Court File Nos.: 499/16 and 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, CATHOLIC CIVIL RIGHTS LEAGUE, FAITH AND FREEDOM ALLIANCE AND PROTECTION OF CONSCIENCE PROJECT, CHRISTIAN LEGAL FELLOWSHIP, THE EVANGELICAL FELLOWSHIP OF CANADA, AND THE ASSEMBLY OF CATHOLIC BISHOPS OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION, B'NAI BRITH OF CANADA LEAGUE FOR HUMAN RIGHTS, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, HIV & AIDS LEGAL CLINIC ONTARIO, CANADIAN HIV/AIDS LEGAL NETWORK AND CANADIAN PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH

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FACTUM OF THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION

PART I - INTRODUCTION

1. The crux of these Applications is whether a professional body has a constitutional duty to exempt physicians from facilitating access to care or providing care in emergency situations to accord with the physician' religious and conscientious beliefs, even if the professional body is of the considered opinion that conscientious exemptions would harm patients' access to care, thereby violating patient dignity, autonomy, safety and liberty.

2. The Applicants argue that Policy #2-15 and Policy #4-16 (collectively, the **Policies**), enacted by the College of Physicians and Surgeons of Ontario (the **CPSO**), with application to

the provision of medical aid in dying (**MAID**) as well as the provision of healthcare generally, including reproductive health services and the provision of certain pharmaceutical products, infringe upon physicians' rights to freedom of conscience and religion under Section 2(a) and their right to equal treatment and benefit before and under the law under Section 15 of the *Canadian Charter of Rights and Freedoms* (the ***Charter***).

3. In the event that this Court finds that the Policies violate the physicians' s. 2(a) and s. 15 rights, the Canadian Civil Liberties Association (**CCLA**) intervenes in this appeal to make submissions on the proper balancing of the physicians' freedom of religion and right to equality with the competing *Charter* rights of patients.

4. If physicians' *Charter* rights are infringed by the Policies, the analysis of whether limits on these fundamental *Charter* rights are demonstrably justified in a free and democratic society must be reconciled with the *Charter* rights of individual patients and the broader public.

5. Any deleterious effects of the Policies to certain physicians are proportional to their salutary effects in light of the protections they afford individual patients and the broader public. More specifically, the Policies serve to promote and protect several *Charter* rights of patients: the right to life, liberty and security of the person pursuant to s. 7, equality rights pursuant to s. 15 and the right to be free from religious coercion while receiving a government service pursuant to s. 2(a).

6. To the extent that the Policies' violation of physicians' freedom of religion and equality rights prevents a more severe violation of patients' ss. 2(a), s. 7 and s. 15 rights, the Policies represent a fair and appropriate reconciliation of the rights at stake consistent with the *Charter*.

PART II - THE FACTS

7. The CCLA takes no position on the facts of this case.

PART III - CCLA'S POSITION ON THE ISSUES

8. The CCLA intervenes to address the extent to which any violations of physicians s. 2(a) or s. 15 rights are demonstrably justified under s. 1 of the *Charter*. More specifically, the CCLA wishes to address the extent to which any violation of physicians' *Charter* rights, and particularly any violation of the physicians' freedom of religion or conscience, caused by the Policies should be appropriately balanced against the impairment to patients' rights in accordance with the *Charter*.

9. The CCLA argues that the balance struck by the Policies is appropriate:

a) First, in the absence of the Policies, patients would face a significant impairment of their rights and freedoms under ss. 2(a), 7 and 15 of the *Charter*;

b) Second, freedom of religion is subject to reasonable limits where the exercise of religious freedoms interferes with the rights and freedoms of others; and

c) Finally, the Policies represent an appropriate balancing of the competing rights and freedoms at stake: they ensure full access to constitutionally protected health care services, with only a minimal impairment of physicians' religious freedoms.

A. The Protections Sought by the Applicants Violate the *Charter* Rights of Patients

10. Contrary to the position taken by the Applicants and several interveners, this case involves competing *Charter* rights. If the Applications are allowed and the Policies are invalidated, physicians will be permitted to withhold care or the facilitation of care on the basis of their conscientious objection, thereby discriminating against and/or otherwise violating the constitutional rights of patients, with the consequence that patients may face substantial hurdles in obtaining timely and adequate healthcare, some forms of which have been deemed constitutionally protected, or may be unable to access care at all.

11. This concern is not hypothetical. The affidavits filed by the Applicants clearly demonstrate that certain physicians will refuse to provide effective referrals or emergency care if the order they seek through these proceedings is granted.[1]

12. Insofar as such conscientious refusals deprive patients of healthcare, or at least of timely, adequate or otherwise equal access to care, they constitute a substantial impairment of patients' rights under ss. 2(a), 7 and 15 of the *Charter*. The potential infringements of patients' *Charter* rights that would result from a repeal of the Policies is evidenced by numerous authorities protecting patient' rights to access care.

13. In the context of MAID, the Supreme Court of Canada (**SCC**) in *Carter v Canada (Attorney General)*,[2] held that the prohibition against physician assisted death had the effect of forcing some individuals to take their own lives prematurely. The Court found this engaged the right to life.[3] Whether a physician refuses to facilitate or provide care because it is contrary to their religious beliefs, or because they are legislatively prohibited from doing so, the ultimate effect on the patient is the same: they face the prospect of premature death or interminable pain. Therefore, patients' s. 7 *Charter* rights are engaged by the order sought by the Applicants.

14. Moreover, the SCC has held that the inability to obtain an abortion constitutes a violation of a woman's right to security of the person.[4] Impeding access to this service risks endangering a woman's life, impairing her ability to make a fundamentally important personal decision, with the potential to cause serious psychological stress and interfere with her psychological integrity.

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[1] Affidavit of Dr. Isabel Nunes, Applicants' Record, Vol. 1, Tab 8, pp. 87 at paras 15-17, 31, 36-37; Affidavit of Dr. Betty-Ann Story, Applicants' Record, Vol. 1, Tab 9, pp. 93 at paras 15-17, 30; Affidavit of Dr. Agnes Tanguay, Applicants' Record, Vol. 1, Tab 6, pp. 54 at paras 19, 25-31; Affidavit of Donato Gugliotta, Applicants' Record, Vol. 1, Tab 7, pp. 80 at paras 13, 19-22, 41, 44. An "effective referral" is defined as "a referral made in good faith, to a non-objecting, available and accessible physician, nurse practitioner or agency" in the context of the MAID Policy: CPSO, Policy Statement #4-16: *Medical Assistance in Death*, Ex. 1 to the Cross Examination of Andrea Foti. See also CPSO Policy Statement 2-15, Professional Obligations and Human Rights, Applicants' Record, Vol. 1, Tab 4, pp. 41-46.

[2] 2015 SCC 5 [**Carter**], CCLA Brief of Authorities (**CCLA Authorities**), Tab 1.

[3] *Carter* at paras 57-58, 62, CCLA Authorities, Tab 1

[4] *R v Morgentaler*, [1988] 1 SCR 30 at para 56 [***Morgentaler***], CCLA Authorities, Tab 2.

15. The courts have routinely held that that where state action interferes with the ability of a person to control their own body and/or make important personal decisions, there will be a serious impairment of s. 7 that cannot easily be justified.

16. Indeed, the SCC has found that "the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference".[5] As Justice Wilson remarked, "liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them."[6]

17. Similarly, a refusal to provide an effective referral may discriminate against patients on the basis of their sex and mental or physical disability. For instance, when a physician refuses to provide a referral, on the basis of a conscientious objection, to a patient seeking MAID or reproductive health services, they are impeding access to medical care to those with a disability or women, thereby engaging patients' s. 15 *Charter* rights. In addition, the lack of access to health care or effective access will have a disparate impact on marginalized individuals who may lack resources to seek out care without the assistance of their attending physician.[7]

18. In an analogous situation, the Saskatchewan Court of Appeal was asked to consider the constitutionality of allowing marriage commissioners to refuse to perform same sex marriages because it was contrary to their religious belief.[8] Discussing the way in which such refusals undermine a fundamentally important aspect of our system of government, the Court held:

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[5] *B(R) v Children's Aid Society of Metropolitan Toronto,* [1995] 1 SCR 315 at para 80, CCLA Authorities, Tab 3; *Godbout v Longeuil (City)*, [1997] 3 SCR 844 at para 66, CCLA Authorities, Tab 4. See also *Mortgentaler*, CCLA Authorities, Tab 2 at para 289.
[6] *Morgentaler* at para 290, CCLA Authorities, Tab 2.
[7] Affidavit of Jeffrey Turnbull, sworn October 19, 2016, Respondent's Application Record, Tab 2, pp.1407-1424 [**Turnbull Affidavit**] at para. 19.
[8] *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 [***Re: Marriage Commissioners***], CCLA Authorities, Tab 5.

> In our tradition, the apparatus of the state serves everyone equally without providing better, poorer or different services to one individual compared to another by making distinctions on the basis of factors like race, religion or gender. The proud tradition of individual public officeholders is very much imbued with this notion. Persons who voluntarily choose to assume an office...cannot expect to directly shape the office's intersection with the public so as to make it conform with their personal religious or other beliefs.[9]

19. The Court of Appeal unanimously ruled that a carve-out designed to sanction the discriminatory provision of public services is itself discriminatory and incompatible with s. 15. Similarly, a religiously-based limitation of the types of care physicians are required to offer patients, in particular those with disabilities and women, is incompatible with s. 15.

20. Finally, the Order sought by the Applicants interferes with a patient's s. 2(a) rights. Section 2(a) of the *Charter* prevents the government from compelling individuals to perform or abstain from certain acts because of the religious significance of those acts to others.[10] As per below, physicians are government agents and gatekeepers to the healthcare system. As government actors who are placed in a necessarily hierarchical role with their patients, and who are the objects of considerable public esteem, it is particularly important that physicians do not exercise their s. 2(a) rights in a way that impairs a patient's freedom of conscience or religion via overt or subtle forms of religious coercion.

21. By denying care or the facilitation of care to patients on the basis of their own conscience or religion, objecting physicians would undermine the medical profession's duty of religious neutrality while providing a public service. They would also potentially deny or impair patients' freedom to make decisions regarding their own bodily integrity in accordance with the patient's conscience or religious beliefs pursuant to s. 2(a) of the *Charter*. The potential for such refusals of care or facilitation of care to rise to the level of religious coercion will be particularly acute in marginalized or remote communities that do not necessarily have adequate social or

[9] *Ibid* at para 97.
[10] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para. 134, CCLA Authorities, Tab 6.

economic resources to "self-refer" themselves to an obliging physician when their attending physician declines to provide them with an effective referral.

B. The Rights of Physicians to Act Upon their *Charter* Rights are Limited

i. The Right to Freedom of Religion is Limited

22. The Applicants contend that the Policies ought to be struck in their entirety on the grounds that they infringe their s. 2(a) right to freedom of conscience and religion. However, the jurisprudential history behind this *Charter* right demonstrates that it is not without limits.

23. In *R v Big M Drug Mart Ltd.*[11], the SCC stated that freedom of religion is principally characterized by the "absence of coercion or constraint".[12] In other words, if a person is being compelled, by the state or the will of another, to undertake a course of action that they would not otherwise choose, they are not truly free. However, Dickson C.J. qualifies this freedom, stating:

> Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[13]

24. In contrast, the Applicants' position is one that conceives of freedom of religion in absolute terms, without limitation, as they suggest that physicians should never have to engage in a care or refer a patient for care that violates their religious beliefs or conscience.

25. For Dickson C.J., the purpose of freedom of religion was to ensure that:

> [...] every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel right....[14]

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[11] *Ibid.*
[12] *Ibid* at para 95.
[13] *Ibid* at para 95 [emphasis added].
[14] *Ibid* at para 124. See also *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 47 at paras. 61-62, CCLA Authorities, Tab 7 [**Amselem**].

26. As such, an otherwise protected expression of freedom of religion or conscience will be subject to reasonable limits when it unduly impairs other *Charter* rights.[15]

ii. As State Agents, Physicians Must Not Infringe the Rights of Patients

27. The *Canada Health Act*[16] establishes the criteria and conditions according to which provinces must set up their health care programs in order to participate in the publicly funded system. Section 3 specifically states:

> It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.

28. With respect to the CPSO's enabling statute, the Ontario Court of Appeal has noted that "the primary purpose of the legislation is the protection of the public" and that "the College as a self-regulatory body has a statutory duty to serve and protect the public interest".[17] Part of the CPSO's duty involves ensuring that all regulated health professionals adhere to the same purposes and public interest principles, including the facilitation of access to health services.[18]

29. Physicians provide services in the Ontario healthcare system voluntarily.[19] Physicians also have a monopoly over and are the gatekeepers to the public health care system in Ontario: they are the only means by which patients are able to receive medical care.[20] MAID, reproductive health services, effective referrals, or any other of the services to which the Applicants object are lawful and the provision of these services has been deemed to be in the public interest and, in some cases, constitutionally protected.

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[15] *Amselem* at para. 62.
[16] RSC 1985, c C-6, s 4.
[17] *Gore v College of Physicians and Surgeons of Ontario*, 2009 ONCA 546 at para 12, CCLA Authorities, Tab 8. See also Schedule 2 to the *Regulated Health Professions Act*, SO 1991, c 18, s. 3(2).
[18] *College of Optometrists (Ontario) v SHS Optical Ltd.*, [2003] OJ No 3077 at para 26, CCLA Authorities, Tab 9.
[19] Turnbull Affidavit at para. 38.
[20] Turnbull Affidavit at para. 25.

30. In considering whether the *Charter* applied to a hospital's delivery of publicly funded care in *Eldridge v British Columbia (AG)*[21], the SCC held that hospitals "act as agents for the government in providing the specific medical services set out in the [*Hospitals Insurance*] *Act*".[22] The same reasoning clearly applies to physicians, given that they are the individuals responsible for providing services set out in applicable legislation.

31. Accordingly, in the provision or denial of care on an equal basis, physicians are state agents and their actions must uphold the ss. 2(a), 7 and s. 15 *Charter* rights of patients.

C. The Policies are a Reasonable Limitation of the Applicants' Rights

32. Section 1 of the *Charter* states that any of the rights set out within may only be subject to such reasonable limits as can be demonstrably justified in a free and democratic society.[23] As discussed above, the Applicants submit that the effect of the Policies is to curtail physician rights protected under s. 2(a) and s. 15 of the *Charter*. The CCLA submits that should a violation of physicians' rights be found, the Policies represent a reasonable limit on these rights and the Policies can be justified in order to promote the public interest and safeguard patients' rights.

33. In evaluating whether the Policies are justified, the CCLA submits that whether the court applies the frameworks from *Oakes, Dore*, or *Dagenais/Mentuck*, the outcome is the same. A consideration of balance and proportionality is required for each.[24] This will be discussed below in the context of the test set out in *R v Oakes*[25] (the ***Oakes* test**), but equally applies to whichever framework the court deems relevant to this case.

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[21] *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, CCLA Authorities, Tab 10.
[22] *Ibid* at para 51.
[23] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 1.
[24] *Dore v. Quebec*, 2012 SCC 12 at para. 5, CCLA Authorities, Tab 11; *R. v. NS*, 2012 SCC 72 at paras. 34-35, CCLA Authorities, Tab 12.
[25] *R v Oakes*, [1986] 1 SCR 103 [***Oakes***], CCLA Authorities, Tab 13.

i. The Policies Respond to Important Concerns

34. In order for a provision to be considered a reasonable limitation of rights and sufficiently important, its objective must relate to "concerns which are pressing and substantial".[26]

35. The Policies outline the professional and legal obligations of physicians when providing certain forms of healthcare. The Policies have the purpose of safeguarding the *Charter* rights and freedoms of patients by respecting patient dignity and autonomy, ensuring equitable access to care, and protecting patient safety and liberty.

36. Almost 30 years ago in *R v Morgentaler*, the SCC found that legislation which inhibited a woman's right to effective and timely access to medical services when her life or her health was endangered interfered with her security of the person contrary to s. 7.[27] More recently in *Carter*, [28]the SCC found the Criminal Code prohibition against physician-assisted death amounted to a "severe" violation of the right to life, liberty and security of the person guaranteed under s. 7.[29] The Policies were adopted by the CPSO in direct response to the SCC's decision in *Carter*.[30]

37. Given the pressing and substantial concerns of ensuring patients' equal and adequate access to health care, it is clear that the purpose of the Policies is sufficiently important.

ii. Proportionality

38. Canadian courts have long recognized that a hierarchical approach to rights must be avoided.[31] However, in certain circumstances, distinct rights may seem mutually incompatible and require the Court to engage in a delicate balancing act.

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[26] *Oakes* at para 73.
[27] [1988] 1 SCR 30 at para 56, CCLA Authorities, Tab 2.
[28] 2015 SCC 5, CCLA Authorities, Tab 1.
[29] *Ibid* at para 3.
[30] *Ibid* at para 132.
[31] *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at para 75, CCLA Authorities, Tab 14.

39. In order to assess whether a given measure is proportional, it is necessary to weigh the deleterious effects of the provision infringing upon the right in question against the salutary effects that are sought by the limitation of the right. The proportionality analysis provides the judiciary with a workable framework to delineate between competing rights and "exists to ground the exercise of discretion in a constitutionally sound manner".[32]

Rational connection

40. The limitation of a right must be rationally connected to the objective of the provision in question. This means that the enacting body "must show a causal connection between the infringement and the benefits sought on the basis of reason or logic".[33]

41. Provisions requiring care in emergencies or an effective referral for patients to access certain types of care in spite of religious or conscientious objections is unambiguously connected to the Policies' goal of ensuring patients' access to healthcare and minimizing the risk of adverse outcomes.

Minimal Impairment

42. At this stage, the inquiry involves an assessment of whether the provision is designed in a manner that impairs the right in question as little as possible.

43. With respect to the Applicants' claim regarding effective referrals, physicians' colleges in other provinces have substantively and functionally equivalent policies in place.[34] The main

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[32] *R v Mentuck*, 2001 SCC 76 at para 37, CCLA Authorities, Tab 15.
[33] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 153, CCLA Authorities, Tab 16.
[34] CPSNS, *Professional Standard Regarding Medical Assistance in Dying*, ss. 4.2-4.3 and 9.1.2, Exhibit 14 to the Cross-Examination of Laurence Worthen; CPSA, *Standard of Practice – Medical Assistance in Dying*, ss. 3-4, Exhibit 9 to the Cross-Examination of Laurence Worthen; CPSS, *Conscientious objection Policy* at 4-5, Exhibit "J" to the Affidavit of Laurence G. Worthen, Applicants' Record, Vol. 5, Tab 17J, pp. 1268-1269; CPSS, *Medical Assistance in Dying Policy* at 4-5, Exhibit "YY" to the Affidavit of Andrea Foti, Respondent's Record, Vol. 3, Tab 1YY, pp. 1227-1228.

distinguishing factor between the Policies and those in place in other provinces is that the CPSO has chosen to name the physician's duties in the face of religious opposition an "effective referral". With respect to what is actually required of the physician, there is little to distinguish the regimes in other provinces from the CPSO's approach.

44. The crux of the Applicants' argument regarding the Policies is that the requirement to provide an effective referral or urgent care forces physicians to participate in a form of medical care to which they object on moral or religious grounds.[35]

45. For certain physicians, this may indeed be true. To the extent that a particular belief or practice requires absolute adherence for certain practitioners, it may be difficult for the governing body (in this case, the CPSO) to minimally impair individuals' rights. In a case such as this, where serious *Charter* violations are at issue on the part of patients and the public interest, the rights of these religious practitioners may need to be restricted. The governing body should nonetheless take pains not to exceed its purpose and should protect the rights of other physicians for whom less severe restrictions may be a workable balance.

46. Allowing physicians to withhold urgent care so as to respect freedom of religion and conscience would, on its face, severely undermine the Policies' purpose of protecting patient safety. Thus, the Policies are minimally impairing insofar as they are tailored to require urgent care only when the absence of such care would result in imminent harm to patients.

47. With respect to alternative models of care, these may be less impairing of physicians' freedom of conscience and religion, however, they are no equivalent alternatives that adequately protect the patients' *Charter* rights at issue in this case.

[35] Fresh as Amended Notice of Application, 499/16 and Fresh as Amended Notice of Application, 500/16

48. The requirement that physicians provide effective referrals to patients respects patients dignity and ensures equitable access to care. Removing this requirement, or a reasonable substitute that compels objecting physicians to facilitate access to care, would seriously impair the CPSO's ability to meet its purpose of safeguarding patients' *Charter* protected right to receive equitable care. The Applicants' suggested models – i.e. a policy of self-referral or a coordinating service that does not obligate physicians to refer or match patients with care – do not address these concerns,[36] as discussed below. As such, they fail to meet the Policies' purpose and are therefore not minimally impairing alternatives to the Policies.

49. Finally, in the event an individual physician is uncomfortable with providing an effective referral, it is open to them to organize their practice in such a way that the actual step of transmitting a referral to a physician willing to provide the patient with the service can be carried out by a staff member employed in the physician's office.[37] The organization of a physician's office to accord with their level of comfort can be managed on an individual level without denying access to care to patients.

Overall Proportionality of the Policies

50. The final step of the analysis weighs the deleterious effects of the infringement of protected rights against the beneficial effects of the law in terms of the broader public good.[38]

51. In the event that a breach of physicians' s. 2(a) rights by the Policies is found, the CCLA acknowledges that the right to freedom of religion is not unlimited and the SCC has, in the past, emphasized the importance of taking a contextual approach when evaluating a policy in dispute, particularly where religious freedoms are at issue:

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[36] Turnbull Affidavit at paras. 31-34.

[37] Fact Sheet, *Effective Referral: Ensuring Access to Care*, Ex. II to the Affidavit of Andrea Foti, sworn October 18, 2016, Respondent's Application Record, pp. 1037-1038.

[38] *Carter* at para 122, CCLA Authorities, Tab 1.

> [O]ur jurisprudence does not allow individuals to do absolutely anything in the name of that freedom....they will still have to consider how the exercise of their rights impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.[39] [emphasis added]

52. The salutary effects of the Policies are obvious: the *Charter* rights of patients are upheld and they are provided access to healthcare. The Policies are underpinned by certain practical considerations. Without the possibility of an effective referral, vulnerable individuals seeking care will be forced to make numerous calls and risk facing multiple rejections before finding a physician that is willing to help them, if at all. Depending on their circumstances, these logistical hurdles may result in the patient being denied access to care.[40]

53. For instance, within the context of MAID, if a patient is afflicted by ALS and does not have the ability to use the telephone, a telephone hotline will be of little assistance to them and they will be prevented from receiving care unless they are able to find someone to place a call on their behalf. However, this has important consequences for the patient with respect to their privacy and must be considered in light of the general sensitivity surrounding requests for MAID.

54. Simple questions of geography are also a concern. If physicians can opt out of the duty to facilitate care in the context of MAID or reproductive health services, it is possible that a situation might arise in which individuals in smaller centers, underserviced neighborhoods, rural areas or the north would have to travel a significant distance in order to find a physician willing to perform the service or provide them with a referral, assuming they are able to travel.[41]

55. Similarly, a marginalized young woman who finds herself in need of contraception or other reproductive healthcare may not have sufficient reserves or resources to face multiple

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[39] *Amselem* at para 62, CCLA Authorities, Tab 7.
[40] Affidavit of Kevin Imrie, sworn October 14, 2016, Respondent's Application Record, Tab 5, pp. 1683-1690 [**Imrie Affidavit**] at para. 11.
[41] Imrie Affidavit at para. 12; Turnbull Affidavit at para. 28(e).

rejections, and the accompanying disapproval or disdain – whether express or implied – by physicians, including her family doctor.[42] Such rejections, the pressure they may place upon her, and the potential lack of meaningful access to care, violate her right to receive public services in a religiously neutral manner, and free from religious coercion.

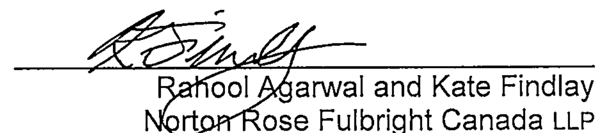
D. Conclusion

56. The Policies enacted by the CPSO represent a practical solution that may work for certain religious physicians, and may regrettably not work for others. In light of the significant *Charter* rights at issue, the Policies provide a proportional balance allowing the conscientious objector to avoid directly providing medical care that is contrary to their religious beliefs, while the patient's access to care is maintained. The rights of patients to equality, autonomy, bodily integrity and to freedom of religion, including the right to be free from religious coercion, must take precedence over a physician's right to provide or deny public health service in accordance with their religious beliefs.

PART IV - ORDER REQUESTED

57. The CCLA respectfully requests that this Court make an order in accordance with the above principles. The CCLA seeks no costs and asks that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8TH day of May, 2017.



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[42] Turnbull Affidavit at para. 28(d).

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Carter v Canada (Attorney General)*, 2015 SCC 5.
2. *R v Morgentaler*, [1988] 1 SCR 30 at 56.
3. *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315.
4. *Godbout v Longeuil (City),* [1997] 3 SCR 844
5. *Marriage Commissioners Appointed Under The Marriage Act (Re), 2011 SKCA 3*
6. *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295
7. *Syndicat Northcrest v Amselem*, 2004 SCC 47
8. *Gore v College of Physicians and Surgeons of Ontario*, 2009 ONCA 546
9. *College of Optometrists (Ontario) v SHS Optical Ltd.*, [2003] OJ No 3077
10. *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624
11. *Dore v. Quebec*, 2012 SCC 12
12. *R. v. NS*, 2012 SCC 72
13. *R v Oakes*, [1986] 1 SCR 103.
14. *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835.
15. *R v Mentuck*, 2001 SCC 76.
16. *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199.

SCHEDULE "B"
RELEVANT STATUTES

1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Rights and freedoms in Canada

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.

Fundamental Freedoms

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

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Equality before and under law and equal protection and benefit of law

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.

2. *Canada Health Act*, R.S.C. 1985, c. C-6

3 It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.

4 The purpose of this Act is to establish criteria and conditions in respect of insured health services and extended health care services provided under provincial law that must be met before a full cash contribution may be made.

3. *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18

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

CHRISTIAN MEDICAL AND DENTAL SOCIETY OF CANADA ET AL.
Applicants

and

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO
Respondent

Court File No.: 499/16 and 500/16

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Ottawa

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