February 13, 2015

College of Physicians and Surgeons of Ontario
80 College Street
Toronto, Ontario
M5G 2E2

The Christian Medical and Dental Society of Canada (“CMDS”) and the Canadian Federation of Catholic Physician Societies (“CFCPS”) welcome this opportunity to provide feedback to the College of Physicians and Surgeons of Ontario (“CPSO”) on the draft policy “Professional Obligations and Human Rights”. Together our organizations represent 1800 physicians, all of whom are seriously concerned about the implications of the policy and their ability to continue to practice medicine should the policy be passed.

Freedom of conscience

Freedom of conscience is protected under the *Canadian Charter of Rights and Freedoms.* As a creature of provincial statute, the CPSO is bound by the *Charter*, and must respect it. Yet this draft policy requires physicians to refer for, and in some cases carry out services that are contrary to their conscience. (Lines 156-168)

Conscience rights were recently reasserted by the Supreme Court of Canada in the *Carter* case. The Court confirmed that "a physician's decision to participate in assisted dying is a matter of conscience" (para 132). The Court favourably cited the factum of the CMDS and CFCPS who had reproduced the comments of Justice Beetz in *Morgentaler* (para 132), who stated that a physician could not be compelled to participate in abortion. These comments are directly applicable to the draft policy and we urge the CPSO to revise the draft in light of the Supreme Court’s decision.

The reasoning of the *Carter* case can also be used to determine whether s.1 of the *Charter* can be used to limit doctors’ freedom of conscience. The *Carter* case made clear that in the absence of evidence that patients are being denied a *Charter* right, the Court will determine that it is not necessary to force physicians to refer patients or perform procedures in violation of the physician's *Charter* right to freedom of conscience and religion. It is noteworthy as well, that the *Charter* does not apply to physicians, but rather, protects them. Under the principles in *Carter* physicians who object to engaging in certain procedures or pharmaceuticals, including through referrals, will be successful if they can show that there is a regulatory system that ensures access to procedures like abortion and euthanasia without incorporating the conscientiously objecting physician into the process of referral. This test is already met, because in Ontario patients can access abortion through self- referral. There is no reason to insist that a conscientiously objecting physician refer for abortion when the patient already can self refer.

1-197D Main Street • Steinbach, MB R5G 1Y5
Tel 204-326-2523 • Fax 204-326-3098 • Toll Free 1-888-256-8653 • office@cmdscanada.org • www.cmdscanada.org

Furthermore, it is not the CPSO's role to ensure access to abortions. Even if it were, there would be an onus on the CPSO to prove that it cannot ensure access to abortions without infringing on the *Charter* rights of individual physicians (para. 118). A theoretical or speculative fear cannot justify an infringement (para. 119).

There is no human right in Canada to demand and receive particular services from a specific physician. Provincial human rights legislation prohibits discrimination against the public on a number of grounds that include among others, race, ethnicity, sex, religion, sexual orientation, age or disability. Human rights legislation does not dictate what services must be delivered. So, if a restaurant chooses not to serve pork because of the owner's religious beliefs, there is no violation. If the restaurant chooses to exclude people of a particular ethnic group, however, that would amount to discrimination and a violation of provincial human rights legislation. In the same way, a physician who is unable to participate in a procedure or prescribe a pharmaceutical product for moral or religious reasons is not discriminating against his or her patient provided all patients are treated the same. Unfortunately, this draft policy suggests that a physician's objection to a specific procedure or pharmaceutical may be a violation of a patient's rights under the *Charter* or the *Code*. This reference makes clear that those who prepared this policy misunderstand the application and function of Ontario and Canadian law.

Provided the services are delivered in a respectful way, there are no competing rights. In such a case, the only human rights present are the physician's human rights to freedom of religion and freedom of conscience. Furthermore, when the physician is an employee they have the additional right to be accommodated by their employer.

Ethical considerations

An essential component of professionalism is the independence required to be able to assess the needs of patients and to be able to recommend treatments that are in the patient's best interests. The draft policy claims to be based on the CPSO's Practice Guide. The Guide contains the following statement:

> This practice guide does not stand alone. There are many resources available, which through varying approaches provide excellent guidance to physicians on how to practice well. These include the principles of bioethics, the Royal College of Physicians and Surgeons of Canada's CanMEDS framework, the Canadian Medical Association's Code of Ethics, and codes and guidelines from other medical leaders across Canada and internationally. The CPSO's practice guide is not intended to replace these resources; rather, it is intended to organize the information in a way that will best guide Ontario physicians in how to meet the expectations of their profession. It should be used in companionship with other resources, rather than in isolation.

In fact, the draft policy contradicts some of these documents. For example, the Code of Ethics of the Canadian Medical Association includes the following provisions:

> 7. Resist any influence or interference that could undermine your professional integrity.
> 9. Refuse to participate in or support practices that violate basic human rights.
> 12. Inform your patient when your personal values would influence the recommendation or practice of any medical procedure that the patient needs or wants.
> 23. Recommend only those diagnostic and therapeutic services that you consider to be beneficial to your patient or to others.

In addition, CMA policies regarding Euthanasia and Assisted Death (2014) and Induced Abortion (1988) both respect the physician's right not to be compelled to participate in procedures that are contrary to their conscience.

The World Medical Association International Code of Medical Ethics states:

> A Physician shall always exercise his/her independent professional judgment and maintain the highest standards of professional conduct. A Physician shall be dedicated to providing competent medical service in full professional and moral independence, with compassion and respect for human dignity.

None of these documents supports the proposed changes in the CPSO policy.

Summary

Physicians who rely on the freedom of conscience protections want to serve patients in an open and inclusive manner, providing all relevant information in a fair and unbiased way, striving to be non-judgemental and supportive in their approach. In a multicultural society, doctors relate to patients with widely divergent worldviews every day. The physician's primary concern is for their patient's health, safety and well being. Even when the physician is not able to participate in the implementation of the patient's ultimate decision, the professional relationship can be maintained and may even be enhanced. Our members agree that they can be respectful and supportive of the patient, while at the same time expressing their inability to facilitate procedures or prescribe pharmaceuticals that are contrary to their personal or professional ethics. Physicians simply request that the CPSO policy in question respects their rights just as the physicians respect the rights and feelings of their patients.

Doctors who have conscience concerns should not have to refer for services that they believe will harm their patients. When a doctor writes a referral she or he is taking direct action to facilitate the patient accessing a service. They are formally involved in the process. This is different from simply providing information that is readily available through public sources. Forcing doctors to refer patients for procedures or

pharmaceuticals against their conscience would damage their moral integrity and go against the very reason they went into medicine in the first place, and is not necessary to provide access to services.

Conclusion

A spokesperson for the CPSO has cited polls to justify the extensive limitations on conscience rights in the draft policy. It would be hard to imagine the CPSO seeking input in this way on a similar question if it affected the civil rights of any other group. Could one imagine the CPSO seeking input on the question of whether women, or persons of colour, or disabled persons, or of differing sexual orientations should be physicians? Yet this whole process has been run as a public referendum on whether Christians and other persons of conscience can be physicians in Ontario. This process has been highly anxiety producing for many conscientious physicians, and has held a segment of physicians in Ontario up to public ridicule unnecessarily. Furthermore, certain aspects of the policy contribute to stereotypes about people of faith that are derogatory. For instance at line 147, a caution is given to “religious doctors” about converting patients, while such a prohibition is not extended to non-religious doctors converting patients to their way of thinking.

Our organizations have produced a video that provides a helpful, first hand account of the thoughts of Ontario physicians. We urge you to view the video at cmdscanada.org, as it may dispel some of the stereotypes that exist about openly Christian physicians. You will find that they are open minded, reasonable and among the leaders in the profession. They are making a significant contribution and have every right to continue to do so.

In conclusion we urge the CPSO to reconsider and revise this policy so that doctors who have conscience concerns with procedures can continue to care for their patients.

Sincerely,

1-197D Main Street • Steinbach, MB R5G 1Y5
Tel 204-326-2523 • Fax 204-326-3098 • Toll Free 1-888-256-8653 • office@cmdscanada.org • www.cmdscanada.org

College of Physicians and Surgeons Ontario Draft Policy: *Professional Obligations and Human Rights*

Submissions from the **Christian Medical and Dental Society** and the **Canadian Federation of Catholic Physicians' Societies** to the College of Physicians and Surgeons of Ontario

Contents

Introduction

1. On August 5, 2014, the Christian Medical and Dental Society of Canada ("CMDS") and the Canadian Federation of Catholic Physicians' Societies ("CFCPS") provided submissions to the College of Physicians and Surgeon's of Ontario ("CPSO") with regard to its revision to Policy #5-08: *Physicians and the Ontario Human Rights Code.* For ease of reference, a copy of the CMDS and CFCPS' August 5, 2014 submissions are attached at Schedule "A".

2. In their submissions, the CMDS and CFCPS set out the legal framework in which the CPSO exists and operates and set out the legal obligations of the CPSO to comply with the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Specifically, the CMDS and the CFCPS set out the legal basis for which the CPSO is required to ensure that it takes no action, including the passing or policies or regulations, which result in the violation of physicians' *Charter* rights to freedom of religion and freedom of conscience. In their submissions, the CMDS and CFCPS set out the application of the *Charter* in this context and some of the various ways in which the *Charter* binds the CPSO, and protects physicians.

3. In reviewing the draft policy, *Professional Obligations and Human Rights,* (the "Draft Policy"), the CMDS and CFCPS note that the CPSO ignores its own obligations under the *Ontario Human Rights Code* (the "*Code*"), misunderstands the application of the *Charter* and the concept of *Charter* rights as a whole. The CMDS and the CFCPS have grave concerns over the manner in which the Draft Policy is drafted. The Draft Policy implies that in certain situations, the *Charter* rights of a physician could be in competition with the *Charter* rights of patients. This misunderstands the application of the *Charter.* More specifically, the CMDS and CFCPS have concerns with certain provisions of the Draft Policy.

4. The Draft Policy requires physicians who abstain from engaging in, providing or prescribing certain procedures or pharmaceuticals to make "effective referrals" to another health-care provider. Including the obligation to refer in the Draft Policy will result in the violation of the *Charter* rights to freedom of religion and freedom of conscience of some physicians. It therefore cannot withstand *Charter* scrutiny and will be struck by a court when challenged.

5. The Draft Policy includes a vaguely worded requirement for physicians to provide "care that is urgent or otherwise necessary to prevent imminent harm, suffering and/or deterioration, even where that care conflicts with their religious or moral beliefs". This obligation will result in the violation of *Charter* rights of some physicians. The violation may be found to be reasonable and saved, but the onus is on the CPSO to defend the violation. Including a vague and blanket provision which results in the violation of *Charter* rights is inappropriate, cannot withstand *Charter* scrutiny and will be struck by a court when challenged.

The Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies

6. The CMDS and the CFCPS represent Evangelical and Roman Catholic physicians across Canada.

The Christian Medical and Dental Society of Canada

7. The CMDS is a national and interdenominational association of Christian doctors and dentists who strive to integrate their Christian faith with medical or dental practice with 1673 members across Canada, representing a wide variety of specialties and practice types and many different Christian denominations.

8. Each of the CMDS' members subscribes to its Statement of Faith which acknowledges the divine inspiration, infallibility and supreme authority of Holy Scripture. The CMDS' membership includes approximately 1,500 Catholic and Protestant Evangelical Christian physicians and medical students across Canada. Over 90% of the CMDS' members identify as Protestant Evangelicals and represent many different Christian denominations.

The Canadian Federation of Catholic Physicians' Societies

9. The CFCPS is a national association of Catholic Physicians' guilds, associations and societies from eleven cities across Canada. The CFCPS' purposes include "To contribute to the development of public policy in relation to medical ethics and health care, in accordance with the dignity and worth of human life."

CPSO Obligations under the *Code*

10. The *Code* applies to all Ontarians who act as employers or who provide services to the general public. It also applies to the CPSO with respect to its policies and regulations over physicians in Ontario. The *Code* requires that individuals from the protected grounds have their needs accommodated. This obligation requires the CPSO to accommodate the needs of all physicians and to ensure that physicians are not discriminated against on the basis of any prohibited ground, which includes creed.

11. The *Code* requires the CPSO to accommodate the religious beliefs and practices of physicians across Ontario. If the CPSO fails to accommodate the religious beliefs of physicians across Ontario, then the CPSO is in violation of the *Code.*

12. The CMDS and CFCPS submit that drafting and implementing a policy which requires physicians to violate their religious beliefs results in the discrimination against certain physicians on the basis of their religious beliefs, or creed, and results in the CPSO failing to meet its own legal obligations under the *Code* to accommodate the needs of physicians.

CPSO Obligations under the *Charter*

13. The *Charter* applies to all branches of government, including entities which regulate a profession on behalf of the government. The *Charter* applies to the CPSO in its regulation of the medical profession in Ontario.

14. The *Charter* protects individuals' rights to freedom of religion, freedom of conscience, freedom of expression and equal treatment under the law. The CPSO therefore, cannot draft and implement policies and regulations which result in the violation of the freedom of religion, freedom of conscience or freedom of expression of physicians. Similarly, the CPSO cannot draft and implement policies and regulations which result in the differential treatment of physicians on prohibited grounds, including religion.

15. Contrary to what is implied in the Draft Policy, the *Charter* does not apply to physicians. The *Charter* has no application in the physician/patient relationship. Indeed, the *Charter*'s application here is limited to the CPSO's policies and regulations.

16. The *Charter* binds the CPSO and protects physicians. In perhaps more clear terms, physicians are not bound by the *Charter*, they are protected by it.

17. Any reference or suggestion that a physician's *Charter* rights will have to be balanced with patients' *Charter* rights is improper and not founded in law.

Obligation to provide effective referrals – Lines 156-159 of Draft Policy

18. At lines 156 to 159, the Draft Policy requires physicians who object to certain procedures or pharmaceuticals on religious or moral grounds to provide an effective referral to "a non-objecting, available, and accessible physician or other health-care provider".

19. For some physicians, an objection to participate in or prescribe a specific procedure or pharmaceutical may be rooted in a religious belief, a moral belief or both. For a physician who, for example, believes that abortion is morally reprehensible, referring patient to a abortionist is equally as offensive an immoral than performing the abortion themselves.

20. The rationale of course, is that by providing a referral, the physician is complicit in the act of obtaining the abortion. Indeed, Canadian criminal law recognizes the blurry line between performing an act and assisting in performing an act. For example, in Canada, it is a crime to sell narcotics. It is also a crime to assist someone in procuring illegal narcotics. On the one hand, the drug-dealer is guilty of selling an illegal substance. On the other hand, the person who refers you to the drug dealer is an accessory to the selling of an illegal substance.

21. The same applies here. For some physicians, providing a referral for a procedure or pharmaceutical they object to on moral or religious grounds is equally reprehensible as providing or prescribing it themselves. For these physicians, the obligation to refer results in a violation of their *Charter* rights to freedom of religion and freedom of conscience.

22. The obligation to provide a referral is an obligation to participate or engage in procuring the offensive procedure or pharmaceutical and therefore an obligation to violate one's religious or moral beliefs and is therefore a violation of the *Charter*. As such, it cannot withstand *Charter* scrutiny and will be struck by a court when challenged.

Requirement to engage in objectionable procedures – Lines 168-169 of Draft Policy

23. The last two lines of the Draft Policy require physicians to "provide care that is urgent or otherwise necessary to prevent imminent harm, suffering, and/or deterioration, even where that care conflicts with their religious or morals beliefs".

24. The language used here is vague and unqualified. The Draft Policy uses terms like "care", "urgent", "otherwise necessary", "imminent", "harm", "suffering" and "deterioration" without defining, qualifying or contextualizing them.

25. As a result, this section of the Draft Policy is vague and entirely subjective. What constitutes care that is "urgent"? What makes care "otherwise necessary"? Does "care" include procedures or pharmaceuticals which are elective such as abortion, assisted-suicide, sterilization and contraceptives? What is "imminent"? Who defines "harm" and "suffering" and are these terms limited to physical sensations?

26. This section of the Draft Policy is rendered meaningless by its failure to define, qualify and contextualize the terms it uses. Including this section in the Draft Policy is also unnecessary. Providing urgent care to patients is part of a physician's duty. In the hypothetical scenario where a patient requires a specific pharmaceutical or procedure urgently to prevent harm, and a physician objects or refuses to provide that pharmaceutical or procedure, then that physician may be liable in tort for negligence if he or she failed to act in accordance with the standard of care. Even in this most extreme of hypothetical scenarios, the physician's refusal to provide the pharmaceutical or procedure in question would not result in the violation of the patient's rights under the *Code.* In such a hypothetical scenario, if the physician refused to provide the pharmaceutical or procedure, then the patient who suffered harm as a result would find his or her recourse in an action for negligence against the physician, not in filing a complaint to the Ontario Human Rights Commission.

27. Including this section in the Draft Policy is problematic because of its vagueness but also because it confuses areas of law. Human rights law and tort law are not the same. Conflating the two assists no one and serves only to create ambiguity and confusion.

28. Further, compelling a physician to act against his or her religious or moral beliefs is always a violation of their freedom of religion and freedom of conscience. In certain exceptional circumstances, such a violation may be saved and deemed necessary, but the default response to *Charter* rights is to protect them, not curtail them. In such a situation, the CPSO would have the onus of demonstrating that violating the physician's *Charter* rights was demonstrably justified in a free and democratic society.

29. The burden falls on the CPSO to justify the violation of the *Charter* right, not on the physician to defend his or her freedom of religion and freedom of conscience.

30. Compelling physicians to violate their religious or moral beliefs is a violation of the *Charter*. Additionally, this section is vague. As such, it cannot withstand *Charter* scrutiny and will be struck by a court when challenged.

Violation of freedom of expression – Lines 146-148 of Draft Policy

31. The Draft Policy prohibits physicians from promoting "their own religious beliefs when interacting with patients, or those seeking to become patients, nor attempt to convert them".

32. If a physician objects to a specific pharmaceutical or procedure and advises his or her patients of that objection, the patient may ask the physician for the moral or religious basis of their objection. This Draft Policy would prevent physicians from answering such questions. Similarly, it would prevent a physician who shares the same faith as his or her patient from praying with that patient, even if the patient requests it.

33. While the CMDS and CFCPS appreciate that the primary role of a physician is not to preach the Gospel or evangelize to his or her patients, they have the legal right to speak about their faith with their patients. The prohibition on discussing their own religious beliefs with patients results in a violation of their freedom of expression and potentially results in a violation of their freedom of religion. As such, it cannot withstand *Charter* scrutiny and will be struck by a court when challenged.

Conclusion

34. The CMDS and CFCPS believe in equality and respect for all individuals. To maintain equality and respect for all, we must, as a society, be cognizant of the fact that differences do exist. Ontario is populated with individuals who differ in faith, race, culture, sex, age, physical appearance and many other respects. With differences of opinion and belief comes inevitable tension. Tension however, does not constitute discrimination.

35. The CPSO is bound by the *Charter* and as such, cannot compel physicians to violate their religious or moral beliefs. Similarly, it cannot violate physicians' freedom of expression or treat physicians differently based on religion.

36. The CMDS and CFCPS submit that the Draft Policy will result in the violation of the freedom of religion, freedom of conscience and freedom of expression of some physicians. For those physicians, the Draft Policy will also result in them receiving differential treatment on the basis of their religious beliefs. As such, the Draft Policy cannot withstand *Charter* scrutiny and will be struck by a court when challenged.

37. The CMDS and CFCPS ask the CPSO therefore, to amend the Draft Policy to ensure that it is *Charter*-compliant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS, 13th DAY OF FEBRUARY, 2015.

Schedule “A”

College of Physicians and Surgeons Ontario Policy #5-08: *Physicians and the Human Rights Code*

Submissions from the **Christian Medical and Dental Society** and the **Canadian Federation of Catholic Physicians' Societies** to the College of Physicians and Surgeons of Ontario

Contents

Executive Summary

The Christian Medical and Dental Society of Canada ("CMDS") and the Canadian Federation of Catholic Physicians' Societies ("CFCPS") represent Evangelical and Roman Catholic physicians from across Canada.

The CMDS and the CFCPS support the protection of human rights and advocate adherence to the *Ontario Human Rights Code* (the "*Code*"). The CMDS and CFCPS recognize that the *Code* prohibits physicians from discriminating against patients on prohibited grounds. While the *Code* imposes obligations on physicians, at the same time, it also provides physicians with protection from discrimination in their employment relationships and in their relationship with the College of Physicians and Surgeons of Ontario (the "College"); a protection CMDS and CFCPS physicians consider important in the context of the current review by the College.

The CMDS and CFCPS recognize that in rare cases a conflict of rights may arise between a patient and a physician. In these rare cases, both the patient and the physician will have human rights or civil liberties which may be determined to be in competition with one another. In such circumstances, there is to be a balancing of the competing rights if both cannot be met.

In the majority of cases where a conflict between physicians' and patients' rights is purported to exist, the CMDS and the CFCPS submit that this is due to a misunderstanding of what constitutes human rights and what constitutes discrimination. In such cases, no true conflict or competition of rights exists.

The CMDS and CFCPS take the position that in its current form, Policy #5-08: *Physicians and the Ontario Human Rights Code* (the "Policy") does not adequately deal with physicians' human rights, which include but are not limited to the right to freedom of conscience and freedom of religion and that it does not accurately reflect the law in this regard.

Both the Policy and the actions of the College are subject to the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), which is Canada's supreme law. The *Charter* guarantees all individuals, including physicians, the right to freedom of religion and freedom of conscience. The CMDS and the CFCPS propose the following amendments in an effort to assist the College in its revision of the Policy. The following paragraphs propose alternative wording for the sections of the Policy which are of concern.

"Policy" – Page 2

This section fails to recognize the supremacy of the *Charter*, which protects physicians' right to freedom of conscience and freedom of religion. The section further fails to recognize that all

rights provided under the *Code* are to be understood and interpreted in light of the underlying values and principles of the *Charter.* The Policy also fails to provide proper guidance for the balancing of competing rights. The Policy, as currently established, has a chilling effect on physicians who may wish to exercise their *Charter* right to freedom of religion or freedom of conscience.

The CMDS and the CFCPS propose removing the words "Compliance with the *Code* is one factor the College will consider when evaluating physician conduct."

"Guidelines – ii) Moral or Religious Beliefs" – Page 3

This section is drafted in such a way as to have a chilling effect on physicians who wish to integrate their personal beliefs, which include religious and conscious beliefs, into their medical practices.

The CMDS and the CFCPS propose adding "While the College respects physicians' freedom of conscience and freedom of religion, the College encourages physicians who find themselves in such a position to seek legal advice on how to ensure compliance with the *Code* without sacrificing their rights and freedoms." Adding this sentence would communicate to physicians that the College recognizes their *Charter* and *Code* rights.

"Guidelines – Ontario *Human Rights Code*: Current Law" – Page 3

This section of the Policy is drafted in a way which suggests to physicians that their rights to freedom of conscience or freedom of religion are secondary to obligations under the *Code.* The Policy goes beyond the rare circumstances in which a physician's rights may conflict with a patient's rights, and instead speaks of a potential situation where a physician's rights conflict with a patient's "need or desire for medical procedures or treatments".

The CMDS and the CFCPS have grave concerns with the language used in this section. While the *Code* does impose a duty not to discriminate on prohibited grounds, it does not impose a duty to perform medical procedures or treatments at a patient's request.

The CMDS and the CFCPS submit that "religious beliefs" should be replaced with "religious beliefs or conscience beliefs" and that the words "a patient's need or desire for medical procedures or treatments" should be replaced with "a prohibited ground of discrimination as set out in the *Code*". This replacement would ensure the Policy accurately distinguishes between a patient's rights and desires.

“College Expectations” – Page 4

The Policy sets out the College’s expectations with regards to a physician who declines to accept an individual as a patient or chooses to end a physician and patient relationship on the basis of the physician’s moral or religious belief. The Policy speaks of providing a referral for the patient. For some physicians however, certain referrals are equally offensive to religious or conscience beliefs as the provision of the services, treatment or pharmaceutical itself.

The CMDS and the CFCPS propose replacing the words “and in some circumstances” with “and, if appropriate in the circumstances,”. The addition of “if appropriate” will make it clear to physicians that they are not *required* to provide referrals for procedures, treatments or pharmaceuticals to which they object on conscience or religious grounds.

Conclusion

The CMDS and CFCPS believe in equality and respect for all individuals. To maintain equality and respect for all, we must, as a society, be cognizant of the fact that differences do exist. With differences of opinion and belief inevitably come some tensions. Tension however, does not constitute discrimination.

By making the proposed amendments, the Policy will accomplish its stated goal of ensuring physicians are aware of their obligations under the *Code* without jeopardizing their *Charter* rights to freedom of religion and freedom of conscience.

1. The Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies

38. The Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies represent Evangelical and Roman Catholic physicians across Canada.

The Christian Medical and Dental Society of Canada

39. The Christian Medical and Dental Society of Canada ("CMDS") is a national and interdenominational association of Christian doctors and dentists who strive to integrate their Christian faith with medical or dental practice with 1673 members across Canada, representing a wide variety of specialties and practice types and many different Christian denominations.

40. Each of the CMDS' members subscribes to its Statement of Faith which acknowledges the divine inspiration, infallibility and supreme authority of Holy Scripture.

41. The Christian Medical and Dental Society's membership includes approximately 1,500 Catholic and Protestant Evangelical Christian physicians and medical students across Canada. Over 90% of the CMDS' members identify as Protestant Evangelicals and represent many different Christian denominations.

The Canadian Federation of Catholic Physicians' Societies

42. The Canadian Federation of Catholic Physicians' Societies ("CFCPS") is a national association of Catholic Physicians' guilds, associations and societies from eleven cities across Canada.

43. The CFCPS' purposes include "To contribute to the development of public policy in relation to medical ethics and health care, in accordance with the dignity and worth of human life."

Position of the CMDS and the CFCPS

44. The CMDS and the CFCPS support the protection of human rights and advocate adherence to the *Ontario Human Rights Code*[1] (the "*Code*"). On this basis, the CMDS and CFCPS recognize that the *Code* prohibits physicians from discriminating against their patients on prohibited grounds. At the same time, the CMDS and CFCPS recognize that the *Code* imposes obligations on physicians, it also provides physicians with protection from discrimination in their employment relationships and in their relationship with the College of Physicians and Surgeons of Ontario (the "College").

45. While patients have the right to equal treatment and the equal provision of services, the CMDS and CFCPS recognize that in rare cases, a conflict of rights may arise between a patient and a physician. In these rare cases, both the patient and the physician will have certain competing human rights or civil liberties which cannot both be met.

46. In the majority of cases where a conflict between physicians' rights and patients' is purported to exist, the CMDS and the CFCPS submit that this is due to a misunderstanding of what constitutes human rights and what constitutes discrimination. In these cases, no true conflict of rights exists.

47. For example, if a physician declines to perform vasectomies on conscience or religious grounds, that physician is not discriminating against men. If however, the physician declines to perform vasectomies on certain men from a particular ethnic background, then the physician is discriminating against individuals of that particular ethnic background.

48. In the rare cases however where actual rights are in conflict, the CMDS and CFCPS advocate and propose a balancing of rights and an accommodation of the rights at issue which results in the least or lesser violation of either rights.

49. The CMDS and CFCPS take the position that the current policy, Policy #5-08: *Physicians and the Ontario Human Rights Code* (the "Policy") does not adequately deal with physicians' human rights, which include but are not limited to the right to freedom of

[1] *Ontario Human Rights Code*, R.S.O. 1990, c.H. 19 [*Code*].

conscience and freedom of religion and that it does not accurately reflect the law in this regard.

50. The CMDS and CFCPS therefore propose certain and specific amendments to the Policy to ensure that it complies with the relevant law and achieves its purpose of helping physicians understand their rights and obligations under the *Code.*

2. Scope and Purpose of Submissions

51. The CMDS and the CFCPS make the following submissions in an effort to assist the College in its revision of the Policy.

52. As set out above, the CMDS and the CFCPS support the protection of human rights as set out in the *Code*, however, the CMDS and the CFCPS have concerns regarding the effect the Policy has and will have on the exercise of physicians' conscience and religious freedoms.

53. On this basis, the CMDS and the CFCPS offer the College the following brief submissions on Canadian law as it relates to the *Code* and physicians' freedom of conscience or freedom of religion.

54. The purpose of these submissions is to assist the College in revising the Policy with an approach to the *Code* which complies with all relevant laws and which respects the individual human rights of everyone, including the constitutionally guaranteed rights to freedom of religion and conscience of physicians.

3. Legal Framework

The *Ontario Human Rights Code*

55. The *Code* is a provincial piece of legislation which has an equivalent in each of Canada's provinces or territories. The *Code* applies to all Ontarians who act as employers or who provide services to the general public.

56. The *Code* prohibits discrimination with respect to services, goods and facilities on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability[2].

57. The *Code* also requires that individuals from the protected grounds have their needs accommodated to the point of undue hardship[3].

58. In determining if accommodation is an undue hardship, Courts and Tribunals consider the cost of accommodation, the existence of any outside sources of funding for the accommodation and any health and safety requirements associated with the accommodation.

The *Canadian Charter of Rights and Freedoms*

59. In 1982, following a reference to the Supreme Court of Canada and with the support of all provincial governments except Quebec, the Governments of the United Kingdom and Canada passed the *Constitution Act, 1982*[4]. The first 34 sections of the *Constitution Act, 1982* are known as the *Canadian Charter of Rights and Freedoms*[5] (the "*Charter*").

60. The *Charter* applies to both federal and provincial governments. The *Charter* can apply to a private or quasi-governmental entity if that entity is controlled by the government, is implementing a government program or is regulating a profession on behalf of the government. Other relationships, such as between two individuals or between an employer and an employee or a physician and a patient, are not subject to the *Charter*. Disputes in this context will generally take place under the Human Rights Code of the province in which they occur; although in light of relevant human rights values and principles as developed under the *Charter*.

61. An individual can bring a *Charter* challenge if their *Charter* rights have been violated, and s/he has automatic standing to bring forward a claim. Individuals can challenge government

---

2 *Code*, *supra* note 1, at sections 1 and 5(1).
3 *Code*, *supra* note 1, at section 2.
4 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ["*Constitution*"].
5 *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 ["*Charter*"].

action, government legislation or non-governmental action taken pursuant to statutory authority.

62. While the Policy deals with the *Code*, it is important to acknowledge and remember that the *Code*, as well as any policy issued by the College, must also adhere to the *Charter*, the supreme law of Canada.

63. It is important then, that in revising the Policy, the College understand and acknowledge its obligations, not only under the *Code*¸ but also under the *Charter.*

The *Charter'*s application to College policy

64. In determining whether and how the *Charter* applies to the College's preparation, implementation and enforcement of the Policy, we must first consider the statutory framework which grants the College the authority to do so.

65. The College was created and derives its authority to regulate the practice of medicine in Ontario from the *Regulated Health Professions Act*[6] and the *Medicine Act*[7] as well as their regulations.

66. The *Charter* applies to organizations such as the College which are part of the apparatus of government or are delegates of statutory authority[8]. Even though the College is not directly linked to or controlled by government and is therefore not a government body, the *Charter* applies to the College when it exercises its statutory discretion to regulate the practice of medicine in Ontario pursuant to the *Regulated Health Professions Act* and the *Medicine Act* either by creating policies or disciplining members. The College is therefore required, in these instances, to make decisions that are consistent with the *Charter*.

67. All state action which violates the *Charter* is of no force or effect[9]. The *Charter* also applies to private entities carrying out a specific government policy and to public bodies delegated

---

6 *Regulated Health Professions Act*, S.O. 1991, Chapter 18 [*RHPA*].

7 *Medicine Act*, S.O. 1991, Chapter 30.

8 *Charter*, *supra* note 5, at section 32; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, pp. 1077-9; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, pp. 584-5.

9 *Constitution*, *supra* note 4, at sections 32, 52.

power by the provincial or federal Crown[10]. The *Charter* therefore clearly applies to the College.

68. The practical outworking of the *Charter*'s application to the College is that that the College must consider the *Charter* when exercising its statutory discretion under the *Regulated Health Professions Act* and the *Medicine Act* in preparing, implementing and enforcing policies. This issue was dealt with by the Supreme Court of Canada in its recent decision, *Doré v. Barreau du Québec*[11] ("*Doré*").

69. In *Doré*, the Supreme Court of Canada considered whether the Barreau du Québec's Disciplinary Council failed to respect a lawyer's freedom of expression under s. 2(*b*) of the *Charter* in its decision reprimanding him for writing an inflammatory letter to a judge. In *Doré*, the Supreme Court considered how *Charter* guarantees and *Charter* values are to be protected in the exercise of administrative decisions of regulatory bodies made pursuant to statutory authority[12].

70. In its decision, the Supreme Court of Canada concluded that administrative decision-makers are required to consider the *Charter* in their exercise of statutory authority[13]. Specifically, the Supreme Court stated:

> [55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).
>
> [56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core

---

10 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86, at para. 36.
11 *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 [*Doré*].
12 *Doré*, *supra* note 11, at para. 3.
13 *Doré*, *supra* note 11, at paras. 24 and 35.

> of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes (para. 47)." [Emphasis added]

71. In its preparation, implementation and enforcement of the Policy, the College is required to consider, and must be guided by, the values and principles of the *Charter*.

Physicians' rights under the *Charter*

72. The *Charter* plays an important role in guaranteeing rights for physicians. Of primary concern to the CMDS and CFCPS are physicians' conscience rights, including those informed by religious beliefs.

73. Section 2(a) of the *Charter* guarantees the right to freedom of religion and conscience[14].

Freedom of religion

74. *R. v. Big M Drug Mart*[15] ("*Big M*") is arguably the most influential case with respect to freedom of religion in Canada. As such, it provides us with the framework from which a court should address questions of religious freedom. In *Big M*, a Calgary pharmacy was charged for doing business on a Sunday contrary to the *Lord's Day Act* of the time. *Big M* questioned the constitutionality of the *Lord's Day Act* and eventually won its case.

75. In the Supreme Court's decision, Justice Dickson described freedom of religion as guaranteed by the *Charter*. He stated:

---

[14] Section 2(a) of the *Charter* reads:
"**2.** Everyone has the following fundamental freedoms:
(*a*) freedom of conscience and religion;"

[15] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 [*Big M*].

> 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[16].

76. In *R. v. Edwards Books*[17], another leading Supreme Court of Canada case, Dickson C.J. defined the purpose of section 2(a) of the *Charter*, and freedom of religion as follows:

> The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, human nature, and in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices.[18] [Emphasis added]

77. Additionally, the Supreme Court of Canada has also found freedom of religion to include, among other elements:
    a) the right to entertain such religious beliefs as a person chooses,[19]
    b) the right to declare religious beliefs openly,[20]
    c) the right not to have society interfere with profoundly personal beliefs,[21]
    d) the right to engage in conduct that may not be recognized by religious experts as being obligatory tenets or precepts of a particular religion,[22] and,
    e) the freedom to undertake practices and harbour beliefs, having a nexus with religion in order to connect with the divine or as a function of spiritual faith.[23]

Freedom of conscience

78. Freedom of conscience is not as straightforward as freedom of religion. Few cases have explored the contours of this freedom and future litigation is needed to more fully develop this area of the law. What is clear however is that non-religious individuals are included in the freedoms under section 2(a) of the *Charter*. Indeed, in her concurring reasons in *R. v.*

---

16 *Big M.*, *supra* note 15, at para. 94.
17 *R. v. Edwards Books* [1986] 2 S.C.R. 713 [*Edwards Books*].
18 *Edwards Books*, *supra* note 17, at para. 97.
19 *Big M.*, *supra* note 15, at para. 94.
20 *Big M.*, *supra* note 15, at para. 94.
21 *Edwards Books*, *supra* note 17, at para. 97.
22 *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at para. 43 [*Amselem*].
23 *Amselem*, *supra* note 22, at para. 46.

Morgentaler,[24] Wilson J. clearly stated that freedom of conscience and religion, while often related, do not need to be. She stated:

> It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.[25]

79. Indeed, the Federal Court of Appeal has stated that:

> It seems, therefore, that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles. These are serious matters of conscience. Consequently the appellant is not limited to challenging the oath or affirmation on the basis of a belief grounded in religion in order to rely on freedom of conscience under paragraph 2(a) of the *Charter*. For example, a secular conscientious objection to service in the military might well fall within the ambit of freedom of conscience, though not religion. However, as Madam Justice Wilson indicated, 'conscience' and 'religion' have related meanings in that they both describe the location of profound moral and ethical beliefs, as distinguished from political or other beliefs which are protected by paragraph 2(b).[26]

80. Though the jurisprudence on freedom of conscience is sparse, what is clear is that freedom of conscience exists and it exists to protect beliefs which are not necessarily grounded in religious tradition or belief; as well as religious beliefs.

The *Charter*'s role in relation to the Policy and the *Ontario Human Rights Code*

81. All legislation in Canada must comply with the *Charter*, which affords the right to freedom of conscience and religion (section 2(a)). The *Code* therefore, must comply with the *Charter*.

82. This being the case, if the *Code* was found to violate the *Charter* or an individual's *Charter* rights, the impugned portions of the *Code* would have to be struck down unless the violation

---

24 *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*].

25 *Morgentaler*, *supra* note 24, at para. 313.

26 *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 FC 406, at para. 25.

could be saved by virtue of section 1 of the *Charter*, which permits violations prescribed by law as can be demonstrably justified in a free and democratic society[27].

83. Similarly, any government action or administrative action taken pursuant to statutory authority, such as action taken by the College, which results in a violation of *Charter* rights would be deemed unconstitutional and would be overturned.

84. On this basis, and as stated by the Supreme Court of Canada in *Doré* as set out above, the College must consider *Charter* values and any *Charter* rights at play when it makes decisions, either regarding discipline or regarding policy.

85. It is on this basis that the CMDS and the CFCPS urge the College to ensure that the Policy not result in or encourage the violation of physicians' freedom of religion and conscience as protected by the *Charter.* If the Policy results in the violation of physicians' *Charter* rights, the Policy and the College will be vulnerable to a legal challenge on constitutional grounds.

86. Indeed, the Supreme Court of Canada recognized that the protection of freedom of religion is jealously guarded and that where a conflict between another right, in that case the right to same-sex marriage and the right to freedom of religion occur, any legislative provision causing the conflict would fail. The Supreme Court stated, in *Reference re Same-Sex Marriage*[28]:

> 52 The right to same-sex marriage conferred by the *Proposed Act* may conflict with the right to freedom of religion if the Act becomes law, as suggested by the hypothetical scenarios presented by several interveners. However, the jurisprudence confirms that many if not all such conflicts will be resolved within the *Charter*, by the delineation of rights prescribed by the cases relating to s. 2(*a*). Conflicts of rights do not imply conflict with the *Charter*; rather the resolution of such conflicts generally occurs within the ambit of the *Charter* itself by way of internal balancing and delineation.
>
> 53 The protection of freedom of religion afforded by s. 2(*a*) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence. We note that

---

[27] Section 1 of the *Charter* reads:
"**1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[28] *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 ["*Same-Sex Marriage*"].

> should impermissible conflicts occur, the provision at issue will by definition fail the justification test under s. 1 of the *Charter* and will be of no force or effect under s. 52 of the *Constitution Act, 1982*. In this case the conflict will cease to exist.[29]

87. The CMDS and the CFCPS therefore, make the following submissions and propose the following amendments to the Policy.

88. The CMDS and the CFCPS submit that the following proposed amendments assist the Policy in achieving its goal of ensuring physicians are aware of their obligations under the *Code*, while not jeopardizing the *Charter* rights to freedom of religion and freedom of conscience of physicians.

4. Analysis and Recommended Amendments

A. "Policy" – Page 2

89. The CMDS and CFCPS endorse the application of the *Human Rights Code* to the provision of medical services and the acknowledgement that the College is not in a position to create new Human Rights law. The approach set out in this section however, fails to acknowledge and recognize the supremacy of the *Charter* and the role the *Charter* plays in alleged infractions of the *Code*.

The Concern

90. The second paragraph of this section reads as follows:

> While the College does not have the expertise or the authority to make complex, new determinations of human rights law, physicians should be aware that the College is obliged to consider the *Code* when determining whether physician conduct is consistent with the expectations of the profession. Compliance with the *Code* is one factor the College will consider when evaluating physician conduct.

[29] *Same-Sex Marriage*, *supra* note 28, at paras. 52-53.

91. The CMDS and the CFCPS have concerns that in the rare cases where there a conflict of rights between a patient and a physician actually does exist, the Policy discourages or fails to provide guidance required to engage in a proper analysis and balancing of competing rights.

The Relevant Law

92. All individuals who either employ individuals or provide services to the general public are bound by and must adhere to the *Code*. This being the case, service providers, including physicians, cannot discriminate in their provision of services on the prohibited grounds set out in the *Code* which include: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability[30].

93. Refusal by a physician to treat or accept a new patient, even if that decision is based on the patient or prospective patient's race, creed, gender or other prohibited ground however, does not necessarily mean that the physician is in breach of the *Code.* In some cases, the *Code* permits exceptions to the "no discrimination" rule. In other cases, the *Code*'s prohibition could be found to be an unconstitutional violation of the physician's *Charter* rights as set out above.

94. In these rare cases, the Ontario Human Rights Tribunal or the Courts would engage in a balancing of the competing rights at play.

95. In the hypothetical situation where a physician's *Charter* rights are in conflict with a patient or prospective patient's *Code* rights, the Courts would consider whether there is protection for the patient under the *Charter*. For example, section 15 of the *Charter* guarantees equal treatment under the law without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability[31].

---

30 *Code*, *supra* note 1, at section 1.

31 Section 15(1) of the *Charter* reads:
"**15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

96. The enumerated grounds at section 15 of the *Charter* are important because they are more narrow than those listed in the *Code.*

Charter of Rights and Freedoms	***Ontario Human Rights Code***
a) Race; b) National or ethnic origin; c) Colour; d) Religion; e) Sex; f) Age; g) Mental or physical disability.[32]	a) Race; b) Ancestry; c) Place of origin; d) Colour; e) Ethnic origin; f) Citizenship; g) Creed; h) Sex; i) Sexual orientation; j) Gender identity; k) Gender expression; l) Age; m) Marital status; n) Family status; o) Disability[33].

97. Given the supremacy of the *Charter*, in situations where a *Charter* right is in conflict with a *Code* right, the starting point of the Courts will be to side with the *Charter* right unless the *Code* right falls into what is called an "analogous ground".

98. The enumerated grounds set out in section 15(1) of the *Charter* are prefaced with the words "in particular". The use of these words indicates that the enumerated grounds are not exhaustive.

99. To date, there have been a number of analogous grounds found to be protected under section 15(1) of the *Charter*. These include, but are not limited to:

    a) Citizenship;

    b) Sexual orientation;

    c) Marital status; and,

---

[32] *Charter*, *supra* note 5, at section 15(1).

[33] *Code*, *supra* note 1, at section 1.

d) Aboriginal residence/off-reserve band member status.

100. Although some of the grounds of discrimination prohibited by the *Code* have been found to be analogous grounds, many are not.

101. The test for determining a ground of discrimination protected by section 15(1) of the *Charter* was confirmed by the Supreme Court in *R. v. Kapp*[34]. Previously, the test had included a requirement that the dignity of the claimant be affected. In *Kapp,* the problems with the dignity analysis were recognized and the dignity analysis was jettisoned[35].

102. The test, as confirmed in *Kapp* is set out as follows:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[36]

103. Unless this exercise has been undertaken, the Courts would be required to give preferential treatment to the *Charter* right over the *Code* right. In a case however, of two *Charter* rights that are in conflict, the Court would engage in a balancing of the competing rights.

104. Perhaps the leading case on the balancing of competing *Charter* rights is *Trinity Western University v. British Columbia College of Teachers*[37].

105. Trinity Western University, a private Christian university, required its students to sign a community standards document in which they agreed to refrain from biblically prohibited activities.[38] Trinity Western applied to the British Columbia College of Teachers to have their teacher training program accredited because at the time, students of the B. Ed. program were

---

34 *R. v. Kapp*, [2008] 2 SCR 483[*Kapp*].
35 *Kapp*, *supra* note 34, at paras. 21 and 22.
36 *Kapp*, *supra* note 34, at para. 17.
37 *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 ["*Trinity Western*"].
38 *Trinity Western*, *supra* note 37, at para. 4.

required to attend a public university in their final year to receive accreditation.[39] The College of Teachers refused on the ground that the university's prohibition against homosexual behaviour was discriminatory.[40] Trinity Western applied for judicial review and had their application granted.[41] The decision was appealed by the College of Teachers to the British Columbia Court of Appeal and later to the Supreme Court of Canada.[42]

106. In *Trinity Western,* the Supreme Court of Canada had to determine whose rights, if anyone's, would prevail in an apparent conflict of religious freedom as protected by section 2(a) of the *Charter* and freedom from sexual orientation-based discrimination as protected by section 15(1) of the *Charter*. Although the *Charter* provides for freedom of religion as well as freedom from sexual orientation-based discrimination, the Supreme Court suggested that the *Charter* must be read as a whole so as not to privilege one right over another.[43] It stated:

> Consideration of human rights values in these circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation.[44]

107. In the case of competing rights then, conflicts can only be avoided through the proper delineation of the rights and values which are in question.[45] To avoid conflict, the Courts must properly define the scope of the rights while remembering that neither the freedom of religion nor the guarantee against sexual orientation-based discrimination is absolute.[46] This is to ensure the full protection of both rights whenever possible.

108. In *Trinity Western*, the Supreme Court concluded that the British Columbia College of Teachers was correct to evaluate the impact of Trinity Western's admission policy upon the public school environment, but that it did so in an inappropriate manner:[47]

---

39 *Trinity Western*, *supra* note 37, at para. 32.
40 *Trinity Western*, *supra* note 37, at para. 19.
41 *Trinity Western*, *supra* note 37, at para. 7.
42 *Trinity Western*, *supra* note 37, at para. 8.
43 *Trinity Western*, *supra* note 37, at para. 31.
44 *Trinity Western*, *supra* note 37, at para. 34.
45 *Trinity Western*, *supra* note 37, at para. 29.
46 *Trinity Western*, *supra* note 37, at para. 29.
47 *Trinity Western*, *supra* note 37, at para. 30.

> There is no denying that the decision of the BCCT places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year. These are important considerations. What the BCCT was required to do was to determine whether the rights were in conflict in reality.[48]
>
> […]
>
> Even though the requirement that students and faculty adopt the Community Standards creates unfavourable differential treatment since it would probably prevent homosexual students and faculty from applying, one must consider the true nature of the undertaking and the context in which this occurs.[49]

109. To properly deny Trinity Western accreditation, concluded the Supreme Court, the British Columbia College of Teachers would have had to base their reasoning on solid and concrete evidence of discriminatory conduct:[50] If Trinity Western were to be denied accreditation simply because of their Community Standards, it would be akin to barring all members of Christian churches from teaching. *Trinity Western* thus serves as an appropriate guide in dealing with competing rights and determining whose rights will prevail.

110. Along the same rationale as *Trinity Western*, forcing a physician to deny his or her conscience or religious beliefs because of possible violations of the *Code* could be akin to barring all physicians who hold deep and sincere religious or moral beliefs.

The Proposed Amendment

111. The CMDS and CFCPS propose removing the words "Compliance with the *Code* is one factor the College will consider when evaluating physician conduct."

---

48 *Trinity Western*, *supra* note 37, at para. 32.
49 *Trinity Western*, *supra* note 37, at para. 34.
50 *Trinity Western*, *supra* note 37, at para. 38.

112. If the College does not have the expertise or the authority to engage in complex or new determinations of human rights law, then it also lacks the expertise and authority to delineate between when a physician's lack of compliance with the *Code* is legally justified in light of the *Charter* and when it is not.

113. For this reason, the inclusion of the words "Compliance with the *Code* is one factor the College will consider when evaluating physician conduct" lacks any real meaning and can serve only to chill physicians who may find themselves in a position where they need to assert their right to freedom of conscience or freedom of religion.

B. "Guidelines – ii) Moral or Religious Beliefs" – Page 3

114. The third paragraph of this section reads as follows:

> Physicians should, however, be aware that the Ontario Human Rights Commission or Tribunal may consider decisions to restrict medical services offered, to accept individuals as patients or to end physician-patient relationships that are based on physicians' moral or religious beliefs to be contrary to the *Code.*

The Concern

115. The CMDS and the CFCPS are concerned that this section is drafted in such a way so as to have a chilling effect on physicians with a moral obligation to integrate their personal beliefs which include religious and conscious beliefs, into their medical practices.

116. As currently drafted, the Policy appears to tell physicians that if they choose or wish to exercise their freedom of conscience or freedom of religion, they do so at the risk of being found in violation of the *Code*, and in light of earlier comments made in the Policy, subject to discipline by the College.

117. As set out above, physicians also benefit from the *Code'*s protections in that they are, in some cases, employees who have the right to have their religious or conscience beliefs accommodated under the *Code.*

The Proposed Amendment

118. The CMDS and the CFCPS propose adding "While the College respects physicians' freedom of conscience and freedom of religion, the College encourages physicians who find themselves in such a position to seek legal advice on how to ensure compliance with the *Code* without sacrificing their rights."

119. The addition of this sentence would communicate to physicians that the College recognizes their *Charter* rights and that while this topic may be delicate and complex, physicians are not expected to abandon their moral or religious beliefs. Indeed, this is the position that was taken by the College when it revised the Policy in 2008.[51]

C. "Guidelines – Ontario *Human Right Code:* Current Law" – Page 3

120. The first paragraph of this section suggests that even if a physician declines to provide a service or accept an individual as a patient on the basis of a prohibited ground, they could be acting contrary to the *Code.* In support of this suggestion, the Policy states the following, under footnote 5:

> This could occur if the physician's decision to refuse to provide a service, though motivated by religious belief, has the effect of denying an individual access to medical services on one of the protected grounds. For example, a physician who is opposed to same sex procreation for religious reasons and therefore refuses to refer a homosexual couple for fertility treatment may be in breach of the *Code.*

121. The Policy goes on, in this section, to explain that the law in this area is unclear and the College therefore cannot advise physicians on how such a situation of competing rights would be resolved. Despite this statement however, the Policy goes on to provide what it terms to be general principles that Courts have articulated in instances of equality rights clashing with freedom of conscience and religion.

122. Finally, in the last paragraph of this section, the Policy states:

---

[51] Preston Zuliani, M.D., then President of the College of Physicians and Surgeons, "Doctors do not have to violate beliefs", *Ottawa Citizen*, August 23, 2008: http://www.canada.com/ottawacitizen/news/letters/story.html?id=16631e26-c448-4694-8168-ec45d3bbdd63

> These principles appear to be generally applicable to circumstances in which a physician's religious beliefs conflict with a patient's need or desire for medical procedures or treatments. They are offered here to provide physicians with an indication of what principles may inform the decisions of Courts and Tribunals.

The Concern

123. This section of the Policy is drafted in a way which suggests to physicians that their rights to freedom of conscience or freedom of religion are secondary to their obligations under the *Code.*

124. The *Code* prohibits discrimination on prohibited grounds such as religion, race, sex or sexual orientation. In this regard, a physician whose religious or conscience beliefs lead them to decline to provide medical services or accept a patient on the sole basis of the patient's religion, race, sex or sexual orientation is in violation of the *Code*.

125. In this situation, the patient's right not to be discriminated against on the basis of a prohibited ground would be in conflict and competition with the physician's right to freedom of religion or conscience. In this situation, a balancing of rights would be required.

126. In the last paragraph of this section however, the Policy goes on to widen this potential conflict in suggesting that the principles laid-out in the Policy "appear to be generally applicable to circumstances in which a physician's religious beliefs conflict with a patient's need or desire for medical procedures or treatments." In this last paragraph, the Policy goes beyond the rare circumstances in which a physician's rights will conflict with a patient's rights, and instead speaks of a potential situation where a physician's rights conflict with a patient's "need or desire for medical procedures or treatments".

127. The CMDS and the CFCPS have grave concerns with the language used in this section. While the *Code* does impose a duty not to discriminate on prohibited grounds, it does not impose a duty to provide medical procedures or treatments at a patient's request.

128. Above, we discussed a hypothetical situation where a physician's religious or conscience beliefs lead them to decline to provide medical services or accept a patient on the sole basis

of the patient's religion, race, sex or sexual orientation. In that situation, the physician would be in violation of the *Code*, although it is possible that the violation of the *Code* could be upheld by a Court on the grounds that the physician's *Charter* rights would otherwise be violated.

129. If however, a physician declines to provide a specific medical procedure or treatment on the basis of his or her religious or conscience belief with regard to the procedure or treatment, then no discrimination under the *Code* has occurred.

130. An example of this distinction has recently been covered in the mainstream media. Recently, it was reported that a physician in Ottawa, Ontario declined to prescribe contraceptives or refer patients or prospective patients to a physician who would prescribe contraceptives[52].

131. In the coverage of this issue, many reports suggested or asserted that the physician in question was imposing his religious views on patients and was somehow violating patients', and prospective patients' rights. Such a conclusion however, is not supported by the law.

132. There is no right to a prescription for contraceptives. There is also no right to receive a prescription for contraceptives from a specific doctor. In the situation involving the physician in Ottawa who objects to contraceptives on religious grounds, there was no discrimination under the *Code.* The physician objects to contraceptives in all circumstances, not with specific individuals. The discrimination is against the contraceptives themselves, not against patients or prospective patients as the physician in question objects to prescribing contraceptives for any and all patients.

133. The wording used in the last paragraph of this section of the Policy however, appears to suggest that the College is of the opinion that if a physician objects to a specific procedure, treatment or pharmaceutical, then the physician is somehow in violation of the *Code.* This is not the case in law or in fact.

---

[52] Elizabeth Payne, "Some Ottawa doctors refuse to prescribe birth control pills", *Ottawa Citizen*, January 31, 2014: http://ottawacitizen.com/news/local-news/some-ottawa-doctors-refuse-to-prescribe-birth-control-pills.

The Proposed Amendment

134. The CMDS and the CFCPS submit that "religious beliefs" should be replaced with "religious beliefs or conscience beliefs" and that the words "a patient's need or desire for medical procedures or treatments" should be replaced with "a prohibited ground of discrimination as set out in the *Code*".

135. These amendments would accomplish the goal of ensuring that physicians understand that in rare situations where their religious or conscience rights conflict with prohibited grounds of discrimination under the *Code*, they must tread carefully and make all efforts to avoid or limit any violations of the *Code* while accurately distinguishing between a patient's rights and desires.

D. "College Expectations" – Page 4

136. In this section, the Policy sets out the College's expectations with regards to a physician who declines to accept individuals as patients or end a physician and patient relationship on the basis of the physician's moral or religious belief.

137. In its fourth and final suggestion, the Policy speaks of providing a referral for the patient. The fourth bullet of this section reads as follows:

> Advise patients or individuals who wish to become patients that they can see another physician with whom they can discuss their situation and in some circumstances, help the patient or individual make arrangements to do so.

The Concern

138. The concern with this section is that in certain cases and for certain physicians, the referral is equally offensive as the provision of the services, treatment or pharmaceutical itself.

139. For example, above we discussed the recent situation in Ottawa where a physician objected to contraceptives on religious grounds. In that circumstance, the physician held the religious belief that the use of contraceptives is a sin. On this basis, he cannot prescribe contraceptives because in doing so, he would be complicit in his patient's sin. Providing a

patient with a referral for contraception makes him equally complicit and is therefore a false compromise.

140. For the physician in question, as with most if not all physicians who object to a specific procedure, treatment or pharmaceutical on religious or moral grounds, administering or providing the treatment is no different than referring the patient to someone who will administer it. In other words, contracting an assassin morally equivalent to committing murder[53].

141. Finally, this section of the Policy deals with the College's expectations when a physician declines to accept a patient or chooses to end the physician/patient relationship. The Policy requires physicians to communicate the limitation of their services promptly and clearly. It is important to note and remember however, that simply because a physician declines to perform a specific procedure or provide a specific pharmaceutical does not mean that the physician is ending the physician/patient relationship or declining to accept a patient.

The Proposed Amendment

142. The CMDS and the CFCPS propose replacing the words "and in some circumstances" with "and, if appropriate in the circumstances,".

143. The CMDS and the CFCPS submit that the addition of "if appropriate" will make it clear to physicians that they are not *required* to provide referrals for procedures, treatments or pharmaceuticals which they object to on moral or religious grounds.

144. The Policy currently encourages physicians to promptly and clearly communicate these issues and the limitations of their services to their patients. Indeed, the Canadian Medical Association's *Code of Ethics* and the College's Policy #3-08: *Ending the Physicians-Patient Relationship* simply require that physicians be honest and upfront with patients and prospective patients about the services and treatment they will and will not provide.

---

[53] Similarly, the College recognizes that referring for a procedure carries with it the same responsibility and culpability as performing the procedures. See "Policy Statement #2-11: Female Genital Cutting (Multilation)", September 2011: http://www.cpso.on.ca/Policies-Publications/Policy/Female-Genital-Cutting-%28Mutilation%29

145. The CMDS and the CFCPS submit that this practice is reasonable and ensures that both physician and patient rights are respected.

5. Conclusion

146. The CMDS and CFCPS believe in equality and respect for all individuals.

147. To maintain equality and respect for all, we must, as a society, be cognizant of the fact that differences do exist. Ontario is populated with individuals who differ in faith, race, culture, sex, age, physical appearance and many other respects. With differences of opinion and belief comes inevitable tension. Tension however, does not constitute discrimination.

148. The CMDS and CFCPS submit that by making the proposed amendments, the Policy will accomplish its stated goal of ensuring physicians are aware of their obligations under the *Code* without jeopardizing their *Charter* rights to freedom of religion and freedom of conscience.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS, 5th DAY OF AUGUST, 2014.