College of Physicians and Surgeons of Saskatchewan Policy: *Conscientious Objection*

Submissions from the **Christian Medical and Dental Society**, **Canadian Federation of Catholic Physicians' Societies** and **Canadian Physicians for Life** to the College of Physicians and Surgeons of Saskatchewan

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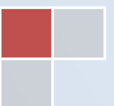

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Executive Summary

The Christian Medical and Dental Society of Canada ("CMDS"), the Canadian Federation of Catholic Physicians' Societies ("CFCPS"), and Canadian Physicians for Life ("CPL") represent Evangelical, Roman Catholic, and other like-minded physicians from across Canada.

The CMDS, CFCPS, and CPL support the protection of human rights and advocate adherence to the *Saskatchewan Human Rights Code* (the "*Code*"). These groups also recognize that the *Code* prohibits physicians from discriminating against patients on prohibited grounds. While 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 Saskatchewan (the "College"); a protection the CMDS, CFCPS, and CPL physicians consider important in the context of the current consultation by the College.

The CMDS, CFCPS, and CPL recognize that, in rare cases, a conflict of rights might arise between a patient and a physician. In these rare cases, both the patient and the physician will have human rights or civil liberties that may be determined to be in competition. 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, CFCPS, and CPL 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, CFCPS, and CPL take the position that in its current form, Policy: *Conscientious Objection* (the "Policy") does not adequately deal with physicians' human rights, which include but are not limited to the rights 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 *Code* as well as 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 conscience.

The CMDS, CFCPS, and CPL propose the following amendments in an effort to assist the College in its drafting of the Policy. The following paragraphs propose alternative wording for the sections of the Policy that are of concern.

Section 1 – Purpose

This section assumes that the College has a responsibility to impose limits on a physician's *Charter* rights. Such a responsibility is fictional and fabricated; it does not exist and is not found in the *Medical Profession Act, 1981,* which established the College.

The CMDS, CFCPS, and CPL propose removing this section, thereby removing any reference to the fictional and fabricated responsibility of imposing limits on physicians' *Charter* rights.

Section 4 – Principles – Obligation to provide referrals

This section misunderstands the term "discriminatory" and the legal concept of discrimination. It is not discrimination for a physician to refuse to perform a specific procedure. A physician's decision not to perform a specific procedure is not discrimination if the decision is based on the procedure itself. If a physician refuses to perform a specific procedure because of patient characteristic(s), such an action would constitute discrimination. When the objection is against a procedure in general and not against a specific patient, the patient is not being discriminated against. Further, the right to receive treatment from a specific physician is not directly protected by the *Charter* and, thus, is subordinate to those rights explicitly protected by the *Charter*, such as the right to freedom of conscience and religious beliefs.

Section 4 – Principles – Physicians' exercise of freedom of conscience

This section of the Policy makes two false assumptions: (1) that patients have a right to receive specific procedures or pharmaceuticals from specific physicians; and, (2) that physicians have a legal obligation to provide them. There is no such legal right to access specific procedures or pharmaceuticals from a specific physician. Even if such a right did exist, the duty to provide them would fall on the government, not on individual physicians.

Section 5.2 – Providing information to patients

This section of the Policy requires a physician to provide information to patients, even if the provision of it violates the physician's moral or religious beliefs. The College is required to balance the *Charter* rights of freedom of conscience and freedom of religion with its statutory objectives. Here, the College makes no attempt to balance *Charter* rights with its statutory objectives; therefore, the Policy will not survive when challenged in the courts.

Section 5.2 – Promoting moral or religious beliefs

The Policy prohibits physicians from "promoting" their moral or religious beliefs. If a physician objects to a certain procedure and the patient asks why, the physician could not answer the question. Similarly, if a physician and patient share the same faith, the physician could not pray with the patient, even if the patient requests it. This could result in a violation of physician's freedom of expression and potentially the physician's freedom of religion.

Section 5.3 – Providing or arranging access to health services

The Policy requires physicians to "make arrangements" for patients to access a procedure or pharmaceutical to which they object on moral or religious grounds. To "make arrangements" is to make a referral and to make a referral is to be complicit in the act; for many physicians, providing a referral for an objectionable procedure or pharmaceutical is as morally reprehensible as performing or providing the procedure or pharmaceutical itself.

Section 5.4 – Necessary treatments to prevent harm to patients

The Policy requires physicians to provide certain procedures or pharmaceuticals to which they have moral or religious objections, in certain circumstances. The Policy does not, however, define the terms "emergency", "care", and "harm"; therefore, these terms are ambiguous in this context. As a result, the Policy provision becomes devoid of any meaning.

The Policy confuses and conflates 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.

Conclusion

The CMDS, CFCPS, and CPL believe in equality and respect for all individuals. To maintain equality and respect for all, we, as a society, must be cognizant of the fact that differences do exist. Differences of opinion and belief inevitably result in some tensions. These tensions, however, do 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*-protected rights to freedom of religion and freedom of conscience.

The Policy results in a violation of the *Charter* rights to freedom of religion and conscience of physicians. A similar policy from Ontario is being challenged in the courts and will not survive *Charter*-scrutiny. If passed in a manner which requires physicians to violate their religious beliefs and conscience, this Policy will be challenged in the courts and will be struck.

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

1. The Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies represent Evangelical and Roman Catholic physicians across Canada. Canadian Physicians for Life represents pro-life physicians across Canada.

The Christian Medical and Dental Society of Canada

2. 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. The society claims approximately 1700 members across Canada, representing a wide variety of specialties and practice types and many different Christian denominations.

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

4. The CMDS' membership includes approximately 1600 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

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

6. 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."

Canadian Physicians for Life

7. Canadian Physicians for Life ("CPL") is a national association of pro-life physicians, retired physicians, medical residents and students. CPL's members are dedicated to building a culture of care, compassion, and life. CPL was founded in 1975 and is a non-religious

charitable organization. CPL's members believe that every human life, regardless of age or infirmity, is valuable and worthy of protection.

8. CPL seeks to provide a united voice and association for Canadian physicians who recognize the sacredness and inviolability of human life from the time of conception to death. CPL seeks to foster, among physicians, a firm commitment to the principles in the Oath of Hippocrates, which are expressed in modern terms in the Declaration of Geneva (1948) and in the International Medical Declaration (Lejeune, 1973). CPL provides support, encouragement and advice for physicians maintaining and acting upon such principles in their daily practice.

9. CPL has a constituency of approximately 3000 physicians, retired physicians, resident students, and medical students across Canada.

Position of the CMDS, CFCPS, and CPL

10. The CMDS, CFCPS, and CPL support the protection of human rights and advocate adherence to the *Saskatchewan Human Rights Code*[1] (the "*Code*"). On this basis, the CMDS, CFCPS, and CPL recognize that the *Code* prohibits physicians from discriminating against their patients on prohibited grounds. At the same time, the CMDS, the CFCPS and CPL recognize that the *Code* imposes obligations on physicians, and also provides physicians with protection from discrimination in their employment relationships and in their relationship with the College of Physicians and Surgeons of Saskatchewan (the "College"). The CMDS, CFCPS, and CPL also recognize the *Canadian Charter of Rights and Freedoms* (the "*Charter*") as Canada's Supreme Law, guaranteeing all individuals, including physicians, the rights to freedom of religion and freedom of conscience.

11. Although patients have the right to equal treatment and the equal provision of services, the CMDS, CFCPS, and CPL 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 that cannot both be met.

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[1] *Saskatchewan Human Rights Code*, SS 1979, c S-24.1 [*Code*].

12. In the majority of cases where a conflict is purported to exist between physicians' and patients' rights, the CMDS, CFCPS, and CPL 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.

13. For example, if a physician declines to perform vasectomies on grounds of conscience or religion, the 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 from that particular ethnic background.

14. In the rare cases where actual rights are in conflict, the CMDS, CFCPS, and CPL 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.

15. The CMDS, CFCPS, and CPL take the position that the current policy, Policy: *Conscientious Objection* (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.

16. The CMDS, CFCPS, and CPL, 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 conscientiously object to participating in certain procedures or prescribing certain pharmaceuticals to which they hold a moral or religious objection. These amendments simultaneously help physicians understand their rights and obligations under the *Code* and the *Charter*.

2. Scope and Purpose of Submissions

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

18. As set out above, the CMDS, CFCPS, and CPL support the protection of human rights as set out in the *Code*; however, the CMDS, CFCPS, and CPL also have concerns regarding the

effect the Policy has and will have on the exercise of physicians' freedoms of conscience and religion.

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

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

3. Legal Framework

<u>The *Saskatchewan Human Rights Code*</u>

21. The *Code* is provincial legislation that has an equivalent in each of Canada's provinces and territories. The *Code* applies to all Saskatchewanians who act as employers or who provide services to the general public.

22. The *Code* prohibits discrimination with respect to services, goods, and facilities on the basis of religion, creed, marital status, family status, sex, sexual orientation, disability, age, colour, ancestry, nationality, place of origin, race or perceived race, or receipt of public assistance[2].

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

24. In determining if accommodation is an undue hardship, courts and tribunals consider the costs of accommodation, the existence of any outside sources of funding for the accommodation, and any health and safety requirements associated with the accommodation.

25. In addition to protecting individuals from discrimination on the basis of prohibited grounds, the *Code* guarantees individuals, including physicians, the right to freedom of conscience[3].

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[2] *Code*, *supra* note 1, at section 2(1)(m.01).
[3] *Code*, *supra* note 1, at section 4.

The *Canadian Charter of Rights and Freedoms*

26. 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*").

27. 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, in light of relevant human rights values and principles developed under the *Charter*.

28. An individual can bring forward a *Charter* challenge if his/her *Charter* rights have been violated, and s/he has automatic standing to bring forward that claim. Individuals can challenge government action, government legislation, or non-governmental action taken pursuant to statutory authority.

29. Although 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.

30. In revising the Policy, the College must understand and acknowledge its obligations, not only under the *Code*¸ but also under the *Charter*.

The *Charter'*s application to College policy

31. In determining whether and how the *Charter* applies to the College's preparation, implementation, and enforcement of the Policy, the statutory framework that grants the College the authority to do so must be considered.

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*"].

32. The College was created, and derives its authority to regulate the practice of medicine in Saskatchewan, from the *Medical Profession Act*[6] as well as its regulations.

33. The *Charter* applies to organizations, such as the College, which are part of the apparatus of government or are delegates of statutory authority[7]. 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 Saskatchewan pursuant to the *Medical Profession Act* either by creating policies or disciplining members. The College is required, in these instances, to make decisions that are consistent with the *Charter*.

34. Any State action that violates the *Charter* is of no force or effect[8]. The *Charter* also applies to private entities carrying out a specific government policy and to public bodies with delegated power from the provincial or federal Crown[9]. The *Charter*, therefore, clearly applies to the College.

35. The practical outworking of the *Charter*'s application to the College is that the College must consider the *Charter* when exercising its statutory discretion under the *Medical Profession 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*[10] ("*Doré*").

36. 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 during the exercise of administrative decisions of regulatory bodies made pursuant to statutory authority[11].

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6 *Medical Profession Act*, 1981, being. Chapter M-10.1 of the Statutes of *Saskatchewan*, 1980-81 ["*MPA*"].

7 *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.

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

9 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86, at para. 36.

10 *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 [*Doré*].

11 *Doré*, *supra* note 11, at para. 3.

37. 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[12]. 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 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]

38. 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*

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

40. Section 2(a) of the *Charter* guarantees the right to freedom of religion and conscience[13].

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12 *Doré*, *supra* note 11, at paras. 24 and 35.

13 Section 2(a) of the *Charter* reads:

Freedom of religion

41. *R. v. Big M Drug Mart*[14] ("*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 then current *Lord's Day Act*. *Big M* questioned the constitutionality of the *Lord's Day Act* and eventually won its case.

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

> 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[15].

43. In *R. v. Edwards Books*[16], 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 <u>to ensure that society does not interfere with profoundly personal beliefs</u> that govern one's perception of oneself, human nature, and in some cases, a higher or different order of being. <u>These beliefs, in turn, govern one's conduct and practices.</u>[17] [Emphasis added]

44. 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,[18]

   b) the right to declare religious beliefs openly,[19]

   c) the right not to have society interfere with profoundly personal beliefs,[20]

"**2.** Everyone has the following fundamental freedoms:
(*a*) freedom of conscience and religion;"

14 *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 [*Big M*].
15 *Big M.*, *supra* note 15, at para. 94.
16 *R. v. Edwards Books* [1986] 2 S.C.R. 713 [*Edwards Books*].
17 *Edwards Books*, *supra* note 17, at para. 97.
18 *Big M.*, *supra* note 15, at para. 94.
19 *Big M.*, *supra* note 15, at para. 94.
20 *Edwards Books*, *supra* note 17, at para. 97.

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,[21] 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.[22]

Freedom of conscience

45. 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. Morgentaler*,[23] 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.[24]

46. 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).[25]

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21 *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at para. 43 [*Amselem*].

22 *Amselem*, *supra* note 22, at para. 46.

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

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

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

47. Though the jurisprudence on freedom of conscience is sparse, freedom of conscience clearly exists and exists to protect beliefs that are not necessarily grounded in religious tradition or belief, in addition to religious beliefs.

48. More recently, the Supreme Court of Canada confirmed that physicians' conscience rights under the *Charter* protect them from participating in a procedure to which they object. The Supreme Court stated:

> In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures. However, we note — as did Beetz J. in addressing the topic of physician participation in abortion in *R. v. Morgentaler* — that a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96). In making this observation, we do not wish to pre-empt the legislative and regulatory response to this judgment. Rather, we underline that the *Charter* rights of patients and physicians will need to be reconciled[26].

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

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

50. 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 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].

51. 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.

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26 *Carter v. Canada (Attorney General)*, 2015 SCC 5, at para. 132.

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."

52. 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 regarding either discipline or policy.

<u>The test for limiting *Charter* rights</u>

53. The Supreme Court of Canada has set out a test by which violations of *Charter* rights can be upheld. The test is referred to as the *Oakes Test* as it was formulated in the 1986 case *R. v. Oakes*[28]. The two-part test sets out the analysis courts will go through to determine if a *Charter* violation can be saved by section 1 of the *Charter* which permits *Charter* violations "as can be demonstrably justified in a free and democratic society[29]." If either of the parts of the *Oakes* Test are failed, then the violation will not stand.

54. The first part requires that the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom;[30]

55. The second part is composed of three sub-tests which deal with the proportionality test:

    i. measures must be fair and not arbitrary, carefully designed to achieve the object in question and rationally connected to that objective[31];
    ii. means should impair the right in question as little as possible[32]; and,
    iii. there must be proportionality between the effects of the limiting measure and the objective[33].

56. The College may argue that the objective of the Policy is to ensure or increase access to specific medical procedures and pharmaceuticals and that compelling physicians to perform procedures or prescribe pharmaceuticals to which they object on moral or religious grounds, or to compel physicians to make referrals for such is necessary to ensure or increase such

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28 *R. v. Oakes*, [1986] 1 SCR 103 [*Oakes*].
29 *Charter, supra* note 5, at section 1.
30 *Oakes*, *supra,* note 28,at para. 73.
31 *Oakes*, *supra,* note 28, at para. 74.
32 *Oakes*, *supra,* note 28, at para. 74.
33 *Oakes*, *supra,* note 28, at para. 74.

access. There is however, no evidence that prior to this Policy, there existed in Saskatchewan a problem with access to specific medical procedures or pharmaceuticals.

57. The CMDS, CFCPS and CPL submit that while it is important, the objective of the Policy is not sufficiently important to justify overriding freedom of conscience and freedom of religion. Without evidence to support that an access problem existed, the objective of ensuring or increasing access cannot be sufficiently important to justify *Charter* violations. As such, the first part of the *Oakes* Test would not be met.

58. Even if, however, the first part of the *Oakes* Test was met, the CMDS, CFCPS and CPL submit that all three sections of the second part of the *Oakes* Test, the proportionality test, would not be met.

59. The measures are arbitrary and not carefully designed to achieve the object in question. The measures are also not rationally connected to the objective. Ensuring or increasing access to specific medical procedures or pharmaceuticals will not be achieved by compelling physicians to violate their conscience or religious beliefs. As set out above, there is no evidence that there exists a problem or barriers in accessing certain procedures or pharmaceuticals as a result of physicians choosing to not violate their conscience or religious beliefs. As such, the first part of the proportionality test would fail.

60. The measures do not minimally impair freedom of conscience and freedom of religion. The CMDS, CFCPS and CPL submit that there exist measures which would accomplish the objective of ensuring or increasing access to certain medical procedures or pharmaceuticals which would not result in violations of physicians' freedom of conscience and religion. For example, the College could set-up hotline that physicians refer patients to if and when the patient requests a procedure or pharmaceutical that the physician objects to on moral or religious grounds.

61. The effects of violating physicians' freedom of religion and freedom of conscience are not proportional to the objective of ensuring or increasing access to specific procedures or pharmaceuticals. The Policy will, at best, have negligible positive effect in increasing access to specific medical procedures or pharmaceuticals. The deleterious effects however, are far-

reaching. Physicians will be required to choose between violating their conscience and religious beliefs or facing possible disciplinary action from the College. The Policy will also have a chilling effect on physicians with sincere or moral religious beliefs from working in certain types of practices such as family medicine or in walk-in clinics. The Policy then, fails the third component of the proportionality test.

62. As set out above, the CMDS, CFCPS and CPL submit that the Policy requires physicians to violate their conscience and religious beliefs. On this basis, the CMDS, CFCPS, and CPL urge the College to ensure that the Policy does not result in or encourage the violation of physicians' *Charter*-protected freedoms of religion or conscience. 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.

63. Indeed, the Supreme Court of Canada recognized that the protection of freedom of religion is jealously guarded and that, where a conflict exists with another right (e.g., between the right to same-sex marriage and the right to freedom of religion), any legislative provision causing the conflict would fail. The Supreme Court stated, in *Reference re Same-Sex Marriage*[34]:

> 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 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.[35]

64. The CMDS, CFCPS, and CPL, therefore, make the following submissions and propose the following Policy amendments.

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

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

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

4. Analysis and Recommended Amendments

A. Section 1 – Purpose

66. Under the "purposes" section of the draft Policy, a series of unnumbered bullets appear. The seventh bullet reads:

> - The College has a responsibility to impose reasonable limits on a physician's ability to refuse to provide care where those limits are appropriate. There are some circumstances in which there is a legitimate clinical reason or other good legal reason that the patient's interest should not be accommodated;

The Concern

67. The responsibility the Policy refers to is fictional and fabricated. The College was created and exists by virtue of the *Medical Profession Act, 1981* (the "*MPA*"). There is no responsibility on the College, in law or by virtue of the *MPA,* to impose limits on a physician's ability to exercise his or her freedom of religion and conscience. The *Charter* exists specifically to prevent the government or governmental bodies from doing so.

68. As set out above, when it comes to dealing with *Charter* rights, including freedom of religion and freedom of conscience, the College is required to balance the *Charter* rights at play with its statutory objectives. The College's statutory objectives do not include imposing limits on freedoms of religion and/or conscience.

The Proposed Amendment

69. The CMDS, CFCPS, and CPL propose amending the "purposes" section to remove the seventh bullet that describes a fictional and fabricated responsibility to impose limits on physicians' *Charter* rights.

B. Section 4 – Principles - Obligation to provide referrals

70. Section 4 of the Policy states that physicians have an obligation to provide referrals. It reads:

> Physicians have an obligation to provide full and balanced health information, referrals, and health services to their patients in a non-discriminatory fashion.

71. The CMDS, CFCPS, and CPL agree with this statement. The issue however, is that the Policy misunderstands and misapplies the term "discriminatory" and the legal concept of discrimination.

What constitutes "discrimination" and the balancing of rights?

72. 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[36].

73. 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, sex, 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, as set out above, an unconstitutional violation of the physician's *Charter* rights.

74. In these rare cases, the Saskatchewan Human Rights Tribunal or the Courts would engage in a balancing of the competing rights, if any, at play.

75. In the hypothetical situation where a physician's *Charter* rights are in conflict with a current 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

[36] *Code*, *supra* note 1, at section 2(1)(m.01).

treatment under the law, without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability[37].

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

Charter of Rights and Freedoms	***Saskatchewan Human Rights Code***
a) Race; b) National or ethnic origin; c) Colour; d) Religion; e) Sex; f) Age; g) Mental or physical disability.[38]	a) Religion; b) Creed; c) Marital status; d) Family status; e) Sex; f) Sexual orientation; g) Disability; h) Age; i) Colour; j) Ancestry; k) Nationality; l) Place of origin; m) Race or perceived race; n) Receipt of public assistance[39].

77. 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 an "analogous ground".

78. 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.

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37 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."

38 *Charter*, *supra* note 5, at section 15(1).

39 *Code*, *supra* note 1, at section 2(1)(m.01).

79. 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,
   d) Aboriginal residence/off-reserve band member status.

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

81. 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*[40]. 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[41].

82. 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?[42]

83. 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.

84. Perhaps the leading case on the balancing of competing *Charter* rights is *Trinity Western University v. British Columbia College of Teachers*[43].

85. 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

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

activities.[44] Trinity Western applied to the British Columbia College of Teachers to have their teacher training program accredited because, at the time, students in the Bachelor of Education program were required to attend a public university during their final year to receive accreditation.[45] The College of Teachers refused on the ground that the university's prohibition against homosexual behaviour was discriminatory.[46] Trinity Western applied for judicial review and had their application granted.[47] The decision was appealed by the College of Teachers to the British Columbia Court of Appeal and later to the Supreme Court of Canada.[48]

86. 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.[49] 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.[50]

87. In the case of competing rights, conflicts can only be avoided through proper delineation of the rights and values in question.[51] 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.[52] This is to ensure the full protection of both rights, whenever possible.

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44 *Trinity Western*, *supra* note 37, at para. 4.
45 *Trinity Western*, *supra* note 37, at para. 32.
46 *Trinity Western*, *supra* note 37, at para. 19.
47 *Trinity Western*, *supra* note 37, at para. 7.
48 *Trinity Western*, *supra* note 37, at para. 8.
49 *Trinity Western*, *supra* note 37, at para. 31.
50 *Trinity Western*, *supra* note 37, at para. 34.
51 *Trinity Western*, *supra* note 37, at para. 29.
52 *Trinity Western*, *supra* note 37, at para. 29.

88. 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:[53]

> 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.[54]
>
> […]
>
> 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.[55]

89. 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:[56] 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. Thus, *Trinity Western* serves as an appropriate guide for dealing with competing rights and determining whose rights will prevail.

90. 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 from practicing medicine in Saskatchewan.

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[53] *Trinity Western*, *supra* note 37, at para. 30.

[54] *Trinity Western*, *supra* note 37, at para. 32.

[55] *Trinity Western*, *supra* note 37, at para. 34.

[56] *Trinity Western*, *supra* note 37, at para. 38.

91. The *Code* prohibits discrimination on prohibited grounds, such as religion, race, sex, or sexual orientation. In this regard, a physician whose religious beliefs or conscience 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*.

92. 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 freedoms of religion or conscience. In this situation, a balancing of rights would be required.

93. Although 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.

94. Above, we discussed a hypothetical situation where a physician's religious beliefs or conscience 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 the violation of the *Code* might be upheld by a Court on the ground that the physician's *Charter* rights would otherwise be violated.

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

96. An example of this distinction was recently covered in the mainstream media. Recently, a physician in Ottawa, Ontario was reported to have declined to prescribe contraceptives or refer patients or prospective patients to a physician who would prescribe contraceptives[57].

97. 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 the rights of patients and prospective patients. Such a conclusion, however, is not supported by the law.

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[57] 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.

98. 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 Ottawa physician who objects to contraceptives on religious grounds, there was no discrimination under the *Code*. The physician objects to contraceptives in all circumstances, not with regard to 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.

99. Any suggestion that a physician objects to a specific procedure, treatment or pharmaceutical is somehow in violation of the *Code* is false. This is not the case in law or in fact.

C. Section 4 – Principles – Physicians' exercise of freedom of conscience

100. This section states that Physicians' exercise of freedom of conscience should not impede access to health services. It reads:

> Physicians' exercise of freedom of conscience to limit the health services that they provide should not impede, either directly or indirectly, access to legally permissible and publicly-funded health services.

The Concern

101. The CMDS, CFCPS, and CPL agree that in the exercise of his or her freedom of conscience and/or freedom of religion, a physician should not interfere with a patient's ability to obtain the procedure or pharmaceutical he or she desires to obtain. This section of the Policy, however, makes two false assumptions that the CMDS, CFCPS, and CPL must point out: (1) that there is a legal right to receive specific health services; and, (2) that physicians have the legal obligation to provide them.

102. There is no right at law to access specific procedures or pharmaceuticals from a specific physician. Patients have the right not to be discriminated against, but they do not have the right to compel physicians to provide pharmaceuticals or participate in procedures that the physician objects to on medical, moral, or religious grounds.

103. Even if such a right existed, which it does not, the duty to provide the procedure or pharmaceutical would fall on the state, not on individual physicians.

104. This section of the Policy assumes rights and obligations which do not exist. Since no such rights exist, there is no balancing of rights required.

D. Section 5.2 – Providing information to patients

105. This section of the Policy requires physicians to provide information to patients even if the provision of such information violates the physician's moral or religious beliefs. It reads:

> Physicians must provide their patients with full and balanced health information required to make legally valid, informed choices about medical treatment (e.g., diagnosis, prognosis, and clinically appropriate treatment options, including the option of no treatment or treatment other than that recommended by the physician), even if the provision of such information conflicts with the physician's deeply held and considered moral or religious beliefs.

The Concern

106. The CMDS, CFCPS, and CPL do not advocate for the withholding of information regarding available procedures or pharmaceuticals. Rather, the concern of the CMDS, CFCPS, and CPL is in the fact that the Policy requires a physician to violate his or her moral or religious beliefs without any consideration of what those beliefs may be, how violating them may affect the physician, or whether there is an option that does not require the physician to violate his or her moral or religious beliefs.

107. As set out above, the College is required to reasonably balance *Charter* rights and *Charter* values, such as freedom of conscience and freedom of religion, with the statutory objectives of the College. Here, the College makes no attempt to balance *Charter* rights and values with the College's statutory objectives, but instead requires physicians to violate their moral or religious beliefs in all instances.

108. Such a requirement will result in the violation of certain physicians' freedom of conscience and freedom of religion, and will be struck by the courts.

109. The Policy goes on to advise how physicians may inform patients about procedures or pharmaceuticals to which the physician objects on moral or religious grounds. It reads:

> The obligation to inform patients may be met by arranging for the patient to obtain the full and balanced health information required to make a legally valid, informed choice about medical treatment from another source, provided that arrangement is made in a timely fashion and the patient is able to obtain the information without undue delay. That obligation will generally be met by arranging for the patient to meet and discuss the choices of medical treatment with another physician or health care provider who is available and accessible and who can meet these requirements. The physician has the obligation to ensure that an arrangement which does not involve the patient meeting and discussing choices of medical treatment with another physician or health care provider is effective in providing the information required by this paragraph.

The Concern

110. The CMDS, CFCPS, and CPL are concerned that the proposed course of action provided results in an abrogation of the physicians' right not to provide a referral, if such a referral also violates their freedom of religion or freedom of conscience.

111. As currently drafted, the Policy requires physicians who object to providing certain information to "arrange" for the patient to see a physician who will provide the information; to "arrange" is to make a referral.

112. 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*. Further, the *Charter* prevents the College from compelling physicians to violate their religious beliefs or conscience.

113. 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 a patient to an abortionist is equally as offensive and immoral as actually performing the abortion.

114. The rationale, of course, is that by providing a referral, the physician is complicit in 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.

115. 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 or religion and freedom of conscience.

116. 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. As such, this obligation is a violation of the *Charter*; it cannot withstand *Charter* scrutiny and will be struck by a court when challenged.

The Proposed Amendment

117. The CMDS, CFCPS and CPL propose adding wording specifying that physicians are only required to "arrange" if his or her religious or moral beliefs do not preclude a referral.

F. Section 5.2 – Promoting moral or religious beliefs

118. At the end of this section, the Policy includes a prohibition on physicians "promoting" their moral or religious beliefs. It reads as follows:

> Physicians must not promote their own moral or religious beliefs when interacting with a patient.

The Concern

119. The Policy prohibits physicians from "promoting their own moral or religious beliefs when interacting with a patient". 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. The Policy, as currently drafted, 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.

120. Although the CMDS, CFCPS, and CPL appreciate that a physician's primary role is not to preach the Gospel or evangelize to his or her patients, they have the legal right to speak about their faith and moral beliefs 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 freedoms of religion and conscience. As such, it cannot withstand *Charter* scrutiny and will be struck by a court when challenged.

G. Section 5.3 – Providing or arranging access to health services

121. This section requires physicians who object to certain procedures or pharmaceuticals to make referrals for such procedures or pharmaceuticals. It goes on to prescribe a protocol for doing so. The protocol requires physicians to "make arrangements" for patients to access the procedure or pharmaceutical in question. It reads as follows:

> Physicians can decline to provide legally permissible and publicly-funded health services if providing those services violates their freedom of conscience. However, in such situations, they must:
>
> a) make an arrangement for the patient to obtain the full and balanced health information required to make a legally valid, informed choice about medical treatment as outlined in paragraph 5.2; and,
>
> b) make an arrangement that will allow the patient to obtain access to the health service if the patient chooses.
> Those obligations will generally be met by arranging for the patient to meet with another physician or other health care provider who is available and accessible and who can either provide the health service or refer that patient to another physician or health care provider who can provide the health service.
>
> If it is not possible to meet the obligations of paragraphs a) or b), the physician must demonstrate why that is not possible and what alternative methods to attempt to meet those obligations will be provided.

122. The protocol results in the physician having to refer the patient to another physician. As set out above, for some physicians, providing a referral constitutes being complicit in the act, and is equally objectionable as providing the procedure or pharmaceutical themselves.

123. Changing the words from "referral" to "making arrangements" does not change the practical reality or the legal implications at issue. Here, the Policy requires physicians to violate their moral or religious beliefs by participating in a procedure or facilitating access to pharmaceutical to which they object. As set out above, for some physicians, pointing the patient to the abortionist is equally morally or religiously offensive as performing the abortion.

124. The result of this obligation is that the freedom of conscience and freedom of religion of some physicians will be violated. As such, the Policy will be challenged in court and the court will strike the Policy for violating the *Charter*.

H. Section 5.4 – Necessary treatments to prevent harm to patients

125. This section of the Policy requires physicians to provide procedures or pharmaceuticals to which they object on moral or religious grounds in certain circumstances. The Policy sets out a protocol for doing so. It reads as follows:

> Physicians must provide medical treatment for a patient if treatment is necessary to avoid harming the patient's health or well-being. Accordingly:
>
> a) Physicians must provide care in an emergency, where it is necessary to prevent imminent harm, even if providing that treatment conflicts with their conscience or religious beliefs.
>
> b) When it is not possible to arrange for another physician or health care provider to provide a necessary treatment without causing a delay that would jeopardize the patient's health or well-being, physicians must provide the necessary treatment even if providing that treatment conflicts with their conscience or religious beliefs.
>
> Physicians must provide medical treatment for a patient within the physician's competency where the patient's chosen medical treatment must be provided within a limited time to be effective and it is not reasonably possible to arrange for another physician or health care provider to provide that treatment.

The Concern

126. The language used here is vague and unqualified. The Policy uses terms like “care”, “emergency”, “necessary”, “imminent”, “delay”, “well-being”, “harm”, “jeopardize” and “health” without defining, qualifying or contextualizing them.

127. As a result, this section of the Policy is vague and entirely subjective. What constitutes care that is “necessary”? What makes a situation an “emergency”? Does “care” include procedures or pharmaceuticals that are elective, such as abortion, sterilization, and prescriptions for contraceptives? What is “imminent”? Who defines “harm”, “care” and “health,” and are these terms limited to physical sensations?

128. This section of the Policy is rendered meaningless by its failure to define, qualify, and contextualize the terms it uses. Including this section in the Policy is also unnecessary. Providing urgent care to patients is part of a physician’s duty. In the hypothetical scenario where a patient urgently requires a specific pharmaceutical or procedure 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 Saskatchewan Human Rights Commission.

129. Including this section in the 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.

130. 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

College would have the onus of demonstrating that violating the physician's *Charter* rights was demonstrably justified in a free and democratic society.

131. As set out above, the *Charter* places the burden on the College to justify the violation of the *Charter* right, not on the physician to defend their freedom of religion and conscience. 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.

5. Conclusion

132. The CMDS, CFCPS, and CPL believe in equality and respect for all individuals.

133. To maintain equality and respect for all, we must, as a society, be cognizant of the fact that differences exist. Saskatchewan 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.

134. The CMDS, CFCPS, and CPL 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, 23rd DAY OF July, 2015.

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