

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CHRISTIAN MEDICAL AND DENTAL SOCIETY OF CANADA, THE CANADIAN
FEDERATION OF CATHOLIC PHYSICIANS' SOCIETIES, CANADIAN PHYSICIANS
FOR LIFE, DR. MICHELLE KORVEMAKER, DR. BETTY-ANN STORY, DR. ISABEL
NUNES, DR. AGNES TANGUAY and DR. DONATO GUGLIOTTA

Appellants

-and-

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

Respondent

-and-

DYING WITH DIGNITY CANADA,
CANADIAN CIVIL LIBERTIES ASSOCIATION,
THE EVANGELICAL FELLOWSHIP OF CANADA, ASSEMBLY OF CATHOLIC BISHOPS
OF ONTARIO and CHRISTIAN LEGAL FELLOWSHIP,
B'NAI BRITH OF CANADA LEAGUE FOR HUMAN RIGHTS, THE VAAD HARABONIM
OF TORONTO and THE CENTRE FOR ISRAEL AND JEWISH AFFAIRS,
JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS,
CATHOLIC CIVIL RIGHTS LEAGUE, FAITH AND FREEDOM ALLIANCE and
PROTECTION OF CONSCIENCE PROJECT,
ONTARIO MEDICAL ASSOCIATION,
CANADIAN HIV/AIDS LEGAL NETWORK, HIV & AIDS LEGAL CLINIC ONTARIO and
CANADIAN PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH,
WOMEN'S LEGAL EDUCATION ACTION FUND INC.

Interveners

**FACTUM OF THE INTERVENERS,
CATHOLIC CIVIL RIGHTS LEAGUE, FAITH AND FREEDOM
ALLIANCE and PROTECTION OF CONSCIENCE PROJECT**

November 12, 2018

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PART I - OVERVIEW

1. This appeal is about whether the CPSO’s “effective referral” policies (the **Policies**) may violate some physicians’ freedom of conscience. In resolving this issue, this court should consider the scope and nature of freedom of conscience—a question appellate courts have largely ignored in the 35 years since the *Charter* was enacted.

2. The Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project (the **Conscience Interveners**) submit that the “effective referral” system violates physicians’ preservative freedom of conscience (the freedom to refuse to do what is perceived to be evil). It compels physicians to do what they believe is wrong and punishes them if they refuse. Such compulsion treats physicians as a means to an end, violating their freedom of conscience and essential dignity.

3. The Conscience Interveners’ analytical framework modifies the *Oakes* test to minimize the risk of unjustified judicial entanglement in disputed moral issues, and provides the appropriate level of protection for freedom of conscience.

PART II - LAW AND ARGUMENT

A. Freedom of Conscience and the Principle Against Servitude

4. Everybody has the freedom of conscience *and* religion.

Canadian Charter of Rights and Freedoms, s 2(a), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5. In *Big M Drug Mart*, Chief Justice Dickson explained that conscience, like all other fundamental freedoms in the *Charter*, is central to the Canadian political tradition. Freedom of

conscience “is characterized by the absence of coercion or constraint.” No one should be forced to act in a way contrary to his or her beliefs or conscience, subject to specific limitations.

R v Big M Drug Mart Ltd., [1985] 1 SCR 295 ¶95, Joint Book of Authorities (**JBA**).

6. Despite its central prominence in the *Charter*, the freedom of conscience has never been defined, never mind applied. In *Morgentaler*, Justice Wilson stated that freedom of conscience should be “broadly construed” to extend to “conscientiously-held beliefs, whether grounded in religion or in a secular morality.” Quoting from *Big M Drug Mart*, Justice Wilson discussed conceptualizations of freedom of conscience, drawn from philosophy, focusing on the integrity and dignity of the individual.

R v Morgentaler, [1988] 1 SCR 30 at 176-178, 179-180, Appellant’s Book of Authorities (**ABA**), Vol. 2, Tab 13.

7. Justice Wilson was writing within a philosophical tradition in which an individual who makes conscience claims is unique and identifies as “I” and “me”. That individual has a single identity served by a single conscience that governs their conduct in both their private and professional life. This moral unity is identified as an individual’s “integrity”.

Jacques Maritain, *The Person and the Common Good*, translated by John J. Fitzgerald (New York: The Scribner Press, 1947) at 46, **JBA**.

8. Key to this tradition is the concept that humans are not a means to an end, and we should never be exploited by someone as a tool to serve someone else’s good. Justice Wilson’s reasoning in *Morgentaler* affirmed that the *Charter* presumes a particular understanding of the individual, who is not “a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity.” The state should not therefore

enforce “one conscientiously-held view at the expense of another,” for that is “to deny freedom of conscience to some, to treat them as means to an end, to deprive them...of their ‘essential humanity’.”

Morgentaler, at 164, 179, ABA, Vol. 2, Tab 13.

9. This concept—that humans are not a means to an end—is the principle against servitude. Justice Wilson insisted that, in a free and democratic society, “the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.” This is “the basic theory underlying the *Charter*”.

Morgentaler, at 166, ABA, Vol. 2, Tab 13. See also *R v Salituro*, [1991] 3 SCR 654 ¶48, JBA, and *Québec (Curateur public) v Syndicat national des employés de l’Hôpital St Ferdinand*, [1996] 3 SCR 211 ¶103, JBA.

10. The principle against servitude is a principle of fundamental justice or, like the concept of human dignity, so foundational to human rights and freedoms it is difficult to imagine how a violation of the principle might be justified.

B. Perfective and Preservative Freedom of Conscience

11. Justice Wilson’s treatment of freedom of conscience does not provide a framework for application of the freedom of conscience by our courts. The Conscience Interveners’ proposed analytical framework combines Justice Wilson’s articulation of the principle against servitude with the recognition that freedom of conscience is exercised in two complementary ways: to pursue an apparent good (perfective freedom) or to avoid an apparent evil (preservative freedom).

Sean Murphy & Stephen J Genuis, "Freedom of Conscience in Health Care: Distinctions and Limits" (2013) 10:3 *Journal of Bioethical Inquiry* at 348, JBA.

(i) Perfective Freedom of Conscience

12. Perfective freedom of conscience is exercised by pursuing an apparent good in accordance with an individual's conscience. For example, physicians who provide medical assistance in dying, because they believe it benefits a patient, can be motivated by perfective freedom of conscience.

13. Perfective freedom of conscience is independent of a particular definition of good. Each individual can express (in different ways) the general idea that doing good contributes to bettering themselves and society.

(ii) Preservative Freedom of Conscience

14. Preservative freedom of conscience is exercised by refusing to participate in an apparent wrong. For example, through conscientious objection to mandatory military service, a person can preserve one's own integrity and autonomy, even if the refusal does not achieve the personal growth that may be possible through acts of generosity, charity or assistance. This refusal *preserves* rather than develops personal autonomy.

15. Preservative freedom of conscience is more fundamental, and more limited, than perfective freedom of conscience. Refusing to do what is believed to be wrong is foundational to personal integrity and necessary for the continuing development of perfective freedom of conscience. An expectation that people will not do what they believe to be wrong is a minimal requirement for social stability reflected in law.

R v Ruzic, 2001 SCC 24 ¶62, JBA.

C. Freedom of Conscience's Structure and Limits

16. While the state can legitimately limit the exercise of freedom of conscience to safeguard the common good, it does not follow that limits on perfective and preservative freedom of conscience can be justified on the same grounds or to the same extent.

17. Limiting perfective freedom of conscience prevents people from doing what they believe to be good. If this infringes their freedom of conscience, the infringement must be demonstrably necessary, minimally impairing and strictly construed. Such infringements do not necessarily harm the affected individual, nor necessarily violate the principle against servitude.

R v Oakes, [1986] 1 SCR 103 ¶¶64-71, ABA, Vol. 1, Tab 2.

18. In contrast, limiting preservative freedom of conscience, by forcing people to do something they believe is wrong, harms the affected individual. For example, an objecting physician believed that she had “no choice” but to obey a directive to make an effective referral for medically assisted dying. The physician told the legislative committee that “this was destructive to my very core. ... I felt like a shell of myself. Months later, I often still do. I came very close to leaving palliative care at the time, and every day I continue to question my ability to stay in this field”.

Ontario, Legislative Assembly, Standing Committee on Finance and Economic Affairs, “Medical Assistance in Dying Statute Law Amendment Act 2017” in *Official Report of Debates (Hansard)* 41st Parl., 2nd Sess., No F-17 (30 March 2017) at F-570, JBA.

19. Complicity in wrongdoing triggers what Justice Wilson described as a “response of the whole person”; it elicits an instinctive sense of abhorrence in people, reflecting a reaction to something fundamentally opposed to one’s integrity and dignity.

Morgentaler, at 171, ABA, Vol. 2, Tab 13.

20. Legal coercion may be thought to mitigate or negate a physician’s personal moral culpability because it is the state or the patient making the choice. But this ignores the essential unity of the individual. No act is possible unless one chooses to act, meaning we cannot completely separate ourselves from our actions, even if coerced. It disregards the response of the whole person.

21. Forcing someone to participate in perceived wrongdoing demands the submission of intellect, will, and conscience, and violates the principle against servitude by reducing that person to the status of a tool to be used by others. This manner of servitude cannot be reconciled with principles of equality. It is an assault on human dignity that deprives physicians of their essential humanity.

D. Coercing Physicians to Participate in Perceived Wrongdoing

22. Under the Policies, physicians who object to performing a morally contested procedure for reasons of conscience must make an “effective referral”. Some objecting physicians may make an effective referral because they share the CPSO’s belief that doing so relieves them of moral responsibility for the act. Other physicians, like the appellants, may refuse to do so because they believe that an “effective referral” makes them a party to wrongdoing. This reflects a reasonable and widely shared approach to moral reasoning. But by compelling physicians to

perform morally contested procedures they believe to be wrong, the Policies discriminate against physicians who refuse to make an “effective referral”.

23. The Policies prohibit physicians’ exercise of preservative freedom of conscience in every situation in which it might be exercised, which amounts to the complete suppression of freedom of conscience.

24. The discrimination and violation of preservative freedom of conscience is deliberate, not incidental. The specific purpose of the Policies is to deprive objecting physicians of “meaningful choice” in exercising fundamental freedoms, something the Supreme Court of Canada described as “very serious” in *Hutterian Brethren*.

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 ¶¶92-94, Respondent’s Book of Authorities, Vol. 1, Tab 3.

E. Justifying Limits on Preservative Freedom of Conscience

25. When the issue concerns a limitation on freedom of conscience, the *Oakes* analysis should incorporate the distinction between perfective and preservative freedom of conscience and apply the principle against servitude. The analysis should be informed by four considerations.

26. First, if suppression of preservative freedom of conscience is contemplated, it should only be in the most exceptional circumstances where especially compelling evidence justifies it:

- (a) Refusing to do what one believes to be wrong is ethically normative. It does not violate any *prima facie* legitimate expectation, nor does it require the cooperation and assistance of others, who remain free to find other ways to satisfy their desires or achieve their goals.

- (b) Preservative freedom of conscience is a much more limited freedom, more foundational to society, more fundamental to the good of individuals, and violations of it have profoundly adverse personal effects.
- (c) Preservative freedom of conscience cannot be incrementally limited or infringed; it can only be suppressed. Suppression (should it be justified) must not be misrepresented as minimally impairing.

Carter v Canada (AG), 2015 SCC 5 ¶102, JBA.

27. Second, it would be wrong to suppress preservative freedom of conscience to privilege perfective freedom of conscience. For example, it would be wrong for a court to find a patient's exercise of perfective freedom of conscience trumps or undermines a physician's exercise of preservative freedom of conscience.

28. Third, unlike infringement of perfective freedom of conscience, violating preservative freedom of conscience will almost certainly violate the principle against servitude. A law contrary to the principles of fundamental justice has never been justified under the *Charter* and the possibility of justification is remote. The majority of the Supreme Court in *Re B.C. Motor Vehicle Act* stated that it may be possible, "but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemic, and the like." The Supreme Court has also suggested that the principle against servitude may overcome even substantive evidence favouring the state position.

Re B.C. Motor Vehicle Act, [1985] 2 SCR 486 ¶93, JBA; *R v Nguyen*, [1990] 2 SCR 906 ¶28, JBA.

29. Fourth, suppression can be justified only case-by-case, and cannot be justified in advance by a general rule through legislation, regulation or professional guidelines. There can be no freestanding legal compulsion or duty to do what one believes to be wrong.

30. The onus rests with the state to demonstrably justify the limit of the *Charter* violation, a burden it has failed to meet here.

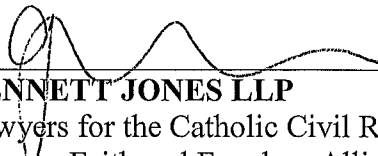
F. Reconciling Patients' Rights with Physicians' Freedoms

31. The Policies deliberately suppress physicians' exercise of preservative freedom of conscience to make them a means to an end. This subordination imposes servitude that cannot be reconciled with principles of equality and dignity. It violates the "basic theory" of the *Charter*.

32. The exercise of freedom of conscience can be accommodated without prejudice to the dignity, integrity and rights of either patients or physicians. All that is required is enough imagination to produce policies that help patients find non-objecting physicians without disadvantaging physicians who do not share the CPSO's beliefs. This approach follows the "basic theory" of the *Charter*: "The state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life."

R v NS, 2012 SCC 72 ¶32-33, ABA, Vol. 1, Tab 7; *Morgentaler*, at 166, ABA, Vol. 2, Tab 13.

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



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**SCHEDULE “A”
LIST OF AUTHORITIES**

JURISPRUDENCE

1. *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295
2. *R v Morgentaler*, [1988] 1 SCR 30
3. *R v Salituro*, [1991] 3 SCR 654
4. *Québec (Curateur public) v Syndicat national des employés de l’Hôpital St Ferdinand*, [1996] 3 SCR 211
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6. *R v Oakes*, [1986] 1 SCR 103
7. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37
8. *Carter v Canada (AG)*, 2015 SCC 5
9. *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486
10. *R v Nguyen*, [1990] 2 SCR 906
11. *R v NS*, 2012 SCC 72

SECONDARY MATERIAL

1. Jacques Maritain, *The Person and the Common Good*, translated by John J. Fitzgerald (New York: The Scribner Press, 1947)
2. Sean Murphy & Stephen J Genuis, “Freedom of Conscience in Health Care: Distinctions and Limits” (2013) 10:3 *Bioethical Inquiry* 347, online:
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3. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 2nd Sess, No F-17 (30 March 2017), Standing Committee on Finance and Economic Affairs, “Medical Assistance in Dying Statute Law Amendment Act 2017”, online:
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