Court File Nos.: 499-16, 500/16

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N :

THE CHRISTIAN MEDICAL AND DENTAL SOCIETY OF CANADA, THE CANADIAN FEDERATION OF CATHOLIC PHYSICIANS' SOCIETIES, CANADIAN PHYSICIANS FOR LIFE, DR. MICHELLE KORVEMAKER, DR. BETTY-ANN STORY, DR. ISABEL NUNES, DR. AGNES TANGUAY and DR. DONATO GUGLIOTTA

Applicants

- and -

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO, DYING WITH DIGNITY CANADA, CANADIAN CIVIL LIBERTIES ASSOCIATION, THE EVANGELICAL FELLOWSHIP OF CANADA and ASSOCIATION OF CATHOLIC BISHOPS OF ONTARIO, CHRISTIAN LEGAL FELLOWSHIP, B'NAI BRITH OF CANADA LEAGUE FOR HUMAN RIGHTS, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, CATHOLIC CIVIL RIGHTS LEAGUE and FAITH AND FREEDOM ALLIANCE and PROTECTION OF CONSCIENCE PROJECT, CANADIAN HIV/AIDS LEGAL NETWORK and HIV & AIDS LEGAL CLINIC ONTARIO and CANADIAN PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH

Interveners

FACTUM OF THE INTERVENERS, CHRISTIAN LEGAL FELLOWSHIP, THE EVANGELICAL FELLOWSHIP OF CANADA and THE ASSEMBLY OF CATHOLIC BISHOPS OF ONTARIO

DEREK B.M. ROSS /
DEINA WARREN
Tel : 519-208-9200
Fax: 519-208-3600
Email: execdir@christianlegalfellowship.org

470 Weber St. N., Suite 202
Waterloo, ON N2L 6J2

Solicitors for the Interveners, Christian Legal Fellowship, the Evangelical Fellowship of Canada, and the Assembly of Catholic Bishops of Ontario

TO : **VINCENT DAGENAIS GIBSON LLP/s.r.l.**
260 Dalhousie Street, Suite 400
Ottawa, Ontario K1N 7E4

ALBERTOS POLIZOGOPOULOS
Tel : 613-241-2701
Fax: 613-241-2599
Email: albertos@vdg.ca
Counsel for the Applicants

AND TO: **COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO**
80 College Street
Toronto, Ontario M5G 2E2

VICKI WHITE / LISA BROWNSTONE
Tel: 416-967-2600
Fax: 416-967-2647
Email: vwhite@cpso.on.ca / lbrownstone@cpso.on.ca
Counsel for the Respondent

AND TO: **THE ATTORNEY GENERAL OF ONTARIO**
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

JOSH HUNTER / EMILY BALA
Tel.: 416-326-3840 / 416-326-4473
Fax: 416-326-4015
Email: joshua.hunter@ontario.ca / emily.bala@ontario.ca
Counsel for the Intervener, the Attorney General of Ontario

AND TO: **JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS**
#253, 7620 Elbow Drive, SW
Calgary, Alberta T2V 1K2

JAY CAMERON
Tel: 403-909-3404
Fax: 587-747-5310
Email: jcameron@jccf.ca
Counsel for the Intervener, Justice Centre for Constitutional Freedoms

AND TO: **SPITERI & URSULAK LLP**
1010-141 Laurier Ave. W.
Ottawa, Ontario K1P 5J3

MICHAEL A. CRYSTAL
Tel: 613-563-1010
Fax: 613-563-1011
Email: mac@sulaw.ca
Counsel for the Interveners, HIV & AIDS Legal Clinic Ontario, Canadian HIV/AIDS Legal Network and Canadian Professional Association for Transgender Health

AND TO: **GOLDBLATT PARTNERS LLP**
20 Dundas Street West, Suite 1100
Toronto, Ontario M5G 2G8
KELLY DOCTOR / CYNTHIA PETERSEN
Tel: 416-979-4052
Fax: 416-591-7333
Email: kdoctor@goldblattpartners.com / cpetersen@goldblattpartners.com
Counsel for the Intervener, Dying with Dignity

AND TO: **BENNETT JONES LLP**
3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4

ROBERT W. STALEY / LAURA J. FREITAG
Tel: 416-863-1200
Fax: 416-863-1716
Email: staleyr@bennettjones.com / freitagl@bennettjones.com
Counsel for the Interveners, Catholic Civil Rights League, Faith and Freedom Alliance and Protection of Conscience Project

AND TO: **NORTON ROSE FULBRIGHT CANADA LLP**
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4

RAHOOL AGARWAL / KATE FINDLAY
Tel: 416-216-3943 / 416-202-6706
Fax: 416-206-3930 / 416216-3930
Email: rahool.agarwal@nortonrose.com / kate.findlay@nortonrosefulbright.com
Counsel for the Intervener, Canadian Civil Liberties Association

AND TO: **WAGNER SIDLOFSKY LLP**
181 University Avenue, Suite 1800
Toronto, Ontario M5H 3M7
CHARLES WAGNER / GREGORY SIDLOFSKY /
BRENDAN DONOVAN / RACHAEL KWAN
Tel: 416-366-6743
Fax: 416-364-657e
Lawyers for the intervener B'nai Brith of Canada League for Human Rights

PART I: OVERVIEW

1. Freedom of religion is a foundational, distinctive feature of a truly free and democratic society.[1] Along with freedom of conscience, it provides the "absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government".[2] It is not a mere policy objective to be considered among or equated with numerous other interests that are not enshrined in the *Charter*.[3] It is a constitutionally entrenched freedom that represents a hallmark of an enlightened and healthy democracy,[4] and which forms the bedrock for the *Charter* as a whole.[5] It is to be "jealously guarded."[6]

2. The CPSO Policies[7] violate this fundamental freedom. The Policies mandate material cooperation in the purposeful and premature ending of another person's life contrary to one's religiously-informed ethical convictions. That the Supreme Court in *Carter* struck the *Criminal Code* prohibition on assisted suicide in certain specific circumstances does not strike conscientious objectors from the practice of medicine. By requiring physicians to either surrender or violate their consciences, the Policies interfere with religion and/or conscience in more than a trivial or insubstantial manner.[8]

3. The CPSO suggests that a number of considerations relevant to the "public interest" (none of which represent *Charter* rights) outweigh this *Charter* violation.[9] However, the "public

---

[1] *R v Big M Drug Mart*, 1985 1 SCR 295 at 336, **Book of Authorities of these Interveners ("BOA"), Tab 1**, ["*Big M*"].
[2] *Big M* at p 346, **BOA, Tab 1**.
[3] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, at s. 15 ["*Charter*"].
[4] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 1, **BOA, Tab 2**, ["*Amselem*"]; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 48, **BOA, Tab 3**, ["*Loyola*"].
[5] *Big M* at p 346: "[2(a) rights] are the *sine qua non* of the political tradition underlying the *Charter*. ", **BOA, Tab 1**.
[6] *Reference re Same Sex Marriage*, 2004 SCC 79, para. 53, **BOA, Tab 4**.
[7] CPSO, Policy Statement #2-15, Professional Obligations and Human Rights, **Applicants' Application Record - POHR ["AAR - POHR"], Vol 1, Tab 4**, pp 41-46 and CPSO, Policy Statement #4-16, Medical Assistance in Dying, **Applicants' Application Record - MAID ["AAR - MAID"], Vol 1, Tab 5**, pp 47-54, [the "Policies"].
[8] *Amselem*, at para 59, **BOA, Tab 2**.
[9] Affidavit of Andrea Foti ["Foti Affidavit"], at para 77, **Respondent's Application Record - MAID ["RAR - MAID"], Vol 1, Tab 1**, p 27.

interest" is not a free-standing, unfettered power that automatically trumps *Charter* rights.[10] Rather, it must be considered within the bounds of the CPSO's enabling statute, other legislative enactments,[11] and of course, the *Charter* itself.[12] An examination of these legal authorities reveal that to the extent "public interest" considerations are relevant, they weigh overwhelmingly in favour of protecting the fundamental rights of conscientiously-objecting health care professionals, not violating them.

PART II: FACTS

4. These interveners agree with the statement of facts as set out by the Applicants.

PARTS III & IV: ISSUES & ARGUMENT

Nature of Religious Freedom

5. Religion is "comprehensive."[13] It is more than an opinion; religion is "the lens through which people perceive and explain the world in which they live. It defines the moral framework that guides their conduct. Religion is an integral part of each person's identity."[14] Religious belief is a "movement of the soul"[15] that "governs every aspect of their [believers'] lives."[16]

6. Religion permeates an individual in such a way as to mold and define the moral framework that guides conduct; it shapes the way in which people think, perceive and explain questions of fundamental importance.[17] This includes questions about the very nature of human

---

[10] *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, at para. 45 **BOA, Tab 5**.
[11] Ontario *Human Rights Code*, RSO 1990, c H.19, ss. 6, 47; Also see Commission's *Policy on preventing discrimination based on creed* (September 17, 2015), p 6, **BOA, Tab 32**: "The duty to accommodate also is not negated simply because a person or organization thinks a belief or practice is unreasonable or objectionable, or because an organization operates in the secular public sphere."
[12] *Doré v Barreau du Québec*, 2012 SCC 12 at para 24, **BOA, Tab 6** ["*Doré*"]; *Loyola* at para 37, **BOA, Tab 3**.
[13] *Amselem* at para 39, **BOA, Tab 2**.
[14] *Mouvement laïque Québécois v Saguenay (City)*, 2015 SCC 16 at para 73 ["*Saguenay*"], **BOA, Tab 7**.
[15] Joshua Mitchell, "Religion Is Not a Preference," *The Journal of Politics*, Vol. 69, No. 2, May 2007, 351-362, **BOA, Tab 29** ["Mitchell, *Religion*"].
[16] *Trinity Western University v Nova Scotia Barristers' Society,* 2015 NSSC 25 at para 230, **BOA, Tab 8**, ["*TWU v NSBS*"]; upheld on appeal on administrative law grounds, 2016 NSCA 59.
[17] *Saguenay* at para 73, **BOA, Tab 7**.

life, its beginning and end, the inherent value and dignity of each person, and the morality of intentionally ending another human being's life in the face of prohibitions against killing.[18]

Freedom of religion includes the right to live according to one's faith

7. Religion is also more than a "choice"; for Christians,[19] adherence to Biblical teaching is not an optional exercise but a necessary, inescapable requirement of their faith.[20] If one holds sincere religious beliefs which inform one's view about human nature, morality and eternity, one is not free to temporarily disregard or suspend those beliefs in order to act contrary to them. Otherwise, the beliefs would not be sincerely held:

> Biblical religion, so circumscribed, is not a preference. It is not a choice. It is not a value. It is, above all, not an identity. The oldest of these terms emerged in the eighteenth century; the youngest, arguably, in the twentieth century. Christianity is 2,000 years old. Judaism perhaps 3,500. Let these be the frame of reference for this discussion here. […] Religious experience cannot be understood as a "preference," because the God who stands before man is not among the plurality of scalar objects among which he prefers this over that. Religious experience pertains not to the extant plurality in the created "world," but rather to the Creator who is the source of that plurality.[21]

8. For Christians and indeed all people of faith, their religious convictions inform and direct all aspects of their lives. This fact has been accepted by the Supreme Court of Canada in multiple instances and is indeed the reason for which the *Charter* protection of religious freedom exists.[22] Thus, adhering to a mandatory moral framework that guides conduct - such as not referring for assisted suicide – is an integral and inseparable aspect of religious belief. The state cannot demand physicians or other healthcare professionals set aside the moral framework that guides their conduct, just as it cannot coerce a believer to renounce his faith.[23]

---

[18] Without limiting the nature of the prohibitions, this would include religious, moral, ethical, and legal prohibitions.
[19] These interveners represent: legal professionals from over 30 Christian denominations (CLF); a constituency of 40 Protestant Evangelical denominations with approximately 2.1 million members/adherents (EFC); and approximately 3.8 million Roman Catholics across Ontario from 14 Archdioceses and Dioceses (ACBO).
[20] Mitchell, *Religion* at pp. 352, 354, **BOA, Tab 29**.
[21] Mitchell, *Religion* at pp. 352, 354, **BOA, Tab 29**.
[22] See i.e., *Big M*, at p. 336 **BOA, Tab 1** and *R*. *v*. *Edwards Books* [1986] 2 S.C.R. 713, at p. 759, **BOA, Tab 9**.
[23] *Big M,* p 336, **BOA, Tab 1**.

9. The Applicants are bound by their sincerely held religious beliefs. As the Honourable Chief Justice McLachlin has acknowledged, they, like all people, are "defined by the commitments and identifications which provide the frame or horizon within which [they] can try to determine from case to case what is good, or valuable, or what ought to be done, or what [they] can endorse or oppose."[24] They cannot act in violation of their religiously-informed convictions because to do so would be contrary to their very being.

10. Religious freedom claimants need not prove that their beliefs are "objectively recognized as valid by other members of the same religion" and it is not an appropriate inquiry to make.[25] Rather than judge or interpret one's religious beliefs it is the State's obligation to protect them:

> [t]he State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion[26].

11. Similarly, when stakeholders (physicians in particular) made the claim that an effective referral is morally "equivalent to providing PAD", the CPSO erred when it determined it "could not accept this argument".[27] The CPSO ought to have accepted the sincerity of the claim and then balanced that *Charter* right with its statutory objectives. Instead, the CPSO assumed the role of arbiter of religious dogma and rejected this claim. In doing so it made an *ultra vires* determination as to the validity of the Applicants' and other like-minded physicians' beliefs, violating their *Charter* right to freedom of religion.

12. Religious freedom is thus engaged and violated by the CPSO Policies. Violations of

---

[24] McLachlin, Beverly, *Freedom of Religion and the Rule of Law,* from: *Religion: Recognizing Religion in a Secular Society*, Edited by Douglas Farrow, McGill-Queen's University Press, 2005, **BOA, Tab 30,** ["McLachlin, *Freedom of Religion*"].
[25] *Amselem* at para 43, **BOA, Tab 2**; because there may exist a range of views within different Christian traditions about some of the procedures and pharmaceuticals at issue does not invalidate or prove insincere the Applicants' claims.
[26] *Amselem,* at para. 50, **BOA, Tab 2**.
[27] Foti Affidavit, at para 111, p 41, **RAR - MAID, Vol 1**, **Tab 1**.

fundamental rights and freedoms are only permitted to the extent that they can be justified in a free and democratic society,[28] or can be demonstrated to impair as little as possible the right or freedom at stake, taking into account the statutory objective,[29] neither of which standard is met.

The Policies Do Not Further the Public Interest

13. In this case, the CPSO has invoked its statutory duty to ensure, as a matter of public interest, that Ontarians have access to adequate numbers of qualified, skilled and competent health professionals as justification for *Charter* violations.[30] However, this statutory directive is not a freestanding license to do anything and everything the CPSO deems to be in the "public interest". The CPSO is to act in the "public interest" only to the extent of its jurisdiction– the concept of the public interest does not broaden CPSO's authority or function and must be viewed through the lens of the provisions of its enabling statute.[31]

14. The CPSO is tasked with twelve specific objects,[32] and in "carrying out its objects the College has a duty to serve and protect the public interest".[33] This wording demonstrates a legislative intent to restrict the application of the "public interest" to carrying out its objects.[34] Defining what is meant by the term "public interest" in this specific context and how it ought to be applied to CPSO's objects is thus essential to the proper resolution of this case.

The Public Interest is Served and Protected by Affirming Physicians' Charter Rights

15. First, any interpretation of the "public interest" must align with and properly understand *Charter* rights and freedoms. A legislative discretion to carry out one's objects in the "public interest" is, after all, subject to (not paramount to) the *Charter* and must not be used as a *carte*

---

[28] *R v Oakes*, [1986] 1 SCR 103, **BOA, Tab 10**; the POHR Policy is subject to an *Oakes* analysis.
[29] *Loyola*, at paras 40-41, **BOA, Tab 3**; the MAID Policy is subject to a *Doré* analysis.
[30] See e.g. Foti Affidavit at paras 23, 35, 73 and 76; see also *Regulated Health Professions Act, 1991* SO 1991 c.18, Schedule 2, Health Professions Procedural Code, S.2.1 ["*RHPA*"].
[31] *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 43-56, esp. para 46, **BOA, Tab 12** ["*Criminal Lawyers*"].
[32] *RHPA*, Schedule 2, s.3(1).
[33] *RHPA*, Schedule 2, s.3(2).
[34] *Trinity Western University v Law Society of Upper Canada*, 2015 ONSC 4250 at para 57, **BOA, Tab 13**.

blanche mechanism to limit and violate a protected *Charter* right. As the majority of the Supreme Court of Canada recognized in *R v. Zundel*:

> It is difficult to see how a broad, undefined phrase such as "public interest" can on its face constitute a restrained, appropriately limited measure which impairs the right infringed to the minimum degree consistent with securing the legislation's objectives.[35]

16. The concept of public interest—whatever the contextual definition—therefore must recognize *Charter* rights, freedoms and values as an inherent component of that interest. It is conceptually incongruous for a decision maker to begin a balancing analysis by pitting *Charter* rights against the public interest, as if they are competing counter-weights on a scale – rather, they should be understood as being in conceptual harmony, weights on the same side of the scale. In other words, it is in *keeping* with the public interest to protect *Charter* rights and freedoms, particularly religious freedom, and particularly minority religious beliefs.[36]

17. Protecting physicians' *Charter* freedoms promotes human dignity by respecting and protecting the right of a person to entertain and manifest religious or moral beliefs as she chooses and to openly declare those beliefs without fear of hindrance or reprisal.[37] These rights and freedoms are not rendered void by virtue of the claimants practicing in a regulated profession. *Charter* rights and freedoms exist precisely to protect (in this case) physicians from the power of the state.[38] As the Justice Beetz explained in *Morgentaler* in the context of abortion:

> [g]iven that the decision to appoint a [therapeutic abortion] committee is, in part, one of conscience and, in some cases, one which affects religious beliefs, a law cannot force a board to appoint a committee any more than it could force a physician to perform an abortion.[39]

---

[35] *R v Zundel*, [1992] 2 SCR 731, p 770, **BOA, Tab 14**.
[36] *Saguenay*, paras. 74-76, **BOA, Tab 7**.
[37] *Big M,* p 336, **BOA, Tab 1**.
[38] Section 32 of the *Charter* states the *Charter* applies (a) to the Parliament of Canada … and (b) to the legislature and government of each province.
[39] *R v Morgentaler*, [1988] 1 SCR 30 at pg 95-96, **BOA, Tab 15** ["*Morgentaler*"].

18. The CPSO does not collect information about members' religious and cultural beliefs, but it has issued certificates of registration permitting independent practice to physicians with medical degrees from 131 different countries, and Ontario physicians speak 125 different languages.[40] Diversity of this nature is laudable, and arguably increasingly reflective of a diverse patient population. The same ought to be true of religious and cultural diversity in that the physician population ought to include and empower minority religious and cultural perspectives:

> To disempower non-state institutions from defying prevailing norms effectively disempowers individuals, exacerbating the problem of having 'large numbers of people [who] do not participate in decisions that determine the conditions of their everyday lives....'[41]

19. It is in the public interest, and in patients' interests, to allow a broad range of perspectives and beliefs for professionals, thereby enhancing freedom for patients to choose professionals who affirmatively practice according to principles that are central to patients' own moral and religious convictions, including those that unconditionally value human life. As the Canadian Medical Association has recognized,

> It is in fact in a patient's best interest and in the public interest for physicians to act as moral agents, and not as technicians or service providers devoid of moral judgement.[…] medical regulators ought to be articulating obligations that encourage moral agency, instead of imposing a duty that is essentially punitive to those for whom it is intended and renders an impoverished understanding of conscience. [42]

20. It is difficult to comprehend how it could possibly be in the "public interest" to expect patients to receive health care services from professionals who have been required by their regulatory body to abandon moral thought upon licensure. Physicians' independent judgment

---

[40] Foti Affidavit, para 6, **RAR - MAID Vol 1, Tab 1,** p 3.
[41] Vischer, *Conscience and the Common Good*, at pg 170, citing Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 Cornell J.L. & Pub. Pol'y (2004) at 297, **BOA, Tab 31**.
[42] CMA Submission to the College of Physician and Surgeons of Ontario (CPSO), Consultation on CPSO Interim Guidance on Physician-Assisted Death, January 13, 2016 ("CMA Submission"), **RAR - MAID, Vol 2, Tab 1, Exhibit Y**, p 885.

"marks a profession" and "well-ordered liberal, democratic societies" respect such judgment.[43] Not only do the Policies restrict the exercise of professional judgment, they eliminate productive and important dialogue between patients and physicians.[44]

21. The CPSO asserts that "a conscientious objection is based on a physician's personal conscience or religious beliefs and not on elements that would inform a clinical decision about the suitability of a patient's choice of treatment or procedure."[45] With this statement, the CPSO attempts to neatly segregate ethical and clinical decision-making, an impossible divide.[46] Even where physicians are fixed as the sole "gatekeepers" regulating access to a particular service, "they remain bound by their own ethics and codes of conduct"[47] within their practice.

22. It also denigrates physicians who practice medicine in accordance with an ethical framework that may engage different standards of morality than the CPSO, and patients who seek out those physicians. This is similar to the position asserted by the Education Minister in *Loyola* that "engagement with an individual's own religion on his or her own terms can simply be presumed to impair respect for others," an assumption firmly rejected by the Supreme Court.[48]

A Statutory Objective is Not Transformed into a Competing* Charter *Right because it must be carried out "in the Public Interest"

23. Statutory objectives protecting the public interest must not be transformed into de facto *Charter* rights so as to set up an apparent - but false - conflict of rights scenario. Here, assisted suicide and other controversial procedures such as abortion are presumed by the CPSO to align

---

[43] Affidavit of Dr. Sulmasy, para 6, **Applicants' Supplementary Record - MAID ["ASR - MAID"], Vol 1, Tab 1**.
[44] Transcript of cross-examination of Dr. Gordon Guyatt, pp 7, 80; Transcript of cross-examination of Dr. Sulmasy at pp 24, 48-49, 60; Transcript of cross-examination of Dr. Farr Curlin at pp 87-88; Removing opportunity for constructive patient-physician dialogue is at odds with the College's object to promote and enhance relations between the College and its members, and the public; s 3(1)(8), *RHPA*, Schedule 2.
[45] Foti Affidavit at para 77, **RAR - MAID, Vol 1**, p 27.
[46] The CPSO should instead, be seeking ways to promote the ability of its conscientious and faith-based members to respond to changes in practice environments and other emerging issues in a manner that respects their faith and conscience; *RHPA*, Schedule 2, s 3(1)(10).
[47] *R v Mernagh*, 2013 ONCA 67 at para 88, **BOA, Tab 16** ["*Mernagh*"].
[48] *Loyola* at para 69, **BOA, Tab 3**.

with the public interest and, while the CPSO has taken into consideration what it deems to be the best interests of patients, there is no clear evidence to substantiate the notion that effective referrals for these are necessary to ensure access to health care in Ontario.[49]

24. Even granting the contentious assumption that for some patients, procedures such as assisted suicide or abortion are in their particular best interest, this does not mean prohibiting conscientious objection is necessary to further the statutory objectives. And where, such as here, there is an absence of evidence that conscientious objectors create access problems[50] any so-called "conflict" between physicians' and patients' rights is fictitious.

25. Additionally, access to these procedures is not a legal right that needs to be balanced with the *Charter* rights of physicians to freedom of religion, conscience and equality. It may represent an *interest*, but not a right on par with *Charter* rights. As explained in the context of medical marijuana by the Ontario Court of Appeal:

> …given that marihuana can medically benefit some individuals, a blanket criminal prohibition on its use is unconstitutional. This court did not hold that serious illness gives rise to an automatic "right to use marihuana", and *Parker* did not remove the requirement that the applicant lead evidence that his or her rights were impaired.[51]

26. Decriminalizing assisted suicide in specific circumstances did not create an automatic "right to assisted suicide" just as decriminalizing marihuana in specific circumstances did not create an automatic "right to use marihuana" or decriminalizing abortion did not create an automatic "right to abortion". The public interest must not therefore be equated with a so-called "right to use" that "competes" with, or is afforded similar weight to, individuals' (in this case, health care professionals') *Charter* rights.

---

[49] As the Canadian Medical Association has recognized, this argument is simply "not empirically supported internationally, where no jurisdiction has a requirement for mandatory effective referral, and yet patient access does not seem to be a concern," **RAR - MAID, Vol 2, Exhibit Y**, p 885.

[50] Transcript of cross-examination of Andrea Foti, pp 154-155, 224-226, 231;Transcript of cross-examination of Dr. Danielle Martin, pp 31-32, 35, 37.

[51] *Mernagh*, at para 61, **BOA, Tab 16**.

27. Furthermore, there is no hierarchy of rights[52] And in this case, there are no competing *Charter* rights to be balanced. Yet freedom of religion and freedom of conscience are substantially violated and placed in hierarchy below undefined, non-*Charter* interests such as patient access and "public confidence in the College".[53]

"Public Interest" Does not Expand Regulatory Authority Beyond Statutory Objectives

28. The CPSO's duty to carry out its objectives in a manner that protects the public interest does not grant it unfettered discretion and must be limited to the specific objects it is required to meet; in making policies and decisions, it must remain within the scope of its jurisdiction. [54]

29. It cannot impose on physicians an obligation that is rightly borne by the state. When the Supreme Court struck down the blanket *Criminal Code* prohibition on assisted suicide, the burden for crafting and implementing a constitutionally valid *Criminal Code* exemption was a Parliamentary and Legislative responsibility. If that legislative response fails to address legitimate, evidence-based, proven section 7 *Charter* infringements, the CPSO cannot place the obligation to redress those infringements upon individual physicians.[55] Even if patients' interests are impacted by allowing physicians to exercise their constitutional rights to freedom of conscience and religion - which is denied - it is the responsibility of the government, not individual physicians, to craft an appropriate and accommodating solution.

30. Decriminalizing a procedure or drug does not translate into an obligation for individual physicians to ensure it is provided to every patient that desires it, even where physicians are the sole "gatekeepers" of that service. Again, access to medical marijuana provides a helpful

---

[52] *Chamberlain v Surrey School District No. 36*, 2002 SCC 86 at para 126, **BOA, Tab 17**, citing *Dagenais v Canadian Broadcasting Corp*., [1994] 3 SCR 835, **BOA, Tab 18**.
[53] Foti Affidavit, para 76, **RAR - MAID, Vol 1** p 26.
[54] Where administrative decision-makers have the power to make decisions in the public interest, their concept of the "public interest" must be consistent with the purposes of the enabling statute: *Congrégation des témoins de Jéhovah de St-Jerôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, paras. 6-7, **BOA, Tab 19**; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, p 140, **BOA, Tab 20**; See also *Criminal Lawyers*, paras. 50, 53, **BOA, Tab 12**.
[55] *Mernagh,* paras 113-115, 139, **BOA, Tab 16**.

comparison. In *R v*. *Mernagh* the accused had, at trial, successfully challenged the Marihuana Medical Access Regulations ("MMAR") as unconstitutional as implemented because physicians had decided *en masse* not to participate in the scheme, a factual assertion rejected by the Court of Appeal. In his concurring opinion on appeal, Doherty J. held that even if mass refusal on the part of physicians had been established, the resulting lack of access to medical marihuana (i.e. the defence to what was otherwise criminal) would not necessarily make the defence illusory.[56]

31. Doherty J. acknowledged that a doctor may refuse to provide the necessary declarations to access medical marihuana for a number of reasons, including the fact that the doctor "views the use of marihuana as medically contraindicated"; this alone suggests that a physician's ethically-informed clinical judgment is a sufficient reason not to participate in a regime. Furthermore, Doherty J. held, although such non-participation "is certainly limiting the availability of the medical exemption", the physician's "decision is not attributable to the government or any form of governmental action" and any "refusals based on the doctor's exercise of his or her judgment are inherent" in the regime created by the legislature:[57]

> …once one accepts that medical oversight is a constitutionally valid component of the defence based on medical need, individual decisions by doctors, be they decisions concerning participation in the scheme as a whole or decisions in respect of individual patients, cannot be said to render the defence illusory. Indeed, the exercise of that individual medical judgment is a component of the defence created by the *MMAR*.[58]

The Policies Violate Section 15 Religious Equality

32. Religious equality includes the right not to be deprived of equal opportunity to maintain a professional license because of one's religiously informed conception of human life that may differ from state-imposed beliefs. The CPSO impermissibly creates a distinction on the basis of an enumerated ground, imposes burdens and denies benefits.

---

[56] *Mernagh,* paras 135, 137, **BOA, Tab 16**.
[57] *Mernagh*, para 147, **BOA, Tab 16**.
[58] *Mernagh,* para 138, **BOA, Tab 16**.

33. To access s. 15 protection,[59] a claimant must demonstrate that the law:[60]

a) "creates a distinction on the basis of an enumerated or analogous ground";[61] and,
b) "fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage".[62]

34. To answer whether the Policies create a distinction on the enumerated ground of religion, the focus is on their actual impact.[63] In this case, the Policies create a distinction between those who live and practice according to religious beliefs which require them to conscientiously object to procedures such as MAID and those who do not. As indicated by the individual Applicants in these proceedings, their conscientious objection is rooted in their religious belief. The faith-based conscientious objections of these physicians are lawful, protected by the *Charter* and have been affirmed by the Supreme Court in the precise context of declaring assisted suicide and abortion prohibitions invalid.[64]

35. The Policies create a distinction; whether that distinction has a discriminatory impact in terms of prejudicing or stereotyping[65] boils down to one question: "Does the challenged law violate the norm of substantive equality"?[66] Prejudice is the "holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member."[67] Stereotyping is a disadvantaging attitude "that attributes

---

[59] Section 15 states: "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination" based on, in this case, religion.
[60] The *Charter* applies where a state actor has violated equality guarantees through an application of law. The CPSO is created by statute to exercise authority delegated by the Province of Ontario and is thus subject to the *Charter* and any obligations that arise pursuant to section 15: Section 32(1) of the *Charter*; *McKinney v University of Guelph*, [1990] 3 SCR 229, p 276, **BOA, Tab 21**.
[61] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, para 19, ["*Taypotat*"], **BOA, Tab 22**.
[62] *Taypotat*, para 20, **BOA, Tab 22**.
[63] *Withler v Canada (Attorney General),* 2011 SCC 12, paras 37, 39, **BOA, Tab 23** ["*Withler*"]; *Quebec (Attorney General) v A* 2013 SCC 5, para 324, **BOA, Tab 24** ["*Quebec v A*"].
[64] *Carter v Canada*, 2015 SCC 5, para 132, **BOA, Tab 25**; *Morgentaler*, pp 95-96, **BOA, Tab 15**.
[65] *Withler*, para 34, *Quebec v A,* para 324, **BOA, Tab 23**.
[66] *Quebec v A,* para 325, **BOA, Tab 24**, citing *Withler,* para 2, **BOA, Tab 23**.
[67] *Quebec v A,* para 326, **BOA, Tab 24**.

characteristics to members of a group regardless of their actual capacities"[68]

36. The Policies betray an underlying assumption that physicians who practice according to religious convictions - and therefore object to involvement with (i.e.) MAID or abortion - are not capable of providing adequate, professional medical care to their patients.[69] In fact, the CPSO's Registrar characterized conscientious objectors as purposefully obstructing patients from seeking out those pharmaceuticals or procedures.[70] It is prejudicial to characterize physicians with life-affirming convictions as having limited capacity as medical professionals on the basis of those convictions. The Policies also appear to be motivated by unfounded and offensive stereotypes about religious physicians as individuals seeking to exploit "loopholes" in order to "impose their beliefs over the patients' beliefs."[71]

37. The practical outworking of the CPSO Policies is to bar religious physicians[72] who affirm life from conception to natural death from the practice of medicine. In other words, the Policies create a rule that bars an entire class of people from the medical profession.[73] As noted by the Supreme Court of Canada in the context of a non-citizen lawyer:

> ...a rule that bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class. […] it discriminates against them on the ground of their personal characteristics…"[74]

---

[68] *Quebec v A*, para 326, **BOA, Tab 24**; Prejudice and stereotyping are not discrete elements of the test that the claimant is obliged to prove, but are indicia that may help answer whether substantive equality is violated. It is also the discriminatory impact, not the attitude at issue. In other words, it matters not whether the CPSO intentionally discriminated against conscientiously objecting physicians. ; *Quebec v A*, paras 325, 333, **BOA, Tab 24**.

[69] Affidavit of Dr. Danielle Martin, paras 8, 24, **RAR - POHR, Vol 4, Tab 3**, pp 1992-2004.

[70] Affidavit of Richard Léger ("Léger Affidavit"), Exhibit "A", **Applicants' Supplementary Application Record ["ASAR"] Vol. 3, Tab 12(a):** "And so they've [conscientious objectors] set out to either not refer, allowing the time to pass so that an abortion would not be feasible, or referred to someone who was likeminded, who would similarly not allow access." p 595,

[71] Léger Affidavit, **ASAR Vol. 3, Tab 12**, p 601.

[72] And future physicians (current medical students) and future medical students.

[73] This type of screening out of conscientious objectors has been advocated in Julian Savulescu & Udo Schuklenk, "Doctors Have no Right to Refuse Medical Assistance in Dying, Abortion or Contraception", *Bioethics* 22 September 2016, **BOA, Tab 28**.

[74] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at pg 151, **BOA, Tab 26** ["*Andrews*"].

38. The same principle applies here. Physicians with religious convictions are subject to potential disciplinary measures and license revocation in ways that other physicians are not. In *Andrews*, the Supreme Court concluded that evidence of "some delay" before otherwise qualified non-citizen lawyers could be called to the bar was an unacceptable discriminatory effect.[75] In this case, it is not a matter of delay, but the very ability to practice. This violation cannot be justified in a free and democratic society - even if there is a pressing and substantial objective and the Policies are rationally connected to the objective,[76] they are not minimally impairing.[77]

The Policies Violate the Principle of State Neutrality

39. Statutory authority must be exercised in accordance with state neutrality.[78] Physicians, like all Canadians, ought not to be excluded from the public sphere or their vocation because of their religious beliefs and practices. The State (i.e. the CPSO) in a secular society has the obligation to welcome and accept religious individuals in the public sphere.

40. A secular state safeguards religious minorities by remaining neutral with respect to religious issues[79] and by encouraging "everyone to participate freely in public life regardless of their beliefs."[80] This principle of state neutrality has developed alongside a growing sensitivity toward religious diversity and the need to protect religious minorities.[81] Pursuing diversity means "respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them."[82] Neutrality therefore does not mean the purging of "religiously informed moral consciences from the public sphere" nor does it mean

---

[75] *Andrews* at pg 183, **BOA, Tab 26**.
[76] A fact that is not conceded.
[77] See, i.e., the system Alberta has implemented: Affidavit of Dr. Brendan Leier, **ASR - MAID, Vol 2**, **Tab 9**, pp 297-304.
[78] *Saguenay* at para 137, **BOA, Tab 7**: "The purpose of neutrality is instead to ensure that the state is, and appears to be, open to all points of view regardless of their spiritual basis."
[79] *Loyola* at paras. 44, 45, **BOA, Tab 3**.
[80] *Saguenay* at para 75, **BOA, Tab 7**.
[81] *SL v Commission Scolaire des Chênes*, 2012 SCC 7 at para 21, **BOA, Tab 27**.
[82] *Loyola*, at para 45, **BOA, Tab 3**.

the state has a "secularizing mission".[83]

41. State neutrality does not mean that state agencies or regulatory bodies like the CPSO can require neutrality of individuals seeking state recognition, accreditation, or license. Requiring individuals to renounce, deny or hide their beliefs is not *state* neutrality, but *universal* neutrality, or coerced conformity. This is contrary to the *Charter*: "The *Charter* is not a blueprint for moral conformity. Its purpose is to protect the citizen from the power of the state, not to enforce compliance by citizens or private institutions with the moral judgments of the state."[84]

PART IV: CONCLUSION

42. The public sphere must accommodate diversity of religious belief and conscientious conviction. Protecting these freedoms is essential to the promotion of a robust democracy where individuals can pursue truth and engage in constructive dialogue about fundamental moral issues. Creating mechanisms that allow patients access to legal medical procedures must not mandate all physicians adhere to a state-imposed morality. It is neither desirable nor necessary.

PART V: ORDER SOUGHT

43. These interveners seek no costs and ask that no costs be ordered against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of March, 2017.

Derek B.M. Ross

Deina Warren
Lawyers for the CLF, EFC, and ACBO

[83] *TWU v NSBS* at para 19, **BOA, Tab 8**.
[84] *TWU v NSBS* at para 10, **BOA, Tab 8**.

APPENDIX A - LIST OF AUTHORITIES

1. *R v Big M Drug Mart*, 1985 1 SCR 295
2. *Syndicat Northcrest v Amselem*, 2004 SCC 47
3. *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12
4. *Reference re Same Sex Marriage*, 2004 SCC 79
5. *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37
6. *Doré v Barreau du Québec*, 2012 SCC 12
7. *Mouvement laïque Québécois v Saguenay (City)*, 2015 SCC 16
8. *Trinity Western University v Nova Scotia Barristers' Society,* 2015 NSSC 25
9. *R. v. Edwards Books* [1986] 2 S.C.R. 713
10. *R v Oakes*, [1986] 1 SCR 103
11. *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23
12. *Trinity Western University v Law Society of Upper Canada*, 2015 ONSC 4250
13. *R v Zundel*, [1992] 2 SCR 731
14. *R v Morgentaler*, [1988] 1 SCR 30
15. *R v Mernagh*, 2013 ONCA 67
16. *Chamberlain v Surrey School District No. 36*, 2002 SCC 86
17. *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835
18. *Congrégation des témoins de Jéhovah de St-Jerôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650
19. *Roncarelli v. Duplessis*, [1959] S.C.R. 121
20. *Ontario (Public Safety and Security) v. Criminal Lawyers Association,* 2010 SCC 23
21. *McKinney v University of Guelph*, [1990] 3 SCR 229

22. *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30

23. *Withler v Canada (Attorney General)*, 2011 SCC 12

24. *Quebec (Attorney General) v A* 2013 SCC 5

25. *Carter v Canada*, 2015 SCC 5

26. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143

27. *SL v Commission Scolaire des Chênes*, 2012 SCC 7

APPENDIX B - STATUTES and REGULATIONS

Canadian Charter of Rights and Freedoms, **Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c II**

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

[…]

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[…]

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Regulated Health Professions Act, 1991 **SO 1991 c.18, Schedule 2, Health Professions Procedural Code, S.2.1**

Objects of College

3 (1) The College has the following objects:

1. To regulate the practice of the profession and to govern the members in accordance with the health profession Act, this Code and the *Regulated Health Professions Act, 1991* and the regulations and by-laws.

2. To develop, establish and maintain standards of qualification for persons to be issued certificates of registration.

3. To develop, establish and maintain programs and standards of practice to assure the quality of the practice of the profession.

4. To develop, establish and maintain standards of knowledge and skill and programs to promote continuing evaluation, competence and improvement among the members.

4.1 To develop, in collaboration and consultation with other Colleges, standards of knowledge, skill and judgment relating to the performance of controlled acts common among health professions to enhance interprofessional collaboration, while respecting the unique character of individual health professions and their members.

5. To develop, establish and maintain standards of professional ethics for the members.

6. To develop, establish and maintain programs to assist individuals to exercise their rights under this Code and the *Regulated Health Professions Act, 1991*.

7. To administer the health profession Act, this Code and the *Regulated Health Professions Act, 1991* as it relates to the profession and to perform the other duties and exercise the other powers that are imposed or conferred on the College.

8. To promote and enhance relations between the College and its members, other health profession colleges, key stakeholders, and the public.

9. To promote inter-professional collaboration with other health profession colleges.

10. To develop, establish, and maintain standards and programs to promote the ability of members to respond to changes in practice environments, advances in technology and other emerging issues.

11. Any other objects relating to human health care that the Council considers desirable. 1991, c. 18, Sched. 2, s. 3 (1); 2007, c. 10, Sched. M, s. 18; 2009, c. 26, s. 24 (11).

Duty

(2) In carrying out its objects, the College has a duty to serve and protect the public interest. 1991, c. 18, Sched. 2, s. 3 (2).

***Human Rights Code*, RSO 1990, c H.19, ss. 6, 47**

Vocational associations

6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 6; 1999, c. 6, s. 28 (7); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (7); 2012, c. 7, s. 5.

Act binds Crown

47. (1) This Act binds the Crown and every agency of the Crown. R.S.O. 1990, c. H.19, s. 47 (1).

Act has primacy over other Acts

(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act. R.S.O. 1990, c. H.19, s. 47 (2).

THE CHRISTIAN MEDICAL AND DENTAL SOCIETY OF CANADA et. al. (Applicants)

and

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO
(Respondent)

Court File Nos.: 499-16
500/16

ONTARIO SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Proceeding commenced at Ottawa

FACTUM OF THE INTERVENERS CHRISTIAN LEGAL FELLOWSHIP, THE EVANGELICAL FELLOWSHIP OF CANADA and THE ASSEMBLY OF CATHOLIC BISHOPS OF ONTARIO

CHRISTIAN LEGAL FELLOWSHIP
470 Weber St. N., Suite 202
Waterloo, ON

Derek B.M. Ross (LSUC# 55093B)
Deina Warren (LSUC# 57603R)
Tel: (519) 208-9200
Fax: (519) 208-3600
execdir@christianlegalfellowship.org

Lawyers for the Proposed Interveners,
Christian Legal Fellowship,
The Evangelical Fellowship of Canada
and The Assembly of Catholic Bishops of Ontario