Court File Nos.: 499/16 and 500/16

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

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

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

Intervenors

FACTUM OF THE INTERVENORS, HIV & AIDS LEGAL CLINIC ONTARIO, CANADIAN HIV/AIDS LEGAL NETWORK AND CANADIAN PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH

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PART I. OVERVIEW

1. The applicant physicians ask this Court to countenance their refusal to provide their patients with meaningful access to lawful, clinically appropriate (and in some cases medically necessary) health services on the basis of their personal beliefs. Their request should be denied.

2. The instant case arises out of two policies created by the College of Physicians and Surgeons of Ontario (the "CPSO") (the "Policies").[1] The Policies are intended in part to provide guidance to Ontario physicians on standards for the delivery of health services, including procedures related to reproductive health, the prescribing of pharmaceuticals and medical assistance in dying. They advise physicians on how to deliver health services in a manner that is non-discriminatory and supports patient autonomy in situations where the physician's personal beliefs are inconsistent with the delivery of a particular health service. The applicants do not allege, nor could they, that the types of health services they seek to deny their patients are not clinically appropriate or even necessary in proper circumstances.

3. Astonishingly, the applicants assert that the only *Canadian Charter of Rights and Freedoms* ("*Charter*") rights and values engaged by the Policies are their own right to

[1] CPSO Policy Statement #2-15, *Professional Obligations and Human Rights* ("Human Rights Policy") Application Record, Court File No. 15-63717 [499/16], Vol. 1, ("Human Rights Policy Application Record"), Tab 4; CPSO Policy Statement #4-16, *Medical Assistance in Death* ("MAID Policy") Application Record, Court File No. DC-16-2217 [500/16] ("MAID Policy Application Record") Vol. 1, Tab 5. The Policies require a physician who objects on grounds of conscience or religion to providing medical assistance in dying, or any other medical procedure or pharmaceutical, to provide an effective referral to another available, accessible, non-objecting physician, healthcare provider, or agency. Throughout the referral process, the physician must act in a way that respects patient dignity, ensures access to care, and protects patient safety. To be effective, the referral must be timely and made in good faith. The CPSO does not consider providing a referral to constitute "assisting" in providing medical assistance in dying. The applicants disagree. The applicants object not only to providing procedures or pharmaceuticals that they personally deem unconscionable, but also object to even referring a patient to another practitioner for a determination of whether such treatment is appropriate: Factum of the applicants, Court File No. 499-16 at paras. 65-68; factum of the applicants, Court File No. 500-16 at paras. 85-88.

freedom of conscience and religion, and their own equality rights.[2] Contrary to the applicants' position, the Supreme Court of Canada has affirmed that the *Charter* protects a patient's right to make fundamental choices concerning their own medical treatment, including end-of-life decisions, and has held that governments (and in turn those to whom governments have delegated the authority and responsibility to implement the policy of universal healthcare) must deliver health services in a manner that is non-discriminatory and supports patient autonomy. In essence, the applicants are asking this Court to hold that their personal beliefs trump the autonomy, dignity, equality, mental health, bodily integrity, and even potentially the lives of their patients – all interests protected by the *Charter* – and that there is no basis for the CPSO to consider other interests and rights when creating policies in the public interest.

4. The balance struck by the CPSO in the Policies is <u>minimally</u> acceptable from the perspective of the HIV & AIDS Legal Clinic Ontario, the Canadian HIV/AIDS Legal Network and the Canadian Professional Association for Transgender Health (the "Intervenors"). In non-emergency situations (the focus of this case), the Policies provide that physicians who for purely personal reasons object to providing a service should instead provide their patient with an effective referral. In emergency situations, the physician should deliver necessary care to avoid imminent harm.[3]

5. The Intervenors submit that the Policies do not go far enough. Providing a patient with only a referral creates delay and a barrier to accessing lawful, clinically appropriate,

[2] The focus of the Intervenors submissions is on the applicants' s. 2(a) right; however, the Intervenors deny that the applicants' equality rights warrant a conclusion that the Policies are unreasonable.

[3] The applicants do not appear take issue with the requirement to provide their patients with care to which they object for personal reasons in an emergency situation (though they take the position that this is an impermissibly vague standard). Therefore, the Intervenors do not address this point further, other than to note that any suggestion that physicians are entitled to put their personal beliefs ahead of the health and welfare of patients is even more objectionable in an emergency situation.

and even medically necessary care. This is especially true for a patient who comes from a marginalized community and faces pre-existing barriers to accessing healthcare, or for a patient who lives outside a metropolitan area where it may be practically difficult or even impossible to travel to a non-objecting physician. These barriers create an unacceptable risk of physical or mental harm to these patients, and have a negative impact on both patients' dignity and autonomy.

6. The Intervenors have serious concerns that the Policies as they stand are inadequate in that they already indulge discrimination and disrespect for patient autonomy to a troubling degree by allowing a physician to put their own personal beliefs ahead of patient care. In these circumstances, however, the applicants cannot demonstrate that the Policies are unreasonable.

PART II. SUMMARY OF FACTS

7. The Intervenors adopt the summary of the facts set out in Part II of the CPSO's factum, and provide the following summary of additional facts they believe are relevant to this Court's determination.

A. The Intervenors

8. The Intervenors are organizations dedicated to promoting the health of, and defending and advancing the rights of people living with HIV, and trans people. The issues raised by these applications are of profound importance to the communities of clients whose health and rights the Intervenors advance.

9. The HIV & AIDS Legal Clinic Ontario is a community legal clinic that provides legal services to people living with HIV in Ontario, and is the only such legal clinic in Canada.

10. The Canadian HIV/AIDS Legal Network is the only national organization in Canada that works exclusively on legal and policy issues related to HIV and human rights, and is one of the world's leading expert organizations in the field.

11. The Canadian Professional Association for Transgender Health is the only national multidisciplinary, professional organization in Canada working to support the health, wellbeing, and dignity of trans people. It also represents health and mental healthcare professionals who provide care and other services to transgender clients and patients.

B. The interests of the people who the Intervenors represent

12. The Intervenors are comprised of, and work closely with and on behalf of members of the marginalized communities they represent – including people living with HIV (and related disability), women, LGBTI (lesbian, gay, bisexual, trans and intersex) people, people with problematic substance use and sex workers.

13. Given the focus of their respective mandates, the Intervenors note that people living with HIV and trans people continue to face pervasive stigma and accompanying discrimination. Both communities of people experience discrimination and harassment across a range of areas, including employment, housing, and, of particular relevance in this case, when accessing health services.[4] Access to medical care plays a particularly critical role in the health and wellbeing of trans people and people living with HIV. Barriers that result in denial or delays in accessing care can have life-threatening effects.

14. People living with HIV require regular access to health services in order to maintain their condition and wellbeing. Moreover, for many trans people, access to transition related medical care, including hormones and a variety of surgical procedures, has a vital and in

[4] See e.g. Affidavit of Greta R. Bauer, Responding Application Record Volume 5, Tab 7, p. 2401-03, paras. 13-16, which outlines the challenges and risks faced by trans people in accessing health services.

some cases life-saving impact. Trans people have particular physical, sexual, reproductive and mental health needs.

C. The discrimination experienced by people living with HIV and trans people in the healthcare sphere

15. Unfortunately, many people living with HIV and trans people experience stigma and discrimination when accessing or attempting to access health services. Many are reluctant to access health services because of past negative experiences with the healthcare system, and fear of further negative experiences.

16. People living with HIV have long experienced discrimination related to their medical condition. There remains a persistent and pejorative attitude shared by some members of the medical community towards people living with HIV and negative assumptions about the means by which they may have contracted the condition.

17. Many people, including some physicians, deny the validity of trans people's gender identity and discriminate against them on the basis of that identity. Some physicians continue to believe that transition-related medical care is optional (when in many cases it is not), or that it is "experimental" or "specialty" care and, thus, will not provide trans people with care which they are fully able to provide, and which prevailing medical standards establish is necessary.

18. In their factum, the applicants submit that the CPSO has provided "no more than anecdotal evidence to support" the fact that some physicians discriminate against people within the LGBTI community.[5] Sadly, the applicants' own evidence reflects these discriminatory attitudes.

[5] Factum of the applicants, Court File No. 499/16, para. 126.

19. For example, Dr. Michelle Korvemaker, a physician whose practice includes rural family medicine, and emergency medicine in Woodstock, Ontario gave evidence that when one of her patients sought her assistance with transgender care, she told the patient: "I believe that God has created us male and female, and that choosing to change your gender is working against how God has made you."[6] Two of the other applicant physicians gave evidence that they would not be comfortable in providing patients with treatment to assist them with gender transitioning.[7]

20. Dr. Korvemaker also testified that she would have a hard time supporting a same-sex couple seeking fertility treatment because fertility treatment was not consistent with her beliefs. She went on to state that: "to be honest with [the hypothetical same-sex couple] … I think I'd probably need to let them know" that she would not be "rooting for them".[8]

21. There is also ample evidence of the applicant physicians' discriminatory attitudes towards other equity seeking groups, such as women, in the healthcare sphere.[9]

22. This evidence is deeply troubling, and can hardly be said to reflect the "values of compassion, service, altruism, and trustworthiness" which must form the foundation of the physician-patient relationship.[10]

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[6] Transcript of cross-examination of Dr. Michelle Korvemaker, Transcripts Vol. 1, Tab 2, P. 155, Q. 111.

[7] Transcript of cross-examination of Dr. Agnes Tanguay, Transcripts Vol. 1, Tab 4, P. 431, Q. 329; Transcript of cross-examination of Dr. Betty-Ann Story, Transcripts Vol. 1, Tab 1, P. 28-29, Q. 103-104.

[8] Transcript of cross-examination of Dr. Michelle Korvemaker, Transcripts Vol. 1, Tab 2, P. 148-49, Q. 94-96.

[9] For example, Dr. Story testified that she could not provide information about abortion in a neutral and objective manner. When patients engage in conduct she considers immoral, she tells them so, including telling women seeking abortion that it is wrong to terminate a pregnancy: Transcript of cross-examination of Dr. Betty-Ann Story, Transcripts Vol. 1, Tab 1, P. 74, Q. 272, 276.

[10] MAID Policy, MAID Policy Application Record Vol. 1, Tab 5, p. 48; Human Rights Policy, Human Rights Policy Application Record Vol. 1, Tab 4, p. 42.

PART III. STATEMENT OF ISSUES, LAW AND AUTHORITIES

23. The sole issue in this case is whether the Policies reasonably balance the CPSO's statutory objective, the *Charter* rights of patients and the underlying *Charter* values of autonomy and dignity, with the interests of the physicians who are regulated by the CPSO.[11] The Intervenors have noted above their reservation that the Policies unduly permit physicians to privilege their personal beliefs (religious in nature or otherwise) over patient autonomy and equality, and hence patient dignity. But in this proceeding, the onus is on the applicants to demonstrate that the Policies are *unreasonable*. They have not done so.

A. The CPSO's statutory objectives

24. Physicians in Ontario have been granted extraordinary privileges, including a monopoly on delivering government-funded medical care, and the privilege of self-regulation. In return, the medical profession has committed to providing care with competence, integrity, altruism, and to promoting the public good within its domain.[12] The CPSO is the statutory mechanism through which the practice of medicine is regulated in Ontario. In carrying out all of its objects, the CPSO must uphold its overriding duty to serve and protect the public interest.[13]

25. Physicians are the gatekeepers to, and providers of government-funded universal healthcare, a specific governmental policy or program.[14] The CPSO in turn acts as physicians' gatekeeper in all respects, including maintaining physicians' registration and

[11] *Doré c. Québec (Tribunal des professions),* 2012 SCC 12 at paras. 6, 55-58 [*Doré*], Book of Authorities of the Intervener, Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario ("HALCO BoA"), Tab 1; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paras. 4, 35-42 HALCO BoA Tab 2; *Trinity Western University v. Law Society of Upper Canada,* 2016 ONCA 518 at paras. 68, 112-13 [*TWU*], HALCO BoA, Tab 3.

[12] MAID Policy, MAID Policy Application Record Vol. 1, Tab 5, p. 48; Human Rights Policy, Human Rights Policy Application Record Vol. 1, Tab 4, p. 42.

[13] Health Professions Procedural Code, s. 3(2), being Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18 [Health Professions Procedural Code].

[14] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 49-50, HALCO BoA, Tab 4 [*Eldridge*].

improving quality of care, discipline, and providing opportunities for ongoing training and education.[15] As one part of its mandate, the CPSO creates policies which provide physicians with guidance on standards and issues they may encounter in their practices. The Policies are two such examples.

26. In the circumstances of this case, the CPSO is subject to the *Charter* and the delivery of medical services in Ontario by individual physicians is, at a minimum, subject to the *Human Rights Code*.[16] Individual physicians also owe their patients a fiduciary duty in the delivery of care.[17] All of these values must inform how the CPSO, the state-authorized regulator of physicians and their practice, pursues its objectives.[18] In other words, the CPSO is required "to take account of, and try to act consistently with, *Charter* values as they make decisions within their mandate".[19] In the context of delivering medical services, the public interest includes (i) creating and fostering an environment in which the personal worth, dignity and autonomy of every patient is respected, (ii) preventing harm to patients, and (iii) facilitating access to appropriate care.

B. The applicants' s. 2(a) rights are not engaged on the facts of this case

1. The Policies do not interfere with the applicants' freedom of religion

27. In the instant case, the applicants assert their religious freedom. An administrative decision infringes a person's religious freedoms when it impedes "the individual's ability to

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[15] Health Professions Procedural Code, ss. 15-24 (registration), 35-56 (discipline), 80-83.1 (quality assurance and continuing education).

[16] *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1. The Intervenors' position is that physicians are bound by the *Charter* in the delivery of services (*Eldridge, supra* note 14 at para. 51, HALCO BoA, Tab 4). However, it is unnecessary for this Court to decide that issue in the circumstances of this case.

[17] *McInerney v. MacDonald,* 1992 CarswellNB 63 at paras. 19-22, 25, 27, 28, [1992] 2 S.C.R. 138, HALCO BoA, Tab 5.

[18] *TWU, supra* note 11 at para. 110, HALCO BoA, Tab 3.

[19] *Ibid.* at para. 68, HALCO BoA, Tab 3.

act in accordance with his or her beliefs".[20] A court will find there has been an infringement of a person's religious freedom where an individual establishes that: (a) the decision interferes with a sincerely held "practice or belief, having a nexus with religion, which calls for a particular line of conduct";[21] and (b) the interference with that religious practice or belief is "more than trivial or insubstantial".[22]

28. The Intervenors do not challenge the sincerity of the applicants' personal beliefs. However, the applicants' submission that the Policies require them to engage in a "sinful act" by providing patients with an effective referral is untenable.[23]

29. The Policies are normative in that they provide guidance to physicians of the expected standards of care and professionalism. However, it is the physician's existing human rights, fiduciary and, arguably, *Charter* obligations to their patients which require them to deliver care in a non-discriminatory manner which respects patient autonomy, not the Policies.

30. Even if the Policies created obligations on physicians to provide health services that did not otherwise exist, the impact on objecting physicians is at its highest, trivial. The Policies do not require the applicants to provide the health services themselves, but only require them to provide an effective referral where they object to providing a particular service.[24] An effective referral does not equate to an agency relationship between the

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[20] *Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16 at para. 85, HALCO BoA, Tab 6.
[21] *Syndicat Northcrest c. Amselem*, 2004 SCC 47 at para. 56, HALCO BoA, Tab 7.
[22] *Ibid.* at paras. 74, 145, HALCO BoA, Tab 7.
[23] Factum of the applicants, Court File No. 499-16, para. 78; Factum of the applicants, Court File No. 500-16, para. 97.
[24] The only situation in which a physician would be required to provide a service to which they objected would be in an emergency situation where providing the service was necessary to prevent imminent harm. The applicants do not appear to object in principle to providing emergency services to which they otherwise object.

referring doctor and the referred doctor. The referred doctor bears an autonomous responsibility to assess the medical appropriateness of any treatment.

31. The Intervenors submit the Policies do not sufficiently interfere with the applicants' freedom of religion to attract the protection of s. 2(a) of the *Charter*. Although the CPSO considered physicians' freedom of religion and conscience when crafting the Policies, the CPSO was not required to do so in these circumstances. In essence, the applicants' position is that this Court should relieve them from their existing legal obligations to their patients or potential patients, which submission should be flatly rejected by this Court.

2. The applicants' s. 2(a) rights are not engaged: the protection of s. 2(a) is internally limited, not absolute

32. The *Charter* right to freedom of conscience or religion is not absolute; under s. 1 of the *Charter* it is subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[25] However, unlike some other *Charter* rights, the jurisprudence holds that s. 2(a) is also internally limited. In cases where the protection of health or the fundamental rights and freedoms of others are at issue, an applicant may have no claim that their s. 2(a) rights have been infringed.[26]

33. In the circumstances of this case, s. 2(a) does not and should not protect an applicant who alleges their belief supersedes the rights of others to equitable access to health services. Moreover, *Charter* protection does not and should not extend to protect a belief that could result in injury to a patient or potential patient where a physician chooses to withhold or refuse care in the exercise of those beliefs.

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[25] *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, s. 1.

[26] *R. v. Big M Drug Mart Ltd.*, 1985 CarswellAlta 316 at para. 95 [1985] 1 S.C.R. 295, HALCO BoA, Tab 8.

C. The Policies engage patients' rights and foundational Charter *values*

34. At their most basic, the Policies provide physicians with normative guidance on standards for the delivery of health services, including in areas such as reproductive health, the prescribing of pharmaceuticals and medical assistance in dying, in a non-discriminatory and equitable fashion that supports patients' dignity and autonomy in medical decision-making. To submit, as the applicants do, that these issues do not engage any *Charter* rights or values other than those personal to them is astonishing. The applicants' failure to recognize how their personal beliefs affect the rights and lives of others, and in particular of their own patients, is a deeply troubling aspect of this proceeding and underscores the need for the CPSO policies such as those being challenged in this proceeding.[27]

35. Contrary to the applicants' submissions, the Policies engage patients' rights guaranteed under the *Charter*, and the foundational *Charter* values of dignity and personal autonomy. The withholding of lawful, clinically appropriate and, in some cases, necessary medical care on the basis of another individual's religious beliefs or conscientious objection clearly "interferes with [a patient's] ability to make decisions concerning their bodily integrity and medical care", which decisions are protected by the *Charter*.[28]

36. In *Carter,* the Supreme Court of Canada recognized that "the law has long protected patient autonomy in medical decision-making."[29] The Court has similarly recognized the "tenacious relevance in our legal system of the principle that competent individuals are —

[27] In striking down the criminal prohibition on assisted suicide in *Carter v. Canada (AG)*, the Supreme Court expressly recognized that the legislative response to assisted suicide must reconcile the *Charter* rights of patients and physicians: 2015 SCC 5 at para. 132 [*Carter*], HALCO BoA, Tab 9.
[28] *Ibid.* at para 66, HALCO BoA, Tab 9.
[29] *Ibid.* at para. 67, HALCO BoA, Tab 9.

and should be — free to make decisions about their bodily integrity."[30] At common law, a patient's autonomy interest generally outweighs all other interests.[31] Under the *Charter*, a sphere of personal autonomy regarding one's body is similarly protected from interference.[32] Respect for personal autonomy permeates section 7 of the *Charter*, and in particular the rights to liberty and security of the person.[33]

37. The Policies also provide ameliorative guidance to the medical profession on the impact of denying health services. Physicians are the agents through which the government delivers healthcare, and these services must be delivered in a non-discriminatory manner.[34] In this role, physicians are called upon to deliver health services to a broad range of patients and potential patients. All Ontarians are entitled to receive equitable access to healthcare. Marginalized or vulnerable communities, especially those such as people living with HIV or trans people who need access to health services, are particularly affected by the discriminatory delivery of medical care. In some cases, barriers that result in denial or delays in accessing care will have life-threatening consequences. In all cases, such barriers will have a negative impact on the dignity and autonomy of patients.

38. People living with HIV and trans people regularly experience stigma and discrimination in healthcare settings.[35] Some of these prejudices are rooted in religious teachings and are promoted by religious leaders and organizations. This Court need look no

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[30] *A.C. v. Manitoba (Director of Child and Family Services*), 2009 SCC 30 at para. 39, Abella J, HALCO BoA, Tab 10.

[31] *Cuthbertson v. Rasouli*, 2013 SCC 53 at paras. 18-19, McLachlin CJ, HALCO BoA, Tab 11.

[32] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 171, Wilson J [*Morgentaler*], HALCO BoA, Tab 12.

[33] *Carter, supra* note 27 at para. 64, HALCO BoA, Tab 9.

[34] *Eldridge, supra* note 14 at para. 51, HALCO BoA, Tab 4.

[35] The record in this case alone shows such prejudices. See for example the transcript of cross-examination of Dr. Michelle Korvemaker, Transcripts Vol. 1, Tab 2, P. 155, Q. 111; transcript of cross-examination of Dr. Agnes Tanguay, Transcripts Vol. 1, Tab 4, P. 431, Q. 329; transcript of cross-examination of Dr. Betty-Ann Story, Transcripts Vol. 1, Tab 1, P. 28-29, Q. 103-104

further than the applicants' own evidence in this proceeding as summarized above to see examples of discriminatory attitudes expressed by certain members of the medical community. Adopting a policy that allows or facilitates physicians to deny services, or failing to create a policy which at a minimum encourages access, would perpetuate these pre-existing disadvantages.

D. The CPSO has struck a minimally acceptable balance

39. The Intervenors have outlined above why the applicants' rights under s. 2(a) of the Charter are not engaged. In the alternative, if the applicants' s. 2(a) rights are engaged, the Intervenors submit that the Policies represent a minimally acceptable balance of the myriad of *Charter* rights and values at issue, and satisfy the CPSO's statutory objective to regulate in the public interest in the circumstances of this case.

40. Proportionality is the guiding principle when balancing *Charter* rights and values in any context.[36] In considering the appropriate balance in this case, the court should consider that, as set out above, any infringement of the applicants' s. 2(a) rights is at most minimal.

41. A further critical contextual factor is that the applicants are effectively asserting a right to practice a profession, but only on the terms which they find personally acceptable. The Policies only affect the applicants *qua* physicians, not *qua* individuals. The applicants admit this in their factum, submitting that the Policies force the applicants to either "leave the practice of medicine [or] leave a particular field of medicine".[37] Any alleged interference

[36] *Doré, supra* note 11, at paras. 21, 55-58, HALCO BoA, Tab 1; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CarswellOnt 112 at para. 99, [1994] 3 S.C.R. 835, HALCO BoA, Tab 13; *R. v. N.S.,* 2012 SCC 72 at para. 7, HALCO BoA, Tab 14.

[37] Applicants' factum, Court File No. 499/16, para. 91; applicants' factum, Court File No. 500/16, para. 110.

with these individuals' freedom of conscience or religion evaporates if, for instance, they choose to practice a different specialty.[38]

42. The Supreme Court of Canada has repeatedly held that the *Charter* does not protect a person's right to engage in a particular profession.[39] To the extent physicians do not wish to treat patients who may request or require treatments which the applicants find morally objectionable, physicians are free to select an area of practice which does not require them to make these difficult choices.

43. The applicants' submission that they are put to the choice of complying with the Policies or leaving the jurisdiction is not tenable.[40] The applicants will continue to be bound by their fiduciary duties to their patients, comparable human rights obligations (and arguably the *Charter*) wherever they practice in Canada.

44. In contrast to the Policies' minimal (even non-existent) impact on the applicants, the Policies are intended to facilitate patients' health and their existing rights, and the values of dignity, equality and autonomy – values that are central to the practice of medicine and core values in Canadian law. The Policies provide guidance that aims at preserving patients' mental and physical wellbeing, even their lives.

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[38] For example, Dr. Story acknowledged that there were other areas of medical practice where the issues to which she objected (including abortion, medical assistance in dying, and transgender issues), were much less likely to arise, such as radiology: Transcript of cross-examination of Dr. Betty-Ann Story, Transcripts Vol. 1, Tab 1, P. 32, Q. 106.

[39] See e.g. *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code,* 1990 CarswellMan 206 at para. 71, [1990] 1 S.C.R. 1123, HALCO BoA, Tab 15; *Siemens v. Manitoba (Attorney General),* 2003 SCC 3 at paras. 45-46, HALCO BoA, Tab 16; *Chaoulli c. Québec (Procureur général),* 2005 SCC 35 at para. 202, HALCO BoA, Tab 17.

[40] See e.g. transcript of cross-examination of Dr. Michelle Korvemaker, Transcripts Vol. 1, Tab 2, P. 148-49, Q. 94-96, P. 155, Q. 111; transcript of cross-examination of Dr. Agnes Tanguay, Transcripts Vol. 1, Tab 4, P. 431, Q. 329; transcript of cross-examination of Dr. Betty-Ann Story, Transcripts Vol. 1, Tab 1, P. 28-29, Q. 103-10.

45. The communities represented by the Intervenors have historically suffered, and continue to suffer from stigmatization, marginalization and discrimination in many areas of life, including in the healthcare context and including as a result some groups' religious teachings. Should the physicians act on their stated desire to refuse to provide healthcare to members of the Intervenors' constituencies on the basis of their identification with those constituencies,[41] it could result (and, indeed, the applicants' evidence suggest that it has already resulted)[42] in the discriminatory denial of health services required to protect patients, and keep them free from harm.

46. The balancing of patients' rights with the applicants' interests in this case could not be starker.

47. If anything, given the limited extent, if any, to which the objecting physicians' s. 2(a) rights are engaged or affected by the issues raised, the Policies already go beyond what is necessary to accommodate doctors' freedom of conscience or religion, at the expense of patients' rights, the *Charter* values of equality and respect for autonomy, and patients' mental and physical wellbeing. The obligation to provide an effective referral is the bare minimum that should be required of physicians if they seek to privilege their own personal beliefs over the provision of care to patients. Adopting a policy, as urged by the applicants, that allows or encourages healthcare providers to deny services based on their personal beliefs would be to enable and endorse the kind of discrimination that the marginalized individuals represented by the Intervenors already encounter far too often.

[41] Transcript of cross-examination of Dr. Agnes Tanguay, Transcripts Vol. 1, Tab 4, P. 431, Q. 329; transcript of cross-examination of Dr. Betty-Ann Story, Transcripts Vol. 1, Tab 1, P. 28-29, Q. 103-104.
[42] Transcript of cross-examination of Dr. Michelle Korvemaker, Transcripts Vol. 1, Tab 2, P. 155, Q. 111.

PART IV. ORDER REQUESTED

48. The Interveners ask that this Court dismiss these applications.

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

Michael Fenrick

Denise Cooney

per/ Khalid Janmohamed

per/ Richard Elliott

Lawyers for the interveners HIV & AIDS Legal Clinic Ontario, Canadian HIV/AIDS Legal Network and Canadian Professional Association for Transgender Health

TAB A

SCHEDULE "A"

JURISPRUDENCE

1. *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12
2. *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12
3. *Trinity Western University v. Law Society of Upper Canada*, 2016 ONCA 518
4. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
5. *McInerney v. MacDonald*, 1992 CarswellNB 63, [1992] 2 S.C.R. 138
6. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16
7. *Syndicat Northcrest c. Amselem*, 2004 SCC 47
8. *R. v. Big M Drug Mart Ltd.*, 1985 CarswellAlta 316, [1985] 1 S.C.R. 295
9. *Carter v. Canada (AG)*, 2015 SCC 5
10. *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30
11. *Cuthbertson v. Rasouli*, 2013 SCC 53
12. *R. v. Morgentaler*, [1988] 1 S.C.R. 30
13. *Dagenais v. Canadian Broadcasting Corp.*, 1994 CarswellOnt 112, [1994] 3 S.C.R. 835
14. *R. v. N.S.*, 2012 SCC 72
15. *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code*, 1990 CarswellMan 206, [1990] 1 S.C.R. 1123
16. *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3
17. *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35

TAB B

SCHEDULE "B"

TEXT OF STATUTES AND REGULATIONS

Human Rights Code, R.S.O. 1990, c. H.19, s. 1

Services

1. Every person has a right to equal treatment with respect to services, goods and facilities, 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.

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

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.

Health Professions Procedural Code, being Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18

Duty

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

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, 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

Intervenors

CERTIFICATE OF THE INTERVENORS, HIV & AIDS LEGAL CLINIC ONTARIO, CANADIAN HIV/AIDS LEGAL NETWORK AND CANADIAN PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH

1. An order under subrule 61.09(2) is not required
2. The Intervenors, the HIV & AIDS Legal Clinic Ontario, Canadian HIV/AIDS Legal Network and Canadian Professional Association for Transgender Health estimate 20 minutes will be required for their oral argument.

May 8, 2017

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Court File Nos. 499/16 and 500/16

THE CHRISTIAN MEDICAL AND DENTAL SOCIETY OF CANADA et al
Applicants

v.

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO
Respondent

ONTARIO *SUPERIOR COURT OF JUSTICE*
DIVISIONAL COURT

Proceeding commenced at Ottawa
and Transferred to Toronto

FACTUM OF THE INTERVENORS, HIV & AIDS LEGAL CLINIC ONTARIO, CANADIAN HIV/AIDS LEGAL NETWORK AND CANADIAN PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH

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