



# Professional Obligations and Human Rights

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**REFERENCE MATERIALS:** *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551.

**OTHER REFERENCES:** Ontario Human Rights Commission, *Policy on Competing Human Rights*, (Ontario: Jan 26, 2012); Ontario Human Rights Commission, *Policy on Ableism and Discrimination Based on Disability*, (Ontario: June 27, 2016).

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# Professional Obligations and Human Rights

## INTRODUCTION

The fiduciary nature of the physician-patient relationship requires that physicians act in their patients' best interests.<sup>1</sup> In doing so, physicians must strive to create and foster an environment in which the rights, autonomy, dignity and diversity of all patients, or those seeking to become patients, are respected. This goal is achieved, in part, by fulfilling the obligations under the Ontario *Human Rights Code*<sup>2</sup> (the "*Code*"), which entitles every Ontario resident to equal treatment with respect to services, including health services, without discrimination.

This policy articulates physicians' professional and legal obligations to provide health services without discrimination. This includes a duty to accommodate individuals who may face barriers to accessing care. The policy also sets out the College's expectations for physicians who limit the health services they provide due to clinical competence or because of their personal values and beliefs.

## PRINCIPLES

The key values of professionalism articulated in the College's Practice Guide – compassion, service, altruism and trustworthiness – form the basis for the expectations set out in this policy. Physicians embody these values and uphold the reputation of the profession by, among other things:

1. Acting in the best interests of their patients, and ensuring that all patients, or those seek-

ing to become patients, receive equitable access to care. This is especially important with respect to vulnerable and/or marginalized populations;

2. Communicating effectively and respectfully with patients, or those seeking to become patients, in a manner that supports their autonomy in decision-making, and ensures they are informed about their medical care;
3. Properly managing conflicts, especially where the physician's values differ from those of their patients, or those seeking to become patients. The patient's best interests must remain paramount;
4. Participating in self-regulation of the medical profession by complying with the expectations set out in this policy.

## PURPOSE & SCOPE

This policy sets out the legal obligations under the *Code* for physicians to provide health services without discrimination, as well as the College's professional and ethical expectations of physicians in meeting those obligations. This policy also sets out physicians' duty to accommodate individuals who may face barriers to accessing care. Finally, this policy outlines physicians' rights to limit the health services they provide for legitimate reasons while upholding their fiduciary duty to their patients.

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1. Please see the College's Practice Guide for further details; Also consistent with the Supreme Court of Canada's decision in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138.

2. *Human Rights Code*, R.S.O. 1990, c. H.19.



## POLICY

### Human Rights, Discrimination and Access to Care

The *Code* articulates the right of every Ontario resident to receive equal treatment with respect to services, goods and facilities, without discrimination on the grounds 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.<sup>3</sup> The *Code* requires that all those who provide services in Ontario, including physicians providing health services, do so free from discrimination.

Discrimination may be described as an act, decision or communication that results in the unfair treatment of a person or group by either imposing a burden on them, or denying them a right, privilege, benefit or opportunity enjoyed by others. Discrimination may be direct and intentional. Alternatively, discrimination may be entirely unintentional, where rules, practices or procedures appear neutral, but may have the effect of disadvantaging certain groups of people. The *Code* provides protection from all forms of discrimination based on the above protected grounds, whether intentional or unintentional.<sup>4</sup>

Physicians must comply with the *Code*, and the expectations of the College, when making

any decision relating to the provision of health services. This means that physicians cannot discriminate, either directly or indirectly, based on a protected ground under the *Code* when, for example:

- Accepting or refusing individuals as patients;
- Providing existing patients with health care or services;
- Providing information or referrals to existing patients or those seeking to become patients; and/or
- Ending the physician-patient relationship.

### The Duty to Accommodate

The legal, professional and ethical obligation to provide services free from discrimination includes a duty to accommodate. Accommodation is a fundamental and integral part of providing fair treatment to patients. The duty to accommodate reflects the fact that each person has different needs and requires different solutions to gain equal access to care.

The *Code* requires physicians to take reasonable steps to accommodate the needs of existing patients, or those seeking to become patients, where a disability<sup>5</sup> or other personal circumstance may impede or limit their access to care. The purpose in doing so is to eliminate or reduce any barriers or obstacles that patients may experience.

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3. *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1.

4. As adapted from the Ontario Human Rights Commission's definition of "discrimination".

5. Section 1 of the *Human Rights Code*, R.S.O. 1990, c. H.19 defines "disability" as follows:

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act*, 1997.

# Professional Obligations and Human Rights

The College expects physicians to comply with their duty to accommodate as set out in the *Code*, and to make accommodations in a manner that is respectful of the dignity, autonomy and privacy of the person.

Examples of accommodation may include: enabling access for those with mobility limitations, permitting a guide dog to accompany a patient into the examination room, ensuring that patients with hearing impairment can be assisted by a sign-language interpreter, being considerate of older patients that may face unique communication barriers, providing reasonable flexibility around scheduling appointments where patients have family-related needs,<sup>6</sup> ensuring signage reflects diverse family configurations (e.g., families with two mothers or two fathers), and/or creating forms to accommodate patients' gender identity and expression.

While physicians have a legal, professional and ethical duty to accommodate, there are limits to this duty. Physicians do not have to accommodate beyond the point of undue hardship, where excessive cost, health or safety concerns would result. The duty to accommodate is also limited where it significantly interferes with the legal rights of others.<sup>7</sup>

## Limiting Health Services for Legitimate Reasons

The duty to refrain from discrimination does not prevent physicians from limiting the health

services they provide for legitimate reasons.<sup>8</sup> Physicians, for instance, may be unable to provide care that is clinically indicated and within the standard of care, if that care is outside of their clinical competence. Also, physicians may be unwilling to provide care that is contrary to their conscience or religious beliefs.

While physicians may limit the health services they provide as discussed below, they must do so in a manner that respects patient dignity and autonomy, upholds their fiduciary duty to the patient, and does not impede equitable access to care for existing patients, or those seeking to become patients.

The following sections set out physicians' rights and obligations in these circumstances.

## A) Clinical Competence

The duty to refrain from discrimination does not prevent physicians from making decisions in the course of practicing medicine that are related to their own clinical competence. Physicians are expected to provide patients with quality health care in a safe manner. If physicians feel they cannot appropriately meet the health-care needs of an existing patient, or those who wish to become patients, they are not required to provide that specific health service or to accept that person as a patient. However, physicians must comply with the *Code*, and College expectations, in so doing. Any decision to limit the provision of health services on the

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6. Ontario Human Rights Commission, *Submission Regarding College of Physicians and Surgeons Policy Review: Physicians and the Ontario Human Rights Code*, (Ontario: August 1, 2014).

7. Further explanation of "undue hardship" is provided in the Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*.

8. For more information see the College's Accepting New Patients and Ending the Physician-Patient Relationship policies.



basis of clinical competence must be made in good faith<sup>9</sup>.

Where clinical competence may restrict the type of services or treatments provided, or the type of patients a physician is able to accept, the College requires physicians to inform patients of this as soon as is reasonable. The College expects physicians to communicate this information in a clear and straightforward manner to ensure that individuals or patients understand that their decision is based on an actual lack of clinical competence rather than discriminatory bias or prejudice. This will lessen the likelihood of misunderstandings.

In order to protect patients' best interests and to ensure that existing patients, or those seeking to become patients, are not abandoned, the College requires physicians to provide a referral to another appropriate health-care provider for the elements of care the physician is unable to manage directly.

## B) Conscience or Religious Beliefs

The *Canadian Charter of Rights and Freedoms* (the "*Charter*") protects the right to freedom of conscience and religion.<sup>10</sup> Although physicians have this freedom under the *Charter*, the Supreme Court of Canada has determined that no rights are absolute. The right to freedom of conscience and religion can be limited, as necessary, to protect public safety, order, health,

morals, or the fundamental rights and freedoms of others.<sup>11</sup>

Where physicians choose to limit the health services they provide for reasons of conscience or religion, this may impede access to care in a manner that violates patient rights under the *Charter* and *Code*.<sup>12</sup> The courts have determined that there is no hierarchy of rights; all rights are of equal importance.<sup>13</sup>

Should a conflict arise, the aim of the courts is to respect the importance of both sets of rights to the extent possible.

The balancing of rights must be done in context.<sup>14</sup> In relation to freedom of religion specifically, courts will consider the degree to which the act in question interferes with a sincerely held religious belief. Courts will seek to determine whether the act interferes with the religious belief in a manner that is more than trivial or insubstantial. The less direct the impact on a religious belief, the less likely courts are to find that freedom of religion is infringed.<sup>15</sup> Conduct that would potentially cause harm to and interfere with the rights of others would not automatically be protected.<sup>16</sup>

While the *Charter* entitles physicians to limit the health services they provide for reasons of conscience or religion, this cannot impede, either directly or indirectly, access to these services for existing patients, or those seeking to become patients.

9. As stated in the College's Accepting New Patients policy, "Clinical competence and scope of practice must not be used as a means of unfairly refusing patients with complex health care needs, or patients who are perceived to be otherwise difficult."

10. *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, s 2(a).

11. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para 95.

12. *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at pp 58-61; *Human Rights Code*, R.S.O. 1990, c. H. 19.

13. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at p 839.

14. Ontario Human Rights Commission, *Policy on Competing Human Rights*, (Ontario: Jan 26, 2012).

15. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at paras 59-61.

16. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para 62.

# Professional Obligations and Human Rights

Physicians have a fiduciary duty to their patients.<sup>17</sup> The College requires physicians, who choose to limit the health services they provide for reasons of conscience or religion, to do so in a manner that:

- i. Respects patient dignity;
- ii. Ensures access to care; and
- iii. Protects patient safety.

## ***i. Respecting Patient Dignity***

Where physicians object to providing certain elements of care for reasons of conscience or religion, physicians must communicate their objection directly and with sensitivity to existing patients, or those seeking to become patients, and inform them that the objection is due to personal and not clinical reasons.

In the course of communicating their objection, physicians must not express personal moral judgments about the beliefs, lifestyle, identity or characteristics of existing patients, or those seeking to become patients. This includes not refusing or delaying treatment because the physician believes the patient's own actions have contributed to their condition. Furthermore, physicians must not promote their own religious beliefs when interacting with patients, or those seeking to become patients, nor attempt to convert them.

## ***ii. Ensuring Access to Care***

Physicians must provide information about all clinical options that may be available or appropriate to meet patients' clinical needs or concerns. Physicians must not withhold

information about the existence of any procedure or treatment because it conflicts with their conscience or religious beliefs.

Where physicians are unwilling to provide certain elements of care for reasons of conscience or religion, an effective referral to another health-care provider must be provided to the patient. An effective referral means a referral made in good faith, to a non-objecting, available, and accessible physician, other health-care professional, or agency.<sup>18</sup> The referral must be made in a timely manner to allow patients to access care. Patients must not be exposed to adverse clinical outcomes due to a delayed referral. Physicians must not impede access to care for existing patients, or those seeking to become patients.

The College expects physicians to proactively maintain an effective referral plan for the frequently requested services they are unwilling to provide.

## ***iii. Protecting Patient Safety***

Physicians must provide care in an emergency, where it is necessary to prevent imminent harm, even where that care conflicts with their conscience or religious beliefs.<sup>19</sup>

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17. Please see the College's Practice Guide for further details.

18. In the hospital setting, referral practices may vary in accordance with hospital policies and procedures.

19. This expectation is consistent with the College's Providing Physician Services During Job Actions policy. For further information specific to providing care in health emergencies, please see the College's Physicians and Health Emergencies policy.



# PROFESSIONAL OBLIGATIONS AND HUMAN RIGHTS



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