The College Must Respect the Constitution
The legal obligation to accommodate physicians’ conscience rights

A submission from the Justice Centre for Constitutional Freedoms
to the College of Physicians and Surgeons of Ontario
in respect of Policy Statement #5-08 and Ontario’s Human Rights Code

August 2014
Introduction

The College of Physicians and Surgeons of Ontario ("CPSO") has invited submissions with respect to Policy Statement #5-08, titled: *Physicians and the Ontario Human Rights Code* ("CPSO Policy"), asking whether the CPSO Policy fails to address any issues, and whether there are ways in which the CPSO Policy should be improved.

The Justice Centre for Constitutional Freedoms (JCCF) is a non-profit, non-partisan, independent human rights advocacy organization, supported entirely by voluntary donations from Canadians who agree with the JCCF’s mission of defending constitutional freedoms for all Canadians. Founded in 2010, the JCCF defends the fundamental freedoms set out in Section 2 of the *Canadian Charter of Rights and Freedoms* ("Charter"): freedom of conscience and religion; freedom of expression; freedom of peaceful assembly; and freedom of association. As an example of the JCCF’s advocacy, the JCCF recently secured the Court’s protection for the expressive rights of students in *Wilson v. University of Calgary*, 2014 ABQB 190. In this case, the JCCF defended the rights of university students to express their opinions peacefully on campus, without censorship or intimidation on the part of university authorities.

Executive Summary

Besides being deeply committed to their oaths as physicians, doctors are also members of Canadian society and are accorded the same basic rights as other members of the community. Foremost among these rights are freedom of conscience, religion, expression, and association. Of course these rights must be articulated within the matrix of obligations owed to patients, but doctors are entitled to live their lives as fully and with as much dignity as other Canadians. The *Charter* protects physicians from government coercion as much as it protects other citizens.

In its current form, the CPSO Policy misinterprets Ontario’s *Human Rights Code* ("Code") as providing patients with a legal right or entitlement to receive medical services they may desire, and to receive these from any physician they may choose. Contrary to this misinterpretation, the *Code* protects the patient from being discriminated against on the basis of the patient’s personal characteristics (e.g. race, religion, sexual orientation). This protection is fundamentally different from creating an entitlement to any particular drug, therapy, treatment, or medical procedure, or an entitlement of receiving this from every doctor.

Further, the current CPSO Policy fails to recognize the *Charter’s* Section 2(a) freedom of conscience and religion, and the manner in which the *Charter* applies to protect physicians from state coercion. The *Charter* is part of Canada’s Constitution – Canada’s supreme law – and the CPSO cannot exclude it from consideration. This means that the CPSO Policy must interpret the *Code* in a manner consistent with the *Charter*. The current CPSO Policy fails to do so.

Even if the CPSO Policy was correct in assuming the existence of a patient’s legal right to obtain whatever treatment the patient desires, the *Charter* protects the rights of physicians to refuse to provide, or refer for, drugs and treatments that the physician believes to be harmful – regardless
of whether the physician’s belief can be characterized as “religious” or otherwise based on conscience. Thus even if patients do possess a legal right to obtain whatever medical services they wish, the CPSO has a legal duty under the Charter and the Code to provide physicians with reasonable accommodation for the practice of their beliefs, whether conscientious or religious.

The Code does not entitle patients to any particular drug or treatment

The provision of medical care is governed by the Canada Health Act, as implemented by each provincial government. Each province determines which drugs, treatments and medical procedures will be made available through the government’s single-payer, single-provider health care system, without any guarantee as to timeliness. The Code itself is silent as to which medical services will, or will not, be provided through the government’s health care system. Rather, the Code serves to ensure that a patient is not discriminated against on the basis of the patient’s own personal characteristics (e.g. ancestry, colour, marital status, disability) as set out in the Code.

By way of illustration, the Code does not prevent any physician from refusing to provide, or refusing to refer for, a sex-selection abortion. However, a physician who provides or refers for sex-selection abortion but refuses to do so for patients of a particular race or ethnic origin would be in violation of the Code. The same holds true of other medical treatments and procedures, about which physicians have differing views. The Code does not entitle patients to receive any specific medical service or procedure. Yet the CPSO Policy implies, incorrectly, that patients have a right to obtain whatever drugs or treatments they may desire.

The Code does not require physicians to provide any particular treatment

The current CPSO Policy asserts that a physician’s refusal to provide, or to refer for, a particular drug or procedure constitutes discrimination prohibited by the Code. This is only true in cases where the physician provides a particular service but refuses to provide that service to certain patients on the basis of the patient’s personal characteristic(s). In contrast, a physician’s refusal to provide or refer for a particular drug or service because the physician believes that the drug or service is harmful to the patient, or because providing the drug or service would violate the physician’s conscience, is not discrimination. The Code does not require any physician to provide any particular medical service or treatment, and should not be interpreted in this fashion.

Therefore, the CPSO Policy should be changed so that it no longer asserts or assumes that a physician’s refusal to provide a specific drug or treatment constitutes discrimination. The CPSO Policy should be changed so that it no longer misinterprets the Code as providing patients with a legal right to particular drugs, treatments, or procedures.
The *Charter* protects individuals from state coercion


The *Charter*, however, does provide express protection for the individual’s freedom of conscience and religion. It is significant that this is the first freedom listed in the *Charter*, before any other right or freedom. The *Charter*’s protection for citizens does not stop or end when the citizen goes to work. Doctors, lawyers, accountants, teachers and other professionals do not lose their *Charter* rights because they work with the public, serve the public, or work in the public sphere.

Foundational principles concerning the *Charter*’s section 2(a) freedom of conscience and religion were laid down by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*: ¹

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. 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. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his belief or his conscience.

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority"[emphasis added].

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The CPSO has a legal duty to apply these principles, to protect the freedom of conscience and religion of Ontario physicians. If the state can coerce physicians to "check their beliefs at the door", freedom of conscience and religion has no value or relevance. Medicine is one of many public spheres in which an individual can choose to work. The fact that one provides services to the public, and the fact that some of those services are fully or partially funded by government, does not remove Charter protection for individuals who provide such services to the public.

The application of the Charter's protection of conscience rights

In Syndicat Northcrest v. Amselem, 2004 SCC 47, the seminal case on the test for protection of freedom of religion, the Supreme Court stated at paragraph 46:

To summarize up to this point, our Court's past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.

In Saskatchewan (Human Rights Commissioner) v. Whatcott, the Supreme Court of Canada stated at paragraph 155: "An infringement of s. 2(a) of the Charter will be established where: 1) the claimant sincerely holds a belief or practice that has a nexus with religion and 2) the provision at issue interferes with the claimant's ability to act in accordance with his or her religious beliefs".

The first step in successfully advancing a claim that an individual's freedom of religion has been infringed is for a claimant to demonstrate that he or she sincerely believes in a practice or belief that has a nexus with religion.3

To prove sincerity of belief, a claimant need not prove that his or her religious belief or conduct is objectively recognized by the religious authorities or experts of the claimant's particular religion as being obligatory precepts. The Court's recognition of sincerity of belief is broad.4 "Indeed, the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice".5

Once the claimant has demonstrated that he or she sincerely believes in a practice that has a nexus with religion, he or she must demonstrate that there has been enough of an interference

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with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Charter. 6

"The second step is to then demonstrate that the impugned conduct of a third party interferes with the individual’s ability to act in accordance with that practice or belief in a manner that is non-trivial". 7

In Amselem, Orthodox Jews who were co-owners of condominiums set up “suceahs” (a hut of sorts) on their balconies to comply with their understanding of biblical teaching. The suceahs violated the condominium by-laws against structures on balconies, which all condominium residents had obligated themselves to follow.

As a compromise to resolve this conflict, some condominium co-owners proposed building one communal sukah to accommodate the Orthodox Jewish co-owners. But Mr. Amselem believed that he was obligated by his religion to set up and dwell in his own sukah. In spite of testimony from one Rabbi that individual sucahs are not required by Judaism, the Court held that the Jewish owners’ right to set up their own sucahs was based on a sincere religious belief that was not trivial or insubstantial. Therefore, a prohibition against Mr. Amselem setting up his own sukah violated the substance of his right, resulting in the infringement of his religious freedom. 8

For an infringement to be non-trivial, it must be demonstrated that it would be distressing to the claimants to avail themselves of an alternative to that which they believe their religious faith obligates them to observe. 9

The Court then balanced the religious rights of the Jewish co-owners against the right of other co-owners to peaceful enjoyment of property and to peaceful security guaranteed to the syndicate under the Quebec Charter of Human Rights and Freedoms. The Court held that the intrusion to these owners was minimal compared to the breach of religious freedom suffered by the Jewish owners.

In Multani c. Marguerite-Bourgeos (Commission scolaire) 10, the Court held a school board’s prohibition on wearing a kirpan, which is required by the Sikh religion, infringed the student’s freedom of religion. The Court found that this absolute prohibition was not justified under section 1 of the Charter as it did not minimally impair the student’s rights. The Court unanimously applied the doctrine of reasonable accommodation. Three of the eight Justices did so under administrative law, while the majority applied the same principle under a Charter analysis.

Under the test introduced in Amselem, the Sikh student in Multani first demonstrated his sincerity of belief by showing that he believed that he must adhere to the practice of wearing a

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kirpan in order to comply with the requirements of his religion.\textsuperscript{11}

Under the second prong of the \textit{Amselem} test, the student demonstrated that the inference with his freedom of religion was neither trivial nor insignificant. The student had to choose between leaving his kirpan at home, or leaving the public education system for a private school that would allow the kirpan. The prohibition against wearing his kirpan to school therefore deprived him of his right to attend a public school. The Court accepted the evidence of the student’s willingness to sacrifice for his religious convictions, and held that the school board’s decision to prohibit him from wearing his kirpan infringed his freedom of religion.

The Court then moved to the second stage of analysis, to find whether this infringement was justified under section 1 of the \textit{Charter}. At this stage, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be proportional to the objective in question.\textsuperscript{12}

The Court held that the pressing and substantial objective in \textit{Multani} was to ensure the reasonable safety of students and staff, and that the school board’s decision was rationally connected to the objective. However, the Court held that the absolute prohibition was an unreasonable measure, because it did not minimally impair the religious freedom of the student. Therefore, the decision to ban the kirpan was not justified under section 1 of \textit{Charter}, and was quashed.

Under this minimal impairment analysis, the Court transposed the principles of reasonable accommodation that are used and applied in human rights law, intersecting a \textit{Charter} analysis with reasonable accommodation principles. The Court held that the student’s request to wear the kirpan to school must be accommodated, as the prohibition on the wearing of the kirpan was greater than a mere minimal impairment of the student’s religious freedom.

In similar fashion, the Court in \textit{Amselem} also applied principles of reasonable accommodation, in its \textit{Charter} analysis, finding that the Syndicat Northcrest had a duty to accommodate.

\section*{The legal duty to provide reasonable accommodation}

The seminal case on “reasonable accommodation” was \textit{Ontario Human Rights Comm. v. Simpsons-Sears}\textsuperscript{13}. The complainant, Mrs. O’Malley, was a member of the Seventh-Day Adventist Church, which required her to abstain from work on Saturdays, as part of observing the Friday sundown to Saturday sundown Sabbath.

\textsuperscript{11} \textit{Multani c. Marguerite-Bourgeoys (Commission scolaire)} 2006 SCC 6, at paragraph 38.
\textsuperscript{12} \textit{Multani c. Marguerite-Bourgeoys (Commission scolaire)} 2006 SCC 6, at paragraph 43.
The Supreme Court of Canada described reasonable accommodation as follows: “The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship; in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer’s business and without undue expense to the employer.”

In British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees’ Union, the Supreme Court held that an employer can justify the standard that implicates the employee by establishing:

1. that the employer adopted the standard for a purpose rationally connected to the performance of the job;
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. that the standard was reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

Applying the duty to provide reasonable accommodation

The concept of reasonable accommodation is not limited to employment matters.

In Alberta v. Hutterian Brethren of Wilson Colony, Chief Justice McLachlin, writing for the majority, held that the concept of reasonable accommodation served to “explain the burden resulting from the minimal impairment test with respect to a particular individual” (emphasis added by the Court).

The Court in Grant v. Canada addressed the RCMP’s accommodation of a Sikh’s right to religious freedom in wearing a turban as part of the RCMP uniform. The Court decided that the public’s freedom of religion is not violated if police officers are allowed to wear a religious symbol as part of their uniform. Allowing the Sikh officers to wear turbans was not discriminatory to others, but was rather designed to prevent discrimination against Sikhs. The Court accepted the fact that the desire to meet the Canadian Human Rights Act and Charter standards could have been one of the Commissioner’s objectives, and that it was a laudable one. The Commissioner assumed that disallowing the wearing of the turban would discriminate against Sikhs, forcing them out of the public service, whereas allowing the wearing of the turban would demonstrate an acceptance of the multicultural nature of Canada. Allowing turbans in the RCMP did not offend the Charter, but rather was required by the Charter.

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In Multani, the Supreme Court of Canada found that accommodating religious belief is best addressed under the minimal impairment branch of the Charter section 1 analysis. The Court found there to be a logical correspondence between the legal principles of the duty to accommodate from employment law, and the minimal impairment test in constitutional law.\textsuperscript{18} The Court described the duty to accommodate as "a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it" and "the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual."\textsuperscript{19}

Regarding the intersection between the concept of reasonable accommodation and a Charter analysis, the Court stated:

In my view, this correspondence between the legal principles is logical. In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it. Although it is not necessary to review all the cases on the subject, the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar. In my view, Professor José Wochriling correctly explained the relationship between the duty to accommodate or adapt and the Oakes analysis in the following passage:

[TRANSLATION] Anyone seeking to disregard the duty to accommodate must show that it is necessary, in order to achieve a legitimate and important legislative objective, to apply the standard in its entirety, without the exceptions sought by the claimant. More specifically, in the context of s. 1 of the Canadian Charter, it is necessary, in applying the test from R. v. Oakes, to show, in succession, that applying the standard in its entirety constitutes a rational means of achieving the legislative objective, that no other means are available that would be less intrusive in relation to the rights in question (minimal impairment test), and that there is proportionality between the measure's salutary and limiting effects. At a conceptual level, the minimal impairment test, which is central to the section 1 analysis, corresponds in large part with the undue hardship defence against the duty of reasonable accommodation in the context of human rights legislation. This is clear from the Supreme Court's judgment in Edwards Books, in which the application of the minimal impairment test led the Court to ask whether the Ontario legislature, in prohibiting stores from opening on Sundays and allowing certain exceptions for stores that were closed on Saturdays, had done enough to accommodate merchants who, for religious reasons, had to observe a day of rest on a day other than Sunday.

(J. Wochriling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998), 43 McGill L.J. 325, at p. 360).\textsuperscript{20}

\textsuperscript{18} Multani c. Marguerite-Bourgeoys (Commission scolaire) 2006 SCC 6, at paragraphs 52-53.  
\textsuperscript{19} Multani c. Marguerite-Bourgeoys (Commission scolaire) 2006 SCC 6, at paragraph 53.  
\textsuperscript{20} Multani c. Marguerite-Bourgeoys (Commission scolaire) 2006 SCC 6, at paragraph 53.
In *Multani*, the Court asked “whether the decision to establish an absolute prohibition against wearing a kirpan ‘falls within a range of reasonable alternatives’”. After a detailed examination of the arguments that such an absolute prohibition was necessary for safety and the prevention of the proliferation of weapons in school and the poisoning of the school environment, the Court found that the school board had “failed to demonstrate that it would be reasonable to conclude that an absolute prohibition against wearing a kirpan minimally impairs Gurbaj Singh's rights.”

The Court in *Grant* looked at the complainants, who were retired officers, and found that the wearing of the turban did not interfere with the complainants’ rights.

The Court in *Multani* did not find that the wearing of the kirpan interfered with safety in a significant way. The interference was deemed minimal.

The Court in *Amselem* did not find that the succahs interfered with the rights of the other syndicate owners in a significant way.

In these cases, each accommodation allowed for the religious adherents to exercise their sincere beliefs in the public sphere. Each accommodation made concessions for religious belief, as long as those beliefs did not interfere with the legal rights of others in more than a minimal way. The fact that these court cases were grounded in factual situations involving the provision of services to the public (education, policing, and housing) did not negate the Charter rights of individuals.

Similarly, if a doctor does not provide a particular service to a patient, even if this denial were somehow deemed to be the denial of a legal right (and this is not the case), the interference with the patient’s rights is still minimal.

In order to disregard the duty to accommodate, the CPSO would have to be able to show that it is necessary, in order to achieve a legitimate and important legislative objective, to require every doctor to provide every medical service, without accommodating religious or conscientious objections. The CPSO would also have to prove that there are no less intrusive means available to achieve the legislative objective, other than requiring every doctor, without exception, to provide or to refer for all services. The CPSO would also need to show that accommodating the Charter-protected freedom of conscience and religion of doctors would impose undue hardship.

The foregoing outline of the legal duty to accommodate would only be applicable if patients had a legal right to obtain from every physician whatever drug or medical procedure they desired. But neither the Charter nor the Code provides patients with this legal right. Even if patients did possess this legal right, court rulings support the Charter right of physicians to refuse medical treatments and procedures which they believe to be harmful.

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21 *Multani c. Marguerite-Bourgeoys (Commission scolaire)* 2006 SCC 6 at paragraph 51
22 *Multani c. Marguerite-Bourgeoys (Commission scolaire)* 2006 SCC 6 at paragraph 77
23 *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paragraph 62
The law rejects a hierarchy of beliefs

The current CPSO Policy makes several references to a doctor’s “moral or religious beliefs,” as though beliefs in this category are worthy of less respect than beliefs which are not “moral or religious.”

This is contrary to a proper understanding of the secular, as explained by the Supreme Court of Canada in Chamberlain v. Surrey School District No. 36 24. Justice Gonthier held that both the religious believer, as well as the atheist, have an equal place in the public sphere of society:

In my view, Saunders J. below erred in her assumption that “secular” effectively meant “non-religious”. This is incorrect since nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the Charter itself establishes that “...Canada is founded upon principles that recognize the supremacy of God and the rule of law”. According to the reasoning espoused by Saunders J., if one’s moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has “belief” or “faith” in something, be it atheistic, agnostic or religious. To construe the “secular” as the realm of the “unbelief” is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.

The CPSO Policy assumes that a doctor’s “secular” beliefs warrant the utmost deference and respect, while a doctor’s “moral or religious” beliefs do not warrant the same deference and respect. In accordance with the Supreme Court’s reasoning in Chamberlain, section 2(a) of the Charter protects the expression and practice of all beliefs, including equally those beliefs that are characterized as “moral or religious”.

The CPSO has a legal duty to accommodate the beliefs of physicians, regardless of whether the belief is characterized as “religious” or “secular.” The current CPSO Policy creates an artificial dichotomy between, for example, a doctor who refuses to provide or refer for sex-selection abortions because of her religious beliefs, and a doctor who refuses to provide or refer for sex-selection abortions because of her secular feminist beliefs. This distinction is not based in law, and is contrary to the Charter, yet the CPSO Policy erroneously assumes the validity of this distinction.

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Summary of Recommendations

The CPSO Policy should be amended as follows:

1. The CPSO Policy should cease to interpret the *Code* as providing patients with an entitlement to receive particular drugs, treatments or medical procedures, because the *Code* does not do this.

2. The CPSO Policy should stop cease to interpret the *Code* as requiring physicians to provide particular drugs or medical services, because the *Code* does not do this.

3. The CPSO Policy should interpret the *Code* correctly, as providing patients with freedom from discrimination based on the patient’s own personal characteristics (e.g. race, age, creed, disability, etc.).

4. The CPSO Policy should recognize expressly that physicians are protected by the *Charter*’s section 2(a) freedom of religion and conscience guarantee, and that this *Charter* protection is not diminished or reduced by virtue of the fact that physicians operate in the public sphere, serve the public, and provide services that are paid for by government.

5. The CPSO Policy should interpret the *Code* based on the *Charter*’s requirements, recognizing that the *Charter* is part of Canada’s Constitution, Canada’s supreme law.

6. The CPSO Policy should recognize expressly that neither the *Charter* nor the *Code* provide patients with any legal entitlement to receive medical services from government.

7. The CPSO Policy should expressly recognize the CPSO’s legal duty to provide reasonable accommodation to physicians to practice their beliefs, based on the physicians’ *Charter*-protected freedom of conscience and religion.

8. The CPSO Policy should cease making the irrelevant distinction between “moral and religious” beliefs and “secular” beliefs. This distinction has no basis in law, and was expressly rejected by the Supreme Court of Canada in its *Chamberlain* decision.