

**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

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

**FRESH AS AMENDED NOTICE OF APPLICATION
TO DIVISIONAL COURT FOR JUDICIAL REVIEW**

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by
the applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court
on a date to be fixed by the registrar at the place of hearing requested by the applicant. The
applicant requests that this application be heard at (*place where a Divisional Court sitting is
scheduled*).

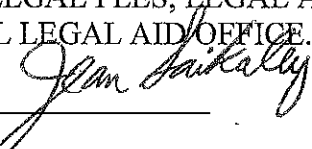
IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the
application or to be served with any documents in the application, you or an Ontario lawyer
acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the
Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have
a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional
Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: June 17, 2016

Issued by _____


Local registrar: 161 Elgin Street
Ottawa, Ontario K2P 2K1

TO: COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO
80 College Street
Toronto, Ontario M5G 2E2

AND TO: ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, Ontario M7A 2S9

1. The Applicants, the Christian Medical and Dental Society of Canada (“CMDS”), the Canadian Federation of Catholic Physicians’ Societies (“CFCPS”), Canadian Physicians for Life (“CPL”), Dr. Michelle Korvemaker, Dr. Betty-Ann Story, Dr. Isabel Nunes, Dr. Agnes Tanguay and Dr. Donato Gugliotta (the “Individual Applicants”) make application for:
 - a. judicial review of the decision of the respondent, the College of Physicians and Surgeons of Ontario (“CPSO”) to enact Policy No. 4-16 *Medical Assistance in Death* (the “Policy”);
 - b. a declaration that the Policy violates the *Canadian Charter of Rights and Freedoms* (the “Charter”), is unauthorized and otherwise invalid;
 - c. an interim order suspending the portions of the Policy which it is alleged violate the *Charter* pending the completion of these proceedings;
 - d. an order in the nature of mandamus suspending the portions of the Policy which violate the *Charter*;
 - e. in the alternative, an order in the nature of mandamus requiring the CPSO to reconsider the Policy and remove the portions of the Policy which violate the *Charter*;
 - f. Their costs of this Application on a substantial indemnity basis; and,
 - g. Such further and other costs as this Honourable Court deems just.
2. The grounds for the application are:

The Applicants

The Christian Medical and Dental Society of Canada

- a. The Applicant, the CMDS, is a national and interdenominational association of Christian doctors and dentists who strive to integrate their Christian faith with medical or dental practice with approximately 1,700 members across Canada, representing a wide variety of specialties and practice types and many different

Christian denominations. The CMDS's members are Catholic and Protestant Evangelical Christian physicians and medical students across Canada. Over 90% of the CMDS' members identify as Protestant Evangelicals and represent many different Christian denominations.

The Canadian Federation of Catholic Physicians' Societies

- b. The Applicant, the CFCPS, is a national association of Catholic Physicians' guilds, associations and societies from eleven cities across Canada, four of which are in Ontario.
- c. The physicians represented by the CMDS and the CFCPS hold sincere religious and moral beliefs which form the basis of their moral or religious objection physician-assisted death.
- d. The CPSO was created and derives its authority to regulate the practice of medicine in Ontario from the *Regulated Health Professions Act*, S.O. 1991, Chapter 18 and the *Medicine Act*, S.O. 1991, Chapter 30 as well as their regulations.

Canadian Physicians for Life

- a. The Applicant, Canadian Physicians for Life ("CPL") is the national association of pro-life physicians, retired physicians, medical residents and students. CPL's members are dedicated to building a culture of care, compassion, and life. CPL was founded in 1975 and is a non-religious charitable organization. CPL's members believe that every human life, regardless of age or infirmity, is valuable and worthy of protection.
- b. CPL seeks to provide a united voice and association for Canadian physicians who recognize the sacredness and inviolability of human life from the time of conception to death and seeks to foster among physicians a firm commitment to those principles in the Oath of Hippocrates which are expressed in modern terms in the Declaration of Geneva (1948) and the International Medical Declaration

(Lejeune, 1973). CPL provides support, encouragement and advice for physicians maintaining and acting upon such principles in their daily practice.

- c. CPL has a constituency of approximately 3,000 physicians, retired physicians, resident students and medical students across Canada, approximately 1,000 of which are in Ontario.

Dr. Michelle Korvemaker

- a. The Applicant, Dr. Michelle Korvemaker is a physician licensed to practice medicine in Ontario. Dr. Korvemaker practices emergency medicine, palliative care and family medicine in Woodstock, Ontario.
- b. Dr. Korvemaker is subject to regulatory and disciplinary proceedings by the CPSO. Dr. Korvemaker is subject to and bound by the Policy.
- c. Dr. Korvemaker is a committed Protestant Evangelical Christian. Dr. Korvemaker's sincerely held religious beliefs inform and direct her positions on certain procedures, pharmaceuticals and procedures which a patient may request.
- d. Dr. Korvemaker's sincerely held religious beliefs and her conscience prevent her from participating, directly or indirectly, in physician-assisted death, to which she objects on religious or moral grounds.

Dr. Betty-Ann Story

- e. The Applicant, Dr. Betty-Ann Story is a physician licensed to practice medicine in Ontario. Dr. Story practices family medicine in an independent practice in Brantford, Ontario.
- f. Dr. Story is subject to regulatory and disciplinary proceedings by the CPSO. Dr. Story is subject to and bound by the Policy.
- g. Dr. Story is a committed Protestant Evangelical Christian. Dr. Story's sincerely held religious beliefs inform and direct her positions on physician-assisted death.

- h. Dr. Story's sincerely held religious beliefs and her conscience prevent her from participating, directly or indirectly, in physician-assisted death to which she objects on religious or moral grounds.

Dr. Isabel Nunes

- d. The Applicant, Dr. Isabel Nunes is a physician licensed to practice medicine in Ontario. Dr. Nunes practices family medicine in Welland, Ontario.
- e. Dr. Nunes is subject to regulatory and disciplinary proceedings by the CPSO. Dr. Nunes is subject to and bound by the Policy.
- f. Dr. Nunes is a committed Protestant Evangelical Christian. Dr. Nunes' sincerely held religious beliefs inform and direct her positions on physician-assisted death.
- g. Dr. Nunes' sincerely held religious beliefs and her conscience prevent her from participating directly or indirectly in physician-assisted death to which she objects on religious or moral grounds.

Dr. Agnes Tanguay

- a. The Applicant, Dr. Agnes Tanguay is a physician licensed to practice medicine in Ontario. Dr. Tanguay practices emergency medicine in Ottawa, Ontario.
- b. Dr. Tanguay is subject to regulatory and disciplinary proceedings by the CPSO. Dr. Tanguay is subject to and bound by the Policy.
- c. Dr. Tanguay is a committed Roman Catholic. Dr. Tanguay's sincerely held religious beliefs inform and direct her positions on physician-assisted death.
- d. Dr. Tanguay's sincerely held religious beliefs and his conscience prevent her from participating directly or indirectly in physician-assisted death to which she objects on religious or moral grounds.

Dr. Donato Gugliotta

- e. The Applicant, Dr. Donato Gugliotta is a physician licensed to practice medicine in Ontario. Dr. Gugliotta practices family medicine and anaesthesia in Trenton, Ontario.
- f. Dr. Gugliotta is subject to regulatory and disciplinary proceedings by the CPSO. Dr. Gugliotta is subject to and bound by the Policy.
- g. Dr. Gugliotta is a committed Protestant Evangelical Christian. Dr. Gugliotta's sincerely held religious beliefs inform and direct his positions on physician-assisted death.
- h. Dr. Gugliotta's sincerely held religious beliefs and his conscience prevent him from participating directly or indirectly in physician-assisted death to which he objects on religious or moral grounds.

The Policy

Interim Guideline Consultation

- h. In or about December 2015, the CPSO announced that it would be beginning an expedited consultation process to produce an interim guideline to address physician-assisted death. In the process of the consultation, the CPSO invited submissions from the general public with a deadline of January 13, 2016.
- i. The CPSO received at least 361 written submissions from physicians, public-interest groups and members of the public. The overwhelming majority of the submissions urged the CPSO to respect physicians' freedom of religion and freedom of conscience.
- j. The CPSO received thorough and detailed submissions from the Applicants, the CMDS which set out the CPSO's legal obligation to introduce a policy which adhered to the *Charter* and to respect and protect physicians *Charter* rights to freedom of religion and freedom of conscience.

The Interim Guideline

- k. Prior to the consultation process, in or about December 2015, the CPSO released a draft version of the *CPSO Interim Guidance on Physician-Assisted Death* the (“Interim Guideline”).
- l. The Interim Guideline contained an obligation that physicians who object to physician-assisted death on conscientious or religious grounds provide patients with an “effective referral” to a physician who is willing to provide assistance in death. This obligation offended many physicians, including the Individual Applicants, the CMDS, CPL and CFCPS.

- m. The obligation read was at lines 184 to 189 and reads as follows:

Where a physician declines to provide physician -assisted death for reasons of conscience or religion, the physician must not abandon the patient. An effective referral to another health-care provider must be provided. An effective referral means a referral made in good faith, to a non-objecting, available, and accessible physician or agency. The referral must be made in a timely manner to allow patients to access care. Patients must not be exposed to adverse clinical outcomes due to a delayed referral.

- n. The obligation to provide an “effective referral” for physician-assisted death is, for some physicians, unconscionable. Requiring a physician, including the Individual Applicants, to participate in a procedure or facilitate the administration of pharmaceuticals to which he or she objects on moral or religious grounds by providing a referral is a violation of that physician’s *Charter* right to freedom of conscience and/or freedom of religion.
- o. At the time the CPSO prepared the Interim Guideline, it was aware that many physicians including the individual Applicants and the CMDS, CPL and the CFCPS objected to providing an effective referral on the basis that the referral itself violated their *Charter* rights to freedom of religion and conscience.

- p. The Interim Guideline was enacted in or about January 2016 without amendment to the obligation for physicians objecting to physician-assisted death on conscientious grounds to provide an effective referral.

The First Policy

- q. The Interim Guideline was to be in place until the Supreme Court of Canada's order in *Carter v. Canada* took effect. Initially, this was to be on February 6, 2016 but as a result of an extension provided by the Supreme Court of Canada, the order did not take effect until June 6, 2016.
- i. On or about May 30, 2016 and May 31, 2016, the CPSO decided to enact Policy No. 4-16 *Physician-Assisted Death* (the "First Policy") which continued to require physicians who object to physician-assisted death on conscientious or religious grounds to provide an effective referral. It read:

Where a physician declines to provide physician-assisted death 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 or agency. The referral must be made in a timely manner to allow the patient to access physician-assisted death. Patients must not be exposed to adverse clinical outcomes due to delayed referrals.

- r. The wording of the obligation was virtually identical to what was contained in the Interim Guideline.
- s. The CPSO did not hold any consultation process prior to enacting the Policy. It invited no submissions from the public.

The Policy

- t. In late June 2016, following the enactment of the First Policy, the CPSO enacted the Policy. Like the Interim Guideline and the First Policy, the Policy continued to require physicians who object to physician-assisted death on conscientious or religious grounds to provide an effective referral. It reads:

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.

- u. The wording of the obligation is virtually identical to what was contained in the Interim Guideline and in the First Policy.
- v. The CPSO did not hold any consultation process prior to enacting the Policy. It invited no submissions from the public.
- w. The obligation to provide an "effective referral" for physicians-assisted death is, for some physicians, unconscionable. Requiring a physician, including the Individual Applicants, to participate in physician-assisted death, either directly or indirectly through referral, when he or she objects to such on moral or religious grounds is a violation of that physician's *Charter* right to freedom of conscience and/or freedom of religion.
- x. The Policy also requires physicians who object to physician-assisted death on conscientious or religious grounds to provide it in certain circumstances. The Policy requires physicians who object to physician-assisted death on conscientious or religious grounds to comply with Policy Statement #2-15: *Professional Obligations and Human Rights* which requires physicians to perform procedures to which they object on moral or religious grounds, including physician-assisted death, if the care is "urgent" or "otherwise necessary". The clause in question read as follows:

Physicians must provide care that is urgent or otherwise necessary to prevent imminent harm, suffering, and/or

deterioration, even where that care conflicts with their religious or moral beliefs.

- y. The requirement that a physician provide “care” that is “urgent or otherwise necessary” even where that “care” violates their religious or moral beliefs is a violation of certain physicians’, including the Individual Applicants’, *Charter* right to freedom of religion and freedom of conscience.

The Policy should be set aside

- z. The Policy is *ultra vires* in that the *Regulated Health Professions Act* and the *Medicine Act* do not give the CPSO the authority to implement policies which violate the *Charter*.
- aa. The CPSO failed to consider and balance the *Charter* rights of physicians who object to physicians-assisted death.
- bb. The CPSO failed to interpret its statutory objectives in a manner which reasonably considered *Charter* values including the *Charter* values of freedom of religion, freedom of conscience, equality rights of religious individuals and Canada’s multicultural heritage.
- cc. The Policy violates sections 2(a) and 15 of the *Charter* and such violations cannot be demonstrably justified in a free and democratic society.
- dd. The Policy violates the section 2(a) and 15 *Charter* rights of the Individual Applicants and such violations cannot be demonstrably justified in a free and democratic society.
- ee. Further, or in the alternative, the CMDS, CPL and CFCPS have public interest standing to assert an infringement of sections 2(a) and 15 of the *Charter*:
 - i. There is a serious justiciable issue raised by the Policy in that the question raised is an important and substantial constitutional and quasi-constitutional issue;

- ii. The CMDS, CPL and CFCPS have a real stake and genuine interest in the issue in that they have a real and continuing interest in protecting the rights of their members and constituents to practice medicine in a way which does not violate their religious or moral beliefs and to be free from discrimination; and,
 - iii. This application for judicial review is a reasonable and effective means of bringing the matter before the Court.
- ff. The CPSO ignored relevant facts, including:
- iv. The Individual Applicants', and other physicians' rights under the *Charter*, including their freedom of conscience, freedom of religion and their right to equal treatment under the law without discrimination based on religion;
 - v. The beliefs which lead the Individual Applicants, and other physicians to object to participating in physician-assisted death, directly or indirectly, are sincerely held and grounded in religious beliefs or conscience;
 - vi. For the Individual Applicants and other physicians to refuse to participate in physician-assisted death, directly or indirectly, does not violate the *Charter* rights of patients;
- gg. The CPSO erred by assuming that it was not subject to and bound by the *Charter*.
- hh. The CPSO erred by failing or refusing to consider the *Charter* rights of physicians and to balance those *Charter* rights with its statutory objectives;
- ii. The CPSO's consultations were conducted in such a manner as resulted in a denial of natural justice. Before, during and after the consultation processes, members of the CPSO acted in a manner that displayed actual bias on the part of the CPSO and its members or, in the alternative, gave rise to a reasonable apprehension of bias;

- jj. *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1
- kk. *Regulated Health Professions Act*, S.O. 1991, Chapter 18.
- ll. *The Medicine Act*, S.O. 1991.
- mm. *Statutory Powers Procedure Act*, RSO 1990, c S.22.
- nn. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982 c 11.
- oo. *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.
- pp. Rules 14.05(2) and 38 of the *Rules of Civil Procedure*.

3. The following documentary evidence will be used at the hearing of the application:
- a. The record of the proceedings;
 - b. The affidavits of the Applicants, to be sworn, and the exhibits thereto; and,
 - c. Such further and other material as counsel may submit and this Honourable Court permit.

DATED at Ottawa, Ontario, this 17th day of June 2016.

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THE CHRISTIAN MEDICAL AND DENTAL SOCIETY OF CANADA et. al
Applicants

and COLLEGE OF PHYSICIANS AND
SURGEONS OF ONTARIO
Respondent

Court File No: DC-16-2217

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)
Proceeding Commenced at Ottawa

FRESH AS AMENDED NOTICE OF APPLICATION
TO DIVISIONAL COURT FOR JUDICIAL REVIEW

AMENDED THIS *11/16* DAY / JOUR
MODIFIÉE DE *11/16*
OF / DE *August 20, 2016*
PURSUANT TO RULE *20.16*
CONFORMEMENT A LA REGLE *02(b)*
OR ORDER
OU A L'ORDONNANCE
DATED THIS / FAIT CE
DAY / JOUR OF / DE 20.....

Vincent Dagenais Gibson LLP/s.r.l.
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