College of Physicians and Surgeons of Ontario

80 College Street Toronto, Ontario. M5G 2E2

CPSO Policy Department:

Dear CPSO,

We write as representatives of immigrant and refugee physicians across Canada and in Ontario. We seek to have a discussion with the CPSO about issues that affect us. We would appreciate the opportunity to meet so that we can ascertain and reconcile the CPSO's position and, in turn, share our current position with the goal of establishing clarity and mutual understanding for further meaningful dialogue.

As the CPSO seeks discussion about human rights, it is important to recognize from the outset that human rights are about inclusion and dignity of all sectors of society: Indigenous People, Canadians whose forefathers settled in Canada, and new immigrant Canadians.

The Canadian Charter of Rights and Ontario's Human Rights Code underscore that a fundamental principle of justice is equal opportunity for all, and access to limited positions being determined on the basis of individual characteristics, not on the group one belongs to. The Ontario Human Rights Code begins by setting out the purpose of the Code and what Ontario seeks to achieve:

> "*Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;*
>
> *And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province*."

The Declaration of Human Rights proclaimed by the United Nations declares fundamental human rights to include: freedom to develop as a person (section 22); the right to work and the right to free choice of employment (section 23); and extremely relevant to issue of access to licensing in the medical profession, the right to professional and technical education which is accessible on the basis of merit (section 26).

The Supreme Court of Canada has held that administrative bodies, which would include the CPSO, the universities, the ministries of health, and other bodies carrying out governmental functions, can only legally discriminate if they are specifically authorized to do so in their empowering legislation.[1]

[1] Shell Canada Products Ltd v Vancouver (City) (SCC), 2994 CanLII 115.

The CPSO, directs physicians to comply with professional obligations and human rights policy. However, we urge the CPSO to take a deeper look at the regulatory system of medicine in Ontario and Canada for the purpose of objectively assessing whether access to licensing in medicine is discriminatory and violates human rights.

We wish to have a discussion which aims to reconcile the CPSO's obligation to reflect the values and expectations of society with respect to a longstanding policy gap that effectively denies Canadians who are immigrants and refugees the rights and equal opportunities afforded others. It is clear that immigrants do not have equal opportunity to medical licensing, because there is segregation between CMGs and IMGs, limited opportunity, and a prohibition against competition on merit in the regulatory process at the resident physician portal despite many IMGs proving they meet the Canadian competence standard. The segregation and limitations imposed on IMGs at the resident physician portal in the CaRMS Match has the effect of marginalizing and excluding from the medical profession international medical graduates including immigrant and refugee physicians. Further immigrant and refugee physicians are adversely affected by the fact that individual competency assessments are not made available to all immigrant and refugee physicians.

The public interest is negatively affected when even one portal in the regulatory process does not accord with fundamental principles of justice including equal opportunity, freedom, and recognition of the respect and worthiness of all Canadians without regard to place of origin or race.

The public interest is also negatively impacted when regulatory process limits the number of physicians licensed because this has the effect of limiting access to health care to millions of Canadians.

The public interest is further negatively impacted when those within Canada – a nation with diverse languages, cultures and people, some whom endured tragic incomprehensible circumstances – have to confront administrative policies across provincial lines, including in Ontario, that effectively hinder and limit the licensing of immigrant and refugee physicians through the regulatory process, preventing them from serving new Canadians who need physicians who are conversant in the language, culture, diet, and circumstances of new Canadians.

The CPSO adopts the Supreme Court of Canada's definition of discrimination[2]:

> "*Discrimination: an act, decision, or communication that results in the unfair treatment of a person or group by either imposing a burden on them, or denying them a right, privilege, benefit or opportunity enjoyed by others. Discrimination may be direct and intentional; it may also be entirely unintentional, where rules, practices or procedures appear neutral but have the effect of disadvantaging certain groups of people."*

The Supreme Court of Canada expands on this definition by providing a practical rule of thumb:

> *"Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed".*[3]

[2] Law v. Canada (Minister of Employment and Immigration), [1991] 1 SCR 497
[3] Law v. Canada (Minister of Employment and Immigration), [1991] 1 SCR 497

Access to the medical profession for immigrant and refugee physicians squarely meets the definition of discrimination.

Immigrant and refugee physicians are denied the "right, privilege, benefit, or opportunity enjoyed by others." We are segregated and prohibited as "international medical graduates", from being allowed to compete for 90% of residency positions in Canada, and 85% of the positions in Ontario. This is particularly harmful considering that these positions are a pre-requisite to becoming licensed to practice medicine and is currently the only pathway for internationally trained physicians to gain licensure in Ontario.

We readily accept that requiring international medical graduates to prove that their knowledge and skills meet the Canadian standard to ensure public safety is differential treatment that is not discrimination. However, we believe it is fair to say that "differential treatment" crosses into "discrimination" after a graduate has proven substantial equivalence by passing the examinations that have been designed to determine whether one has the "critical medical knowledge and decision-making ability of a candidate at a level expected of a Canadian medical student who is completing their medical degree in Canada"[4] and "the knowledge, skills, and attitudes essential for entrance into postgraduate training in Canada"[5,6].

In the Canadian system, segregation and substantially reduced opportunity for international medical graduates is not related to competence and public safety. The Canadian system of access to residency training, and therefore, the medical profession, does what human rights legislation prohibits: it creates barriers for Canadians who are international graduates for the purpose of ensuring that all graduates of Canadian medical school graduates get entry level jobs which provide the experience necessary to become licensed in medicine.[7] In other words, the purpose of the two-stream process is to avoid competition on the basis of individual merit so that stronger graduates of international medical schools do not displace weaker graduates of Canadian medical schools. The system is founded on the assumption that Canadian citizens and permanent residents who are graduates of Canadian and American medical schools are more worthy of becoming licensed to realize their career aspirations and work as physicians by virtue of the place of medical school graduation than Canadian citizens and permanent residents who are graduates of international medical schools.

The harsh reality is that international medical graduates are prohibited from competing for all but 10-15% of the positions for which we are qualified. Regulatory bodies have the authority, and we would argue a positive duty, to ensure that all gateways to the profession are free of discrimination.[8] But no provincial regulatory has yet to act to stop discrimination in access to licensure. Below we set out the differences between opportunity afforded graduates of Canadian and American medical schools and opportunity afforded graduates of international medical schools. Is there a material difference between the regulatory system depriving Canadians of equal opportunity as set out below on the basis of him/her

[4] MCCQE Part I | Medical Council of Canada
[5] NAC Overview | Medical Council of Canada (mcc.ca)
[6] Ontario, Royal Commission Inquiry into Civil Rights, Commissioner: James Chalmer McRuer (Tornoto: Queen's Printer, 1968-1971) p. 1179
[7] AFMC Resolution Eligibility criteria - CaRMS
[8] Trinity Western University v. Law Society of Upper Canada 2018 SCC 33

being an immigrant or international medical graduate versus being excluded on the basis of race or religion, particularly when the vast majority of the class of immigrants that is most adversely affected are people of colour?

Here is a list of some of the fundamental differences in opportunity afforded these two groups of Canadians:

i. There are more residency positions in the CMG Stream (for graduates of Canadian and American medical schools) than there are applicants. Members of this group are all but guaranteed residency positions and licensing. Conversely, there are residency positions for less than 20% of the applicants who are international medical graduates and constrained to the IMG Stream.

ii. Graduates of Canadian and American medical schools have the opportunity to apply to be licensed in the discipline of their choice. International medical graduates do not. This is because some disciplines are simply not available to international medical graduates, and because of the small quota of positions allotted them. Most resident positions available to international medical graduates are in underserviced disciplines (family medicine, internal medicine, pediatrics, and psychiatry) which generally generate a lower income;

iii. Graduates of international medical schools who defy the odds and get matched to a residency position, are forced to sign a return of service contract as a condition of proceeding to work in the position we matched to. In other words, while the social benefit of professional training and access to entry level employment is free for graduates of Canadian and American medical schools, it is only available to Canadian citizens and permanent residents who are international medical graduates at the onerous price of waiving their constitutional rights including freedom of mobility.[9] The fact that waiving a constitutional right is illegal is irrelevant when the party imposing the condition holds all the power and the person on whom the condition is being imposed is socially and financially oppressed, and unable to mount an effective challenge in a system that is not transparent or accountable.

We expect that most in the medical profession are so accustomed to the imposition of return of service contracts on Canadians who are international medical graduates that little is thought of it. The return of service contract is thought of as an “agreement”, a valid contract. But stripped to the core and put to the most glaring light, return of service contracts amount to the ministries of health using the regulatory process to put to Canadian citizens and permanent residents who are international medical graduates this proposition: sign this agreement or you cannot be licensed to work in Canada as a physician. The Supreme Court has held that giving a person a choice between a course of action or their livelihood is no choice at all, and thus a breach of a constitutional right[10]. We would like the CPSO to consider whether allowing a third party to impose on one sector of

[9] Godbout v. Longueuil (City), 1997 CanLII 335 (SCC),
[10] A. C. Teacher's Federation v. School District No. 39, 2003 BCCA 100 (CanLII)

society, the obligation to work in underserviced regions. Is this imposition in the regulatory process consistent with the requirement of a "transparent, objective, impartial, and fair" regulatory process? In examining this issue, it would likely be relevant to consider that the majority of international medical graduates are immigrants and people of colour, thus among the most vulnerable and marginalized sector of society.

Would an objective and impartial adjudicator not consider it fairer, if it is necessary to impose this condition, to impose it on graduates of Canadian medical schools who have had their education subsidized by the taxpayer by as much as $300,000 per graduate? We expect that imposition on graduates of Canadian medical schools was ruled out because when the British Columbia Ministry of Heath tried to restrict mobility rights of new graduates of Canadian schools as a class through restricted issuance of billing numbers and subsequently reduced fees, the medical profession rallied to their side by funding legal challenges, all of which were successful. The courts held that a restriction on a Canadian's right of freedom of mobility is contrary to his/her Charter rights.[11] The question arises, why are international medical graduates the group who face place of work restrictions after being certified? Was their position of vulnerability, their lack of cohesiveness, and lack of financial means to mount legal challenges a factor in this decision?

iv. Competence requirements are different for the two groups. It is a pre-requisite to applying to CaRMS in the IMG stream, that international medical graduates have passed the Medical Council of Canada Qualifying Examination Part 1 (MCCQE1) and the NAC OSCE. Conversely, graduates of Canadian and American medical schools do not have to pass the MCCQE1 in order to be qualified to apply in the CMG stream. This difference can be justified by the fact that graduates are from Canadian and American medical schools.

The different application of the MCCQE1 is perhaps the most objective measure of differential standards and treatment of international medical graduates and graduates of Canadian and American medical schools. Not only must international medical graduates pass the MCCQE1, we must excel in it (and the NAC OSCE) to be considered for an interview. But graduates of Canadian and American medical schools do not have to take the NAC OSCE and are free to fail[12] the MCCQE1 without affecting their graduation nor their ability to be licensed and work as resident physicians serving the public. This is perplexing in the context of a regulatory system, considering that the MCCQE1 is designed to determine whether a graduate has "the critical knowledge and decision-making skills" expected of a graduate of a Canadian school.

While international medical graduates' applications are eliminated without having their application viewed by a human eye if their MCCQE1 score is not well above a pass rate, almost all graduates of Canadian medical schools are practicing medicine. This is because the medical regulatory system has

[11] Mia v. Medical Services Commission of British Columbia, 1985 CanLII 148 (BC SC); Wilson v. Medical Services Commission of British Columbia, 1988 CanLII 177 (BC CA) (Leave to Supreme Court of Canada denied. [1988] 2 S.C.R. viii); Waldman et al. v. The Medical Services of British Columbia et al., 1999 BCCA 508 (CanLII)

[12] 3-5% of graduates of Canadian medical schools fail the MCCQE1 each year Citation needed. Medical Council of Canada Annual Report 2019-2020 p. 22

institutionalized privilege and greater worth for those who have graduated from Canadian and American medical schools than those Canadian citizens and permanent residents who are international medical graduates.

It is not well-known outside the medical establishment that Canadian and American medical schools, i.e., LCME accredited schools, mark their students on a pass/fail basis and have a policy against failing weak students. The United States addresses public interest concerns inherent in this LCME accredited medical school policy, by requiring every graduate, regardless of place of graduation, to pass US Medical Licensing Exams (USMLEs) as a condition of applying to the Match. The USMLEs are similar to the Medical Council of Canada exams imposed on only international medical graduates in Canada.

The institutionalization of classification by place of education in the medical licensing process has the unfortunate effect of negatively affecting people's self-worth which often leads to humiliation, mental health issues, and even family breakdown. Canadians are told that a Canadian is a Canadian.

A system designed to ensure the career advancement of one sector of society to the exclusion of another in the context of a society which believes in human rights and Canadian values, reasonably leads that society to assume that our exclusion and limitations on our opportunity is a function of inferiority. Scientific studies demonstrate that we are not inferior[13], but this is little comfort to us considering that the public is uninformed of these studies and of the fact that despite passing examinations, the public is told that we are not licensed because of "credential recognition" and "public safety". In reality, there are thousands of us in Ontario who have passed the examinations which demonstrate that we meet the Canadian standard, but that is insufficient for an international medical graduate to apply to all the residency positions available in our province and our country. Thus, segregation and denial of equal opportunity open to other sectors of society, perpetuate the marginalization and prejudice against immigrants, our credentials, and our abilities.

We would like to discuss with the CPSO consideration of policy change. We seek a policy which ensures that the regulatory process of admission to the medical profession complies with principles of fundamental justice and human rights by:

> The CPSO taking a leadership role in furthering human rights, diversity, and equality by exercising its legislative authority under (a) the Regulated Health Professions Act, and (b)its common law gatekeeper rights to stop the discrimination and violation of human rights that immigrant and refugee physicians currently face via the resident physician portal which has the adverse effect of excluding us from becoming licensed in the medical profession. This can be accomplished by directing CaRMS to allow all Canadian citizens and permanent residents who have proven ourselves qualified to work as resident physicians to compete for all residency positions on the same terms.

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[13] "Quality of care delivered by general internists in US hospitals who graduated from foreign versus US medical schools: observational study" BMJ 2017; 356. https://www.bmj.com/content/356/bmj.j273; Ko DT, Austin PC, Chan BT, Tu JV. Quality of care of international and Canadian medical graduates in acute myocardial infarction. Arch Intern Med. 2005;165(4):458-463. doi:10.1001/archinte.165.4.458. Online at: https://www.ncbi.nlm.nih.gov/pubmed/?term=15738378

It is necessary for immigrant and refugee physicians and the CPSO to converse. It is necessary to talk about the medical culture which accepts the legitimacy of placing Canadians who are international medical graduates in second place. It is time international medical graduates were at all the tables where decisions are made that impact them. It is time to discuss the uncomfortable, including the fact that an immigrant's place of education is proxy for place of origin[14] It is also necessary to talk about the fact that because international medical graduates from white British Commonwealth countries do not need to re-train, the vast majority of immigrant physicians who are adversely impacted by the system of segregation and varied opportunity at the residency training portal are people of colour. The time has come for engagement and frank conversation.

We would appreciate the CPSO reaching out to us for further discussion.

Sincerely yours,

Canadian on Paper Society for Immigrants for Equality (Canadian On Paper Society for Immigrant Physicians Equality)

AND

Foundation for International Medical Graduates (Foundation of IMG)

AND

Create a PATH for International Medical Specialists to practice in Canada (Create a PATH for International Medical Specialists to practice in Canada | Facebook)

[14] *Bitonti v CPSBC* (1999) 36 CHRR D/263; *Neiznanski v. University of Toronto* (1995) 24 CHRR D/187; Fazli v National Dental Examining Board of Canada, [2014] OHRTD No 1340, 2014 HRTO 1326