Court File No.: C65397

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Appellants

- 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 THE ASSEMBLY OF CATHOLIC BISHOPS OF ONTARIO and CHRISTIAN LEGAL FELLOWSHIP, B'NAI BRITH OF CANADA LEAGUE FOR HUMAN RIGHTS and VAAD HARABONIM OF TORONTO and CENTRE FOR ISRAEL AND JEWISH AFFAIRS, 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, ONTARIO MEDICAL ASSOCIATION, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.

Interveners

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PART I: OVERVIEW

1. The Charter guarantees both freedom of religion and religious equality. These are distinct, discrete protections but they are allied in protecting "equal religious citizenship", that is, "the right of religious persons to participate fully in Canadian society without abandoning the tenets of their faith."

Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship", in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 87, at p. 88.

2. Regulatory bodies violate these guarantees when they compel professionals to practice in a manner that unduly violates their fundamental religious, ethical principles. In this case, for example, physicians are compelled to participate in, among other things, the intentional and premature ending of patients' lives; failure to comply may result in professional sanction.

Reasons for Decision of the Divisional Court, Appellants' Appeal Book & Compendium ["ABC"], Tab 3, at paras. 29-30 ["Reasons"].

3. The Appellants, like many Roman Catholic and Evangelical Protestants represented by these interveners, believe participating in a process to intentionally kill another human being is ethically and morally wrong. This appeal will have a profound effect on everyone whose professional and vocational ethics are informed by similar religious beliefs. Religious minorities should not be denied equal access to professions and vocations because of their religiously-informed identity and ethics, including conceptions of human life. Instead it should be recognized, as did the trial court in *Carter*, that "thoughtful and well-motivated people can and have come to different conclusions about whether physician-assisted death can be ethically justifiable."

Carter v. Canada (Attorney General), 2012 BCSC 886, at para. 343 ["*Carter* BCSC"].

PART II: LAW & ARGUMENT

Religion and Religious Convictions are Immutable Characteristics of Personal Identity

4. As an enumerated ground in s. 15, religion — and its inseparable convictions — represent

"a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity". Religion is not just a 'choice', 'opinion', or 'label' carried by a believer but "an integral part of each person's identity." It is "the lens through which people perceive and explain the world in which they live", defining the moral framework that guides all conduct, whether personal, professional, or otherwise. It informs one's understanding of what is 'right' and 'wrong', questions which lie at the heart of ethical decision-making.

Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, at para. 13.
Mouvement laïque Québécois v. Saguenay (City), 2015 SCC 16, at para. 73 ["*Saguenay*"].
Carter BCSC, *supra*, at para. 164.

5. Acting in violation of one's religiously-informed convictions, or temporarily disregarding them, would be contrary to one's very being. This includes beliefs about the nature of human life, its beginning and end, the inherent value and dignity of each person, and the morality of intentionally ending another human being's life. Adhering to a mandatory ethical framework that guides conduct — such as not referring for assisted suicide or abortion — is not a simple matter of choice, but an integral and inseparable aspect of one's religion. Disadvantaging an individual for such conduct violates the Charter's guarantee of religious equality.

Quebec (Attorney General) v. A, 2013 SCC 5, Appellants' Book of Authorities ["ABA"], Tab 20, at paras. 334-337 ["*Quebec v. A*"].

Section 15 Religious Equality is Violated

6. Religious equality and religious freedom work in tandem, but the former is not subsumed by the latter. One Charter right is "not derivative" of another, and each "stands as an independent right with independent content". The presumption against redundancy also speaks to the distinction between these protections: "every word in a statute is presumed … to have a specific role to play in advancing the legislative purpose." The legislature "avoids superfluous or meaningless words" and does not "pointlessly repeat itself or speak in vain."

Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1, at para. 49.
Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont: LexisNexis Canada, 2014), at p. 211.

7. It is thus important to consider how an impugned law or state action engages the unique interests protected by s. 15 — including freedom from discriminatory treatment based on religion — *in addition* to s. 2(a)'s protection of religious practices and conscientious beliefs. This is also relevant to the analysis under s. 1: "A law that has deleterious effects on multiple protected interests will weigh differently in the balance than a law that impacts only one."

British Columbia Civil Liberties Association v. Canada (Attorney General), 2018 BCSC 62, at para. 262.

8. In this case, the Divisional Court accepted that the Policies created a distinction based on religion, meeting the first part of the s.15(1) test, but concluded there was no discriminatory impact, failing the second part of the test. According to the Court, the Policies did "not arise from any demeaning stereotype but from a neutral and rationally connected policy choice".

Reasons, *supra*, at para. 132, citing *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

9. However, even if this were true, a s. 15 claimant is not required to establish that a policy is "consciously premised upon a prejudicial stereotype". State actors "seldom set out to discriminate on purpose; discrimination when it occurs is usually a matter of unintended effect." The question is therefore whether the impugned policies have a discriminatory *effect*, intended or not. Otherwise, the test for s. 15 would be reduced to a mere "prohibition on intentional discrimination based on irrational stereotyping." As the British Columbia Supreme Court observed in *Carter*, the reference to a "neutral and rationally defensible policy choice" in *Hutterian Brethren* must be read in light of subsequent jurisprudence, and does not provide a final answer to a s. 15 claim:

> "It would be mistaken, in my view, to read the *Hutterian Brethren* decision as a repudiation of the adverse impact analysis approved in the long line of cases [of the Supreme Court], especially in the light of what the Court later said in *Withler*."

Quebec v. A, *supra*, ABA, Tab 20, at paras. 333, 420.
Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, at para. 80 ["*Law*"].
Carter BCSC, *supra*, at para. 1093.

10. Perpetuation of prejudice or stereotyping are "useful guides" — not essential requirements — in the contextual s. 15 analysis, which takes into account a number of considerations including the nature and scope of the interest(s) affected, and aims to promote substantive, not formal, equality. This involves assessing the severity of the consequences of the distinction created by a law (or, as in this case, policies) for the affected individuals or groups. A guiding inquiry is "whether the distinction restricts access to a fundamental social institution, or affects 'a basic aspect of full membership in Canadian society'".

Egan v. Canada, [1995] 2 S.C.R. 513, at paras. 63-64.
Law, *supra*, at para. 74.
Withler v. Canada (Attorney General), 2011 SCC 12, Respondent's Book of Authorities ["RBA"], Tab 23, at paras. 2, 39, 43, 66.

11. Employment is one such fundamental institution. The Supreme Court has held that "employment is vital to one's livelihood and self-worth", and should be "equally accessible" because discrimination in this area "has the potential to marginalize [equality-seeking claimants] from the fabric of Canadian life." The Supreme Court further explained that "this is true whether or not the discrimination operates on the basis of stereotyping"; if it makes claimants "feel less deserving of concern, respect and consideration", such discrimination "runs afoul of s. 15(1)."

Lavoie v. Canada, 2002 SCC 23, at para. 52.

12. In being forced to refer patients to procedures such as abortion and MAID, religious physicians feel precisely this impact. The practical outworking of this type of policy is to

effectively exclude religious physicians who affirm life from conception to natural death from practice in many areas of medicine.[1] As noted by the Supreme Court 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 [of their personal characteristics] violates the equality rights of that class." In *Andrews*, subjecting non-citizen lawyers to "some delay" before they could be called to the bar was found to violate s. 15. Here, it is not just a matter of delay but the very ability to practice.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at pp. 151, 183 ["*Andrews*"].
Factum of the Appellants, at paras. 43-44, 48.

13. Professionals who are otherwise trained, competent, and qualified have a constitutionally protected right not to be expelled from their practice, and means of earning a living, based on their religion. To paraphrase Justice LaForest in *Andrews*, policies that deprive individuals "of the 'right' to pursue their calling" exact "too high a price on persons wishing to practice [their profession]". This is especially problematic where alternative accommodation is available, as the state has the "duty to make reasonable accommodation [to the point of undue hardship] for individuals who are adversely affected by a policy or rule that is neutral on its face."

Andrews, *supra*, at para. 88.
Factum of the Appellants, at paras. 52, 62-63.
Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, ABA, Tab 4, at para. 53.

Charter Rights are not Forfeited within Regulated Professions

14. Charter protections are not forfeited because a claimant happens to be a member of a regulated profession. Rather, they exist precisely to protect (in this case) physicians from the power of the state: "...Doctors are not 'government' so as to bring them under the ambit of the *Charter*"

[1] 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" (2016) 31 Bioethics 162.

and are "under no obligation [to 'act constitutionally']." The CPSO is obliged to respect physicians' Charter rights just as it must respect patients' interests.

R v. Morgentaler, [1988] 1 S.C.R. 30, ABA, Tab 13, at p. 95-96.
R v. Mernagh, 2011 ONSC 2121, at paras. 244-245 (overturned by ONCA but not on this point).
Carter v. Canada (Attorney General), 2015 SCC 5, at para. 132 ["*Carter* SCC"].

15. The impugned policies characterize a physician's conscientious objection to a practice she deems unethical, such as MAID, as a "personal" rather than "clinical" decision (and require the physician to inform patients as such). This approach attempts to neatly segregate ethical and clinical decision-making, but this is an impossible divide; as this Honourable Court has recognized, ethical considerations form an essential part of medical decision-making. Any exercise of professional judgment is inherently and necessarily holistic; it integrates clinical experience, education, and — critically — a morally-informed ethical framework. All ethical decisions are informed by one's religious beliefs, worldview, or moral philosophy. Such beliefs will likely develop over time, being challenged or confirmed by factors such as clinical experience, but they remain relevant, rational and required elements of professional decision-making. Attempts to bifurcate the 'moral' from the 'clinical' undermine the very idea of professional judgment, which necessarily integrates both elements. Such *integration* is foundational to a professional's *integrity*, which is a fundamental quality and essential element in all professional relationships.

Policy Statement #2-15, Professional Obligations and Human Rights, ABC, Tab 6.
Flora v. Ontario Health Insurance Plan, 2008 ONCA 538, at para. 75.

16. Individual physicians must not be coerced to provide services in violation of their ethical judgment. This is true even where professionals are fixed as the "gatekeepers" to a particular service; in such contexts, "they remain bound by their own ethics and codes of conduct" and may decline to participate in a particular regime (one recent example being medical marijuana). A regulated professional's decision not to participate in a regime "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. As the trial court recognized in *Carter,* actions "may be legal but not ethical"; state actors determine the former, but they must leave room for individual and professional judgment in relation to the latter.

R v. Mernagh, 2013 ONCA 67, at para. 88 ["*Mernagh* ONCA"].
Carter BCSC, *supra*, at paras. 173, 343.

17. In fact, the exercise of physicians' individual judgment is a *sine qua non* component underpinning the legalization of MAID; this approach rightly recognizes the need for independent judgment (as opposed to automated service) and accounts for the moral uncertainty and varying ethical intuitions of both professionals and patients regarding assisted suicide. Individual decisions by doctors, including religiously/ethically-informed decisions concerning participation in the scheme as a whole, cannot be said to render the MAID framework illusory, harmful, or inequitable. The state cannot pick and choose which aspects of a professional's judgment suit its purposes and demand that they abandon the rest. If the *state* has failed in meeting any constitutional obligations owed to one group (i.e. patients), the remedy is not to sacrifice the constitutional freedoms of another group (i.e. health care professionals); rather, the *state* must continue to respect both patients' and physicians' rights by, for example, allowing or arranging for alternative access options. Other Canadian jurisdictions have found ways to ensure such a reconciliation.

Mernagh ONCA, *supra*, at paras. 75-76, 138.
Carter SCC, *supra*, at paras. 27, 115, 132.
Carey DeMichelis, Randi Zlotnik Shaul & Adam Rapoport, "Medical Assistance in Dying at a Paediatric Hospital" (2018) 0 Journal of Medical Ethics 1, at pp. 3, 5 ["Paediatric MAID"].
Factum of the Appellants, at paras. 62-63.

Section 1 Balancing - Reconsidering the Salutary & Deleterious Effects

18. In determining whether a Charter violation is justified under s. 1, consideration must be given to both "moral claims and broad societal benefits" as well as the "greater public good".

Invoking the "public interest" to justify any rights infringement caused by the impugned policies effectively assumes that religious accommodation would have only deleterious, and not salutary, effects for the "greater public good". However, the opposite is true: accommodating religious minorities in the medical profession *advances* the public interest and the common good, for the following reasons.

Carter SCC, *supra*, at paras. 79, 122.

19. First, as the Supreme Court recently affirmed, a profession that reflects the diversity of the public it serves undeniably promotes the public's confidence in its integrity and administration. A diverse profession is more responsive to the needs of the public it serves, and thus is a more competent profession. Professional regulators are to eliminate inequitable barriers to their profession, not erect them. Rules which "negatively impact equitable access to and diversity within" a regulated profession, particularly based on personal characteristics such as religion, undermine the public interest.

Law Society of British Columbia v. Trinity Western University, 2018 SCC 32, ABA, Tab 1, at para. 39.

20. Second, it is in the public interest, and in patients' interests, to allow a broad range of perspectives and beliefs for professionals. Ontario physicians speak 125 different languages and hail from 131 different countries. Diversity of this nature is laudable, and reflective of a diverse patient population, empowering minority cultural perspectives. The same ought to be true of religious diversity. This enhances freedom for patients to choose professionals who affirmatively practice according to principles that are central to patients' own moral and religious convictions. It is difficult to comprehend how it could possibly be in the "public interest" to expect patients to receive care from professionals who have been required to abandon their moral convictions.

Affidavit of Andrea Foti, AEB, Tab 58, at p. 7589, para. 6.

21. Third, accommodating religious diversity within Ontario's health care system benefits patients (and the public as a whole) by enhancing a genuinely pluralistic society — one that reasonably respects religious minorities and a diversity of ethical perspectives — as required per the state's duty of neutrality and s. 27 of the Charter. In a secular and pluralistic society, professional regulators have an obligation to welcome and accept religious individuals in the public sphere regardless of their beliefs, respecting religious differences, not extinguishing them, and not seeking to remove "religiously informed moral consciences from the public sphere". A neutral public space "free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity" and therefore "helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27."

Saguenay, *supra*, at para. 75.
Loyola High School v. Quebec (Attorney General), 2015 SCC 12, RBA, Tab 15, at para. 45.
Trinity Western University v. Nova Scotia Barristers' Society, 2015 NSSC 25, at para. 19 ["*TWU v. NSBS*"].

22. Like all Canadians, medical, legal and other professionals must not be excluded from the public sphere or their vocation because of their religious identity and ethics. Requiring individuals to deny or suppress their beliefs in order to be licensed is not state neutrality, but coerced conformity, contrary to the purpose of 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."

TWU v. NSBS, *supra*, at para. 10.

23. The Divisional Court found that physicians are "the patient's 'navigator'" or advocate (para.159); however, policies that compel a uniform, single response of referral effectively strip the physician of her primary navigational or advocacy tool: independent professional judgment. Not only is this demeaning to the dignity of professionals, it raises serious questions about the

extent to which regulators can compel members to violate their ethical principles, which for many, are informed by and integrated with their religious identity. In the context of potential MAID expansion, for example, how far will physicians be compelled to practice as 'navigators' and 'advocates'? Will authorities mandate a prima facie obligation to routinely initiate conversations about MAID? To proactively raise MAID with paediatric or psychiatric patients? Refer incapacitated patients for MAID? Or keep paediatric MAID requests secret from parents and family members? These questions ought not mandate a single answer, enforced by regulatory policy. Rather, complicated moral, ethical and clinical questions like these demand room for a variety of moral, ethical and clinical responses.

DeMichelis, "Paediatric MAID", *supra*, at pp. 4, 6-7.

PART III: CONCLUSION & ORDER SOUGHT

24. The public sphere must accommodate diversity of religious belief and conscientious conviction, including those for whom it is "ethically inconceivable" to ever participate in "intentionally ending the life of a patient". Protecting these freedoms is essential to a robust democracy where individuals can pursue truth and engage in constructive dialogue about fundamental moral issues: "respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy."

Carter BCSC, *supra*, at para. 310.
Syndicat Northcrest v. Amselem, 2004 SCC 47, RBA, Tab 4, at para. 1.

25. Pursuant to the order of the Honourable Associate Chief Justice Hoy, these interveners do not seek costs and no costs are to be ordered against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of November, 2018.

Derek Ross/Deina Warren/Sarah Mix-Ross
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APPENDIX A - LIST OF AUTHORITIES

Case Law

1. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37
2. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
3. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62
4. *Carter v. Canada (Attorney General)*, 2012 BCSC 886
5. *Carter v. Canada (Attorney General)*, 2015 SCC 5
6. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203
7. *Egan v. Canada*, [1995] 2 S.C.R. 513
8. *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538
9. *Lavoie v. Canada*, 2002 SCC 23
10. *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32
11. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497
12. *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12
13. *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1
14. *Mouvement laïque Québécois v. Saguenay (City)*, 2015 SCC 16
15. *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, ABA, Tab 4, at paras. 52-53
16. *Quebec (Attorney General) v. A*, 2013 SCC 5
17. *R v. Mernagh*, 2011 ONSC 2121
18. *R v. Mernagh*, 2013 ONCA 67
19. *R v. Morgentaler*, [1988] 1 S.C.R. 30
20. *Syndicat Northcrest v. Amselem*, 2004 SCC 47
21. *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, upheld on appeal on administrative law grounds 2016 NSCA 59
22. *Withler v. Canada (Attorney General)*, 2011 SCC 12

Secondary Sources

23. Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship", in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 87
24. Carey DeMichelis, Randi Zlotnik Shaul & Adam Rapoport, "Medical Assistance in Dying at a Paediatric Hospital", (2018) 0 Journal of Medical Ethics 1

25. Julian Savulescu & Udo Schuklenk, "Doctors Have no Right to Refuse Medical Assistance in Dying, Abortion or Contraception" (2016) 31 Bioethics 162

26. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont: LexisNexis Canada, 2014)

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.

[…]

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[…]

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.

THE CHRISTIAN MEDICAL AND DENTAL SOCIETY OF CANADA et. al. (Appellants)
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COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

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

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