Find Another Doctor: The Right to Refuse Making a Medical Referral

This article was written by a law student for the general public.

Introduction

How can our courts strike a balance between the right to access medical services and a physician's right to refuse providing those services on religious grounds? The College of Physicians and Surgeons of Ontario requires physicians who object to a medical service on religious or moral grounds to refer patients to a non-objecting doctor. The policy also requires physicians to perform the medical service in the case of an emergency.

The Christian Medical and Dental Society is challenging this policy in court. The society argues that the policy violates their freedom of conscience and religion, which is guaranteed by section 2(a) of the *Canadian Charter of Rights and Freedoms*.[1] The society is concerned about procedures like abortion and euthanasia, especially since physician-assisted suicide could be legalized in some form next year.[2] This case will be about balancing the rights of physicians with the rights of patients. Which side will the court likely support?

Section 2(a) of the *Charter*: Freedom of Conscience and Religion

Freedom of conscience and religion is a fundamental freedom in the *Charter*. The Supreme Court of Canada states that this freedom protects the right to hold, declare, and openly manifest beliefs.[3] It also guarantees that no one can be compelled to follow another religion, or be forced to act contrary to one's beliefs.[4]

Section 2(a) is violated when: (1) a person holds a sincere belief or practice associated with religion and (2) a law interferes with a person's ability to act according to his or her belief.[5] The interference must be more than trivial, and will depend on the context.[6]

Freedom of religion, like all *Charter* rights, is not absolute. It can be limited for "public safety, order, health, or morals or the fundamental rights and freedoms of others."[7] Governments have a legitimate interest in ensuring that religious freedom does not include activities that harm others.[8]

The protection given to religious freedom depends on how the exercise of religious activity affects the rights of others.[9] A court must balance physicians' right to exercise their religious beliefs with patients' rights to access medical services.

The "Obligation to Refer" Policy

The college's policy might infringe freedom of conscience and religion. Christian Medical and Dental Society members hold a sincere belief that their faith prevents them from performing or facilitating certain medical procedures. The college's policy would compel

these Christian physicians to make a referral for medical services that they object to because of their religious beliefs. Therefore, the policy would interfere with their right to act in accordance with their beliefs.

The objective of the college's policy is to respect the rights of physicians without compromising the rights of patients. It tries to accomplish this by letting physicians object to certain medical procedures, but requiring them to make referrals so patients receive timely access to the services. The college says that its policy ensures access to care, and protects patient dignity and safety.[10]

One factor to consider in balancing physicians' rights with patients' rights is whether refusing to make a referral would create an unreasonable delay in getting medical services. The college argues that physicians' freedom of religion cannot allow them to prevent patients from accessing services.[11] If physicians' religious beliefs prevent patients from receiving timely access to medical services, patients could suffer physical or psychological harm. This could therefore violate a patient's right to life, liberty, and security of the person, which is guaranteed under section 7 of the *Charter*.

Section 7 of the *Charter*

Section 7 of the *Charter* protects Canadians' right to life, liberty and security of the person. The right to liberty protects "the right to make fundamental personal choices free from state interference."[12] The right to security of the person protects against "state interference with bodily integrity and serious state-imposed psychological stress."[13] If the exercise of physicians' religious beliefs affects patient liberty and security of the person, then a court might impose a limit on physicians' religious rights.

Denying referrals could prevent patients from making personal choices about their health. For example, if a doctor refused to refer a woman for an abortion, he or she would be interfering with that patient's ability to decide about obtaining an important medical service. A law that interferes with "fundamentally important personal medical decision-making" limits the right to liberty.[14]

Refusing to provide referrals could also interfere with a patient's security of the person. In the past, the Supreme Court has held that religious freedom can be limited when the religious activity "threatens the physical or psychological well-being of others."[15] An unreasonable delay in receiving medical care is one of those situations that can affect patients' physical and psychological wellbeing.[16] Refusing to make a referral might create an unreasonable delay in obtaining medical services by forcing patients to spend time searching for another physician. The delay could cause physical or psychological harm.

Physicians' Rights and Patients' Rights

A court will have to decide whether these potentially harmful effects on patients outweigh the effects of limiting physicians' freedom of religion. The Supreme Court has already stated that "[t]he freedom to hold beliefs is broader than the freedom to act on them."[17] Letting

physicians refuse to make a referral could allow physicians' religious rights to trump patients' rights. There would be no balance in a scenario where a patient gets no accommodation because of a physician's religious views.

The College of Physicians and Surgeons of Ontario is not the only medical body that forces physicians to make referrals for patients. The obligation to refer patients to a non-objecting physician is consistent with international practices and guidelines.[18] France, Italy, Norway, and Great Britain all have policies that require doctors to make referrals.[19]

Finally, referring a patient to a non-objecting doctor for a medical service is not the same as facilitating it. An "obligation to refer" probably means that physicians have a duty to provide their patients with the means to make an informed choice about what decision to make.[20] In other words, a referral gives the patient an opportunity to make a decision about obtaining the service from another physician.

Conclusion

The Christian Medical and Dental Society will likely face an uphill battle against the College of Physicians and Surgeons of Ontario. A court will try to balance physicians' religious rights with patients' right to liberty and security of the person. If a court finds that allowing physicians to refuse providing referrals could cause physical or psychological harm to patients, then it will likely rule in favour of the college.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 .

[2] The Supreme Court of Canada delivered its decision on physician-assisted suicide on February 6, 2015. The Supreme Court gave the federal government one year to create a new law that allows physician-assisted suicide in some form. After one year, the laws that make physician-assisted suicide illegal will no longer apply. In June2015, the Minister of Justice stated that the government would be asking for an extension of the one-year time limit to make a new law on physician-assisted suicide.

[3] *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 69, 382 DLR (4th) 385.

[4] *Ibid*.

[5] *Whatcott v Saskatchewan Human Rights Tribunal*, 2013 SCC 11 at para 155.

[6] *Syndicat Northcrest c Amselem*, 2004 SCC 47 at para 59.

[7] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, [1985] SCJ 17, at para 95.

[8] *Young v Young*, [1993] SCJ 112, 108 DLR (4th) 193, at para 225, McLachlin J.

[9] *Ibid*.

[10] The College of Physicians and Surgeons of Ontario, "Professional Obligations and Human Rights" (2015), Online: The College of Physicians and Surgeons of Ontario http://www.cpso.on.ca/Policies-Publications/Policy/Professional-Obligations-and-Human-Rights.

[11] *Ibid*.

[12] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 54, [2000] 2 SCR 307.

[13] *R v Morgentaler*, [1988] 1 SCR 30, [1988] SCJ 1, at para 25.

[14] *Carter v Canada*, 2012BCSC 886 at para 1302, aff'd 2015 SCC 5.

[15] *B (R) v Children's Aid Society of Metropolitan Toronto* (1994), [1995] 1 SCR 315, at para 226.

[16] *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35 at para 118.

[17] *Trinity Western University v College of Teachers (British Columbia)*, 2001 SCC 31 at para 36.

[18] Anne O'Rourke, Lachlan De Crespingy and Amanda Pyman, "Abortion and conscientious objection: the new battleground" (2012) 38 Monash UL Rev 87 at 103.

[19] *Ibid* at 107.

[20] Julian Burnside, "Letter to Members of the Legislative Council" (Legal advice provided to members of the Victoria Legislative Council, delivered at the Legislative Council, 8 October 2008), cited in *supra* note 17 at 103.