November 27, 2019

Re: Bill 207: Conscience Rights (Health Care Providers) Protection Act (Williams)

Dear Members of the Legislative Assembly,

Thank you for the opportunity to present a few thoughts on why an organisation like the Canadian Council of Christian Charities is particularly interested in Bill 207.

We currently have some 3,400 members across Canada. In Alberta we represent 553 members; most of these are churches, but our membership also includes dozens of schools (including universities, colleges, and seminaries) as well as humanitarian agencies, theatre programs, summer camps, homeless shelters, community development organisations, media and broadcasting companies, and medical associations.

The issue of conscience is something we take very seriously. Indeed, conscience is a matter of **basic human dignity** that must be respected and accommodated in a truly free and diverse society.

As we understand it, this bill was initiated in response to the Ontario decisions involving the College of Physicians and Surgeons of Ontario (CPSO). Both the Divisional Court and the Court of Appeal (ONCA)[1] denied accommodation of physicians who were conscientiously opposed to being involved in certain medical procedures (like abortion and medical assistance in dying).

The Ontario decisions are disconcerting given that the Supreme Court of Canada noted in *Carter v Canada* (2015 SCC 5), "nothing in the declaration of invalidity which we proposed to issue would compel physicians to provide assistance in dying... What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures." The unanimous decision also noted that "a physician's decision to participate in assisted dying is **a matter of conscience and, in some cases, of religious belief**" (emphasis added). It is therefore within the Legislature's purview to engage in this important initiative and to clearly set out and affirm these *Charter* protections.

MLA Dan Williams recognized the gravity of the Ontario court decisions and put forward a private member's bill that exempts medical practitioners from having to perform medical procedures that violate their consciences. It is a sensible response to the ONCA decision. The legitimate concern is that the Ontario decisions will influence other jurisdictions across the country to limit conscience.

Mr. Williams rightly decided to seek legislative protection of conscientious doctors. After all, **if the courts cannot be relied upon to respect the rights of physicians, then legislative bodies must fill in the gap**. That is what the Supreme Court of Canada instructed in *Carter* and what Williams has proposed.

[1] See *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (CanLII), <http://canlii.ca/t/j08wq>.

Crucially, the proposed legislation **does not limit or infringe on patients' access** to any health care procedures. Individuals will not be hindered from obtaining the services they seek. (In fact, it is worth noting that the Ontario Divisional Court specifically accepted that there was no concrete evidence of harm caused by a doctor's conscientious objection).[2] Rather, the bill affirms the right of medical practitioners to live in accordance with their convictions.

A number of commentators have stated that the bill is redundant. We already have the *Canadian Charter of Rights and Freedoms,* they say. True: but to reiterate, if the courts are not willing to uphold *Charter* protections, then the legislatures must step in.

Further, it is worth noting that critics of Bill 207 have largely and grossly misinterpreted the Ontario decisions as pre-empting the proposed Alberta legislation and effectively answering the question (in the negative) of whether physicians can practice in accordance with their conscience.

Importantly, the Ontario decisions do not address the **collective rights of religious health care organizations**. The claims in that case were framed solely in the context of the individual. Thus, significant elements of the proposed legislation were not given any judicial consideration, let alone fully adjudicated. Mr. Williams' concern for religious institutions is very much needed given the lengths to which activists have been willing to go to invalidate the religious objections of healthcare institutions.

On this point we recommend Dr. Bussey's academic article, "The Right of Religious Hospitals to Refuse Physician-Assisted Suicide," (2018) 85 S.C.L.R. (2d), available at https://ssrn.com/abstract=3183767. Please also **see the editorials copied below**, including Dr. Bussey's most recent piece from The Lawyer's Daily.

There are significant implications of failing to protect conscientious objection in the most serious of circumstances – the purposeful ending of another human life. **If the *Charter* cannot be applied to protect conscience in this most egregious and compelling of circumstances, what will it protect**?

We therefore urge you to vote **in favour of Bill 207** in consideration of the fundamental conscience rights of physicians – and in recognition of the Legislature's important role in affirming that conscience rights are protected.

Sincerely,

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Deina Warren, LL.M., Associate Legal Affairs

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[2] See *CMDS v CPSO*, 2018 ONSC 579 at para 147: "Second, I accept that there is no study or direct evidence that demonstrates that access to health care is, or was, a problem that was caused by physicians objecting on religious or conscientious grounds to the provision of referrals for their patients".

Editorials by Dr. Barry W. Bussey

"Ontario Court of Appeal Decision Could Result in Alberta Legislation", The Lawyer's Daily (November 21, 2019), online: https://www.thelawyersdaily.ca/articles/16897

> While it may initially seem strange that a decision of one appellate court would result in proposed legislation in a different province altogether, such is the state of politics and law in this country. Over the last number of years, the judiciary has been reluctant to protect the physician, being the *Charter* rights-holder, who has a conscientious objection – religious or otherwise – to taking another human life (whether pre-born or with a terminal illness). It now falls on legislators to act in support of the *Charter* rights of doctors.
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> Alberta MLA Dan Williams' private bill to ensure conscience protection of physicians in Alberta is a sensible – indeed, commendable – move in response to the unfortunate decision of the Ontario Court of Appeal (ONCA) in which the Court declared that conscientious physicians "have no common law, proprietary or constitutional right to practice medicine."[3] Imagine the outcry if this statement were applied to a racial minority.
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> Yet this argument appears to be fair game against those medical practitioners who do not agree with the Court's definition of "public interest." That "public interest," according to the Court, requires physicians to be involved in a host of potentially controversial medical procedures including abortion, contraception, infertility treatment for heterosexual and homosexual patients, prescription of erectile dysfunction medication, gender re-assignment surgery, and Medical Assistance in Dying.
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> Religious conscience has become the politically correct punching bag of late for the courts, as is evidenced by the Hutterian Brethren[4] and the Trinity Western University law school cases[5] at the Supreme Court of Canada. The ONCA decision is but the latest in an ongoing attack against religious conscience. It is, therefore, not surprising that legislators are taking a stand in response to their constituents' legitimate concerns that the courts have overstepped their jurisdiction in implementing a "progressive ideology." It is evidence that the courts' definition of "the public interest" is not fully accepted by the "public". And just exactly who gets to determine the "public interest" is a valid question in this age of judicial activism.
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> Maybe, just maybe, we are starting to see some legislative pushback against the growing power of the judiciary. However, we can expect those in power to respond with pushback of

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[3] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (CanLII), <http://canlii.ca/t/j08wq> at para 187. Instead of being willing to accommodate conscientious convictions, the court concluded at paras 184-86 that physicians should either make "individual sacrifices" of conscience or "narrow their 'scope of practice'" to avoid potential conflicts.

[4] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, 2009 SCC 37 (CanLII), <http://canlii.ca/t/24rr4>.

[5] *Law Society of British Columbia v. Trinity Western University*, [2018] 2 SCR 293, 2018 SCC 32 (CanLII), http://canlii.ca/t/hsjpr; and *Trinity Western University v. Law Society of Upper Canada*, [2018] 2 SCR 453, 2018 SCC 33 (CanLII), http://canlii.ca/t/hsjpt.

their own. Already, we see the Court Party[6] – that is, the legal and media commentators – suggesting that Williams' proposal will result in the loss of healthcare services, particularly for women and LGBTQ+ patients. That is a **misrepresentation of the bill**, which does not seek to limit or hinder access for patients, who will still be able receive the treatments they want or require. It only means that physicians will be able to decline taking part in a medical procedure that violates their conscience.

This is not a new concept in our law. From the very inception of our country, we have tolerated differences of belief and conscience. Workers who need time off to attend religious services on a holy day; conscripts who refuse to bear arms; drivers who refuse to have pictures taken; Sikhs who refuse to wear helmets – all have been accommodated, on the basis of conscience, to one extent or another. Far from damaging or destroying our country, this **diversity has shaped our very identity, helping to define our nation as an inclusive mosaic of cultures, viewpoints, and beliefs**.

In the case of this legislation, the worst that could happen is that a potential patient may be informed by their family physician that she does not perform such services and that the patient is to see someone else. As a result of that interaction, a patient may discover that the physician has a different perspective on the moral and ethical dimensions of medicine. The patient may well be offended by that knowledge, and such offence needs to be acknowledged and respected. At the same time, the risk of causing offense should not force the physician to give up medicine. Surely it is not in our public interest to have fewer physicians due to conflicts between the demands of conscience and the demands of their practice. Nor is it in the public interest, I suggest, to shield our citizens from exposure to divergent beliefs: as the Supreme Court itself has observed in *Chamberlain*, experiencing "cognitive dissonance … is simply a part of living in a diverse society. It is also part of growing up."[7]

There is much talk of "dog whistles", meaning political language that resonates differently with certain subgroups. "Dog whistles" go both ways. The loudest whistle in this debate so far has been the claim, coming from Osgoode Hall, that conscientious physicians have no "right" to practice medicine because of their conscience. It is time we all work together to find a reconciliation of views by ensuring that the patients are served and that conscientious physicians are respected.

Mr. Williams' proposal is a great first step.

"With Ontario Ruling on Doctors, the Revolution Continues," The National Post (May 17, 2019), online: https://nationalpost.com/opinion/with-ontario-courts-ruling-on-doctors-the-revolution-continues

How is it that such a simple decision could be made so complicated? Given the history of accommodating individual conscience in the medical profession and in Canadian law, the

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[6] F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: U of T, 2000).
[7] *Chamberlain v. Surrey School District No. 36* - 2002 SCC 86 - [2002] 4 SCR 710 at para 65.

case before the Ontario Court of Appeal to accommodate doctors' consciences was a "no-brainer." The law, history, and basic human decency cried out: "Accommodate the physician!" Instead, the highest court in Ontario followed the worrying legal revolution against accommodation and stomped on conscience. And it did so wrapped up in language that purported to support vulnerable patients.

The decision against physicians who, because of conscience, cannot assist in the intentional killing of a human being, pre- or post-birth, is a travesty of justice. It is wrong. It is wrong morally, ethically and legally.

The Ontario Court's decision is focused almost entirely on the hypothetical patient who cannot access "health services." Yet, there was not a single shred of evidence that showed even one person in Ontario wanted to end their life or the life of their pre-born child but was unable to get the "treatment" they wanted because of physicians' religious objections. The College of Physicians and Surgeons of Ontario (CPSO) did present evidence on appeal of a patient finding it challenging to obtain medical assistance in dying but that was not due to a religious conscientious objector. Not one. In fact, the Court of Appeal quoted from the Divisional Court that "there was **no direct evidence that access to health care is a problem caused by physicians' religious objections** to providing care" (emphasis added). So, where was the problem? Basic morals, ethics, and law say this is a "solution" without a problem. And yet the "solution" of non-accommodation was so vigorously defended by CPSO that it wound up in court. Why?

As far as I can tell, there is only one reason why this issue came to court. That is, there is a growing antipathy among Canadian elites against conscientious individuals who refuse to accept the elitist moral (or lack thereof) vision of how we ought to live. Some even go so far as to say that if anyone has religious scruples, they should not enter the professions. Really? We have come to that? A new orthodoxy has taken hold, and woe betide those who do not conform. As we saw with the Trinity Western University law school case, courts generally — and the Ontario courts particularly — appear to take a certain pride in being the legal vanguard of enforcing the secular orthodoxy.

Tellingly, one piece of evidence not mentioned by the Ontario courts in this case was an affidavit of I.M., an immigrant patient of one conscientious family doctor who would not refer her for an abortion. IM got the abortion as desired and returned to her doctor, relationship unimpaired, and still considered the doctor to be as close as family. That is what we would expect of any doctor: providing expert care for their patients even if they do not agree with the personal choices patients make. **Where is the protection for these conscientious doctors who care?**

We can anticipate more, not fewer, lawsuits of conscience. That is due to the fact that people of conscience are a tenacious bunch. They do not cower easily. The Wilson-Rayboulds and Philpotts of the world are courageous people. Personal expense is of no consequence for them, when they speak truth to power.

Liberal democratic societies owe much of our basic freedoms to people of conscience who have bravely resisted the dictates of those in power. Freedom of conscience is the very bedrock of all our freedom. It is the first freedom listed in the Canadian Charter, but it is now the first target of systematic erosion by our elites. Academics, the legal profession, and the media have become so zealously secular in their outlook that any objections to their positions — no matter how respectful or lawful — must be stopped at all costs. Given their masterful command of language, they beguile us into thinking we are doing right when we do wrong. For example, the physician's conscience becomes an issue of patient services; the religious university's support of traditional marriage interferes with equality; the religious group's refusal to be photographed for a drivers' licence is a matter of protection against identity theft; and it goes on.

Failure to accommodate conscience is a failure to govern. From the Sikh student wearing his kirpan to school to the Sabbatarian taking her holy day off to attend church, we have historically, as a country, been willing to accommodate diversity. But the increasingly strident legal revolution against accommodating conscience, particularly religious conscience, would force everyone into the same straitjacket of conformity. Such political, legal and social policies do not end well. The examples of such failures are too numerous to mention — Aleksandr Solzhenitsyn's Gulag Archipelago is enough.

Of course, patients who want medical assistance in dying will continue to obtain it and those wanting abortions similarly have access. The law permits both.

And until the recent legal revolution, the law also permitted conscientious objection through accommodation. The failure to protect conscience does not bode well for our collective freedom.

"The Stigma and Shame", Convivium (May 22, 2019), online:
https://www.convivium.ca/articles/stigma-and-shame/

The religious conscience makes little sense to the non-religious. To them, a physician who denies medical assistance in dying (MAiD) to a terminally ill patient is committing the ultimate indignity.

Likewise, they see a physician who chooses to not perform an abortion as failing to respect a woman's autonomy. The non-religious are even more incredulous when the conscientious physician refuses to give an "effective referral," meaning to arrange for another physician to provide the "healthcare service." It simply makes no sense.

Indeed, it does not – for those who are non-religious.

But that is the very point of the religious accommodation practiced for centuries in liberal democratic countries. We have, until recently, been willing to allow some space for religious individuals who reject the status quo because they are convinced that God requires them to act differently. Somewhere along the way, we seem to have forgotten our history.

If we peek behind the curtain of our present, we see a society that struggled with religious conscience and came to terms with it. Consider the Mennonites: In an era when Church and State practiced infant baptism, they believed adult baptism was Biblically required. Their defiance of authority led to public execution by drowning (if you want water, then die in it) or being burnt at the stake. Looking back further to Ancient Rome, we see Christians being fed to lions because they refused to perform the simple act of offering incense to the emperor. Much less daunting than an "effective referral."

But, by the 18th century, we came to the realization in the West that religious conscience was to be respected. For one thing, it took significant State resources to deal with "heretics" – resources that were better spent elsewhere. Nor did persecution convert the remaining religious group to the "proper" views of the elites. Moreover, we discovered that those with an acute conscience were an industrious lot: they contributed more to our overall wellbeing by a strong work ethic (as they worked for the Lord, not man) and were thus worth more alive than dead.

Rather than the skirmishes of the Thirty Years' War, we decided to live with our differences. Here in Canada, we built a country of French Catholics and English Protestants based on mutual respect – even though each thought the other would go to Hell for not accepting the truth. It has worked well for the last 150-plus years. We do not have the killing fields that many other countries around the world do.

Yet, here we are in a similar predicament. Different ideologies. Different elites. Same problem: the attempt to coerce the religious conscience. If history is any guide – and, while it may not repeat, it often rhymes – we will come to rue the day we sacrificed religious conscience on the altar of public convenience and for fear of "stigma and shame."

The religious conscience that was rejected by the Ontario Court of Appeal (ONCA) last week in the case of the Christian Medical and Dental Society of Canada [CMDSC) v. College of Physicians and Surgeons of Ontario [CPSO]. I maintain it is a shameful rejection of our heritage of religious accommodation.

There was **no evidence of "actual harm"** caused by a religious physician denying MAiD. Rather, there was **evidence of exemplary care** being provided to patients both before and after physicians chose not to perform certain procedures. However, Ontario's College of Physicians and Surgeons argued that it did not need to provide evidence of "actual harm." Instead, all that was necessary was evidence that its effective referral policies would prevent harm to vulnerable patients.

The lower Divisional Court and the Court of Appeal agreed that the ultimate priority was to prevent injury "due to interference or delay in accessing care, shame and stigma associated with a physician's refusal to provide care, and loss of faith in physicians and in the health care system." Meanwhile, the admittedly "deleterious effects of the Policies" on religious physicians could be resolved through "individual sacrifices."

The Court of Appeal observed that "[a]bortion and MAiD carry the stigmatizing legacy of several centuries of criminalization grounded in religious and secular morality." It stated "[d]elay in accessing these procedures can prevent access to them altogether." But there is more. While issues of MAiD and abortion made the headlines, the Court also referenced "sexual health care," including "gender re-assignment surgery" and infertility treatment. For the Court, the concerns "relating to the safety of vulnerable patients as a result of deprivation of access … were, and have been, conclusively established." "Actual harm" is not required.

The Court was not interested in evidence that the Christian Medical and Dental Society of Canada presented clearly revealing **there were less invasive ways to accommodate religious conscience while still meeting the College's stated objective** of providing patients with "equitable access … to health care services."

The Medical and Dental Society argued that religious physicians could provide patients with "generalized information" listing non-objecting physicians who would provide abortion, MAiD, or other services. This was unacceptable to the Court because it "would leave the patient with feelings of rejection, shame and stigma" which, according to the Court "is not theoretical." The Court reviewed several affidavits of religious physicians who shared with their patients why they were not able to perform or be involved in treatments they requested. According to the Court, "[s]uch remarks could reasonably be expected to cause the patient stigma and shame."

Reading the decision leaves one with the impression that the Court accepted the oft-expressed attitude that anyone with a religious objection ought not to be in the medical profession to begin with. The Court emphasized the "deference" due to the College in "advancing the goal of equitable access to abortion, MAiD, contraception and sexual and reproductive health care," not to any requirement to accommodate religious conscience. That was a mistake.

Adding insult to injury, the Court agreed with the Divisional Court that religious physicians "have no common law, proprietary or constitutional right to practice medicine… they are subject to requirements that focus on the public interest, rather than their interests."

Missing from the two Ontario court decisions is the realization that the "public interest" includes the accommodation of religious conscience. Our history proves it. A recent graduate from a Christian medical school in the U.S. told me last night, "Dad, it sounds like Ontario wouldn't even be interested having me practice family medicine there."

Such is the stigma and shame of Ontario's religious physicians after reading this decision.