Court of Appeal File No.: _____
Divisional Court File Nos. 499-16 / 500-16

**COURT OF APPEAL FOR ONTARIO**

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
(Moving Parties)

- and -

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

Respondent
(Respondent)

- and -

ATTORNEY GENERAL OF ONTARIO

Intervener

APPLICATION UNDER rules 14.05(1), 38 and 68 of the *Rules of Civil Procedure* and the *Judicial Review Procedure Act*, RSO 1990, c.J.1, s 2

**NOTICE OF MOTION FOR LEAVE TO APPEAL**

The moving parties will make a motion to the Court of Appeal for Ontario to be heard 36 days after service of the moving parties' motion record or factum or on the filing of the moving parties' reply factum, if any, whichever is earlier, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

**PROPOSED METHOD OF HEARING**: The motion is to be heard in writing under rule 61.03.1 of the Rules of Civil Procedure.

**THE MOTION IS FOR** an order granting leave to the moving parties to appeal to the Court of Appeal from the order of the Divisional Court pronounced on January 31, 2018, made at Toronto;

**THE GROUNDS FOR THE MOTION ARE**

**A. The Applicants**

1. Dr. Michelle Korvemaker, Dr. Isabel Nunes, Dr. Betty-Ann Story, Dr. Agnes Tanguay and Dr. Donato Gugliotta (the “Individual Applicants") are each physicians licensed to practice medicine in Ontario. The Individual Applicants practice medicine in various parts of Ontario in family medicine, emergency medicine, palliative care and anesthesia.
2. Each of the Individual Applicants’ sincerely held religious beliefs and consciences prevent them from participating, directly or indirectly, in the provision of certain services such as abortion or Medical Assistance in Dying (“MAID”).
3. The Christian Medical and Dental Society of Canada (“CMDS”), is a national and interdenominational association of Catholic and Protestant Evangelical Christians doctors and dentists. It has approximately 1,700 members across Canada, representing a wide variety of specialties and practice types. The CMDS’s members cannot, because of their sincerely held religious beliefs and consciences, directly or indirectly participate in the provision certain services such as abortion or MAID.
4. The Canadian Federation of Catholic Physicians’ Societies (“CFCPS”), is a national association of Catholic Physicians’ guilds, associations and societies from eleven cities across Canada. As Roman Catholics, the CFCPS’ members are precluded, because of their sincerely held religious beliefs and consciences, from participating, directly or indirectly, in the provision certain services such as abortion or MAID.
5. Canadian Physicians for Life (“CPL”) is a non-religious national association of 3,000 pro-life physicians, retired physicians, resident students and medical students across Canada. CPL’s members believe that every human life, regardless of age or infirmity, is valuable and worthy of protection. Most of CPL’s members are, based on personal conscience, unable to

participate, directly or indirectly, in the provision certain services such as abortion or MAID.

**The Respondent**

6. The respondent College of Physicians and Surgeons of Ontario ("CPSO") regulates the medical profession in Ontario under the *Regulated Health Professions Act* and the *Health Professions Procedural Code.* The Act does not provide the CPSO with the mandate or objective of ensuring access to health care. Rather, the CPSO's mandate is to ensure that physicians are qualified and competent.

**The Impugned Policies**

7. On March 6, 2015, the CPSO enacted Policy Statement #2-15: *Professional Obligations and Human Rights* (the "POHR" policy). The POHR policy included a requirement that physicians with a conscientious objection to a particular procedure or pharmaceutical provide patients with an "effective referral" for the it. It read:

> Where physicians are unwilling to provide certain elements of care due to their moral or religious beliefs, an effective referral to another health care provider must be provided to the patient. An effective referral means a referral made in good faith, to a non-objecting, available, and accessible physician or other health-care provider. The referral must be made in a timely manner to reduce the risk of adverse clinical outcomes. Physicians must not impede access to care for existing patients, or those seeking to become patients.

8. The POHR policy also included a requirement that physicians directly provide, perform or prescribe procedures or pharmaceuticals to which they have a conscientious objection "in an emergency, where it is necessary to prevent imminent harm, even where that care conflicts with" the physician's conscience or religious beliefs.

9. On June 21, 2016, the CPSO enacted Policy 4-16: *Medical Assistance in Dying* ("MAID policy"). Like the POHR policy, the MAID policy (collectively the "Impugned Policies") required physicians who have a conscientious objection to MAID to nonetheless provide an

effective referral. It read:

> Where a physician declines to provide medical assistance in dying for reasons of conscience or religion, the physician must not abandon the patient. An effective referral must be provided. An effective referral means a referral made in good faith, to a non-objecting, available, and accessible physician, nurse practitioner or agency. The referral must be made in a timely manner to allow the patient to access medical assistance in dying. Patients must not be exposed to adverse clinical outcomes due to delayed referrals.
>
> The federal legislation does not compel physicians to provide or assist in providing medical assistance in dying. For clarity, the College does not consider providing the patient with an 'effective referral' as 'assisting' in providing medical assistance in dying.

**The Two Applications Below**

10. After the enactment of the POHR policy, the Applicants brought a Rule 14 Application in Superior Court in Ottawa, asking the Court to strike and declare portions of the POHR policy unconstitutional. After the enactment of the MAID policy, the Applicants brought an Application for Judicial Review in the Divisional Court in Ottawa seeking a review of the CPSO's decision to enact the MAID policy.

11. On the consent of counsel, both applications were transferred to the Divisional Court in Toronto and ordered to be heard together. In adjudicating both applications, the Divisional Court concluded that the Rule 14 Application ought to have been brought as a judicial review application and proceeded to treat it as though it had been.

12. In support of the POHR Application, the Applicants filed twenty affidavits. Five affidavits were from the Individual Applicants and three from the organizational Applicants. Eleven affidavits were from various experts and one affidavit from a patient of one of the individual Applicants. The CPSO filed ten affidavits on behalf of seven affiants. Each of the Applicants (individual and organizational) was cross-examined on their affidavits. Nine of the Applicants' experts were cross-examined on their affidavits. Five of the CPSO's affiants

were cross-examined.

13. In support of the MAID Application, the Applicants filed twenty-five affidavits. Five affidavits were from the Individual Applicants and three from the organizational Applicants. Sixteen affidavits were from various experts and one affidavit from a lawyer in the Applicants' lawyers' office. The CPSO filed ten affidavits on behalf of six affiants.
14. Each of the Applicants (individual and organizational) were cross-examined on their affidavits. Eleven of the Applicants' experts were cross-examined on their affidavits. Five of the CPSO's affiants were cross-examined.
15. The Attorney General of Ontario ("AGO") filed two affidavits for use on both applications. One of the AGO's affiants was cross-examined. The transcripts of cross-examinations for both proceedings totaled more than 3,000 pages.
16. Thirteen parties sought leave to intervene. A number of parties proceeded in coalitions, resulting in seven motions for leave to intervene being filed. The AGO intervened as of right. All motions for leave to intervene proceeded with the consent of the main parties.
17. On January 31, 2018, the Divisional Court dismissed both Applications.

**The Applicants' Appeal**

18. An appeal from an order of the Divisional Court, on a question that is not solely a question of fact, lies at the Court of Appeal with leave of the Court.
19. When considering whether to grant leave to appeal, the Court considers various factors, each of which apply here and each of which favours that leave be granted. These include:
    a. Whether the Divisional Court exercised appellate jurisdiction (in which case the applicant for leave is seeking a second appeal) or whether the Divisional Court was sitting as a court of original jurisdiction;

b. Whether the appeal involves the interpretation of a statute or regulation, including its constitutionality;

c. The interpretation, clarification or propounding of some general rule or principle of law; and,

d. Whether the interpretation of the law or agreement in issue is of significance only to the parties or whether a question of general interest to the public or a broad segment of the public would be settled for the future.

**The Divisional Court Erred in Law**

20. The Divisional Court erred in law in dismissing the Applicants' Applications.

21. The Divisional Court erred by not declaring the Impugned Policies to be invalid after finding that their purpose was religious in nature, which was a violation of section 2(a) of the *Charter* and the State's obligation to remain neutral.

22. The Divisional Court erred in concluding that the violation of the Applicants' *Charter* rights is the result of "a conscious choice of the physician to practice in circumstances in which such a conflict could arise." This approach effectively turns the *Charter* on its head and removes its protections by blaming the Applicants, rather than the Impugned Policies, for the religious freedom violation.

23. The Divisional Court erred by not considering the individual Applicants' claim that their 2(a) *Charter* right to freedom of conscience was violated. The Divisional Court conducted no analysis of whether the violation was proven or whether it was saved by section 1.

24. The Divisional Court erred in concluding that the individual Applicants' section 15(1) *Charter* right to equal treatment under the law on the basis of religion was not engaged because their claim rested as a 2(a) freedom of religion claim. This logic guts section 15(1) of the *Charter* of any protection for religious equality, religion being an enumerated ground.

25. The Divisional Court erred in concluding that the Impugned Policies do not disadvantage the Applicants on the basis of religion, in view of section 15(1) of the *Charter*, particularly since it found that the Impugned Policies violated the Applicants' freedom of religion in more than a trivial and insubstantial way.
26. The Divisional Court erred in not considering the unequal burden placed on the Applicants and the implications of those burdens *vis-à-vis* their section 15(1) *Charter* rights.
27. The Divisional Court erred by producing deficient reasons. The Court failed to address the conflicting evidence and advise why it favoured some over others. The Court's conclusions that *inter alia,* mandatory referral would increase access to healthcare, that lack of mandatory referral would lead to harm, or that the regimes in other jurisdictions did not achieve the stated objectives of the Impugned Policies were at best, contested. The Court failed to adequately explain the basis of its conclusions. This constitutes a violation of procedural fairness and is an error of law.
28. The Divisional Court erred in finding that the CPSO's statutory objectives include an obligation to ensure access to health care and an obligation to direct its members, by policies or otherwise, to comply with purported *Charter* values in their practice of medicine, including the furtherance of equitable access to health care services that are legally available in Ontario. The CPSO's mandate is to ensure that individuals practicing medicine in Ontario are competent and qualified.
29. The Divisional Court erred in concluding that section 7 of the *Charter* includes a right to equitable access to legal medical procedures. There was neither evidence nor legal authority to support this conclusion.
30. The Divisional Court erred in imposing *Charter* obligations on physicians to safeguard the

purported *Charter* right to equitable access to health care.

31. The Divisional Court erred in concluding that ensuring access to particular medical procedures or ensuring equitable access to health care was a pressing and substantial objective. The Divisional Court accepted that there was no evidence to suggest that in the absence of mandatory referral, an access problem existed in Ontario or exists in other provinces. The Supreme Court of Canada was clear in *Trinity Western University v. BCCT* that *Charter* violations cannot be justified based on speculative concerns.
32. The Divisional Court erred by relying on speculative concerns to conduct the section 1 *Charter* analysis.
33. The Divisional Court erred in finding that speculative salutary effects of the Impugned Policies were proportionate to the actual deleterious effects.
34. The Divisional Court erred by placing the burden on the Applicants to prove that the Impugned Policies were not justified under section 1 of the *Charter*, when the onus to justify *Charter* violations rests with the State actor, in this case, the CPSO.
35. The Divisional Court erred in ignoring the burden that the Impugned Policies place on physicians of faith. The Divisional Court concluded that physicians could insulate themselves from the risk of being asked to perform or prescribe a procedure or pharmaceutical to which they object by simply rearranging their practices; however, there was no evidence that this was possible, either in terms of meeting their obligations of the Impugned Policies or at a practical level. The Divisional Court simply assumed that physicians could declare new practice or specialty areas, without further training, licensing, certification or having to relocate geographically.
36. The Divisional Court erred in concluding that the effective referral requirement was the

result of careful consideration of alternative and less intrusive options. The evidence was unequivocal that the CPSO would not consider any alternatives to achieving the goal of the Impugned Policies which did not require conscientiously objecting physicians to compromise. There was no evidence that any consideration was given to impairing the freedom of religion and freedom of conscience of physicians as minimally as possible.

37. The Divisional Court erred in finding that the violation of the Applicants' freedom of religion was minimally impairing. At the minimal impairment stage, the Court approached the referral requirement as though it was designed to be an accommodation mechanism (which it is not), rather than the very source of the *Charter* violation (which it is).
38. The Divisional Court erred in concluding that the emergency provision of the POHR policy would not affect the Applicants.

**The Divisional Court Erred in Fact**

39. The Divisional Court made multiple errors in fact, all of which had no basis on the record, and misapprehended the evidence in multiple instances, including but not limited to, finding:
    a. That the mandatory referral requirement was an attempt to accommodate physicians' conscience and religious rights;
    b. The CPSO carefully considered alternative means of achieving their stated objective;
    c. That less restrictive means such as those employed in all other provinces and many other countries would not achieve the stated purpose;
    d. There was evidence on the record to support a reasonable apprehension that not requiring referral by conscientious objectors would impede access to health care;
    e. That patients would suffer harm without the mandatory referral requirement;
    f. That patients could experience shame or stigma associated with a particular medical

service and that such hypothetical stigma could limit the patient's willingness to seek the service in the first place;

g. That the mandatory referral requirement would increase access to health care;

h. That there is a *Charter* right to equitable access to healthcare;

i. That not having the mandatory referral requirement could lead to a risk of deprivation of equitable access to health care;

j. That physicians could insulate themselves from potential conflicts between their religious beliefs and obligations and the obligations imposed by the Impugned Policies;

k. That physicians could change their practices or specialties, or easily modify their practices or specialties, in the absence of evidence of what is required to obtain a specialty, or what would be required to convert to some other specialty or practice area;

l. That the only physicians who are vulnerable because of the Impugned Policies are family physicians in solo practice;

m. That the emergency provision of the POHR policy would not affect the Applicants;

n. That potential psychological and physical harm caused to physicians compelled to violate their consciences and religious obligations could be alleviated without removing the mandatory referral requirement;

o. That any conflict between the Impugned Policies and physicians' religious beliefs is the result of the physician's choice to practice medicine in certain circumstances;

**THE BASIS OF THE APPELLATE COURT'S JURISDICTION** is:

40. Section 6 of the *Courts of Justice Act* which provides that an appeal lies to the Court of Appeal from an order of the Divisional Court on a question that is not a question of fact alone, with leave of the Court of Appeal.

41. The appeal is not on a question of fact alone.

42. There are arguable questions of law or mixed fact and law raised by the Divisional Court's Order, and the proposed appeal involves matters of such importance that it is appropriate that leave should be granted.

43. The proposed appeal is *prima facie* meritorious and raises issues of significance to the parties as well as to the general public. The appeal raises issues around the constitutionality of certain provisions of regulatory policies of the CPSO; the scope of authority of the CPSO*;* and the interpretation of the general legal principles of sections 1, 2 and 15 of the *Charter*.

44. The proposed appeal raises novel questions of law of general interest to the public. The interpretation of those questions of law is of importance to a broad segment of the public.

45. There is no appellate authority on the issues raised. Guidance from this Court is warranted.

46. Rule 61.03.1 of the *Rules of Civil Procedure*.

47. Such further and other grounds as counsel may advise and this Honourable Court permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:**

(a) all affidavits and other material used before the Divisional Court; and

(b) the order of the Divisional Court of January 31, 2018, and the reasons therefor.

February 14, 2018

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Court of Appeal File No.: _____
Divisional Court File Nos. 499-16 / 500-16

**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

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