Top Ontario Court Confirms Physicians' Duty to Provide Effective Referrals

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The Court of Appeal has confirmed that where physicians are unwilling to deliver care on moral or religious grounds, they must provide an effective referral to another health care provider or agency.

On May 15, 2019, the Ontario Court of Appeal upheld the constitutionality of the College of Physicians and Surgeon's (CPSO) policies on 'effective referral'. The policies require physicians who are unwilling to provide certain care on moral or religious grounds to provide an effective referral to other practitioners or clinics. Known examples of such care include medical assistance in dying (MAID), abortions, contraception, fertility treatments and transgender treatments. The Court unanimously ruled that patients' rights to equitable access to medical services outweighs a physician's freedom to refuse providing care on religious grounds. While the decision does not directly address hospitals' or health authorities' obligations to provide effective referrals, the Court highlights the Divisional Court's observation that a point person to make referrals can be identified by a clinic or hospital.

What is an Effective Referral?

An effective referral is one that is made in good faith, to a non-objecting, available and accessible physician, health-care professional or agency, and importantly, is made in a timely manner. The CPSO's "Fact Sheet" — which gives guidance to physicians on complying with the requirements — notes that the physician can make the referral or assign the task to another non-physician staff member. Effective referrals are not formal written referrals to a specialist.

The Court's Decision

The Court upheld the Divisional Court's finding that while the CPSO's policies infringed individual physicians' religious freedom, the policies are reasonable limits prescribed by law that are demonstrably justified in a free and democratic society. On appeal, the appellants argued that the effective referral requirement was unnecessary, and that a "generalized information" model could be a less impairing alternative to achieve the CPSO's objective, while respecting their freedom of religion. This model would allow objecting physicians to lead patients to publicly available resources such as Ontario's

Care Coordination Service (for MAID services) and Telehealth (for general care information). The College presented fresh evidence to argue that this model would not respond to the realities of vulnerable patients, places the burden on the patient to self-refer and creates delays in accessing time-sensitive medical care. The Court found that the alternatives proposed by the appellants were directed at reducing the policies' burden on objecting physicians, rather than addressing the needs of vulnerable patients and advancing the goal of equitable access to medical care.

Given the importance of physicians as "gatekeepers" and "navigators" in the health care system, the Court recognized that effective referral is essential to preserving trust in the physician-patient relationship and in preventing harm to vulnerable patients. The Court was mindful to note that the CPSO is a self-governing professional body and accordingly, is uniquely qualified to develop policies and procedures governing the practice of medicine. The CPSO's "Fact Sheet" clarifies that the objecting physician does not need to personally provide all clinically appropriate services or a formal referral. Rather, the intent of the policies is to ensure that in the event of a physician's religious conflict, patients are not left alone to find a willing health-care provider. The Court affirmed that the policies strike a reasonable balance between patients' interests and a physician's freedom to refuse services that conflict with religious views.

Takeaways:

- The CPSO's long-standing policy on effective referral still stands.
- The Court recognized that navigating and accessing specific care can be challenging, especially for vulnerable and/or remote patient populations. The Court emphasized the importance of patients not bearing the burden of navigating access to their requested care.
- This Court decision does not impose a requirement that a hospital must provide any particular service, but does highlight the practical role that hospitals can play in identifying a point person to assist both patients and treating physicians where the treating physician is unwilling to provide specific care.

By

Daphne G. Jarvis, Anna Marrison

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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