l'Hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 at para. 103 (upholding the award of damages against a union of hospital workers who illegally went on strike), the Court held:

> The concept of human dignity was interpreted in *R. v. Morgentaler*, [1988] 2 S.C.R. 30, which dealt with the right to life, liberty and security of the person, a right guaranteed by s. 7 of the Canadian *Charter*. Madam Justice Wilson provided the following definition of that right (at p. 1660):
>
> > The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to **any one conception** of the **good life**. [Emphasis added]

In *R. v. Salituro*, [1991] 3 S.C.R. 654 at 674 (allowing a wife's testimony against her estranged husband), the Court likewise adopted.

The government's duty to accommodate physicians

While the Policy asserts that physicians must refrain from discrimination when providing health services and referrals, the Policy is strangely silent when it comes to the College'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.[24]

---

[24] *Big M Drug Mart Ltd.* at 336.

Accommodation is required under employment law

Acting in a capacity that is substantively similar to that of an employer, the government has a duty to accommodate the conscientious and religious beliefs of physicians.[25]

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*,[26] where the complainant, Mrs. O'Malley, was a member of the Seventh-Day Adventist Church. Simpson-Sears required her to work on Saturdays, contrary to her religious faith, which 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 without undue interference in the operation of the employer's business and without undue expense to the employer.[27]

Accommodation is 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*.[28] 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."[29]

Policy provisions that violate physicians' *Charter* freedoms

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

---

[25] See Saskatchewan Human Rights Commission, "Employment Discrimination and the Duty to Accommodate", available at http://www.shrc.gov.sk.ca/pdfs/publications/SHRCemploymentdiscrimination.pdf.
[26] *Ont. Human Rights Comm. v. Simpsons-Sears* [1985] 2 SCR 536 [referred to as "*O'Malley*"].
[27] *O'Malley* at para. 23.
[28] *Multani* at paras. 52-53.
[29] *Multani* at para. 53.

Requiring referrals even when doing so violates *Charter* rights

The Policy expressly requires that physicians "must make a timely referral to another health care provider" even when doing so violates their freedom of conscience and religion.

If a procedure is wrong, referring for that procedure is also wrong. For example, if the College of Physicians and Surgeons of Saskatchewan chose to expressly prohibit physicians from performing female genital cutting/mutilation, it would also be appropriate to prohibit physicians from referring for that procedure, as the College of Physicians and Surgeons of Ontario has chosen to do.[30]

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 a referral (timely or not) for any desired health services. What "undue hardship" would be caused by accommodating those 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

Under 5.4 Treating Patients, the Policy requires physicians to provide the patient with "all health services that are legally permissible and publicly-funded." This requirement is inconsistent with the *Charter*'s express 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 and its modern successors. There are likely many doctors who have sincere religious or conscientious beliefs that would prohibit them from performing such medical procedures. Yet, this requirement in the Policy forces physicians to perform procedures that directly contradict their conscientious or religious beliefs, clearly interfering with the practice of those beliefs. This constitutes a clear and serious violation of physicians' *Charter* right to freedom of conscience and religion.

---

[30] See the Policy Statement of the College of Physicians and Surgeons of Ontario on "Female Genital Cutting (Mutilation)" available at http://www.cpso.on.ca/policies-publications/policy/female-genital-cutting-%28mutilation%29.

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 against 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 assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96).[31]

The Policy will required physicians to perform services that that violate their "deeply held and considered moral and religious beliefs" when not doing so "would jeopardize the patient's health or well-being". Such terms are open to subjective interpretation. For example, what is encompassed in determining a patient's "well-being" and who makes such a determination? With the potential for such subjectivity in the application 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 physician referrals undercuts the argument that all family physicians must 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.

The Policy fails to provide a compelling, or any, rationale for this requirement. The Policy ignores the fact 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 physician 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.

---

[31] *Carter* at para 132.

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

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

Conclusion

The College's Policy has failed to explain why it would be necessary to require every doctor in Saskatchewan 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 *Charter* requires the College to accommodate the religious and conscientious objections of doctors, to the point of undue hardship on the College. Yet the Policy does not recognize the government's duty to accommodate physicians.

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 protected by section 2(a) of the *Charter*, the College would need to act on specific evidence of harm to others, with such harm being caused by virtue of a small number of physicians refusing to provide or refer for controversial health services. The Policy is based on the assumptions that (1) physicians who honour their conscience will "interfere with or obstruct" access to care, and that (2) a refusal to provide a particular health service constitutes "discrimination". As explained above, both assumptions are false.

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.

About the Author

Calgary lawyer John Carpay has been involved in *Charter* litigation since 2001, when his then-employer, the Canadian Taxpayers Federation, intervened in *Benoit v. Canada*. In the *Benoit* case, the Canadian Taxpayers Federation argued that race, ancestry, descent, and ethnicity should not be grounds for the unequal taxation of Canadians. John also championed racial equality before the Supreme Court of Canada in *R. v. Kapp*, representing the intervener Japanese Canadian Fishermen's Association. He defended freedom of expression before the Saskatchewan Court of Appeal in *Whatcott v. Saskatchewan Human Rights Commission*, and before the Alberta Court of Queen's Bench in *Lund v. Boissoin*. John's involvement in *Kingstreet Investments v. New Brunswick* led to a victory for taxpayers and for democratic accountability, with the Supreme Court of Canada recognizing the principle of "no taxation without representation." In *Wilson v. University of Calgary*, John represented seven U of C students who were found guilty of non-academic misconduct for peacefully expressing their opinions on campus. The students successfully challenged this finding in the Alberta Court of Queen's Bench. John has served the JCCF as its President since 2010.