2017 01G 4144
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

THE ESTATE OF DESIREE A. DICHMONT	**APPLICANT**

AND:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR AS REPRESENTED BY THE MINISTER OF GOVERNMENT SERVICES AND LANDS	**FIRST RESPONDENT**

AND:

NEWFOUNDLAND AND LABRADOR HUMAN RIGHTS COMMISSION	**SECOND RESPONDENT**

BRIEF OF THE INTERVENOR
JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS

Justice Centre for Constitutional Freedoms
#253-7620 Elbow Drive SW
Calgary, Alberta T2V 1K2
Attention: Marty Moore
Phone: (403) 909-3404
Fax: (587) 352-3233
Email: mmoore@jccf.ca

INDEX

PART 1 – STATEMENT OF FACTS

The facts of this matter have been set out by the Applicant Estate of Desiree A. Dichmont (referred to hereinafter as the “Estate”) in its Memorandum of Law.

PART 2 – ISSUES

The issues to be addressed in this matter have been set out by the Estate in its Memorandum of Law. In this submission, the intervenor, the Justice Centre for Constitutional Freedoms (the "Justice Centre") addresses the issue of the correct interpretation and application of the government's *Charter* obligations to respect the *Charter* rights of both the public and those engaged by the government to serve the public.

PART 3 - ARGUMENT

Summary

1. It is trite law that all Canadians – including those engaged by government in the public service – have rights guaranteed by the *Canadian Charter of Rights and Freedoms* which the government must respect.
2. Government is not justified in infringing the *Charter* rights of public servants by merely asserting that doing so is necessary to meet a government obligation or public interest. Rather, government must engage in a fair and complete assessment of both the *Charter* rights of the public servant(s) and the allegedly competing interest. A reviewing court must consider whether the evidence in fact demonstrates a conflict between the *Charter* rights of the public servant(s) and the allegedly competing right.
3. If there really is a conflict, then a proper legal balancing is required between the *Charter* right and the competing right, interest or government objective (in this case the provision of marriage solemnization). Absent evidence to the contrary, government accommodation of public servants' *Charter* rights does not violate its duty of neutrality or the *Charter* rights of the public.

Standard of Review

4. The Justice Centre submits that in this Court's review of the Reasons for Decision issued by the Board of Inquiry of the Newfoundland and Labrador Human Rights Commission (the "Board Decision"), the correctness standard should be applied to the Board Decision's holding that government's *Charter* obligations, including the state duty of neutrality, can be imposed on individual public servants. The reasoning of the Board Decision eliminates the requirement to accommodate the *Charter* rights of public servants who act "as government". Correctness review of this issue is warranted on the basis that it is an important question to the legal system which concerns the scope and application of the state's duty of religious neutrality, and its resolution will have a broad effect on the relationships between government and public servants in this province and beyond: see ***Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16** [*Saguenay*] at paras 49 and 51 (Appellant's Book of Authorities "**ABOA**" **Tab 3**).

5. Alternatively, the Board Decision is unreasonable under a Doré/*Loyola* analysis, since, as will be argued below, it fails to "reflect[] a proportionate balancing of the *Charter* protections at play": ***Loyola High School v Quebec (Attorney General),* 2015 SCC 12**, at para 39 (Intervenor's Book of Authorities "**IBOA**" **Tab 1**).

6. The Justice Centre does not take a position on the standard of review applicable to the other issues raised in this case.

A. Government owes *Charter* obligations to both the public and those it engages in serving the public

7. In ***Osborne v Canada (Treasury Board)***, the Supreme Court of Canada rejected arguments that the scope of a public servant's *Charter* rights should be reduced or limited because of that person's status. Instead, the Court held that *Charter* rights – freedom of expression specifically in that case – are "constitutionally entrenched, without exception for public servants": **[1991] 2 SCR 69, 1991 CarswellNat 348** [***Osborne***] at paras 37, 42 (**IBOA Tab 2**). Such recognition is demanded by the *Charter* itself, which in section 2 guarantees Canada's fundamental freedoms to "Everyone".

8. This foundational principle must be initially recognized in any case dealing with a request that government respect or accommodate a *Charter* right of one of its agents or employees. The Board Decision fails to appropriately note the government's *Charter* obligation to respect the *Charter* rights of its public servants. For example, in the "Law" section at the outset of the Board Decision, no mention is made of this key constitutional obligation of the government: see Board Decision at pages 5-7. Later on, the Board Decision states that "a public official acting as government such as Ms. Dichmont is at the same time an individual whose religious views demand respect" (page 9), but then immediately proceeds to minimize (or even eliminate) any required respect by stating that accommodation is limited where a public official is "acting as government".

9. The Board Decision never expressly references the fact that public servants are protected by the *Charter's* guarantees, including freedom of conscience and religion. Rather, the Board Decision's only reference to the *Charter* is as an *obligation* on public servants: see Board Decision at pages 4-5, 8 and 10. This limited, one-sided view of the *Charter* misrepresents the *Charter* application and effect where a public servant is requesting that the government

respect her or his *Charter* rights. This view omits appropriate consideration of the government's obligations to respect the *Charter* rights of both the public and public servants.

B. <u>Government cannot justify violating the *Charter* rights of public servants by simply asserting that it is doing so in order to respect the rights of the public</u>

10. It would be truly a rare case in which government could not argue that some duty or public interest weighs against it respecting or accommodating the *Charter* rights of public servants.

11. In ***Osborne***, the government argued that the "constitutional convention of political neutrality" within the public service justified violating public servants' freedom of expression and association: see ***Osborne***, at paras 17-18, 26-31, 40-43 and 52-61 (**IBOA Tab 2**). Likewise, in ***Haydon v R***, the government sought to justify restricting two government employees' freedom of expression by relying on the duty of loyalty of public servants: **[2000] F.C.J. No. 1368, 2000 CarswellNat 2024**, [***Haydon***] at paras 47-50 (**IBOA Tab 3**).

12. Canada's Federal Court has rejected the argument that accommodating public servants' *Charter* rights breaches the *Charter* rights of the public: see ***Grant v Canada (Attorney General)* (1994), [1995] 1 FC 158, 1994 CarswellNat 1424 (Fed TD)** [***Grant FC***] (**IBOA Tab 4**), aff'd **[1995] FCJ No 830, 1995 CarswellNat 1666 (Fed CA)** [***Grant FCA***] (**IBOA Tab 5**), leave to appeal refused (1996), 130 D.L.R. (4th) vii, 35 C.R.R. (2d) 188 (note) (SCC). In ***Grant***, a group of the citizens argued that accommodation of the religious beliefs of Sikh RCMP officers, specifically permitting them to wear a turban rather than the traditional hat, violated the public's *Charter* rights under sections 2(a), 7 and 15(1). The plaintiffs in the case asserted that "it is inappropriate, indeed, illegal and unconstitutional for a religious symbol to be incorporated into the uniform of the national police force of Canada": ***Grant FC*** at para 2 (**IBOA Tab 4**). The Federal Court received evidence that "religious pluralism, tolerance and mutual respect are best guaranteed when the state maintains as much neutrality as possible towards all traditional religions", and that "[s]uch neutrality is fostered when the symbols of the state are not mixed with those of any religion": ***Grant FC*** at para 7 (**IBOA Tab 4**). An expert witness for the plaintiffs asserted that "this is particularly important in those state institutions which exercise the coercive powers of law enforcement": ***Grant FC*** at para 7 (**IBOA Tab 4**). In fact, there was general agreement that "there has been an increasing insistence that the state be neutral with respect to religious

matters in Canada": ***Grant FC*** at para 14 (**IBOA Tab 4**). Justice Reed described the plaintiffs' argument as follows:

> Counsel for the plaintiffs argues that the incorporation of religious symbols into the uniform of the RCMP similarly imposes a type of pressure or compulsion, on members of the public who are compelled to deal with that officer, to acknowledge the religious tradition of the officer in question.
> …
> Counsel links this analysis of section 7 to what he asserts is a constitutional convention that our police forces operate in a neutral fashion, free from all indications of political or religious allegiance. He alleges that a constitutional convention central to our system of government requires that police officers of the state not only act in an impartial manner but exhibit an appearance of impartiality when exercising law enforcement powers.

Grant FC at paras 83 and 90 (**IBOA Tab 4**).

13. At the trial division, Justice Reed stated:

> In the case of interaction between a member of the public and a police officer wearing a turban, I do not see any compulsion or coercion on the member of the public to participate in, adopt or share the officer's religious beliefs or practices. The only action demanded from the member of the public is one of observation.

Grant FC at para 84 (**IBOA Tab 4**).

14. Justice Reed concluded that, "even in the context of a situation in which the police officer is exercising his law enforcement powers", this did not constitute an infringement of freedom of religion of a member of the public: ***Grant FC*** at para 84 (**IBOA Tab 4**). More generally, Justice Reed took issue with the evidence, actually the lack thereof, supporting the claimed violation of the public's *Charter* rights. She described the plaintiff's evidence of *Charter* violations as "quite speculative and vague": ***Grant FC*** at para 92 (**IBOA Tab 4**). For example, Justice Reed found as follows:

> There is no evidence that any person has been "deprived" of his or her "liberty or security" by either of the two RCMP officers wearing turbans. There is no evidence that any person has experienced a reasonable apprehension of bias in the context of such deprivation. There is no evidence, for example by a Hindu or Muslim that that individual would entertain a reasonable apprehension of bias if deprivation occurred.
> …
> There is no evidence concerning what duties are being given to the turbaned officers. It is possible that the duties are such that they are not placed in situations where the concerns which the plaintiffs describe could arise (perhaps the officers operate solely in a plain clothes capacity or perform functions where there are no direct interactions with members of the public). The

> plaintiffs' evidence has all been theoretical and speculative. The assertion that a visible manifestation of a Sikh officer's religious faith, as part of his uniform, will create a reasonable apprehension of bias is not based upon any actual concrete evidence. The plaintiffs speculate that this could occur. One can equally speculate that it will not.

Grant FC at paras 92-93 (**IBOA Tab 4**). Justice Reed found that arguments that "state recognition of one religious group as opposed to others is discriminatory" could only be advanced if "concrete evidence would be brought forward to prove the discrimination which was alleged": ***Grant FC*** at paras 102-103 (**IBOA Tab 4**).

15. Justice Reed noted rather that failing to accommodate the beliefs of the religious public servants at issues could amount to adverse effect discrimination, in violation of both the *Canadian Human Rights Act* and section 15(1) of the *Charter*, although she declined to make such a ruling since it was not the focus of the case or evidence before her: ***Grant FC*** at paras 104-109 (**IBOA Tab 4**).
16. The Federal Court of Appeal affirmed Justice Reed's findings that the policy to accommodate Sikh officers' religious beliefs did not violate the *Charter* rights of the public, stating: "we have not been convinced that protection of the religious freedom of one group means that there is non-protection for any other group": ***Grant FCA*** at para 3 (**IBOA Tab 5**). Writing for the unanimous panel, Justice Linden held that the Appellants' central argument "lacks balance for it overlooks the religious freedom of the officers that is being respected by the accommodation": ***Grant FCA*** at para 4 (**IBOA Tab 5**).
17. Justice Linden commended the accommodation of the police officer's religious beliefs, stating, "This program was not one which restricted religious freedom; it was aimed at enlarging it": ***Grant FCA*** at para 4 (**IBOA Tab 5**). The Court of Appeal held that "speculation" without "concrete evidence" of "actual discrimination against a particular group" cannot prove a constitutional violation. The Supreme Court of Canada refused leave to appeal the unanimous decision of the Federal Court of Appeal.
18. Mere speculation that respecting public servants' *Charter* rights will violate the *Charter* rights of the public is insufficient to justify a refusal to appropriately respect and accommodate the *Charter* rights of public servants.
19. In its factum, the Estate has outlined its specific concerns with the Board Decision's speculation that the accommodation of Ms. Dichmont's religious beliefs would violate the

governments duty of religious neutrality: see Estate's Memorandum of Law, paras 76-83. Likewise, the Estate notes the government's failure to provide evidence that the accommodation of Ms. Dichmont's religious beliefs would violate the rights of the public: see Estate's Memorandum of Law at paras 99-101.

20. Permitting government to justify its refusal to accommodate the religious beliefs of public servants on the basis of *speculation*, unsupported by *evidence*, would create a dangerous precedent damaging to the multicultural nature of Newfoundland and Labrador, and indeed of Canada.

21. Considering such a holding's broader implications, it is foreseeable that government could fire or refuse to hire a woman who, for religious or conscientious reasons, is averse to having physical contact with males, simply because it is *speculated* that in the government position, be it airport screening or corrections, for example, the woman may do a pat down search of a male. Permitting as justification the mere assertion that such an officer is "acting as government" in interacting with the public – unsupported by *evidence* that accommodation could not be reasonably made and discrimination would occur – could have serious consequences for the respect and accommodation of the diversity across the public service.

22. As will be discussed below, the assertion of *Charter* rights by public servants does not necessarily mean that respecting those *Charter* rights requires accommodation. But what is required is a fair and complete assessment of both the *Charter* rights of the public servant(s), the evidence of allegedly competing *Charter* rights or interests and, if a conflict does in fact exists, a balancing of those interests.

C. Government's *Charter* obligations requires a fair and complete assessment of both the *Charter* rights of public servants and the public.

23. The assessment and, if necessary, balancing of *Charter* rights is standard fare in the constitutional jurisprudence of Canada. For example, in ***Carter v Canada (Attorney General),* 2015 SCC 5 [*Carter*]** (**IBOA Tab 6**), the Court had to "balance competing values of great importance": "the autonomy and dignity of a competent adult who seeks death as a response to a grievous and irremediable medical condition" on one hand, with "the sanctity of life and the need to protect the vulnerable" on the other hand: ***Carter*** at para 2 (**IBOA Tab 6**). It has long been noted that no *Charter* rights are absolute: see eg ***Syndicat Northcrest v. Amselem,* 2004 SCC 47** at para 61 (**IBOA Tab 7**). Further, it is also a

longstanding principle that *Charter* rights must not be placed in a hierarchy; "[w]hen the protected rights of two individuals come into conflict, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights": ***Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 1994 CarswellOnt 112** at para 75 (**IBOA Tab 8**). Canadian jurisprudence and tradition require that "state institutions and actors … accommodate sincerely held religious beliefs insofar as possible": ***R v NS*, 2012 SCC 72** [***R v NS***] at para 51 (**IBOA Tab 9**). An alleged conflict of rights must be approached contextually based on the evidence and not speculation.

24. The first question to be considered is whether the allegedly conflicting *Charter* rights can be reconciled in that context: see ***R v NS*** at paras 30-32 (**IBOA Tab 9**). If there is indeed a conflict between competing *Charter* rights that cannot be reconciled, then a balancing analysis must be conducted: ***R v NS*** at para 34 (**IBOA Tab 9**).

25. In ***R v NS***, the Supreme Court of Canada addressed the potential conflict of religious freedom of women who wear niqabs and the *Charter* rights of accused persons against whom such women may testify. Relying on the *Dagenais-Mentuck* test set out in prior cases, the majority held that "a witness who for sincere religious reasons wishes to wear the niqab while testifying in a criminal proceeding will be required to remove it if:

> (a) requiring the witness to remove the niqab is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; *and*
>
> (b) the salutary effects of requiring her to remove the niqab, including the effects on trial fairness, outweigh the deleterious effects of doing so, including the effects on freedom of religion.

R v NS at para 3 (**IBOA Tab 9**). Writing for the majority at paragraphs 8 and 9, Chief Justice McLachlin found that the application of this test required answering four questions:

> 1. Would requiring the witness to remove the niqab while testifying interfere with her religious freedom?
> 2. Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?
> 3. Is there a way to accommodate both rights and avoid the conflict between them?
> 4. If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?

26. The above approach provides guidance for the appropriate approach that should be followed for considering requests for accommodation of religious beliefs and practices in the face of alleged competing *Charter* rights. Although ***R v NS*** did not involve accommodation of public servants, it did involve religious accommodation in the context of government authority of the most blatant kind: where the government is utilizing witnesses with religious convictions in presenting criminal charges that could have a serious and lasting effect on the liberty and security of the person of an accused.

27. The above approach exercises a balancing similar to that applied by the courts in considering alleged conflicts between accommodating public servants' freedom of expression and the convention of the political neutrality of the public service (which is not a constitutional right).

28. The approach to accommodating public servants, specifically in regard to freedom of expression, was first set out by the Supreme Court of Canada in ***Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, 1985 CarswellNat 145** [***Fraser***] (**IBOA Tab 10**). There Chief Justice Dickson addressed the firing of a public servant for expressing views highly critical of the government and set out the following required determination:

> Central to that issue is the proper legal balance between (i) the right of an individual, as a member of the Canadian democratic community, to speak freely and without inhibition on important public issues and (ii) the duty of an individual, *qua* federal public servant, to fulfil properly his or her functions as an employee of the Government of Canada.

Fraser at para 1 (**IBOA Tab 10**).

29. ***Fraser*** was decided without reliance on the *Charter*. In 1991, the Court reconsidered a similar question in ***Osborne***, but this time with reliance on the *Charter*. In considering legislation that prevented the political participation of public servants, the Court affirmed the applicability of a balancing approach in considering *Charter* rights (freedom of expression in the case before it) and other competing values:

> Therefore, where opposing values call for a restriction on the freedom of speech, and apart from exceptional cases, the limits on that freedom are to be dealt with under the balancing test in s. 1, rather than circumscribing the scope of the guarantee at the outset.

Osborne at para 40 (**IBOA Tab 2**).

30. The Court engaged in the required balancing by applying an *Oakes* analysis, appropriately utilized in considering the constitutionality of legislation: ***Osborne*** at paras 51-61 (**IBOA Tab 2**). In doing so, the Court found that legislation which applied "the same standard to a

deputy minister and a cafeteria worker" failed to "impair freedom of expression as little as reasonably possible": ***Osborne*** at para 56 (**IBOA Tab 2**). Further, there was evidence that "the line between management and non-managerial employees, already in existence, formed a rough line which would allow the bulk of the public service below the line to be politically freed, while maintaining the neutrality of the public service as an institution": ***Osborne*** at para 57 (**IBOA Tab 2**).

31. In ***Haydon***, the Federal Court found a violation of the freedom of expression of two public servants. The Court's decision demonstrates the appropriate application of the government's obligation to respect public servants' *Charter* rights in the face of competing interests. In ***Haydon***, Justice Tremblay-Lamer reviewed the actions taken by the government against two research scientists who had publicly criticized the government in television interviews concerning the testing of bovine growth hormones. Subsequently, the scientists were issued letters and ordered to refrained from unauthorized speaking to the media.

32. Justice Tremblay-Lamer applied the ***Fraser*** approach in reviewing the government's decision to issue the letters to the scientists it employed: see ***Haydon*** at paras 90-120 (**IBOA Tab 3**). Justice Tremblay-Lamer held that "the onus rested on the government" to verify if the scientists' conduct was outside the required duty of loyalty set out in ***Fraser***, which included exceptions for public expression where the government was "engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability": ***Haydon*** at paras 82 and 95 (**IBOA Tab 3**). It was incumbent upon the government to consider the relevant factual context and "proceed with a fair and complete assessment of the competing interests": ***Haydon*** at para 98 (**IBOA Tab 3**).

33. Justice Tremblay-Lamer completed the required analysis, carefully reviewing the evidence in the record and concluded:

> I am of the view that the record demonstrates sufficient evidence for the ADM to conclude that the Applicants' public criticisms fell within the first qualification of the *Fraser* test, namely disclosure of policies that jeopardize life, health or safety of the public.
>
> …
>
> In regard to the ADM's appreciation of the appropriate balance necessary between the Applicants' freedom of expression and a public servant's duty of

> loyalty, I am of the view that the ADM should not have concluded that the limit placed on the Applicants' freedom of expression by management was reasonable and appropriate in light of their duty of loyalty and the circumstances of this case. I believe that he failed to proceed with a fair and complete assessment of the Applicants' right, as a member of the Canadian public, to speak on an important public issue.

Haydon at paras 100 and 111 (**IBOA Tab 3**).

34. Justice Tremblay-Lamer relevantly noted that the government had focused "primarily on the Applicants' duty of loyalty to his employer" and had "failed to examine the Applicants' right to freedom of expression": ***Haydon*** at paras 112 (**IBOA Tab 3**). Further, Justice Tremblay-Lamer noted that "[t]here is no evidence demonstrating the negative impact their statements have had on their ability to perform their duties as drug evaluators": ***Haydon*** at para 114 (**IBOA Tab 3**).

35. The Supreme Court of Canada requires government to meaningfully engage in the protection and reconciliation of both the *Charter* rights of the public and of public servants. In ***Carter***, the Court affirmed the obligation of government to respect the *Charter* rights of physicians, engaged by government in the public service, stating:

> In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures. However, we note — as did Beetz J. in addressing the topic of physician participation in abortion in *Morgentaler* — that a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96). In making this observation, we do not wish to pre-empt the legislative and regulatory response to this judgment. Rather, **we underline that the *Charter* rights of patients and physicians will need to be reconciled.**

Carter at para 132 [emphasis added] (**IBOA Tab 6**).

D. Imposing government's *Charter* obligations directly on individual public servants is inconsistent with Canada's *Charter* jurisprudence

36. The Board Decision's analysis concerning possible accommodation of Ms. Dichmont's religious beliefs concluded prematurely by asserting that marriage commissioners act "as government", as though this finding made further analysis irrelevant: Board Decision at pages 7-8. The Board Decision's faulty reliance on ***Nichols v MJ*****, 2009 SKQB 299 (ABOA Tab 22)** and ***Marriage Commissioners Appointed under the Marriage Act (Re)*****, 2011**

SKCA 3 (ABOA Tab 23) to support its truncated analysis was addressed briefly by the Estate in its Memorandum of Law at paragraphs 96-97.

37. As a consequence, the Board Decision does not attempt to engage in a fair and complete assessment of Ms. Dichmont's *Charter* freedom of religion, and whether the evidence in fact demonstrates that her religious beliefs would have a negative impact on the *Charter* rights of the public. The Board Decision rather makes conclusory statements that accommodation would be "problematic and offensive to the duty of state neutrality" and that it "would run contrary to the duty of the Province to be truly neutral in its provision of public services" (pages 11, 13), but fails to cite any evidence demonstrating such harms. The Board Decision simply concludes (at page 13) that "[e]ach marriage commissioner in Newfoundland and Labrador is acting 'as government' individually" and thus "each marriage commissioner individually is subject to the duty of neutrality."

38. The imposition of *Charter* obligations directly on individual public servants, as the Board Decision has done, is inconsistent with *Charter* jurisprudence addressing government's obligation to respect the *Charter* rights of public servants. Whether the actions of certain public servants are properly attributable to government when a member of the public asserts that his or her *Charter* rights have been violated is an entirely different consideration from the extent to which government must accommodate the *Charter* rights of public servants.

39. Thus, whether a police officer's actions are attributable to government when a citizen complains that the officer's actions violated his or her *Charter* rights is a separate question from the extent to which the government must accommodate the religious beliefs of that police officer. Whether a police officer acts "as government" in relation to the public is not a determinative question on the issue of whether the officer's religious beliefs can be accommodated. There is no question that a police officer acts "as government" is his or her official capacity, but that does not mean that his or her religious beliefs, even if openly expressed while carrying out that role, are attributable to government. Thus, the religious beliefs of Sikh officers are not attributable to government and do not violate the government's neutrality, even though government accommodates those beliefs and permits their open expression while the Sikh officers carried out their government duties: see ***Grant FC*** at paras 82-83 (**IBOA Tab 4**); see also ***Grant FCA*** at para 4 (**IBOA Tab 5**).

40. One could assert that many public servants act "as government" in some way. While whether a public servant acts "as government" is relevant to considering the extent to which government must accommodate those public servants, it is not determinative of a finding that government does not need to accommodate public servants' *Charter* rights. Rather, it is part of the context considered. Thus, under an appropriate contextual analysis, there are likely to be different levels of accommodation, based on the roles played by the public servants. For example, in ***Osborne*** at para 56 (**IBOA Tab 2**), Justice Sopinka stated: "To apply the same standard to a deputy minister and a cafeteria worker appears to me to involve considerable overkill, and does not meet the test of constituting a measure that is carefully designed to impair freedom of expression as little as reasonably possible." The relevant context as established by the evidence must be carefully evaluated in considering whether the government is infringing the *Charter* rights of even senior, high level public servants. See ***Haydon***, discussed above.

41. What is inappropriate is a simplistic determination that public servants act "as government" and therefore are not entitled to have their *Charter* rights accommodated.

E. Suggested framework for considering governments' obligation to respect public servants' *Charter* rights and contextually balance them with competing *Charter* rights.

42. From the above jurisprudence, it is clear that government is required to engaged in a fair and complete assessment of public servants' *Charter* rights and engage in a contextual balancing of *Charter* rights that are demonstrated to be in conflict with the public servants' *Charter* rights. The burden is on the government, including the requirement to demonstrate by *evidence*, not mere *speculation*, actual violation of competing *Charter* rights.

43. As seen through the case law from ***Fraser*** to ***Carter***, government must engage in a consideration, and if a conflict is found, a balancing of 1) the *Charter* rights of the public servant(s), and 2) any competing *Charter* obligations of government, the *Charter* rights held by the public or the ability of the public servant to fulfil his or her functions. Government cannot ignore the public servant's *Charter* rights.

44. The principles applied through the *Dagenais-Mentuck* test, while developed in the context of publication bans and subsequently applied in the context of religious accommodations for witnesses, have been recognized by the Supreme Court of Canada to have "broader application": ***R v NS*** at para 8 (**IBOA Tab 9**). It is submitted that the following four

questions, based on the *Dagenais-Mentuck* test as applied in ***R v NS***, are appropriately useful in guiding consideration of the accommodation of public servant's *Charter* rights:

1. Would requiring the public servant to comply with the requirement interfere with the public servant's *Charter* right or freedom?
2. Would permitting the public servant to exercise that particular *Charter* right or freedom interfere with the *Charter* obligations of the government, the *Charter* rights of public, or the ability of the public servant to fulfil his or her functions?
3. Is there a way to accommodate the public servant's *Charter* rights and avoid conflict with the competing interest?
4. If no accommodation is possible, do the salutary effects of infringing the public servant's *Charter* rights outweigh the deleterious effects of doing so?

Conclusion

45. The Justice Centre submits that the Board Decision fails to engage in the required and appropriate consideration of public servants' *Charter* rights. The Board Decision errs by imposing government's *Charter* obligations directly on public servants individually, and effectively eliminating the necessary consideration of the government's obligations to respect public servants' *Charter* rights.

DATED at the City of _____, in the Province of _____, on the ____ day of February, 2019.

_____
Marty Moore and Jay Cameron
Justice Centre for Constitutional Freedom
#253-7620 Elbow Drive SW
Calgary, Alberta T2V 1K2
Phone: (587) 998-1806
Fax: (587) 352-3233
Email: mmoore@jccf.ca

PART 4 – ORDERS SOUGHT

As an intervenor pursuant to Rule 7.06 for the purpose of rendering assistance to this Honourable Court, the Justice Centre does not seek any Order.

APPENDIX A – CASES CITED

Case Name	Factum Paragraph
Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16	4
Loyola High School v Quebec (Attorney General), 2015 SCC 12	5
Osborne v Canada (Treasury Board) [1991] 2 SCR 69, 1991 CarswellNat 348	7, 11, 30, 40
Haydon v R, [2000] FCJ No 1368, 2000 CarswellNat 2024	11, 31, 32, 33, 34, 40
Grant v Canada (Attorney General) (1994), [1995] 1 FC 158, 1994 CarswellNat 1424 (Fed TD)	12, 13, 14, 15, 39
Grant v Canada (Attorney General), [1995] FCJ No 830, 1995 CarswellNat 1666 (Fed CA)	16, 17, 39
Carter v Canada (Attorney General), 2015 SCC 5	23, 35
Syndicat Northcrest v. Amselem, 2004 SCC 47	23
Dagenais v Canadian Broadcasting Corp., [1994] 3 SCR 835, 1994 CarswellOnt 112	23
R v NS, 2012 SCC 72	23, 24, 25, 26, 44
Fraser v Public Service Staff Relations Board, [1985] 2 SCR 455, 1985 CarswellNat 145	28, 30