

Alberta Doctors' Digest

Effective referrals in Ontario

On May 15, a three-judge panel of Ontario's highest court dismissed an appeal seeking to overturn a Divisional Court decision that upheld the requirement for an "effective referral." The court ruled that doctors in that province must give referrals for medical services that clash with their religious beliefs, calling it a "... compromise that balances the rights of physicians and the interests of patients."

The decision has ramifications across the country, notably in Alberta where some physicians have resisted the referral of patients seeking medical assistance in dying ("MAID") and some institutions have refused to allow the procedures or the assessments necessary to have MAID in alternative venues.

Facts

The Christian Medical and Dental Society of Canada, The Canadian Federation of Catholic Physicians' Societies, The Canadian Physicians for Life, Dr. Michelle Korvemaker, Dr. Betty-Ann Story, Dr. Isabel Nunes, Dr. Agnes Tanguay and Dr. Donato Gugliotta (the appellants) challenged the constitutionality of two policies enacted by the College of Physicians and Surgeons of Ontario. The policies required physicians who object to providing certain medical procedures or pharmaceuticals on the basis of religion or conscience to provide the patient with an effective referral, which is "... a referral made in good faith to a non-objecting, available, and accessible physician, other health care professional, or agency in a timely manner."

The Ontario Divisional Court dismissed the appellants' original applications. The court found that even though the policies infringed the appellants' (a) *Charter* right (freedom of religion), the infringement was justifiable under s. 1 of the *Charter* which provides that all *Charter* protections are "subject to ... such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." A claim alleging a breach of the right to freedom of conscience under s. 2(a) was not considered, and a claim for a breach of a *Charter* equality rights [s. 15(1)] was dismissed.

The Ontario Court of Appeal accepted the lower court's finding that some of the appellants' religious beliefs would preclude them from giving a referral to another physician for MAID, abortion or certain reproductive features, and that they would be compelled to abandon their practice area rather than face persecution for failing to do so. The court found that the interference with the appellants' freedom of religion was neither trivial nor insubstantial.

Similarly, the court refused to accept the appellants' arguments regarding the alleged breach of their section 2(a) right to freedom of conscience or the claim for a breach of their section 15(1) equality rights, which was based on the argument that the policies created a differential impact on "religious" physicians.

The primary focus of the appeal was the s. 1 analysis, and specifically the "minimal impairment" and "proportionality" branches of the "Oakes test". *Oakes* is a 1984 decision

of the Supreme Court of Canada which found that a framework for an s. 1 analysis of an alleged *Charter* breach required three branches:

- (a) the *Charter* infringement must be “prescribed by law”;
- (b) the objective of the impugned measure must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; and
- (c) the means chosen must be reasonably and demonstrably justified, which requires a balancing of the interests of society with the interests of individuals and groups and that:
 - (i) the measure must be rationally connected to the objective;
 - (ii) the means chosen should impair the *Charter* right or freedom as little as possible; and
 - (iii) there must be proportionality between the salutary and deleterious effects of the measure.

The appellants’ principal submission on appeal was that the effective referral requirements are not minimally impairing of their rights and that alternative methods would achieve the same objective while respecting their freedom of religion. They contended that a “generalized information” model, where physicians give patients information concerning publicly available resources and services, would provide a less impairing alternative to effective referral.



The Ontario decision has ramifications across the country, notably in Alberta where some physicians have resisted the referral of patients seeking medical assistance in dying (photo credit: Gerd Altmann, Pixabay.com)

Discussion

On the question of whether the policies in question were “prescribed by law,” the court found that where a government policy is authorized by statute and has set out a general

norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is “prescribed by law.”

The court went on to find that the lower court did not err in identifying the purpose of the effective referral requirements as “the facilitation of equitable patient access to health care services.” The policies, in the eyes of the court, struck an appropriate balance in identifying a purpose that is more specific than the “animating social value” of the policies, but broader than a “virtual repetition” of the effective referral requirements. The Court of Appeal also agreed with the Divisional Court that, as a matter of logic and common sense, requiring objecting physicians to give an effective referral for MAID, abortion or reproductive health care services will promote equitable patient access to those health care services.

On the issue of “minimum impairment,” the Court of Appeal found that alternatives identified by the appellants were flawed. While less impairing of the appellants’ rights, they were focused on *their* rights and not on the objective of the effective referral requirements or the interests of vulnerable patients. The evidence showed that the appellants’ proposed “generalized information” model, like other self-referral models, would impair equitable access to health care rather than promote it.

In terms of the balancing of society’s interests with those of individuals, the court found that the policies’ requirements enhanced equitable access to MAID, abortion and other services, and also reduced or eliminated barriers, delays, anxiety and stigmatization of vulnerable patients.

On the other hand, the court accepted that deleterious effects included the burden and anxiety associated with a choice between a physician’s deeply held religious beliefs and complicity in acts they regarded as sinful. In the end, the court agreed with the Divisional Court’s conclusions that patients should not bear the burden of managing the consequences of physicians’ religious objections. It recognized that the issues raised in the proceeding presented difficult choices for religious physicians who objected to the policies, but contrary to the argument regarding the need to leave practice, felt that objecting physicians did have choices.

In the result, the Ontario Court of Appeal held that the policies struck a reasonable balance between patients’ interests and physicians’ *Charter*-protected religious freedom. The policies were “... reasonable limits prescribed by law that are demonstrably justified in a free and democratic society.”

Next steps

It would not be surprising if one or more of the appellants sought leave to appeal the Court of Appeal decision to the Supreme Court. The issue is one common to all jurisdictions in Canada.

In terms of the impact on Alberta physicians, at present there is no similar formal requirement for an “effective referral” in Alberta; however, there are certain guidelines and standards that need to be followed when there is a referral.

Physicians in Alberta who receive a request for MAID but who decline for religious reasons must ensure that the patient has timely access to Alberta Health Services’ “central coordination service.” There is, however, no requirement of providing “effective referrals.” Thus in Alberta, the onus remains on the patient to find a MAID provider, not with the physician.

Covenant Health has a number of links on its website to various policies and procedures associated with patients in Covenant facilities looking for MAID. Readers, however, may remember the news reports from a few months ago regarding Covenant's reluctance to allow MAID assessments in its facilities.

The College of Physicians & Surgeons of Alberta website has several links to various PDFs that outline guidelines for referrals.

Useful links

[CPSA Standards for Referrals](#)

[CPSA Establishing the Physician-Patient Relationship](#)

[CPSA Transfer of Care](#)

[Alberta Health Services QURE \(Quality Referral Evolution\) Quality Referral Pocket Checklist](#)

References available upon request.

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