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*Via email:* eolpolicy@cpso.on.ca

Dr. Nancy Whitmore
Registrar
College of Physicians and Surgeons of Ontario
80 College Street
Toronto, Ontario M5G 2E2

Dear Nancy:

**Re: Consultations on the Revised Decision-Making for End-of-Life Care Policy and Advice**

The Canadian Medical Protective Association (CMPA) appreciates the opportunity to participate in the consultations being conducted by the College regarding the revised draft Policy and Advice document on *Decision-Making for End-of-Life Care*.

As you know, the CMPA delivers efficient, high-quality physician-to-physician advice and assistance in medico-legal matters, including the provision of appropriate compensation to patients injured by negligent medical care. Our evidence-based products and services enhance the safety of medical care, reducing unnecessary harm and costs. As Canada's largest physician organization and with the support of our over 105,000 physician members, the CMPA collaborates, advocates and effects positive change on important healthcare and medico-legal issues.

The CMPA's comments will focus on the following two issues:

- Consent and communication requirements when considering withholding resuscitative measures; and
- Complying with critical care triage protocols and other public health/institutional requirements impacting end-of-life care during a public health emergency.

**Withholding Resuscitative Measures**

The CMPA recommends that the *Policy* be amended to impose consistent communication requirements for *all* situations where withholding resuscitative measures is being considered.

While we are pleased to see that changes are being proposed to better align the Policy and Advice documents with the decision in *Wawrzyniak v Livingstone*[1] with respect to consent and

[1] 2019 ONSC 4900 [*Livingstone*]

communication requirements, there remains some inconsistency. In particular, the draft Policy and Advice documents make a distinction between withholding resuscitative measures in different scenarios:

- Where the physician determines that resuscitative measures would be medically futile, physicians would have to inform the patient and/or substitute decision-makers (SDM) about the DNR order at the earliest opportunity, and if possible, before the DNR order is written.

- Where resuscitative measures is not medically futile, but the risks of providing resuscitative measures outweigh the potential benefits, physicians would have to inform the patient and/or SDM before writing the order.

- Where a patient's condition is deteriorating rapidly and there is an imminent need for a DNR order to be written, physicians would have to inform the patient and/or SDM before writing the order, and at the earliest opportunity.[2]

The *Livingstone* decision does not require that physicians communicate in advance with patients or SDMs regarding the writing or acting on the DNR order, even in situations where the risk of providing resuscitative measures outweigh the potential benefits or where the patient's condition is rapidly deteriorating.

To better align with the *Livingstone* decision and make it less confusing for physicians, it would be preferable if the Policy required in all situations where withholding resuscitative measures is being considered that physicians inform the patient and/or SDM at the earliest opportunity, and only if possible, before the DNR order is written.

**Public Health Emergency**

While the public health emergency related to the COVID-19 pandemic has continued to evolve, we maintain our recommendation as part of the preliminary consultations, that the Policy and Advice documents be revised to recognize the unique situation created by public health emergencies. In these exceptional circumstances, physicians may be required to make decisions about life sustaining treatments based on other considerations, including critical care triage protocols and public health/institutional requirements.

When confronted with a lack of adequate resources during a public health emergency, physicians may not be able to provide all patients with the level of care otherwise expected. It would be helpful if the Policy and Advice documents recognized the exceptional circumstances in which physicians may be called upon to make decisions based on critical care triage protocols and other considerations related to a public health emergency that may impact end-of-life care. This would further reassure physicians acting in good faith compliance with these triage protocols or other relevant public health measures that they will not face disciplinary proceedings for making decisions that diverge from the usual principles set out in the Policy and Advice document.

In updating the Policy, the CPSO might consider an approach similar to that adopted by the

[2] Paragraph 10 of the draft Policy refers to paragraph 9, which requires prior communication with the patient and/or SDM of the decision to write a DNR order.

College of Physicians and Surgeon of Manitoba (CPSM), which published an Advisory with respect to its Standard of Practice on *Withholding and Withdrawing Life-Sustaining Treatment*. Specifically, the CPSM expressly recognized that physicians may not be able to comply with the College's Standard of Practice in the circumstances of the pandemic. The Advisory states that physicians must make decisions consistent with the spirit and intent of the Standard "where possible, but recognizes they must be guided and adhere to institutional and/or public health requirements/directives as to how to best allocate limited resources".

We hope these comments will be of some assistance to the College in finalizing the updated *Decision-Making for End-of-Life Care* Policy and Advice to the Profession.