

Submission from the Canadian Physicians for Life

September 11, 2008

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

Dear Members of the Policy Department and Council:

Re: Draft policy document, “Physicians and the *Ontario Human Rights Code*”

As a nationwide group of pro-life physicians, we have viewed the recent interaction between the Ontario Human Rights Commission and the College of Physicians and Surgeons of Ontario with grave concern.[i] Reassurances from the College notwithstanding[ii], the freedom of physicians to avoid direct participation in contentious medical acts, and also to avoid de facto participation via coerced referral, is under attack. The practice of abortion provides the archetype for this conflict.

Abortion is not illegal in Canada and physicians can carry out abortions without incurring legal liability. Any pregnant Canadian woman has the freedom to request an abortion within the public health system to destroy and remove the human being within her if participating in the pregnancy does not fit her aspirations for the conduct of her life.

Likewise, physicians who have no ethical or moral reservations about destroying unborn human life are free to make that known and the pregnant woman is free to seek out and be treated by these physicians.

Correlative to the freedoms of both pregnant women and pro-choice physicians, a Canadian pro-life physician has hitherto been free to avoid participation in the destruction of any human life, which would be a serious breach of his or her moral beliefs and ethics, and has been free to make this position known to patients or prospective patients. In

declining to refer a woman for an abortion, the physician who objects to abortion is exercising his or her freedom to choose not to be a segment of that woman's self-chosen road to an abortion. It is not the responsibility of any physician to manage, promote, or enhance access to a procedure which he or she finds medically harmful and morally repugnant.

The ethical bankruptcy of any society which would punish physicians who object to abortion, and the imprudence of doctors sitting in regulatory institutions who would threaten to punish their objecting colleagues, should be obvious. To stimulate the moral imagination, we offer this analogy: Suppose you live in a society in which slavery is legal but you think it is wrong. Someone comes to you, knowing that you are a knowledgeable native of the region, and asks directions to the nearest and most convenient slave market. Should you be punished if you won't give directions? Is it not obvious that directing the aspiring slave owner to the market means facilitating the purchase of a human being, a wrongful act? What would you think of neighbours who wanted to deprive you of your livelihood or seize your assets and home because they were offended by your objection to slavery and they wanted to enforce your obedience to their way of thinking?

We have entered an era in which radical self-determination is endorsed by elites and fostered by the law. Surgery which would formerly have been seen as mutilation is now portrayed as a right necessary for self-fulfillment. The protection of human rights is the responsibility of us all, and the special interest of human rights commissions and tribunals who take their cues from a list of prohibited grounds of discrimination, a list with a tendency to grow.

Problems arise, however, when such bodies want not only to protect certain lifestyles and designated groups from adversity but also to force others, such as physicians, to carry out acts to which they have moral and ethical objections, or which are contrary to their vision of good professional practice. Often such objections are dismissed on the grounds that they are connected with religion and that religious belief has no place in the public square

or the practice of a profession. This assertion does not bear close scrutiny, and the presumption that all such objections are based on religious belief is erroneous.

For example, if physical stature became a prohibited ground, parents could demand human growth hormone supplements for constitutionally short children. You might have no religiously-based objection to height augmentation and it might have been proven safe, or the principle that safety concerns are subsidiary might have been enshrined in legal precedent, but you still might have qualms about tinkering with the natural stature of the child in this way. What would be your defense? After all, under a human rights commission regime you couldn't just say "I need to study this" or "I don't have any competence in this field of practice" without being coerced to refer – and in this hypothetical case, treatment lengthily delayed would be treatment denied.

The argument, sometimes heard, that it is because Canadian physicians work in a publicly funded system that HRCs have a responsibility to police them is particularly specious. That Canadian medicare for physician services is essentially publicly funded but privately administered is irrelevant to the issues which could as easily arise in a completely user-pay system. The receipt of public funds does not diminish the civil rights of unemployed people on income assistance – should doctors working for public money not have the same rights?

The importance of health care makes the practice of medicine a perennial topic of public discussion and many of our social controversies are intensified when placed in a medical context. This is especially evident when social activists seek test cases to bring before human rights commissions, often for causes unrelated to the provision of health care. This has special implications for physicians who may be targeted for having unfashionable, or at least unprotected, moral, social, and medical opinions. It has been widely noticed that becoming enmeshed in the tribunal system imposes a considerable burden on the defendant – that, regardless of the final outcome, "the process is the punishment."

It would seem that some conceive of the public sphere as a playing field onto which citizens may venture only if they are willing to obey rules that can be changed at any time by a committee (and, we suggest, a committee that doesn't even understand the nature of the game being played). On this view, our actions on the field should simply reflect the rules, without intrusion by our private thoughts and beliefs. We are expected to accept that we can be removed from the field and fined for infractions at the discretion of a referee who is a surrogate for, and takes orders from, the committee.

In reality, we live our lives on a continuous spectrum between the public and the private, in a condition of continuous intermingling of public acts and private thoughts. Human rights commissions must take this into account. Their goal should be to respect the rights of everyone, especially on matters of profound moral belief.

Of course it is true that, in any functional society, the freedom to hold beliefs is broader than the freedom to act on them. We are not debating the necessity of rules that limit actions, since everyone can agree that a functional society needs rules. It is the precise nature of the rules and the *sharing* of the onus to limit oneself by rules which is under discussion.

Thus the concept of “accommodation” must be restored to its origins in mutual good faith. Coercion must be assiduously avoided, especially in matters of deep moral conscience. The individual humanity of physicians, no less than patients, must be respected. On the contrary, in the position taken by the OHRC one looks in vain for a balancing emphasis on the duty of the Canadian health care system to accommodate the religious or moral scruples of its employees. Why should every industry *except* health care have to accommodate its employees, right up to the point of “undue hardship,” regarding the protected-grounds-of-discrimination list? [iii]

Real and unjust discrimination is ethically wrong because it denies access to society's good things – such as education or employment – to those who do not “measure up” to some arbitrary and irrelevant standard like skin colour. The law rightly condemns and

seeks to prevent it. There is a true consensus that education is a good thing, and that employment is a good thing. But nothing of the sort can be said about morally controversial procedures like abortion, euthanasia, or artificial reproduction. If there is a conflict between a physician and patient as a result of a refusal to facilitate such a procedure for reasons of conscience, the conflict originates not in discrimination but in a disagreement between the physician and the patient about what constitutes a good thing. Sometimes the disagreement results from the professional perspective, knowledge and experience of the physician, even if he or she does not, in principle, object to the procedure in question.

Consider the request of a 20 year old man for a vasectomy or a 20 year old woman for a tubal ligation. Such surgery has permanent implications for the patient which could be bitterly regretted later in life. It would be, in our view, a *misuse* of the word “discrimination” to characterize a physician’s conscientious refusal to facilitate such surgery as wrongful “discrimination on the basis of a prohibited ground” (age or sex). If this is discrimination, it is only so in the sense that one discriminates between a prudent and an imprudent act, or between acts that do harm and those that do not.

When physician and patient disagree about whether or not a procedure is a good thing, the OHRC's Chief Commissioner herself, Barbara Hall, apparently expects the CPSO to coerce and punish the physician for failing to agree with the patient, on the grounds that the College should endorse and enforce the patient's views at the serious cost of breaching the human rights of the physician. This is precisely what Madam Justice Bertha Wilson said should never be done, for that would be to “deny freedom of conscience to some, to treat them as means to an end, to deprive them . . . of their ‘essential humanity’.”^[iv] We strongly object to the attempt by the OHRC to subvert thousands of years of medical ethics and to deny the essential humanity of physicians by suppressing their freedom to act in accord with their deepest moral beliefs, merely to avoid the inconvenience some patients might experience in having to “shop around” for morally controversial procedures.

When considering codes of behaviour, as a general principle freedoms may only be infringed if the harm *caused* by the infringement is not disproportionate to the harm the infringement seeks to prevent. The suppression of conscience, religion, and free speech proposed by the OHRC is recklessly disproportionate to any conceivable harm which inconvenience or hurt feelings might represent to some patients. Professional standards and public safety can be maintained without compromising physicians' freedom of conscience, and in fact it is our duty to work together to achieve this.[v]

Importantly, this situation could be seen by the CPSO as an opportunity to strengthen the ethical practice of medicine in Canada by adopting standards of physician conscience protection which are truly reflective of the inclusive, diverse, and pluralistic society we should all be striving to create.

The CPSO must not abdicate its obligation to bring medical and ethical judgment to the regulation of the medical profession and the practice of medicine in Ontario. It is inconsistent to expect ethical conduct from physicians who are told to check their personal moral and ethical beliefs at the door. The College must refuse to become an agent for the promotion of such views.

We wish the College well in its difficult but necessary review of this pivotal issue.

Yours respectfully,

Will Johnston, MD

On behalf of Canadian Physicians for Life