

The Conscientious Objection of Medical Practitioners to the CPSO’s “Effective Referral” Requirement.

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Introduction

The term “conscience” is used in two different ways in discussions about religious freedom. Sometimes, conscience is contrasted with religion. Freedom of conscience, in contrast to freedom of religion, is concerned with the protection of fundamental beliefs or commitments that are not part of a religious or spiritual system.¹ Together, freedom of conscience and freedom of religion protect the individual’s most fundamental moral beliefs or commitments.²

Other times, though, the term “conscience” refers to a particular kind of accommodation claim. In most religious accommodation cases, an individual or group seeks to be exempted from a law that prevents them from engaging in a religious practice — for example, from wearing religious dress or keeping religious holidays. In conscientious objection cases, however, the individual asks to be exempted from a law that requires them to *perform* an act that they regard as immoral or sinful. In many of these cases the claimant asks to be excused from performing an act that is not itself immoral, but supports or facilitates what they see as the immoral action of others, and so makes them complicit in this immorality. In this comment I will focus on this second use of the term conscience, and more particularly the conscientious

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1 The term “freedom of conscience” was once used interchangeably with freedom of religion to refer to an individual’s freedom to hold beliefs that were spiritual or moral in character. At this earlier time the moral beliefs of most individuals were rooted in a religious system. Freedom of conscience, though, is now viewed as an alternative to, or extension of, freedom of religion.

2 However, as I have argued elsewhere, the conscience part of section 2(a) is seldom raised before the courts and may have very little practical content. See Richard Moon, “Conscience in the Image of Religion” in John Adenitire, ed, *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Oxford: Hart, 2019) 73.

objection claim made by some medical practitioners in Ontario to the requirement that they provide an effective referral to another doctor when they are unwilling, for moral or religious reasons, to perform a particular medical procedure.

In the last several years, Canadian courts have dealt with a number of conscientious objection claims. When the definition of civil marriage was changed in Canada to enable same-sex couples to marry, a few civil marriage commissioners objected on religious grounds to performing such marriages.³ While some provinces agreed to accommodate the commissioners' religious objections and excuse them from performing same-sex civil marriage ceremonies, other provinces were unwilling to do so and instructed the commissioners to perform these marriages or face dismissal. The question of whether a province could require its marriage commissioners to perform same sex civil marriages, despite their religious objections, was addressed by the courts in several cases.⁴ In each of these cases, the court or tribunal held that the equality rights of same-sex couples outweighed the religious freedom of marriage commissioners.

There have also been a variety of cases in Canada in which market service providers have objected on religious grounds to providing services to same-sex couples and sought to be exempted from anti-discrimination laws. The claims in these cases have generally been unsuccessful.⁵

More recently, a number of doctors in Ontario challenged the policy of the provincial College of Physicians and Surgeons (CPSO) that required its members to provide a patient with an "effective referral" to another doctor if they were unwilling or unable on moral grounds to offer a particular medical service, such as an abortion or medical assistance in dying (MAiD).⁶ The doctors argued that if they were to give an effective referral, they would be complicit in acts that in their view were immoral. The doctors' claim was rejected by the Ontario Court of Appeal, which held that the interests of patients in accessing medical services outweighed the doctors' freedom of religion claim.

I will argue that the significant issue in *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario (Christian Medical Society)*, and other con-

3 I have examined this issue previously in Richard Moon, "Conscientious Objection in Canada: Pragmatic Accommodation and Principled Adjudication" (2018) 7:2 Oxford JL & Religion 274.

4 See e.g. *MJ v Nichols* (2008), 63 CHRR 145 (SKHRT), aff'd *Nichols v MJ*, 2009 SKQB 299 [*Nichols* (QB)]; *Re Marriage Coammissioners Appointed Under The Marriage Act*, 2011 SKCA 3.

5 See e.g. *Eadie & Thomas v Riverbend Bed and Breakfast and Others (no. 2)*, 2012 BCHRT 247 (a bed and breakfast that denied service to a gay couple); *Brockie v Brillinger*, [2002] 222 DLR (4th) 174, 161 OAC 324 (a print shop that refused to provide services to a gay organization).

6 *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 at para 121 [*Christian Medical Society* (CA)] states: "The medical procedures to which the appellants object (an objection shared to varying degrees by the individual appellants and members of the appellant organizations) include: abortion, contraception (including emergency contraception, tubal ligation, and vasectomies), infertility treatment for heterosexual and homosexual patients, prescription of erectile dysfunction medication, gender re-assignment surgery, and MaiD." There is a growing body of literature on this issue, including Bruce Ryder, "Physicians' Rights to Conscientious Objection" in Benjamin L Berger & Richard Moon, eds, *Religion and the Exercise of Public Authority* (Oxford: Hart, 2016) 127; Jacquelyn Shaw & Jocelyn Downie, "Welcome to the Wild, Wild North: Conscientious Objection Policies Governing Canada's Medical, Nursing, Pharmacy, and Dental Professions" (2014) 28:1 Bioethics 33.

scientious objection cases, is not, as the courts have said, the reasonable balance between the individual's religious interests or commitments and the interests or rights of others in the community, but is instead whether the individual's religiously-based objection should be viewed as an expression of personal religious conscience that should be accommodated, provided this can be done without noticeable harm to others, or as a religiously-grounded civic position or action that falls outside the scope of religious freedom and may be subject to legal regulation. The commitment to religious freedom requires that a distinction be made — a line drawn — between civic and spiritual beliefs or actions. An individual's spiritual practices are both excluded and insulated from political decision-making. However, their beliefs concerning civic issues, such as the rights and interests of others and the just arrangement of social relations, even if grounded in a religious system, must be subject to the give-and-take of ordinary politics.

The courts' task is not to trade off or balance specific competing values/interests but is instead to mark out a protected space for religious communities or ways of life -- to define the scope of personal or communal religious practice that can be practically insulated (and excluded) from legal regulation. Religious freedom, as a constitutional right in a democratic political system, must be limited in what it protects to matters that can be viewed as private and outside the scope of politics. The protection of religious freedom then requires the courts to draw a line between the spheres of spiritual and civic life, even if that line often appears to be pragmatic and moveable.⁷

In determining whether a particular (conscientious) objection should be viewed as a personal or spiritual matter or instead as a civic or political position, two factors may be relevant. The first is whether the individual is being required to perform the particular act to which they object only because they hold a special position not held by others, notably some form of public appointment. The other factor is the relative remoteness-proximity of the act that the objector is required to perform from the act that they consider to be inherently immoral. The more remote the legally required action, the more likely we are to regard the refusal to perform it as a position about how others should behave or about the correctness of the law, rather than as an expression of personal conscience.

Accommodation, balancing, and line-drawing

The separation of religion and politics — the exclusion and insulation of religion from politics — rests on the idea that religion is a matter of cultural identity rather than contestable political opinion, and that the restriction of a religious group's practices, and more generally the marginalization of the group, whether intended or not, can be damaging to individual members and undermining of social stability. Religious beliefs and practices are sometimes excluded and insulated from political contest not because they are intrinsically valuable, but instead because they are aspects of an individual's cultural identity or markers of their membership in the collective. Religious belief systems are a source of meaning and value for their adherents. Religious commitment connects the individual to a community of believers and orients them in the world. The ties of religious community can sometimes be as deep and significant to the individual as the ties of family. This is what is meant when religious practices are described as deeply held or rooted.

⁷ This claim is more fully developed in R. Moon, "Freedom of Religion under the Charter of Rights: The Limits of State Neutrality", 45 UBC Law Review 497-549 (2012)

Judgments about the necessity and extent of accommodation for a particular religious practice do not depend on the balancing of competing religious and civic interests. A court has no way to attach value or weight to a religious belief or practice. From a secular or public perspective, a religious belief or practice has no necessary value; indeed, it is said that a court should take no position concerning its value — that the court should remain neutral on the question of religious truth. The belief or practice is significant, from a civic-secular perspective, because it matters ‘deeply’ to the group and its members or because it is part of their cultural identity. But there is no way to balance this value against the purpose or value of the restrictive law. The secular concern is not with the belief or practice itself, but rather with its importance and meaning to the group’s members and the potential impact of its restriction on the position of the group in the larger society.⁸ Religious freedom seeks to prevent or limit the marginalization of a religious group by requiring the state to reasonably accommodate the group’s religious practices — by treating these practices as the equivalent of group traits.⁹

The courts have adopted a subjective/sincerity test for determining whether a particular practice or belief falls within religious freedom’s protection.¹⁰ The subjective test, which provides that a practice or belief will be protected if the individual has a sincere belief in its spiritual significance, reflects the courts’ understandable reluctance to determine the content or significance of an individual’s or group’s religious beliefs. This test, though, enables the objector in conscientious objection cases to blur the distinction between a religious belief about how one should live one’s life, which should sometimes be accommodated, and a religiously-grounded moral or political belief about how others should act or about the public interest, which must remain subject to political debate, and which political decision-makers may either accept or reject.¹¹

The objecting doctors may sincerely believe that it is immoral for them to engage in action that supports or facilitates the immoral actions of others. Moreover, they may argue, with some justification that it is not for the courts to decide that this belief lacks weight — that it is not something that matters deeply to them. However, the issue in conscientious objection cases is not what the objector sincerely believes or what is the correct understanding of the religious belief system which they follow. It is instead whether their sincerely-held religious belief should be viewed as an expression of personal morality or spiritual commitment, or rather as a political position — as a religiously-grounded belief about a civic matter.

8 While a religious group may think that its practices should be protected because they are true and that anything less than full accommodation is wrong, the group must argue before the courts that its practices should be protected because it believes them to be true — adopting a detached perspective.

9 In this way religious freedom is different from rights, such as freedom of expression, which is protected because there is value in the activity of expression — its contribution to democracy, knowledge, individual agency.

10 In Canada this test was established in *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem*].

11 The Divisional Court of Ontario in *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 at para 108 [*Christian Medical Society (SC)*] states: “the notion that the Court should determine what constitutes ‘complicity’ or ‘participation’ in an act that a physician regards as immoral or sinful is inconsistent with the Court’s role in matters involving religious belief.” The Court then points to the statement of Iacobucci J in *Amselem*, *ibid* at para 50, that the state is in no position to be “the arbiter of religious dogma.”

In the civil marriage commissioner cases, the courts saw the issue as a contest between the religious freedom of the objecting commissioners and the right of same sex couples to receive government services without discrimination that should be resolved through the balancing of these competing interests. Yet nothing of the sort occurred in these cases. The objecting marriage commissioners argued that their religious beliefs could be accommodated without any impact on the ability of same-sex couples to access the services of a civil marriage commissioner, since there were other commissioners willing to perform same-sex marriages. If a commissioner's personal decision not to perform the marriage had no practical impact on the couple, as long as they were able to quickly find someone else to perform the ceremony, then the 'competing' interests of equality and religious freedom did not appear to be in conflict, at least not in any significant way.

Nevertheless, the courts in these cases held that even if a same-sex couple could easily find another commissioner to perform their civil marriage, the initial refusal was objectionable and amounted to a significant breach of the couple's right to equality. The refusal was viewed as an affront to their dignity, even though the refusal was based on the commissioner's sincerely-held religious belief — a belief that the courts formally agreed fell within the scope of section 2(a), freedom of religion protection.¹² When a marriage commissioner tells a same-sex couple that she or he is opposed on religious grounds to their marriage and sends them to another commissioner, she or he is considered to have caused them injury. The courts, in these cases, also attached no significance to the fact that other provinces had decided not to require civil marriage commissioners to perform same-sex marriages and instead had introduced a "single entry system," in which those seeking the services of a commissioner applied to a central office, which then assigned a commissioner to perform the marriage. Under such a system, the couple seeking a commissioner would never know if one of the commissioners on the roster had refused to perform their ceremony, and so would not experience any dignitary harm.

The civil marriage commissioner's religiously-based refusal to perform a same-sex couple's civil marriage was viewed by the courts as an act of state discrimination — as a political or civic act (that should not be insulated from democratic judgment and legal duty) rather than an expression of personal conscience.¹³ As a private citizen, the marriage commissioner can refuse to attend and participate in a same-sex wedding. But the commissioner is a public official, who has been granted special rights and powers. If they object to performing their duties because they disapprove of the conduct of others and the law's acceptance or affirmation of that conduct, they can step down from their position. The objecting marriage commissioners said that their refusal to perform same sex marriages was simply an expression of their personal conscience. Yet they wanted to be excused from performing the duties attached to their civic role, because they believed that same-sex marriage is immoral and should not be recognized by the state.¹⁴

12 *Nichols* (QB), *supra* note 4 at para 57.

13 See e.g. *ibid.*

14 The distinction between a civil servant's personal religious expression and the performance of his/her public role or duty is erased to opposite effect in the Province of Quebec's recently enacted Bill 21, *An Act respecting the laicity of the State*, 1st Sess, 42nd Leg, Quebec, 2019 (assented to 16 June 2019), SQ 2019, c 12, which treats the wearing of religious dress or symbols, such as a hijab or turban, by certain civil servants as a political act — a state act — that is incompatible with the requirement that the state remain neutral in matters of religion.

Authority and remoteness

In many of the conscientious objection cases, an individual is required to perform a particular act only because they hold a position that is not held by others, and that carries certain powers and duties. The civil marriage commissioners who objected to performing same-sex marriages were legally required to facilitate what they saw as the ‘immoral’ act of another only because they occupied a particular civic position or exercised a form of public power. They held a special power and could escape any ‘complicity’ simply by giving up this position. In contrast, compulsory military service, by its very nature, is not voluntary, applies to a wide group, and brings no significant benefits or privileges. Compulsory military service is an extraordinary intervention into the individual’s life which cannot be avoided by stepping down from a particular role. Other cases may be less clear-cut. If the law were to require all palliative care doctors to provide MAiD or all gynecologists to provide abortion services, might we reasonably expect a conscientious objector to change their specialization?

When the act the objector is required to perform is remote from the act they regard as necessarily immoral, we are more likely to see their objection as a political position rather than an expression of personal religious commitment. The most obvious case of remoteness is the objection to paying taxes on the grounds that some of the government’s revenue may go to the military or to support abortion services. The courts have invariably rejected such claims.¹⁵ In contrast, the courts have generally viewed the moral objection to compulsory military service during war as an expression of personal conscience that should be accommodated because such service require the individual to engage directly in acts they regard as immoral, rather than as a political position that may be subject to democratic regulation.¹⁶ The courts have taken this view, even though the objector’s reasons are universal in the sense that they believe that it is wrong for anyone to go to war, and even though the exemption may place a greater burden of public service on other members of the community.

The objection of medical practitioners to providing an effective referral

Doctors in Ontario are not required to perform medical procedures to which they object on moral or religious grounds, such as assisted death or pregnancy termination, except in emergency situations. However, the CPSO, which licences and regulates doctors in the province, requires that they provide an “effective referral” to another doctor or health care professional when they are unwilling to perform a particular procedure themselves. The CPSO’s policy defines an effective referral as a referral made in good faith “to a non-objecting, available, and accessible physician, other health-care professional, or agency.”¹⁷

15 See e.g. HRC, Optional Protocol to the International Covenant on Civil and Political Rights, *Dr JP v Canada*, 43rd Sess, UN Doc CCPR/C/43/D/446/1991, 7 November 1991.

16 Governments sometimes have their own, more political, reasons for exempting conscientious objectors from military service. They may be concerned, for example, that conscription will result in acts of civil disobedience, which in time of war may be particularly destabilizing.

17 College of Physicians and Surgeons of Ontario, “Professional Obligations and Human Rights” (approved September 2008, updated March 2015), “effective referral,” online: CPSO <www.cpso.on.ca/Physicians/Policies-Guidance/Policies/Professional-Obligations-and-Human-Rights> [perma.cc/6XDA-8ATZ];

A number of doctors objected to the effective referral requirement, arguing that if they were to provide such a referral they would be complicit in acts they regard as immoral.¹⁸ This requirement, they argued, breached their freedom of conscience and religion under section 2(a) of the *Charter* and could not be justified under section 1. The Divisional Court of Ontario and, on appeal, the Ontario Court of Appeal rejected the doctors' claim. The Court held that while the referral requirement breached the objecting doctors' section 2(a) rights, the restriction of these rights was necessary to protect the interests of patients.

The Court found that in a publicly-funded system "which is structured around patient-centered care ... the interests of patients come first, and physicians have a duty not to abandon their patients."¹⁹ The Court described family doctors as "advocates" and "navigators" for their patients in the public health care system.²⁰ Moreover, because a patient is dependent on their doctor in this way, they may experience shame or humiliation when their doctor makes a religious objection to a procedure they want or require and declines to provide them with a referral to another doctor.²¹

The Court held that doctors in the province had no "right" to practice medicine and that "as members of a regulated and publicly-funded profession, they are subject to requirements that focus on the public interest, rather than their interests."²² The Court also noted that physicians may adopt "other practice structures that will insulate them from participation in actions to which they object."²³ In the Court's view, if the doctors are unable to do this, "they will

College of Physicians and Surgeons of Ontario, "Medical Assistance in Dying" (approved June 2016, updated December 2018), "effective referral," online: CPSO <www.cpso.on.ca/Physicians/Policies-Guidance/Policies/Medical-Assistance-in-Dying> [perma.cc/29N9-YL4M]. See also the Divisional Court's description of the requirement in *Christian Medical Society (SC)*, *supra* note 11 at para 31: "First, the Policies do not require that a referring physician provide a formal letter of referral to, and arrange an appointment for a patient with, another physician. The CPSO says that the intent of the Policies is to ensure only that patients are not left to finding a willing physician on their own without any assistance from the physician from whom they first sought care. Accordingly, the spirit of the requirements is that the physician take 'positive action' to connect a patient with a physician, another health-care professional or an agency. Second, referral may be made to any of a physician, another health-care professional or an agency provided the party to whom a patient is referred provides the requested medical services and is 'non-objecting, available and accessible.' In the case of an agency, a referral may be made to an agency that is charged with facilitating referrals for the health care service."

18 *Christian Medical Society (CA)*, *supra* note 6 at para 70: "The appellants' objections that compliance with the Policies would make them complicit in moral wrong is supported by the evidence of expert theologians and ethicists who deposed that the act of referral is a form of direct cooperation in the act which makes the physician complicit. As one, Dr. Daniel Sulmasy, put it, for a religious physician, '[r]eferral is not just a morally neutral get-together."

19 *Ibid* at para 167.

20 *Christian Medical Society (SC)*, *supra* note 11 at para 159; *ibid* at para 43.

21 *Christian Medical Society (CA)*, *supra* note 6 at paras 132, 141.

22 *Ibid* at para 187

23 *Ibid* at para 186. The Court explained at para 50: "For those physicians whose religious objections could not be addressed by the options identified in the Fact Sheet, the physicians could change the nature of their practice to a specialty or sub-specialty that did not engage the same moral and ethical issues. Given the options available to comply with the Policies, the potential for a conflict between a physician's religious beliefs and the Policies, and any resulting psychological concern, results from a conscious choice of the physician to practice in circumstances in which such a conflict could arise. The deleterious effects of the Policies, while not trivial, are less serious than outright exclusion from the practice of medicine."

have to seek out other ways in which to use their skills, training and commitment to patient care,” even though this may involve some sacrifice for the doctors.²⁴ The Court accepted that “the burden of these sacrifices did not outweigh the harm to vulnerable patients that would be caused by any reasonable alternative.”²⁵

The Court concluded that the interests of patients outweighed the religious freedom rights of the objecting doctors. Yet there are several troubling aspects to the Court’s assessment of the competing factors. The first is the expectation that a doctor might alter the nature of their practice or specialization in order to avoid situations in which they might be complicit in acts they consider immoral. A doctor is not a public official, even though they are a member of a regulated profession and paid for their services through a publicly-funded Medicare system. Unlike a marriage commissioner, a doctor is not acting as an agent of the state and is not exercising any special or public powers delegated to them by the state.²⁶ The second is the Court’s emphasis on the “stigma and shame” a patient will experience when told by their doctor the reasons the doctor will not assist them in accessing a particular service. The Court had already found that the doctor’s refusal to make an effective referral rested on a sincere religious belief and so was protected under section 2(a). Should the shame experienced by a patient when someone exercises their right to religious freedom be a basis for limiting that freedom? The doctor’s refusal to provide an effective referral will cause harm to the patient’s dignity only if we think that the refusal amounts to a judgment about the morality of the patient and is not simply an expression of the doctor’s personal conscience. Finally, the Court seems to put no burden on the state to establish other processes or channels that would enable a patient to access medical procedures that their doctor is unwilling to provide.

The Court is quick to find a breach of section 2(a) and so must rely on section 1 to reach the conclusion that seems intuitively correct. However, the requirement that a doctor provide an effective referral should not be seen as a breach of section 2(a).²⁷ The action the objecting doctors are required to perform — a referral — is so remote from the act they regard as inherently immoral that it is better viewed as a civic position rather than an expression of personal conscience. While the doctor’s objection is framed as a belief about their personal practices or actions, it is focused on the immorality of the actions of others and on the error of lawmakers in permitting (and even facilitating) these actions.

The doctors in *Christian Medical Society* present their objection as a personal position — as an expression of personal conscience — that should be exempted from the effective referral requirement imposed by the CPSO. The religious belief that MAiD or abortion are immoral, a belief that played a role in the public debate about the legal recognition of these procedures, but was rejected in the democratic and legal processes, now becomes the basis for a rights’ claim by

24 *Ibid* at para 186.

25 *Ibid*.

26 I am aware of, but entirely unconvinced by, the argument that doctors are engaging in state action subject to the Charter because they are implementing a specific state policy, see *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577. Ryder, *supra* note 6 at 129 observes that individual doctors “do not have an obligation to provide all medical services; that obligation is borne by the public health care system as a whole, not by individual doctors.”

27 Concerning the remoteness of the requirement, it is worth noting the different views held by objectors as to what is acceptable and what is not. While some of the objectors thought that a requirement that they provide a phone number to a general referral service would be acceptable, other objectors did not.

the objecting service providers — a claim to be exempted from their obligation to refer patients to doctors who can provide the particular medical services. In other words, a religious belief or value that was treated as political — as something that might influence public policy but was rejected by policy makers — is converted into a private or personal practice or belief (a matter of personal religious conscience) that should be protected from political judgment.

The objecting doctors may continue to oppose such laws in the political sphere — although constitutional commitments may limit the scope of legislative action. The state, though, should not ‘accommodate’ their beliefs about what others should and should not do and their personal opposition to the law that permits these activities.