Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
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Policies Made by a Regulator Are a Type of Law

by Erica Richler
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Regulators are increasingly using policy documents rather than legislation to set out expected conduct by practitioners. This use of policies raises important questions as to the authority of regulators to make such policies and the authority of the policies once made.

For regulators, this issue may be the most interesting aspect of the recent Divisional Court decision in *The Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 579, http://canlii.ca/t/hq4hn. This decision may be better known for its discussion of religious objections by physicians who oppose any form of participation in the provision of abortion services and medical assistance in dying. The case also contains an interesting discussion of the balancing of competing rights (i.e., religious beliefs vs. equitable access to health services). However, regulators should not miss the important guidance from the Court on the role of policies.

In this case the regulator made two policies requiring physicians to effectively refer a patient to another health care provider or agency when physicians object to providing health services to the patient themselves because of the physicians' religious or moral beliefs. In addition, physicians are required to provide those services in an emergency despite their beliefs.

In describing the legal force of these policies the Court said:

> The Policies have been adopted by the CPSO [College of Physicians and Surgeons of Ontario] as policies of general application. The Policies establish broad expectations of physician behaviour and are intended to have normative force. They articulate what the CPSO believes the tenets of medical professionalism require independently of CPSO policy. There is no issue that the *Charter* applies to the Policies.

The Court noted that there was explicit authority in the legislation for the College to enact standards of practice through the making of a regulation. The failure to do so did not make the policy invalid. Rather, by choosing to make a policy instead of a regulation, the breach of the policy was not automatically professional misconduct. The Court said:

> The Policies may be used as evidence of such professional standards, and of the conduct expected of a physician in particular circumstances, in support of an allegation of professional misconduct. However, a physician remains entitled to seek to lead contrary evidence and to argue that failure to adhere to the Policies' guidance did not, on the particular facts, constitute professional misconduct.

The Court held that the regulator did have the jurisdiction to make policies on such matters as ensuring that practitioners respect the dignity of clients and members of the public, do not act in a discriminatory fashion, and comply with the *Canadian Charter of Rights and Freedoms*:

> In my view, the CPSO not only has the authority but is obligated to provide guidance

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> to its members, by policies or otherwise, regarding the manner of compliance with *Charter* values in their practice of medicine, including the furtherance of equitable access to health care services that are legally available in Ontario.

The Court held that the two policies in this case did violate the freedom of religion of some physicians. However, the policies were still constitutionally valid under the saving provision found in s. 1 of the *Charter* because they are prescribed by law, serve a pressing or substantial objective and advance that objective in a manner that is rational, minimally impairing and proportionate. Of interest for regulators is that the policies were deemed to be "law" for the purposes of this analysis:

> The Policies fall within the CPSO's statutory mandate and are consistent with its duty to serve and protect the public interest. Accordingly, I am satisfied that the Policies establish limits prescribed by law that may be subject to the *Oakes* analysis.

Policies are sometimes referred to as "soft law" because of their non-coercive nature. At least for the purpose of a constitutional analysis, they may be considered as "law".

In upholding the constitutionality of the policies under s. 1 of the *Charter*, the Court quoted extensively from the policy analysis prepared by the regulator when making the policies. In particular, the Court gave great weight to the other options considered by the regulator and the reasons why those options were not recommended when evaluating whether the policies minimally impaired the freedom of religion rights of practitioners. This outcome highlights the importance of preparing such policy discussion papers when regulators enact policies.

In weighing whether the infringement of the physicians' freedom of religion was proportionate to the objectives of the policies, the Court reiterated that practising a profession is not a right:

> …the Applicants do not have a common law right or a property right to practice medicine, much less a constitutionally protected right. Rather, a licence to practice medicine is granted by statute subject to regulation pursuant to the principles set out in the *RHPA* and the *Code*, among other statutes. These statutes grant the CPSO the authority to regulate physicians with a view to, among other things, protecting the public interest. Those who enjoy the benefits of a licence to practice a regulated profession must expect to be subject to regulatory requirements that focus on the public interest, rather than the interests of the professionals themselves. In this case, physicians are assumed to accept this authority of the CPSO, including the authority of the CPSO to address the requirements of professionalism in the practice of medicine. Accordingly, physicians' *Charter* rights should be assessed against the expectation in entering the profession that such rights may be affected in the protection of the public interest.

Some of the other interesting issues raised in the case include:

- The Court held that the proper method of challenging a regulator's policies was an application for judicial review and not an application for a declaration under Rule 14 of the Rules of Civil Procedure.
- The constitutional validity of a regulator's policies should be assessed using the usual framework found in *R. v. Oakes*, [1986] 1 S.C.R. 103 and not the approach taken to individual adjudicative decisions as found in *Doré v. Barreau du Québec*, [2012] 1 SCR 395.
- The Court reviewed the constitutionality of the policies on a correctness standard (meaning less deference was given to the regulator). The question of whether the regulator had the jurisdiction or authority to create the policies was reviewed on the more deferential reasonableness standard.
- The issue regarding the duty to provide emergency services was sidestepped on a factual basis. There was no evidence that this portion of the policy applied to medical assistance in death cases and no applicant asserted a right to refuse to perform an abortion where the life of the woman was in jeopardy.

The *Christian Medical* case can be found at: http://canlii.ca/t/hq4hn.