Court File No.: M48851

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. BETTEY-ANN STORY, DR. ISABEL NUNES, DR. AGNES TANGUAY, and DR. DONATO GUGLIOTTA

Appellants

-and-

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

Respondent

-and-

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

Interveners

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OVERVIEW

1. The Justice Centre for Constitutional Freedoms ("JCCF") intervenes in this appeal on behalf of the Appellants as a friend of the court. Pursuant to the order of Associate Chief Justice Alexandra Hoy, the JCCF will not provide background information respecting this appeal.

ISSUES

2. The JCCF makes three arguments in this intervention: 1) the Divisional Court erred in too broadly defining the objective of the effective referral requirements and thereby immunized the effective referral requirement from challenge under the *Oakes* test; 2) the Divisional Court erred in failing to precisely define "equitable access to healthcare" thereby making the *Oakes* test unworkable; and 3) the Divisional Court erred in finding that patients have a *Charter* right to equitable access to health care.

LAW & ARGUMENT

The Divisional Court erred in too broadly describing the objective of the effective referral requirements

3. It is critically important to precisely define the objective of a law under any s. 1 analysis. The Supreme Court of Canada has stated that the objective of a law must be both "precise and succinct"[1]. If the objective is stated too generally, there will be no meaningful check on the

[1] *R. v. Moriarty*, 2015 SCC 55 at para 29; *R. v. K.R.J.* 2016 SCC at para 63

means employed to achieve the objective, and almost all means will be rationally connected to the objective.[2]

4. At the hearing below, the Divisional Court was tasked with determining the objective of the effective referral requirements of the two CPSO policies. In deciding the issue, the Divisional Court described the objective of the effective referral requirements in both policies as "the facilitation of patient access to healthcare services, and in particular the facilitation of equitable access to such services."[3]

5. The JCCF respectfully submits that, insofar as the objective of the policies was determined to be "access to healthcare", the Divisional Court erred by describing the objective too broadly.

6. The Divisional Court's task in determining the objective of the effective referral requirements was very specific as it was only tasked with determining the objective of the effective referral requirements of the policies, and not the objective of either policy as a whole. As the policies themselves are concerned with specific areas within healthcare, namely human rights and physician assisted death, it stands to reason that the objectives of the policies would be narrower than "access to healthcare". By this fact, it also stands to reason that effective referral requirements would have a more specific purpose than "access to healthcare". A provision in a policy should not have a broader purpose than the policy itself. In the circumstances, the Divisional Court erred insofar as it described the objective of the effective referral requirements broadly as "access to healthcare."

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[2] *R. v. Moriarty*, 2015 SCC 55 at para 28; *Canada v. Carter (Attorney General)*, 2015 SCC at paras 77-78

[3] *The Christian Medical and Dental Association of Canada v. College of Physicians and Surgeons of Ontario*, ONSC 579 (Divisional Court) at paras 146, 149 and 162

7. The effect of describing the objective too broadly is that it immunizes the policy from challenge under the proportionality branch of the *Oakes* test. As stated earlier, the Supreme Court of Canada has noted that almost all means will be rationally connected to a broadly stated objective. An overly broad objective therefore neutralizes the first arm of the *Oakes* proportionality test (rational connection).

8. The Supreme Court of Canada has also stated that an unduly broad objective will almost always lead to a finding that the provision is not overbroad.[4] As overbreadth is tied to the minimal impairment analysis,[5] an overly broad objective will neutralize the second arm of the *Oakes* proportionality test (minimal impairment).

9. In failing to apply the principle that the objective of a law must not be too broad, the Divisional Court erred in law. The error immunized the effective referral policies from meaningful scrutiny under the *Oakes* test and the decision should be set aside.

The Divisional Court erred by failing to precisely define the phrase "equitable access to healthcare" thereby rendering the *Oakes* test unworkable

10. In defining the objective of the effective referral requirements as "access to healthcare," the Divisional Court qualified their finding by stating that the objective was more particularly "equitable access to healthcare".

[4] *R. v. Moriarty*, 2015 SCC 55 at para 28
[5] See *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at 160;

11. The difficulty with the phrase "equitable access to healthcare", as will discussed in more detail below, is that it lacks clarity. This poses a problem which is distinct from the problem of an overly broad objective. An overly broad objective immunizes a law from challenge under the *Oakes* test because the means to achieve it will almost always be rationally connected to it and will almost never be overbroad. In contrast, where an objective is unclear, the *Oakes* test logically becomes unworkable because each branch of the test is tied to objective, and therefore presupposes a clear knowledge about the objective. Consider that under the first branch of the *Oakes* test, the objective must be of sufficient importance to warrant overriding a constitutional protected right or freedom. Under the second branch of the *Oakes* test, the limit on the *Charter* right must be a) rationally connected to the objective; b) impaired no more than necessary to accomplish the objective; and c) must be balanced against the salutary effects of the objective.[6]

The phrase "equitable access to healthcare" lacks clarity

12. In finding that the objective of the effective referral requirements was access to healthcare, and in particular equitable access to healthcare, the Divisional Court specifically chose not to adopt the language of either party. The Applicants, in their submissions at the hearing, defined the objective of the requirements as "ensuring access to healthcare." The Respondents described the objective more narrowly as "the articulation of physicians' professional and legal obligations to provide health services without discrimination."[7]

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[6] *R. v. Oakes*, [1986] 1. S.C.R. 103 at para 69-70

[7] *The Christian Medical and Dental Association of Canada v. College of Physicians and Surgeons of Ontario*, ONSC 579 (Divisional Court) at paras 146, 149 and 162

13. Despite not specifically adopting the language of either party concerning the objective, the Divisional Court did not define "equitable access to healthcare", nor did it explain how its finding about the objective was different from the submissions of the parties. While it might not be necessary in all cases for the court a court to explicitly define an objective of a law or policy, the word "equitable" can have different meanings in different contexts. The question is what does "equitable access" mean in the context of this case?

14. One interpretation of equitable access to healthcare would simply be access to healthcare without discrimination based on the prohibited grounds set out in the Ontario *Human Rights Code*. Such an interpretation would be bolstered by the fact that one of the policies in question, "Policy Statement 5-08: *Physicians and the Ontario Human Rights Code*", specifically uses the phrase "equitable access to healthcare" and it does so within a broader discussion of the Ontario *Human Rights Code*.[8] The difficulty with this interpretation is that the Divisional Court never once mentions the Ontario *Human Rights Code* in its decision.

15. A careful reading of the Divisional Court's decision does not assist in revealing the precise meaning of "equitable access to healthcare". In fact, the Divisional Court appears to find contending purposes respecting equitable access. On the one hand, a reading of paragraph 146 suggests that the objective of the effective referral requirements is to ensure that access to healthcare is generally not impeded by the religious and conscientious objections of physicians. On the other hand, a reading of paragraph 130 suggests that the objective of the effective referral requirement is more narrowly focussed on ensuring that persons who are

[8] Policy Statement #5-08: *Physicians and the Ontario Human Rights Code* as found at tab 6 of Volume 1 of the Appeal Book and Compendium.

vulnerable have access to healthcare. This latter purpose seems to take precedence throughout the case.

16. The JCCF submits that the distinction between the two competing purposes matters. For instance, if equitable access to healthcare means access to healthcare for the vulnerable, there is an argument that the effective referral requirements go too far insofar as they require a referral in all cases where someone seeks a service a physician objects to providing, and not just those cases where the person is vulnerable because of a mental illness, homelessness, drug addiction, a language barrier, or for some other reason. In other words, the requirement is overbroad as it infringes freedom of religion and conscience in a way that bears no relation to the objective of the requirement.[9]

17. In any event, the JCCF submits that it is not clear what the Divisional Court meant by "equitable access to healthcare". As the objective of the policy is insufficiently defined, it is not possible to say that the objective is of sufficient importance to override a *Charter* right, and it is not possible to say that there is proportionality between the objective and the means used to achieve it. The decision should be set aside.

The Divisional Court erred in finding that patients have a *Charter* right to equitable access to healthcare

[9] See *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para 85.

18. The JCCF submits that Divisional Court correctly found that there is no freestanding constitutional right to healthcare in Canada, but it erred in finding that s.7 of the *Charter* confers a *Charter* right to equitable access to medical services that are legally available and that are provided for under the provincial healthcare system.[10]

19. In describing equitable access to healthcare as a *Charter* right, the Divisional Court characterized it as a "natural corollary" to each individual's s.7 right to "life, liberty, and security of the person". It noted that Justice Wilson, in *R v. Morgentaler*, stated that s.7 is concerned with fundamental concepts such as human dignity, individual autonomy and privacy, and that equitable access to healthcare gives effect to these concepts within the context of a single-payer, publically-funded health care system.[11]

20. First, it is important to note that s. 7 of the *Charter* has only been interpreted as restricting the state's ability to deprive individuals of life, liberty, or security of the person. This principle was reiterated fairly recently by the Ontario Court of Appeal in *Flora v. Ontario (Health Insurance Plan, General Manager),*[12] a case in which the court held that a patient does not have a constitutional right to a state funded medical procedure, even if the procedure would save or extend the patient's life. Section 7 has never been used to create a positive obligation on behalf of the state or others.

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[10] *The Christian Medical and Dental Association of Canada v. College of Physicians and Surgeons of Ontario*, ONSC 579 (Divisional Court) at para 80 and 195.
[11] *The Christian Medical and Dental Association of Canada v. College of Physicians and Surgeons of Ontario*, ONSC 579 (Divisional Court) at para 195.
[12] *Flora v. Ontario (Health Insurance Plan, General Manager),* 2008 ONCA 538 at para 106.

21. Second, it should be noted that while Justice Wilson did make references to human dignity and personal autonomy in *R. v. Morgentaler*, she did so within a restrictive context. For example, Justice Wilson stated that respect for human dignity is founded on the right to make fundamental personal decisions without interference from the state.[13] She also stated that the right to liberty contained in s. 7 guarantees to every individual "a degree of personal autonomy over important decisions intimately affecting his or her private life," but she did not impose any obligation on the state other than a requirement to respect the decision.[14] Justice Wilson's approach is therefore consistent with the traditional restrictive use of s. 7 of the *Charter*, but it is not supportive of establishing a *Charter* right to equitable access to healthcare.

22. In addition to the above, the Divisional Court commented about access to health care in connection with the Supreme Court of Canada's decision in *Chaoulli v. Quebec (Attorney General)*. The Divisional Court referred to this decision as standing for the principle that government schemes to provide healthcare must comply with the *Charter*.[15] But *Chaoulii,* like *Morgentaler*, only applies s. 7 in a restrictive context. In *Chaoulli,* the majority of the Supreme Court of Canada found that the Quebec government's healthcare scheme, which prohibited private healthcare services while also failing to deliver reasonable services within the public system, was an infringement of the Appellant's rights to life and liberty under s.7 of the *Charter*.[16] It is in this restrictive context that Chief Justice McLachlin stated that government schemes for public healthcare must be consistent with the *Charter*. There is no

[13] *R. v. Morgentaler,* [1988] 1 S.C.R. at page 166.
[14] *R v. Morgentaler,* [1988] 1 S.C.R. at page 171.
[15] *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35 at para 104; *The Christian Medical and Dental Association of Canada v. College of Physicians and Surgeons of Ontario,* ONSC 579 (Divisional Court) at para 80.
[16] *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35 at para 158

basis in *Chaoulii* for the establishment of a *Charter* right to equitable access to healthcare as a natural corollary of s.7.

23. As a final matter, the error in describing equitable access to healthcare as a *Charter* right was not merely an academic issue which had no effect on the Divisional Court's decision in the case below. There are notably two areas in which this error influenced the Divisional Court's reasoning. First, when the Divisional Court balanced the deleterious effects of the infringement against the salutary effects of the policies, it specifically identified the mistaken *Charter* right as an "important" part of the "social context" in which the balancing had to take place.[17] Second, when conducting the minimal impairment analysis, the Divisional Court identified three considerations relevant to the analysis, the third of which was that the Applicants failed to address the issue of "preserving patients' *Charter* rights of equitable access to healthcare" in the alternative measures they presented to the court.[18]

24. As the error in describing equitable access to healthcare as a *Charter* right had an impact on the Divisional Court's proportionality analysis under the *Oakes* test, the decision should be set aside.

ORDER REQUESTED

25. The JCCF seeks an order that no costs shall be awarded for or against it in this intervention.

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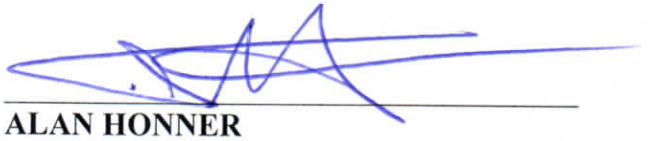
[17] *The Christian Medical and Dental Association of Canada v. College of Physicians and Surgeons of Ontario*, ONSC 579 (Divisional Court) at paras 191-195

[18] *The Christian Medical and Dental Association of Canada v. College of Physicians and Surgeons of Ontario*, ONSC 579 (Divisional Court) at para 161 and 170.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

November 12, 2018



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Schedule A
List of Authorities

1. R. v. Moriarty, 2015 SCC 55
2. R. v. K.R.J. 2016 SCC
3. Carter v. Canada (Attorney General), 2015 SCC 5
4. The Christian and Medical Dental Association of Canada v. College of Physicians and Surgeons of Ontario, ONSC 579 (Divisional Court)
5. RJR MacDonald Inc. v. Canada (Attorney General), [1995] 3 SCR 199
6. R v. Oakes, [1986] 1. S.C.R. 103
7. Flora v. Ontario (Health Insurance Plan, General Manager) 2008 ONCA 538
8. R. v. Morgentaler, [1988] 1 S.C.R.
9. Chaoulli v. Quebec (Attorney General), 2005 SCC 35

Schedule B
Legislation

None

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