



## Protection of Conscience Project

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# Joint intervention in *Carter v. Canada*

Supreme Court of Canada

15 October, 2014

*Oral Submission of the Interveners: Catholic Civil Rights League, Faith and Freedom Alliance, Protection of Conscience Project.*

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## Introduction:

The Catholic Civil Rights League, Faith and Freedom Alliance and the Protection of Conscience Project were jointly granted intervener status in *Carter* by the Supreme Court of Canada. The joint factum voiced concern that legalization of physician assisted suicide and euthanasia would likely adversely affect physicians and health care workers who object to the procedures for reasons of conscience. The factum was supplemented by the following oral submission.

Time stamps are cited to allow the relevant section of the Supreme Court webcast<sup>1</sup> to be located. Annotations have been added here to clarify references in the text.

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## Robert W. Staley (Counsel for the interveners)

[449:32/491:20]

. . . We represent the Catholic Civil Rights League, the Freedom Alliance and the Protection of Conscience Project. And just from the name of our clients, we represent a group that is diverse. The first of the two interveners that are identified are what Mr. Arvay might call "church groups."<sup>2</sup> The second one is the Protection of Conscience Project, is an intervener that does not take a position on the merits of the appeal. . .

[450:27/491:20]

. . . Our submissions today go to the issue of remedy. Because our clients don't take a position on the appeal, the submissions we make, and that's probably why I'm last, go to what happens if you decide to allow the appeal. And our clients, though they are diverse in their views on the merits of the appeal, their position and their submission to you is that in the event that you declare that Section 241 is invalid, you should at the same time provide direction to the legislature, in addition to providing the legislature time to remedy the problem, to give direction to the legislature that is sufficient to protect the freedom of conscience of healthcare providers who object to directly or indirectly participating in physician assisted death.

[451:16/481:20]

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And, and just before I get into the three points that I want to make that are set out in our outline, I listened with interest to the comments made by counsel for the Attorney General for Quebec, who said that the Quebec statute, which at some point may come before you, is intended to do precisely that,<sup>3</sup> and I would say to you it does exactly, it does nothing of the sort. And it's precisely the sort of thinking that, in our submission, ought to be protected against.

[451:41/491:20]

The three points that I want to develop briefly, I'm going to take you briefly just to a couple of items in my condensed book are the following.

The first one is that freedom of conscience protects sincerely held moral beliefs.

The second point I want to make is that healthcare providers have no legal duty to kill, and - this is more to the point of the submissions I want to make - or to assist in killing patients.

And the third one is that direction to the legislatures is necessary to protect freedom of conscience, especially when we hear the counsel for the Quebec Attorney General say that the province has done exactly that when I say they haven't.

[452:21/491:20]

So I want to start now with the first of the three submissions I'm making briefly. And that deals with the freedom of conscience protecting sincerely held moral beliefs.

This court has only addressed section, the freedom of conscience in Section 2(a) in one case, and that's in Justice Morgentaler's reasons, in, uh, Justice Wilson's reasons in *Morgentaler*.<sup>4</sup> I've given you the relevant abstract at my compendium at Tab 3, and at page 178 [Figure 1] she notes there, that freedom of conscience is personal morality which is not founded in religion and conscientious beliefs which are not religiously motivated. And it's important to note that while religion obviously has views on killing, it's possible to have moral views about killing that are divorced from religion.

And in terms of how those are to be protected, we say that the test for triggering a freedom of conscience claim should be the same test as the test for triggering a freedom of religion claim, which is as set out in the *Anselem* case:<sup>5</sup>

- Does the claimant have a moral practice or belief that calls for a particular line of conduct?
- And, secondly, is he or she sincere in his or her belief?

And there is no reason, in my submission, to distinguish between freedom of conscience and freedom of religion in respect of the protection that Section 2(a) affords.

[453:44/491:20]

The next point I want to make is, deals with there being no legal duty to kill or assist in killing patients. And I have extracted, in Tab 6 of the compendium, an extract from the *Rodriguez* trial decision,<sup>6</sup> where the court there notes in the, in paragraph 15 [Figure 2], that dealing with the subject of physician assisted suicide there could be no duty at law on a physician to assist the petitioner in achieving her goal, which, of course, in that case, was death.

And in this case, we hear from Mr. Arvay that there is no suggestion that a particular physician should be compelled to assist in suicide or perform euthanasia.<sup>7</sup> The issue that we're concerned with, that my client is concerned with, is what is, what happens if one is asked to assist indirectly.

[454:32/491:20]

And the trial judge admitted into evidence an expert report by the Royal Society of Canada<sup>8</sup> that I have extracted at Tab 9, and you will see from the report that what the Royal Society calls for, that's uh, I've sideboarded the portion, it begins three lines down, is that where a physician decides that he or she is not going to help kill a patient, he or she has a duty to refer the patient to somebody who will kill them [Figure 3].

[455:01/491:20]

And, you know, it's not like we're talking here about someone who's got a hangnail, you're talking about something that, for many people, is a very deeply, deeply held view, whether it's religiously based or not. And the view here from the Royal Society is that where this right, where this right is recognized, that physicians have to cooperate in allowing for physician assisted suicide to happen, even if they are not the ones who are prepared to provide it. And our submission to you on behalf of our intervenor clients, is that no health care professional should be at legal jeopardy, because, including professional jeopardy, because he or she refuses to kill patients or take steps to indirectly assist patients who wish to kill themselves.

[455:48/491:20]

I now go to my third point, which is that the direction is necessary. And as we have heard, the court has heard today in submissions that you've already received, Quebec is the first province to adopt legislation expressly permitting physician assisted death. And I have extracted, at Tab 15, a relevant section of the statute, it's section 44\* that I want to refer you to, and this is the one that counsel for the Attorney General of Quebec said protected physicians rights.

[456:20/491:20]

If you take a look at section 44\* it provides that the Act does not limit the right of health care professionals to refuse - pause there - in accordance with their code of ethics - to provide or take part in providing end of life care for reasons of conscience [Figure 4]. And so the question, of course, is, well, what does the code of ethics say? And what will the physicians' societies say to people who have a moral view on this issue, that opposes not only the act of killing, but also the act of assisting in killing, even including by making the referral?

[456:54/491:20]

When you turn over the next tab and you find that the code of ethics for physicians in Quebec,<sup>9</sup> which we have extracted, provides in Section 24 that the physician must, where his personal convictions prevent him from prescribing or providing professional services, acquaint the patient with the convictions and advise him of the possible consequences, and then goes on to say the

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\* Section 44 was the section number in the original bill; it is now Section 50.

physician must then offer to help the patient find another physician. [Figure 5]

So for the physician who opposes physician assisted suicide has that, opposes on the basis of conscience, believes that it is morally wrong according to the person's conscience to participate in physician assisted suicide. Remember, this is an act that, until a few years ago, was a criminal act in Canada. A criminal act. For someone to refuse to engage in a criminal act is now being told, in effect, you have to cooperate to the extent that you refer them to somebody who will actually kill them.<sup>10</sup>

And it's our respectful submission that if this view is adopted in Canadian law, health care providers may be compelled to act, directly or indirectly, as is set out in Quebec, against their constitutionally protected, sincerely held moral beliefs, and that those moral beliefs, in my submission, merit constitutional protection, and that this court, if it decides to allow the appeal and directs the legislature that the legislation should be fixed, in my submission you should, at the same time, provide that any fix to legislation take into account the constitutional rights of those who object, as a matter of conscience, to killing, directly or indirectly, other people.

Thank you.

[458:40/491:20]

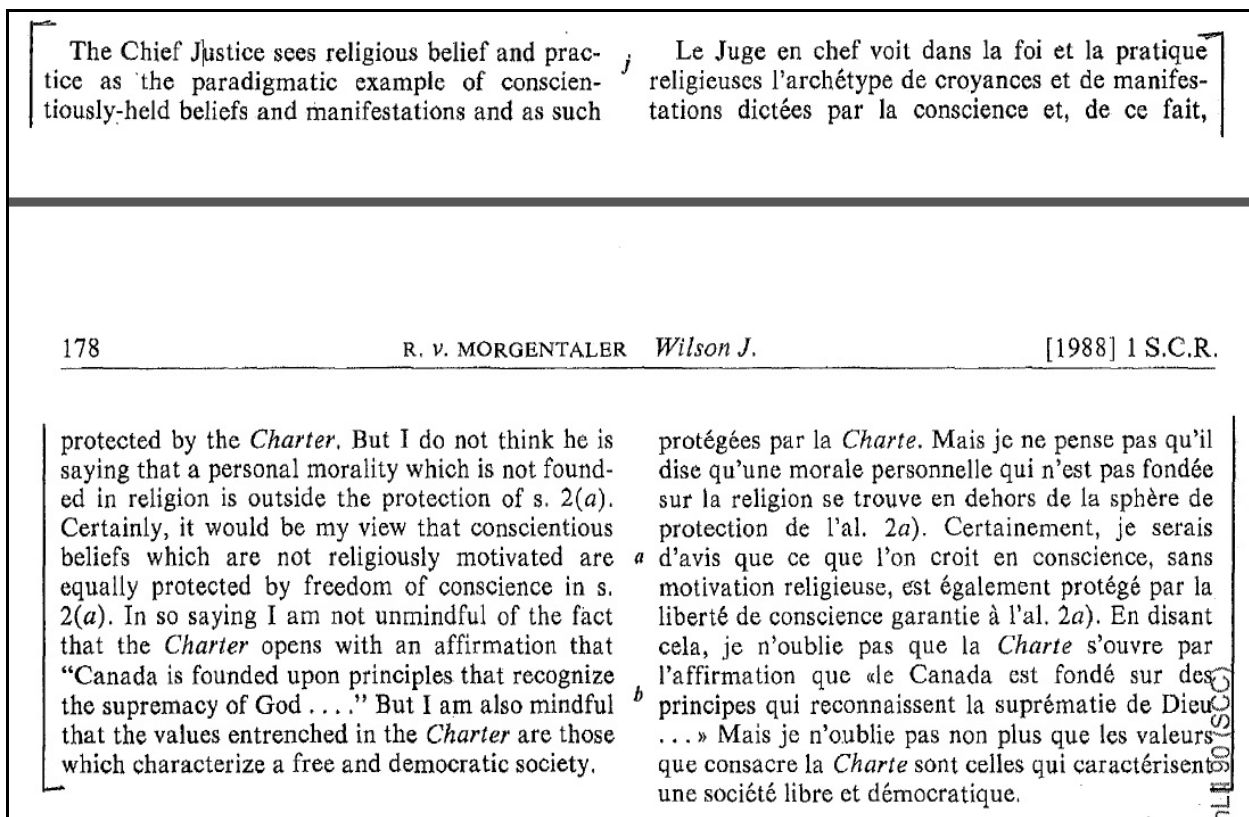


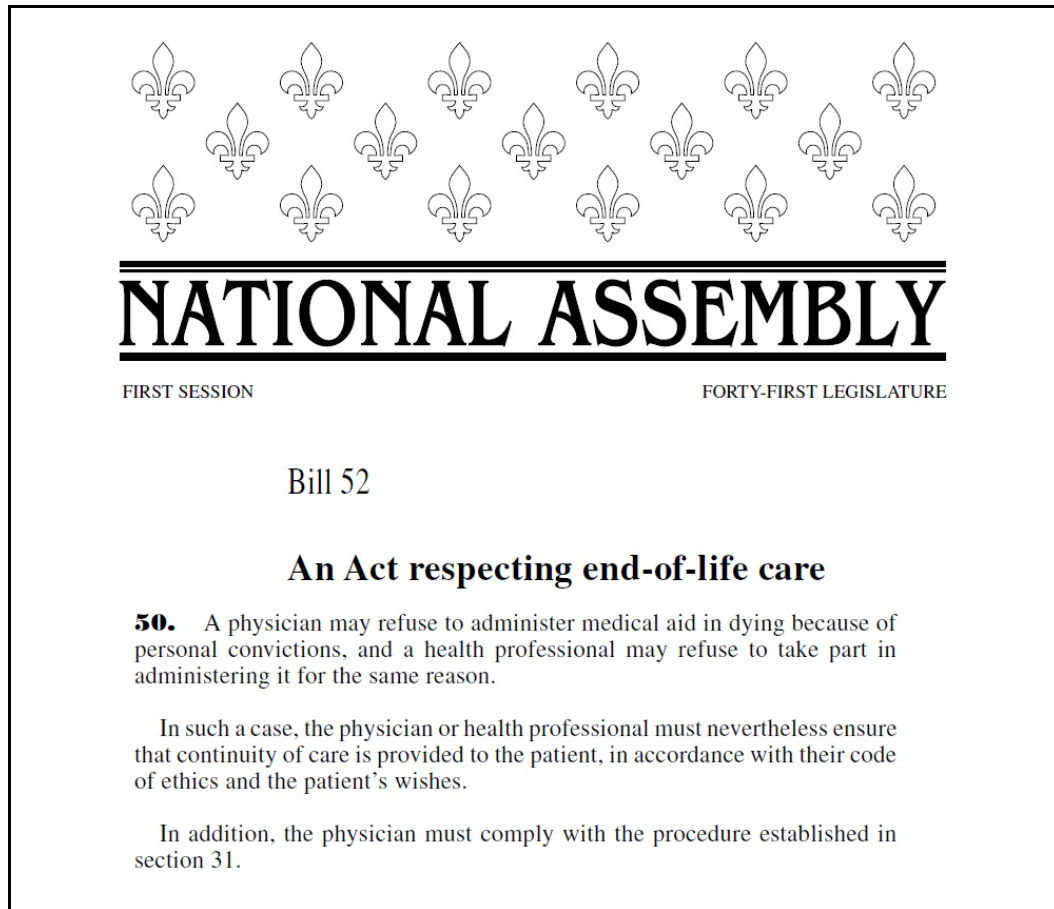
Figure 1

15 As to the submission that the right to life, liberty and security of the person of the petitioner and her fundamental choices are affected by s. 241, in my opinion, s. 241 does not impact on her choices. Her choice can be made; the difficulty that she faces is the impact of this disease with reference to the timing of the event she wishes to occur. At best, all the petitioner would have, absent s. 241, would be an opportunity to request a medical professional to assist her in achieving her goal. If she has a constitutionally protected right to achieve that goal then of necessity there must be a corresponding duty either not to interfere with the attainment of that right or alternatively to ensure that the right is recognized. In the case at bar, dealing with the subject of physician-assisted suicide, in my view, there could be no corresponding duty at law on a physician to assist the petitioner in achieving her goal. Consequently, if s. 241 were struck on the basis that it violated s. 7 *Charter* rights, she would have the right to request assistance but the person requested to so perform would have no duty at law (with or without s. 241) to comply with the petitioner's wishes. If it were otherwise and such a duty existed which would be enforceable at the instance of the petitioner, it would ultimately mean that the petitioner could apply for a court order to compel another to assist her in carrying out her wishes. When the petitioner's position is taken to that extreme it demonstrates, in my view, that there is no right as there is no corresponding duty. Insofar as s. 241 may be alleged to interfere with her life, liberty or security of person, that only does so on the basis that it interferes with the rights of others who may wish to assist the petitioner in achieving her goal. The petitioner's choices remain regardless of s. 241.

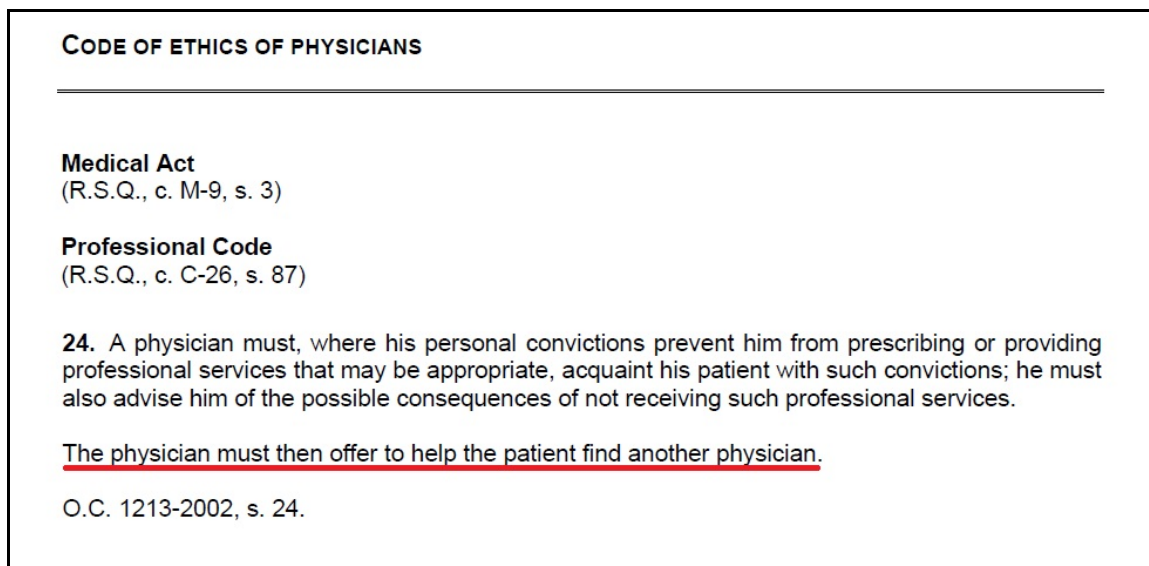
Figure 2

The image shows the cover of a report. At the top right, there are logos for the Royal Society of Canada (RSC) and the Société royale du Canada (SRC). The RSC logo includes the text 'The Royal Society of Canada The Academies of Arts, Humanities and Sciences of Canada'. The SRC logo includes the text 'La Société royale du Canada Les Académies des arts, des lettres et des sciences du Canada'. On the left side, the word 'REPORT' is written vertically. The main title is 'The Royal Society of Canada Expert Panel: End-of-Life Decision Making' in a large, serif font. Below the title, the date 'November 2011' is printed. A list of panel members is provided: Prof. Udo Schuklenk (Chair), Prof. Johannes J. M. van Delden, Prof. Jocelyn Downie, FRSC, Prof. Sheila McLean, Prof. Ross Upshur, and Prof. Daniel Weinstock. At the bottom, a numbered list item '3.' is visible, stating: 'That health care professionals are not duty-bound to accede to the request of competent and informed individuals who have formulated the uncoerced wish to die, but they may do so. If their religious or moral conscience prevents them from doing so, they are duty bound to refer their patients to a health care professional who will.'

Figure 3



**Figure 4**



**Figure 5**

## Notes:

1. Supreme Court of Canada, 385591, *Lee Carter, et al. v. Attorney General of Canada, et al.* (British Columbia) (Civil) (By Leave) Webcast  
(<http://www.scc-csc.gc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=35591>)  
(Accessed 2014-10-19)
2. In his opening remarks, Joseph Arvay, counsel for the appellants, said that their most “vociferous opposition” came from “some church groups.” 74:27/491:20 to 75:04/491:20
3. Responding to a question from Mr. Justice LeBel, M. Jean-Yves Bernard, counsel for the Attorney General of Quebec, had affirmed that Quebec’s *Act Respecting End of Life Care* took into account conscientious objection to euthanasia by physicians. 170:09/491:20 to 172:47/491:20
4. *R. v. Morgentaler* (1988) 1 S.C.R. 30, p. 166  
(<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do>) Accessed 2014-08-19.
5. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47  
(<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2161/index.do>) Accessed 2014-10-18.
6. *Rodriguez v British Columbia (Attorney General)*, [1992] BCJ no 2738 (WL Can)  
(<https://www.canlii.org/en/bc/bcsc/doc/1992/1992canlii726/1992canlii726.html?searchUrlHash=AAAAAQAJcm9kcmlndWV6AAAAAAAE>)
7. In his opening remarks, Joseph Arvay said, “[N]o one is suggesting that a physician who has a religious objection to assisting a patient with his or her death must do so.” 74:27/491:20 to 75:04/491:20
8. The report was introduced at trial by Mr. Arvay.
9. Collège des médecins du Québec, *Code of Ethics of Physicians*, para. 24  
(<http://www.cmq.org/en/Public/Profil/Commun/AProposOrdre/~~/media/Files/ReglementsANG/cmcodeontoan.ashx?61323>) Accessed 2013-06-23.
10. This statute is recommended by Mr. Arvay as a suitable model for new legislation. In the SCC on appeal from the BCCA, *Factum of the Appellants*, para. 156, note 312  
(<http://bccla.org/wp-content/uploads/2012/12/2014-05-13-Appellants-Factum.pdf>)