

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

and

ATTORNEY GENERAL OF ONTARIO

Intervener

---

**MOTION RECORD OF THE PROPOSED INTERVENER**  
**The Justice Centre for Constitutional Freedoms**  
**(Motion for Leave to Intervene returnable February 6, 2017)**  
**(Pursuant to Rules 13.02 and 13.03 of the *Rules of Civil Procedure*)**

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December 21, 2016

**JUSTICE CENTRE FOR  
CONSTITUTIONAL FREEDOMS**  
#253, 7620 Elbow Drive SW  
Calgary, Alberta  
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The Attorney General of Ontario**

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**TAB 1**

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  
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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

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**NOTICE OF MOTION FOR LEAVE TO INTERVENE OF  
THE JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS**

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The moving party, the Justice Centre for Constitutional Freedoms (the "Justice Centre") will make a motion to the Court on February 6, 2017, or soon after that time as the motion can be heard, at 130 Queen Street West, Toronto, Ontario M5H 2N5.

**PROPOSED METHOD OF HEARING:**

1. The Motion is to be heard orally.

**THE MOTION IS FOR:**

2. An Order granting the Justice Centre leave to intervene as a friend of the Court pursuant to Rule 13.02 of the *Rules of Civil Procedure* in this Application;

3. An Order granting the Justice Centre leave to make oral arguments of no more than 10 minutes at the hearing of this Application;
4. An Order granting the Justice Centre leave to file a factum of no more than 15 pages (for use in both this matter and the related Application in court file no. 500/16, where leave to intervene is also being sought); and,
5. An Order that the Justice Centre will not seek costs and will not be liable for costs to any other party; and,
6. Such further or other Order as counsel may advise and that this Honourable Court may deem appropriate.

**THE GROUNDS FOR THE MOTION ARE:**

7. Pursuant to Rules 13 and 37 of the Rules of Civil Procedure, this Honourable Court has jurisdiction to allow any person to intervene for the purpose of rendering assistance to the Court. The requirements of Rules 13.01, 13.02 and 13.03 of the Ontario *Rules of Civil Procedure* are met in this case.
8. The Justice Centre's mission is to promote and defend the constitutional freedoms of Canadians through litigation and education. The Justice Centre was established as a non-profit corporation by way of Letters Patent issued in October 2010 under the *Canada Corporations Act*. The Justice Centre's Board of Directors and Advisory Council include lawyers, law professors, academics and others active in the realm of Canadian public policy. Our Board of Directors and Advisory Council serve to significantly enhance the Justice Centre's experience and expertise in Canadian constitutional matters. Further, the Justice Centre maintains collaborative relationships with approximately 30 lawyers across Canada, including law professors and retired judges, who are involved on a pro bono basis with the Justice Centre's litigation files. The Justice Centre has six full-time staff, including three lawyers and an articling student.
9. The Justice Centre is an independent, non-religious and non-partisan registered charitable organization based in Calgary, Alberta. As a citizen-based organization, the Justice Centre relies on voluntary donations from donors across Canada. In 2016, the Justice Centre received donations from over 2,500 individuals and charitable foundations across Canada. The Justice Centre does not seek or accept funding from any level of government.

10. The Justice Centre's expertise is focused on section 2 of the *Canadian Charter of Rights and Freedoms*. The Justice Centre activities, both in education and litigation, foster its expertise and unique perspective on the application of the *Charter*.
11. In addition to its litigation in support of constitutional freedoms, the Justice Centre conducts research and publishes its findings. For example, the annual Campus Freedom Index evaluates Canadian universities and student unions on their policies and practices as they relate to freedom of expression. Other examples include reports on Canada's human rights legislation, a guide for university students called Know Your Rights on Campus, and reports on conscience rights, freedom of association, and parental rights in education. The Justice Centre's efforts to educate Canadians on the nature and importance of their *Charter* freedoms frequently lead to appearances in radio, television, and newspaper media, including the publication of guest columns on legal issues in the *Globe and Mail*, *National Post*, and papers across Canada.
12. The Justice Centre acts for citizens whose Charter rights and freedoms have been infringed by government. In *Allen v. Alberta*, the Justice Centre argued, pursuant to the Supreme Court of Canada ruling in *Chaoulli v. Quebec*, that Alberta's prohibition on private medical insurance violates the Charter right to life and security of the person. In *Wilson et al. v. University of Calgary*, the Justice Centre represented seven University of Calgary students who were found guilty of non-academic misconduct for having peacefully expressed their opinions on campus. In addition to these litigation files, the Justice Centre responds to numerous inquiries from citizens across Canada, in respect of violations of Charter rights. The Justice Centre writes letters on behalf of these clients, petitioning governments and government bodies to respect Charter rights and freedoms. We frequently achieve resolution of problems without litigation.
13. The Justice Centre was granted intervenor status in *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 (CanLII) and *Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518 (CanLII) to present argument in respect to the application of Charter section 2(d) freedom of association. The Justice Centre also intervened before the BC Court of Appeal in *BC Civil Liberties Association v. University of Victoria*, 2016 BCCA 162 (CanLII).
14. Finally, the Justice Centre has expertise specifically in regard to Bill C-14 and medical assistance in dying ("MAID"), as one of its lawyers testified twice before Parliamentary committees to assist in the drafting of legislation to respond to the decision in *Carter v. Canada (Attorney General)*,



2015 SCC 5 [“Carter”].<sup>1</sup> On both occasions, written submissions were made to the Parliamentary Committees for review and publication. The Justice Centre has also made written submissions on MAID to the Colleges of Physicians and Surgeons of Ontario, Alberta, Manitoba, Saskatchewan and the Yukon.

### **Submissions to be made by the Justice Centre**

15. This case raises important public interest concerns as to whether medical practitioners can lawfully be compelled by the state to provide an effective referral for MAID or otherwise provide care that is contrary to religious beliefs and/or personal conviction. The Justice Centre proposes to argue that the impugned policies of the CPSO in the instant case infringe the *Charter* rights of medical practitioners by overriding personal belief and conviction, and that they do so with the coercive threat of professional sanction. We propose to further argue that this infringement is not justifiable under section 1 of the *Charter*.
16. The Supreme Court of Canada has consistently found there is no *Charter* right to health care.<sup>2</sup> *Carter* does not alter the legal landscape in this regard.
17. *Carter* struck down *Criminal Code* prohibitions against physician assisted suicide and euthanasia. It is now legal (under specific circumstances set out in Bill C-14) to assist someone to end his or her life. The Court’s finding in *Carter* was predicated on two key factual conditions, however: a willing patient and a willing doctor. The Applicants in *Carter* all had willing doctors. Patients in that case neither sought nor received a *Charter* right to compel doctors and other healthcare practitioners to provide, or refer for, MAID. Bill C-14 does not compel medical practitioners to participate in MAID. In enacting policies that require effective referral by objecting medical practitioners, the CPSO has overstepped the bounds of its lawful authority.
18. Since there is no *Charter* right to MAID, there is no conflict of rights in the instant case. Medical practitioners have religious and conscience rights that are protected by the *Charter*. Patients do not have a *Charter* right to any given health care service, and do not have a right to compel medical practitioners to refer for a particular service. It is undesirable for a government entity such as the

### **Reference:**

<sup>1</sup> Jay Cameron, a lawyer with the Justice Centre, testified before the Special Parliamentary Joint Committee on Physician Assisted Dying on February 1, 2016, and again before the Standing Committee on Justice and Human Rights on May 4, 2016.

<sup>2</sup> *R. v. Morgentaler*, [1988] 1 SCR 30; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791; see also *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538 (CanLII): the Ontario Court of Appeal has reiterated that there is no *Charter* right to health care. It is not conceded that MAID could properly be characterized as a “health care” service in any event, given that its purpose is to terminate the existing health of a patient.

CPSO to attempt to compel action in conflict with the conscience or religious beliefs of a medical practitioner in any event.

19. The impugned CPSO policies in the instant case, therefore, are not lawfully aimed at balancing competing rights. There are no competing rights to balance.

**The Justice Centre's Intervention Will Not Cause Undue Delay or Prejudice**

20. The Justice Centre will limit its argument solely to the argument outlined herein, which should avoid unnecessary duplication of argument before this Honourable Court. The Justice Centre has also consulted with the other proposed intervenors to ensure that duplication of argument does not occur. The Justice Centre proposes to file a single identical factum (maximum 15 pages) for use in both the within action, as well as Court file no. 499/16, and requests that it be granted 10 minutes for oral argument in totality. The Justice Centre agrees not to raise new issues or evidence, and agrees to accept service of all materials by email only.

**The Justice Centre's Interest in These Proceedings**

21. The Justice Centre was founded with the mission of advancing and promoting the core principles of freedom and equality as protected by the *Canadian Charter of Rights and Freedoms*.
22. The balancing of rights and freedoms under the *Charter* is not a concern limited to this litigation in Ontario, as it will set a precedent for the treatment of medical practitioners across Canada. In its activities in various provinces, the Justice Centre is actively involved in efforts to establish the appropriate balance which recognizes the *Charter's* guarantees. Such work touches the core of the Justice Centre's mission and purpose.

**The Justice Centre's Intervention is in the Public Interest**

23. As a group wholly dedicated to, and experienced in, advancing *Charter* freedoms, the Justice Centre is in an advantageous and unique position to assist in illuminating the *Charter* issues of this case for the Court's consideration. Moreover, the Justice Centre is the lone secular intervenor arguing in support of medical practitioners' conscience rights in the face of relevant CPSO policies, and therefore operates from a unique perspective among the proposed intervenors. Finally, the Justice Centre has amassed substantial experience in regard to Bill C-14 and MAID. It is submitted that the Justice Centre's application to intervene in this case will significantly advance the goal of giving this Court the fullest perspective from which to rule on the merits of the present application.

**Evidence to be used in support of this Motion**

24. Affidavit of John Carpay, sworn January 24, 2017.

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**Lawyers for the Intervener,  
The Attorney General of Ontario**

COURT FILE #:499-16; 500-16

Christian Medical and Dental Society of Canada et al  
**Applicants**

v.

College of Physicians and Surgeons of Ontario  
**Respondent**

*ONTARIO*

SUPERIOR COURT OF JUSTICE

Proceedings commenced at Ottawa

Transferred to Toronto

393 University Avenue

Toronto, Ontario

NOTICE OF MOTION

Justice Centre for Constitutional Freedoms

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**TAB 2**

ONTARIO  
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DIVISIONAL COURT

BETWEEN:

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CANADIAN FEDERATION OF CATHOLIC PHYSICIANS' SOCIETIES, CANADIAN  
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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

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**AFFIDAVIT OF JOHN CARPAY**  
**THE JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS**

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I, **John Carpay**, Barrister and Solicitor, of the City of Calgary, in the Province of Alberta,  
**make oath and give evidence as follows:**

1. I am the President of the Justice Centre for Constitutional Freedoms (the "Justice Centre") and, as such, I have personal knowledge of the evidence sworn in this affidavit, except where otherwise stated to be based on information and belief.
2. I state in this Affidavit the source of any information that is not based on my own personal knowledge, and I state my belief of the source. I am authorized to swear this Affidavit on behalf of the Justice Centre.

3. I received a B.A. in political science from Laval University, and a law degree from the University of Calgary. I have been a member of the Law Society of Alberta since 1999.

4. For most of my legal career, my practice has been in constitutional litigation on behalf of both *Charter* litigants and interveners. From 2001 to 2005, I was in-house counsel with the Canadian Taxpayers Federation, and managed its intervention in *Benoit v. Canada*, 2003 FCA 236, at the trial and appellate levels, with the intervener Federation arguing that race, ancestry, descent, and ethnicity should not play any role in the taxation of Canadians. From 2005 to 2010, I served as the Executive Director of the Canadian Constitution Foundation, managing the Foundation's court interventions in *Kingstreet Investments v. New Brunswick*, 2007 SCC 1, *Whatcott v. Saskatchewan Human Rights Commission*, 2010 SKCA 26, and other cases. In *R. v. Kapp*, 2008 SCC 41, I acted for the Japanese Canadian Fishermen's Association when it intervened at the Supreme Court of Canada to argue for racial equality within the commercial fishery. Since 2010, I have served as the President of the Justice Centre, responsible for all of its constitutional litigation files.

#### **The Justice Centre**

5. The Justice Centre is a secular organization with a mission is to promote and defend the constitutional freedoms of Canadians through litigation and education. The Justice Centre was established as a non-profit corporation by way of Letters Patent issued in October 2010 under the *Canada Corporations Act*. The Justice Centre's Board of Directors and Advisory Council include lawyers, law professors, academics and others active in the realm of Canadian public policy. Our Board of Directors and Advisory Council serve to significantly enhance the Justice Centre's experience and expertise in Canadian constitutional matters. Further, the Justice Centre maintains collaborative relationships with approximately 30 lawyers across Canada, including law professors and retired judges, who are involved on a *pro bono* basis with the Justice Centre's litigation files. The Justice Centre has six full-time staff, including three lawyers and an articling student.

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7. The Justice Centre's expertise is primarily focused on section 2 of the *Canadian Charter of Rights and Freedoms*. The Justice Centre activities, both in education and litigation, foster its expertise and unique perspective on the application of the *Charter*.

8. In addition to its litigation in support of constitutional freedoms, the Justice Centre conducts research and publishes its findings. For example, the annual *Campus Freedom Index* evaluates Canadian universities and student unions on their policies and practices as they relate to freedom of expression. Other examples include reports on Canada's human rights legislation, a guide for university students called *Know Your Rights on Campus*, and reports on freedom of association, conscience rights, and parental rights in education. The Justice Centre's efforts to educate Canadians on the nature and importance of their *Charter* freedoms frequently lead to appearances in radio, television, and newspaper media, including the publication of guest columns on legal issues in the *Globe and Mail*, *National Post*, and papers across Canada.

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11. Finally, the Justice Centre has expertise specifically in regard to Bill C-14 and medical assistance in dying ("MAID"), as one of its lawyers testified twice before Parliamentary committees to assist in the drafting of legislation to respond to the decision in *Carter v. Canada (Attorney*

*General*), 2015 SCC 5 [“*Carter*”].<sup>1</sup> On both occasions, written submissions were submitted to the Parliamentary Committees for review and publication, and our staff lawyer also made oral presentations and responded to questions. The Justice Centre has also made written submissions on MAID to the Colleges of Physicians and Surgeons of Ontario, Alberta, Manitoba, Saskatchewan and the Yukon.

### **Submissions to be made by the Justice Centre**

12. This case raises important public interest concerns as to whether medical practitioners can lawfully be compelled by the state to provide an effective referral for MAID or otherwise provide care that is contrary to religious beliefs and personal conviction. I believe the impugned policies of the CPSO in the instant case infringe the *Charter* rights of medical practitioners by overriding personal belief and conviction, and do so with the coercive threat of professional sanction. I believe that the infringement cannot be justified in accordance with section 1.

13. The Supreme Court of Canada has consistently found there is no *Charter* right to health care.<sup>2</sup> Neither Bill C-14 nor *Carter* alter the legal landscape in this regard.

14. *Carter* struck down *Criminal Code* prohibitions against physician assisted suicide and euthanasia. It is now legal (under specific circumstances set out in Bill C-14) to assist someone to end his or her life. The Court’s finding in *Carter* was predicated on two key factual conditions, however: a willing patient and a willing doctor. The Applicants in *Carter* all had willing doctors. Patients in that case neither sought nor received a *Charter* right to compel doctors and other healthcare practitioners to provide, or refer for, MAID. Bill C-14 does not compel medical practitioners to participate in MAID. In enacting policies that require effective referral by objecting medical practitioners, the CPSO has overstepped the bounds of its lawful authority.

15. Since there is no *Charter* right to MAID, there is no conflict of rights in the instant case. Medical practitioners have religious and conscience rights that are protected by the *Charter*. Patients do not have a *Charter* right to any given health care service, and do not have a right to compel medical practitioners to refer for a particular service. It is undesirable for a government body such

### **Reference:**

<sup>1</sup> Jay Cameron, a lawyer with the Justice Centre, testified before the Special Parliamentary Joint Committee on Physician Assisted Dying on February 1, 2016, and again before the Standing Committee on Justice and Human Rights on May 4, 2016.

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as the CPSO to attempt to compel action in conflict with the conscience or religious beliefs of a medical practitioner in any event.

16. The impugned CPSO policies in the instant case, therefore, are not lawfully aimed at balancing competing rights. There are no competing rights to balance.

**The Justice Centre's Intervention Will Not Cause Undue Delay or Prejudice**

17. With the Justice Centre having intervened in other cases, I am aware of the need to avoid undue delay of the proceedings, or prejudice to any of the parties to this case. The Justice Centre will limit its argument solely to the argument outlined herein, which should avoid unnecessary duplication of argument before this Honourable Court. The Justice Centre has also consulted with the other proposed intervenors to ensure that duplication of argument does not occur. The Justice Centre proposes to file a single identical factum (maximum 15 pages) for use in both the within action, as well as Court file no. 499/16, and requests that it be granted 10 minutes for oral argument in totality. The Justice Centre agrees not to raise new issues or evidence, and agrees to accept service of all materials by email only.

**The Justice Centre's Interest in These Proceedings**

18. The Justice Centre was founded with the mission of advancing and promoting the core principles of freedom and equality as protected by the *Canadian Charter of Rights and Freedoms*.

19. The balancing of rights and freedoms under the *Charter* is not a concern limited to this litigation in Ontario, as it will set a precedent for the treatment of medical practitioners across Canada. In its court actions and interventions in various provinces, the Justice Centre is actively involved in efforts to establish the appropriate balance which recognizes the *Charter's* guarantees. Such work touches the core of the Justice Centre's mission and purpose.

**The Justice Centre's Intervention is in the Public Interest**

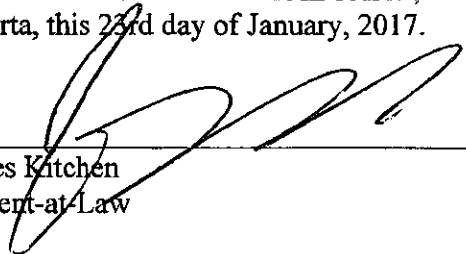
20. As a group wholly dedicated to, and experienced in, advancing the freedoms in the *Charter*, the Justice Centre is in an advantageous and unique position to assist in illuminating the *Charter* issues of this case for the Court's consideration. Moreover, the Justice Centre is the lone secular intervener arguing in support of medical practitioners' conscience rights in the face of the CPSO's policies that are relevant to this case, and therefore operates from a unique perspective among the proposed intervenors. Finally, the Justice Centre has amassed substantial experience in regard to Bill C-14 and MAID. I believe the Justice Centre's application to intervene in this case will significantly

advance the goal of giving this Court the fullest perspective from which to rule on the merits of the within matter.

21. I make this Affidavit in support of Justice Centre's Motion to intervene in this Action, as well as in Court file no. 499/16, and for no other or improper purpose.

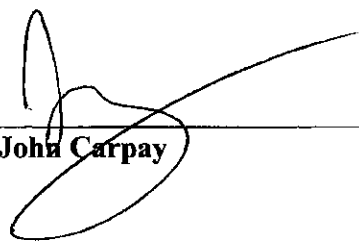
SWORN BEFORE ME at CALGARY,  
Alberta, this 23<sup>rd</sup> day of January, 2017.

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James Kitchen  
Student-at-Law



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John Carpay



COURT FILE #:499-16; 500-16

Christian Medical and Dental Society of Canada et al  
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*ONTARIO*  
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AFFIDAVIT OF JOHN CARPAY  
Sworn January 23, 2017

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