CPSO "Effective Referral" Policy Does Not Adequately Respect Physicians' Conscientious Care

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The ruling in *Carter v Canada* and the subsequent passage of Bill C-14 by the Canadian Parliament have had a profound impact on what is deemed healthcare in Canada. With the legalization of euthanasia and assisted suicide, codified under the blanket term "medical assistance in dying" (MAID), participation in the intentional and active hastening of a patient's death has gone from being a punishable act to one enshrined as an essential component of comprehensive healthcare. Many physicians have expressed discomfort with this redefinition of their profession; a poll conducted shortly after the conclusion of the Carter case found that 63% of surveyed physicians would refuse to provide MAID if requested.[1]

The College of Physicians and Surgeons of Ontario (CPSO)'s policy *Professional Obligations and Human Rights* (revised in 2015) sets out the minimum expectations of dissenting physicians with respect to the provision of MAID.[2] Under this policy, physicians who object to a particular procedure or service are required to provide an "effective referral" to a non-objecting physician who can provide the procedure or service in an efficient manner.[2] With respect to MAID, the requirement for effective referral means that Ontario physicians have greater constraints upon their freedom of conscience than those in other jurisdictions where euthanasia or assisted-suicide is legal. For example, the law regulating assisted-suicide in Oregon does not compel physicians to include MAID as part of their therapeutic repertoire either directly or indirectly.[3]

In crafting regulations on MAID, and on conscientious care in general, it is true that the CPSO must take into account its various and sometimes competing responsibilities. Within the *Professional Obligations and Human Rights* policy, the justification for a policy mandating effective referral includes a need to protect equitable access to healthcare for all Ontarians, particularly those from vulnerable populations.[2] This is a perspective shared by stakeholders, such as Minister of Health Dr. Eric Hoskins, who have lauded the CPSO's *Professional Obligations and Human Rights* policy as a balance between patient access to care and physicians' freedom of conscience.[4]

Ensuring access to healthcare is certainly important. However, there are two objections to utilizing a policy of mandatory effective referral to achieve this end. Firstly, it can be questioned whether this balance is the least restrictive means of ensuring access to MAID. Given the reasonable contention that the requirement for an effective referral still compels participation in an act which a rational physician could judge to be unethical[5] (an argument which will be further explored in this article), we would argue that less restrictive means could be pursued if the CPSO and the Government of Ontario demonstrate universal access to MAID to be a compelling public interest. One such proposal, endorsed by major conscience-rights proponents[6] and promised by the Ontario Government,[7] is the implementation of a self-referral system to a care coordination service, whereby patients are able to access a range of palliative care options, including MAID, without the need for a referral from their physician. Such a system removes an extra step for patients seeking these services, while also allowing physicians to decline from participating in MAID.

Secondly, contrary to the CPSO's portrayal of conscientious objection as merely "personal," they are enforcing conformity to a definition of medical care that is neither indisputable nor universal. Declining from participating in MAID need not be about the physicians' "personal beliefs"; it may rather be rooted in their professional judgment on how they are best to fulfill their obligation as physicians, to serve as healers. Hippocrates' Oath enshrines a counter-perspective that limits legitimate medical acts to acts of healing: *"I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect… In purity and holiness I will guard my life and my art."*[8] The American Medical Association still "opposes any bill to legalize physician-assisted suicide or euthanasia, as these practices are fundamentally inconsistent with the physician's role as healer" (H-270.965).[9] On this view, acts counter to health are illegitimate, bad medicine. This view is not limited to religious extremists, but is rationally held even by acclaimed experts in end-of-life care such as Balfour Mount, who was awarded the Order of Canada for being the "father of palliative medicine."[10] Physicians who share Mount's conscientious understanding of medicine should not be dismissed as unreasonable. For such physicians, dissociating themselves from MAID is not merely personal but a professional obliga-

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tion. Moreover, they are not suggesting that they will abandon their patients, a concern some have raised.[11] To the contrary, they want to continue undertaking the type of care for which Mount received national recognition.

The CPSO implicitly acknowledges that effective referral is a materially necessary step for a patient to access MAID. Put another way, if referral did not directly facilitate MAID, why would the CPSO take such a strong stand in requiring it? Moreover, the act of referral is not a neutral act; the CPSO describes effective referral as a "positive action," structured in such a way as "to ensure the patient is connected" to a non-objective provider.[12] The referring physician's intention is therefore oriented towards the death of the patient, regardless of whether he or she personally agrees with the patient's decision. Given this close relationship between the referring physician and the act of MAID, there is a negligible ethical distinction between referring for and performing euthanasia. This line of reasoning stands regardless of one's personal view of euthanasia. Indeed, bioethicists opposed to conscientious objection from MAID acknowledge that a mandatory referral policy is ethically indistinguishable from mandating direct participation in the provision of a service, albeit drawing a different conclusion from this analysis.[13]

This argument is well illustrated by Professor Roger Trigg in his recent article, "*Conscientious Objection and 'Effective Referral.*"[14] In it, Professor Trigg uses the analogy of two bank robbers, one of whom orders the other to kill the bank teller during their getaway. Most people would agree that both hold equal responsibility for killing the teller, even though only one fired the lethal shot; Canadian law would consider the referring robber a "party to that offence."[15] The robber giving the instructions acts much in the same way as the referring physician; the instruction helps facilitate the proper timing of the shot and therefore materially contributes to the teller's death, while the act of the instruction indicates support for the teller's death.[14] Note that this analogy does not intend to prove the moral equivalence of homicide and MAID. It is outside the scope of this paper to discuss whether the moral nature of intentionally killing a person is changed when the person requests it. The point here is that a person who directs someone else to do an act shares the same moral responsibility as the person who actually does said act.

The CPSO elsewhere affirms this analysis, acknowledging that physicians who refer for a procedure are complicit in its direct provision. As other authors have noted,[5] the CPSO policy on female genital mutilation (FGM) forbids any physician from performing or referring for FGM, and both the referring physician and the acting physician face professional sanction under the policy.[16] This demonstrates that the CPSO is quite willing to accept the basic ethical analysis that referral for a procedure is not meaningfully different from directly providing the procedure. To conclude otherwise in the case of MAID, and conscientious practice in general, is inconsistent.

If this argument holds, mandating effective referral for MAID is not an authentic protection of physicians' conscientious judgment, and the current CPSO policy is therefore requiring physicians to violate their deeply held moral principles to remain professionals in good standing. A legal analysis of such a requirement vis a vis fundamental Charter freedoms is beyond the scope of this article. Irrespective of the ethical or legal impact of a mandatory referral policy on physicians, this policy stands to have a negative impact on patients, and as such should be rethought by the CPSO.

One of the principal arguments made in favour of limiting physicians' freedom to exercise their conscientious judgment is that it will promote equal access to health services across a jurisdiction.[17] The argument suggests that allowing physicians to refuse to provide or refer for a specific service will prevent some individuals, particularly those in smaller and more remote communities, from accessing certain services in a timely manner.[13] However, physicians who deem MAID to be equivalent to murder would sooner pursue other avenues, such as relocating their practice or leaving medicine altogether, than violate their consciences. This has already begun to occur[18] and would likely accelerate if the CPSO opted to aggressively enforce the new effective referral policy. The net result would be that communities could be deprived of a local physician altogether, and long-standing fiduciary relationships between physicians and communities would be broken. As previously mentioned, if the government of Ontario deems the provision of MAID to be a pressing and substantial concern, it could adopt a less restrictive option to effective referral, as other jurisdictions have done, such as a self-referral system that would give patients more direct access to the services they desire.

One "solution" to this problem which has been proposed by opponents of conscience rights for physicians is to screen out medical school applicants who object to particular practices like MAID.[13] The argument is that even though there is a shortage of physicians in some communities, there is no shortage of qualified, aspiring students. Therefore, by restricting access to medical school to those without conscientious objection, the question of accommodating dissenting physicians will cease to trouble regulatory authorities.[13] Such a practice would pose obvious problems with respect to potential religious or cultural discrimination; in a pluralistic society, the makeup of the healthcare profession should not be a monolith but reflect the diverse cultural experiences and perspectives of the patients it serves. A discriminatory admissions process is further problematic when one considers that the majority opinion regarding medical ethics is constantly changing. All practicing physicians in Ontario entered medical school at a time when euthanasia was illegal, and so a screening policy for conscientious objection would not have eliminated any of them. There may be practices introduced into the medical sphere twenty years from now which trouble the consciences of current medical students and practitioners. In reality, the only way that a screening policy would effectively eliminate future conscientious objectors is by asking, "Are you prepared, upon entering the medical profession, to participate in any practices deemed to be within your scope by your regulatory body, regardless of any objection, ethical or otherwise?" Patients might feel uncomfortable knowing that their physicians have been drawn from the subset of students answering that question in the affirmative. A robust conscience – a commitment to judiciously seek patient wel-

fare with integrity – is not a nuisance to the medical profession; rather, it is critical to maintaining a profession which can continue to merit the trust of its patients.[5] If anything, rather than discouraging conscientious practice in medical students by implementing such a screening policy, medical schools should incorporate education on the importance of conscience as part of their ethics curricula.

Managing the multifarious perspectives on medical ethics, both within and without the healthcare profession, is not straightforward. However, particularly when faced with controversial issues such as MAID, patients deserve to know that they can trust the integrity of their physicians, even if this means that not all services can be obtained from every physician. A recent survey found that 75% of Canadians agree that their physicians should be permitted to avoid participating in MAID, underscoring the strong support held for physician conscience rights in our country.[19] Physicians and patients deserve a policy which respects the diversity of beliefs in Ontario and ensures the vibrancy of conscientious care.

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