Court File No.: CV-17-585553

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

SHALOM OUANOUNOU, BY HIS SUBSTITUTE DECISION-MAKER AND LITIGATION GUARDIAN, MAXIME OUANOUNOU

Applicant

- and -

HUMBER RIVER HOSPITAL, ALI GHAFOURI, GARRET PULLE, SANJAY MANOCHA, DAVID GIDDONS, CORONER, REPRESENTATIVE OF THE OFFICE OF THE CHIEF CORONER

Respondents

FACTUM OF THE APPLICANT

PART I - OVERVIEW

1. The fundamental issue in this case is whether Shalom is alive or dead, and whether the Respondents are required to consider and to accommodate his express religious beliefs in coming to and certifying that determination.

2. Shalom is alive according to Jewish Law. His heart continues to beat and he continues to breathe, with the assistance of a ventilator.

3. To the extent that Shalom's heart continues to beat and he continues to breathe, he is a living human being, subject to the same rights as any other human being without being judged

based on the quality of his life or the cost of his care.

4. The determination of death requires more than simply a clinical assessment of neurological criteria. It is a legal and spiritual determination and not simply a medical determination. It is the ultimate zero sum determination and requires full consideration and accommodation of an individual's religious beliefs before that determination can be arrived at.

5. Doctors and coroners do not define "life" or "death." They only apply whatever medical definitions society has agreed upon, which should be set out in legislation. Unfortunately for all citizens of Ontario, our Province has no statutory legal definition of "death."

6. To the extent that the Canadian Guidelines relative to the neurological determination of death, and the legal process to certify death in Ontario failed to consider and accommodate Shalom's express religious beliefs, the guidelines and certification of death based upon them alone are discriminatory and violate Shalom's fundamental constitutional and human rights to equality, religious freedom, to liberty, security and to life itself.

7. In concluding that Shalom is "dead", the Respondents have only applied medical criteria without regard to the multicultural fabric of our society or our deep respect for the firmly held religious beliefs of every person.

8. It is precisely to live by these foundational constitutional principles that Shalom's family immigrated from Morocco to Canada. They sought to be free, equal and to be able to freely exercise their religious freedoms as Orthodox Jews in a tolerant and multicultural Canada.

9. This court is asked by the Respondents to sanction the withdrawal of life support and condemn Shalom to death in express violation of his deeply held and fundamental religious beliefs.

10. Shalom asks this court to uphold the very freedoms and equality promised to him and his family when they first came to Canada, as he faces the most challenging and difficult time of his young life.

PART II - FACTS

11. Shalom is a devout Orthodox Jew who lives his life in accordance with the fundamental laws of the Torah as these Holy words have been explained by Talmudic scholars for centuries and interpreted by his Rabbi.[1]

12. Throughout his life, Shalom has adhered to the tenets of traditional Halachach Jewish Law. He has always strictly observed the Sabbath, the Jewish Holidays, the laws of Kashruth and the other commandments of the Torah.[2]

13. Shalom prays daily, as Jewish law requires. In the morning, except on certain Jewish Holidays when it is not required, Shalom puts on Tefillin as part of his morning prayers. At all times when awake, Shalom wears a kippah, in keeping with the Jewish requirement that he

[1] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶6.
[2] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶7.

cover his head out of respect for G-d. He also always wears an "undervest" with "tzitzes" [special fringes] tied at each corner.[3]

14. Shalom does not work on the Sabbath or on Jewish Holidays for which work is proscribed. His interpretation of Jewish law in this regard is in accord with that of Orthodox Judaism and his own Rabbi and therefore prohibits him from being in an automobile, turning lights on or off, and even writing or using a computer on the Sabbath and holidays.[4]

15. Shalom's identity is defined by his strict adherence to his religious beliefs.[5]

16. Shalom lived with his father until the start of his recent hospitalization. He spent two years at a Yeshiva in Israel, where he was taught the lessons of the Torah and accepted them as the Code by which he lived his life.[6]

17. While at the Yeshiva, Shalom had the opportunity to develop his Jewish faith, values and beliefs with teachers and other students. He spent this time in order to enhance his understanding of the Jewish faith. The lessons learned at the Yeshiva have informed his spiritual values and beliefs and contributed to his advanced understanding and appreciation of the lessons of the Torah and its role in his daily life.[7]

[3] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶7.
[4] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶8.
[5] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶9.
[6] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶10-13.
[7] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶10-13.

18. Shalom's father is also an observant Orthodox Jew and he instilled Jewish values in Shalom.[8]

19. Shalom's father is aware of his legal obligation to make his treatment decisions based upon Shalom's wishes, values and beliefs and that is why as Shalom's substitute decision maker, he opposes the withdrawal of his life support.[9]

20. Shalom's family immigrated to Canada from Morocco precisely so they could live in a multicultural community that respects and welcomes their Orthodox Jewish heritage, and enables them to practice Judaism in accordance with their Orthodox values and beliefs.[10]

21. Shalom works as an installer of doors and windows. At the same time he attends Seneca College, intending to study business management with plans to work in property management.[11]

22. He is also a student of Judaic ethics, philosophy and law, both here in Toronto and as noted above at a Yeshiva in Jerusalem.[12]

23. Shalom is a model son, conscientious, sensitive and committed to his family. He has one older and one younger sister and a younger brother. His whole family is devoutly Orthodox.

[8] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶14.
[9] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶14.
[10] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶15.
[11] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶16.
[12] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶17.

Shalom has a wide range of friends. He plays basketball in a house league and was developing an interest in baseball.[13]

24. He also serves as a mentor to younger children in the Orthodox Jewish community. Shalom organized Jewish education programs in his community to teach Jewish philosophy, ethics and practices to help younger community members refine their character and become active and contributing members to his Orthodox Jewish community.[14]

25. When Shalom was 10 years old, he and his father made a pilgrimage to the grave of Rabbi Nachman of Breslov, an important religious figure who is buried in Uman, Ukraine, about three hours south of Kiev. For the last two years, Shalom and his father made the same pilgrimage. The purpose of these pilgrimages on Rosh Hashonnah, one of the holiest days of the year, is to reaffirm their commitment to the study of and adherence to strict observance of the Jewish Code of Law as set out in the *Shulchan Aruch*, which is the comprehensive code of Jewish law.[15]

26. Shalom is, in the words of his doctors, "brain dead". Nonetheless, a ventilator assists his breathing and his heart and respiratory functions continue.[16]

27. Because a ventilator assists his breathing and his heart and respiratory functions continue, based upon the Jewish *Halachic* law to which Shalom subscribes, he is alive and not dead.[17]

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[13] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶18
[14] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶19.
[15] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶20.
[16] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶21.
[17] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶21.

28. The principles of Jewish Halachic law represent the principles, values and beliefs shared by Shalom, his father, and their Rabbi. They reflect the teachings and lessons from the Torah that they received and practice as the foundation of their lives and identities in Toronto.[18]

29. Shalom has demonstrated throughout his entire life that he accepts the tenets of Jewish law as set out in the Torah, commented upon by Jewish scholars throughout the centuries and interpreted by his Rabbi.[19]

30. These tenets include the principle that brain death is not death. Shalom's values and beliefs do not accept "brain death" as the equivalent of death. Rather, his view is that he is alive for as long as his heart beats and he breathes.[20]

31. Consequently, discontinuing his life support in these circumstances is tantamount to murder and therefore contrary to his fundamental belief in the sanctity of human life, a belief that is the foundation of Judaism.[21]

32. Shalom knows that there are differing opinions among Jews and Jewish scholars regarding whether "brain death" is the same as "death." However, he made clear that his beliefs in this

[18] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶22.
[19] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶23.
[20] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶24-25; Affidavit of Eliyahu Zrihen, sworn October 30, 2017, ¶19-20, 22.
[21] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶26.

regard hold that "brain death" is not the same as death, which he defines as cessation of respiratory and circulatory function.[22]

33. Shalom's beliefs are consistent with a large body of Jewish legal and medical opinion and with those of his spiritual advisor, Rabbi Zrihen.[23]

34. Shalom would express how the determination of when a person dies is a matter of religious and halachic law, and not merely a medical matter. His belief is that G-d determines when a person lives or dies and not man.[24]

35. Shalom and his father have talked about this issue on several occasions over the years, including specific discussions about life, death and family, particularly when Shalom's grandfather became ill and came to live with the family.[25]

36. Shalom's family cared for Shalom's grandfather throughout this time and provided comfort and support during his illness and the decline that ultimately resulted in his death.[26]

[22] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶27; Affidavit of Eliyahu Zrihen, sworn October 30, 2017, ¶22 and 28.
[23] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶28; Affidavit of Eliyahu Zrihen, sworn October 30, 2017 ¶27-29.
[24] Affidavit of Tomer Malca, sworn October 30, 2017, ¶13.
[25] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶29.
[26] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶30.

37. Although Shalom's grandfather died at home and did not require ventilator support, his family did discuss this prospect and what would be his grandfather's wishes in that event, and in the event that the ventilator would subsequently have to be removed.[27]

38. This naturally provoked a discussion about Shalom's own wishes, values and beliefs and what he would want in similar circumstances.[28]

39. Shalom has made it clear on numerous occasions that his view of Halachic Jewish law prevented removal of a ventilator where doing so would hasten or cause death. Shalom also believes that as long as the heart beats, a person is alive.[29] These statements constitute a previously expressed capable wish applicable to his current circumstances.

40. This is based upon Shalom's learning of *Halachic* Jewish law at the Yeshiva, as well as from his review of multiple sources on this and other subjects of Jewish law, including Rabbi Nachman, Maimonides, and the Talmud. Shalom is also a regular student of Rabbi Zrihen, whom he views as his spiritual advisor and with whom he studied weekly.[30]

41. In the face of differing interpretations of Jewish law with regard to any topic, including the Jewish definition of "death," Shalom has a simple way of deciding what, for him, is the correct

[27] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶31.
[28] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶32.
[29] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶33
[30] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶34.

course of action: he asks his Rabbi and accepts the Rabbi's interpretation. This is his "rule of Law", consistent with his Jewish tradition.[31]

42. On Shalom's behalf, his Rabbi, Rabbi Zrihen, was asked whether or not Shalom's mechanical ventilation can be discontinued. Rabbi Zrihen was definitive in his response. He advised that according to Jewish Law, Shalom is not dead and that to remove mechanical ventilation prior to cessation of all cardiac function is the equivalent of murder.[32]

43. Shalom accepts such determinations as authoritative and binding rulings relative to his Jewish practices and beliefs.[33]

44. Respect for Shalom's wishes, which are based upon his devout belief and faith in Orthodox Judaism therefore requires that mechanical ventilation not be withdrawn prior to his cardiac death. Anything less than continuing Shalom's life support is a failure to accommodate his lifelong, firmly held religious beliefs.[34]

45. Failure to allow for an accommodation of Shalom's religious beliefs as part of the Canadian guidelines on the determination of death and as part of the legal standard by which death is determined in Ontario would require that Shalom be either transferred to New York State, New

[31] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶35-36.
[32] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶37; Affidavit of Eliyahu Zrihen, sworn on October 30, 2017 ¶27-29, 32 and 33.
[33] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶38.
[34] Affidavit of Maxime Ouanounou, sworn October 30, 2017, ¶39.

Jersey or Israel, or be brought home, in order to ensure that he is able to live and die according to his lifelong deeply held religious beliefs.[35]

46. In the circumstances, to remove the ventilator and life support from Shalom would be impermissible based on his beliefs until his heart had stopped and he was incapable to breathe. At that time, he would be considered dead under Jewish Law.

47. For these reasons, it is clear that Shalom's express religious beliefs and values would support maintaining the ventilator and to withdraw it would represent fundamental disrespect for Shalom's religious beliefs and Jewish identity.

PART III – ISSUES AND LAW

SHALOM IS ALIVE

48. The fundamental issue in this case is whether Shalom is alive or dead, and whether or not his religious beliefs should be considered and accommodated in the process to determine and certify death.

49. Shalom is alive by Jewish law. His heart continues to beat and he continues to breathe.

50. As such, he is a living human being according to Jewish law, subject to the same rights as any other human being without being judged based on the quality of his life or the cost of his

[35] Affidavit of Maxime Ouanounou, sworn October 30, 2017, 40; Affidavit of Eliyahu Zrihen, sworn on October 30, 2017 ¶32-33.

care.[36]

51. Section 7 of the Charter of Rights and Freedoms guarantees to every individual the right to life, liberty, and security of the person. Once an improper neurological determination of brain death is made, this Court not only has the jurisdiction to intervene to correct that error based on its *parens patrie* jurisdiction, but it is legally bound to review and reverse the error in order to preserve life and uphold fundamental human rights, including respect for religious freedom.

INJUNCTION

52. This Court has the inherent jurisdiction to grant equitable relief, and the jurisdiction to grant an injunction pursuant to s. 101 of the *Courts of Justice Act*, and Rule 40 of the *Rules of Civil Procedure*.[37]

53. The Court has set out a three-part test in order to determine whether an interlocutory injunction should be granted:

a. The applicant demonstrate that there is a serious question to be tried;
b. The applicant demonstrate that it will suffer irreparable harm if the relief is not granted; and,
c. The Balance of Convenience favour the Applicant.[38]

[36] *Re S.D.,* 1983 CarswellBC 6 (BSSC), ¶38-43.
[37] *Courts of Justice Act*, R.S.O. 1990, c.C-43, s.101; *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 40.01.
[38] *RJR MacDonald v Canada*, [1994] 1 S.C.R. 311.

54. Where the result of the motion will, in effect, amount to a final determination of the Application, the Applicant must show a "strong prima facie case".[39]

SERIOUS ISSUE TO BE TRIED

55. The absence of religious accommodation as part of the legal process to determine and certify death in Ontario represents discrimination and a breach of religious freedom of Shalom and the Applicant on his behalf. Such issues are fundamental to the identity and very existence of Shalom as a human being and a Jew.

56. Disregard of a person's religious beliefs at the time of sickness or death when they would most expect to take comfort from those beliefs represents a serious assault on human dignity, equality, and religious liberty which raises fundamental and serious human rights and constitutional issues to be tried.

57. The absence of any consideration or accommodation for religious beliefs as part of the definition and criteria for determining and certifying death in Ontario calls into question the constitutional validity of the legal requirements for determining and certifying death for Orthodox Jews such as Shalom in Ontario.

[39] *RJR MacDonald v Canada*, [1994] 1 S.C.R. 311; *Quizno's Canada Restaurant v. 1450987 Ontario Corp.*, 2009 CarswellOnt 2280 (SCJ), ¶38-39.

58. The strength of the *prima facie* case in this matter is bolstered by the fact that such religious exemptions to the legal definition of death were either disregarded or ignored in constructing the practices of determining death in Ontario.

59. The strength of the case is further bolstered by the fact that neighbouring jurisdictions sharing similar values, beliefs, and cultural norms in the states of New York and New Jersey provide for religious accommodation in the legal statutory definitions of death in those states, to allow for death by cardio-respiratory cessation in the case of Orthodox Jews, sharing similar beliefs and values as Shalom.

60. Shalom's claim raises a serious constitutional issue and is not frivolous or vexatious.[40]

SECTION 2 OF THE CHARTER

61. Section 2 of the Charter constitutionally protects freedom of conscience, religion, thought and belief in order to promote the values of liberty, freedom and human dignity which underpin the Charter's rights and protections.

62. The Supreme Court of Canada characterised the nature of this Charter guarantee as follows:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly without fear of hindrance or reprisal, and the right to manifest belief by worship or practice or by teaching and dissemination. But the concept means more than that.

[40] *RJR MacDonald v Canada*, [1994] 1 S.C.R. 311.

> Freedom can primarily be characterised by the absence of coercion or constraint... Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.[41]

63. Doctors are required to give careful consideration to the values, beliefs and religious preferences of incapable persons on whose behalf decisions with respect to treatment are made and to ensure their substitute decision-makers make decisions that respect those wishes, values and beliefs.[42]

64. Consideration of an incapable person's values, beliefs and religious preferences by which they have chosen to govern their lives should not be undertaken in a formalistic or highly technical manner.[43]

65. Failure to consider express philosophical or religious beliefs where they are known, to accept the sincerity of those beliefs, and to act on the beliefs of incapable people with respect to requests for life-saving medical treatment or determination of brain death, trivializes a person's religious beliefs, values and principles protected by section 2 at a time when they would most expect to derive comfort and security from them.[44]

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[41] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 336-337.
[42] *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A, ss.10(1)(b), 21.
[43] *R. v. Big M Drug Mart,* [1985] 1 S.C.R. 295 p.336-337.
[44] *Jones v. The Queen,* [1986] 2 S.C.R. 284.

66. Subjugating the incapable person's express religious preferences, values and beliefs and the choices based on them to some other point of view is a threat to individual autonomy, dignity and self-determination which should not be countenanced.[45]

67. Madam Justice Wilson in *Morgentaler* stated as follows:

> The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded their right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they would live and what occupation they will pursue. These are examples of the basic theory underlying the Charter, namely that the state will respect choices made by individuals and to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.[46]

68. She further noted in *Jones*:

> I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choice for good or ill, to be non-conformist, idiosyncratic and even eccentric - to be in today's parlance, "his own person" and accountable as such. John Stewart Mill described it as "pursuing our own good in our own way." This, he believed, we would be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it." He added:
>
> > Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.[47]

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[45] *Scardoni v. Hawryluck*, 2004 CanLII 34326 (ON SC).

[46] *R. v. Morgentaler*, [1988] 1S.C.R. 295, ¶227.

[47] (J.S. Mill, On Liberty (ed. By Elizabeth Raparport), Indianapolis, Hackett Publishing Co. 1978 at p. 12); *Jones v. The Queen*, [1986] 2 S.C.R. 284.

69. To the extent that the criteria for the neurological determination of brain death fail to provide for a religious exemption to those whose values and beliefs are undermined by application of the criteria, the criteria and their application as a matter of law run afoul of section 2 of the *Charter*.

70. Section 2(a) protects religious minorities against the "tyranny of the majority".[48] As stated by the Supreme Court in *Big M*:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[49]

71. More recently, in *Saguenay*, Gascon J., writing for the majority, emphasized that "no person can be compelled to adhere directly or indirectly to a particular religion **or to act in a manner contrary to his or her beliefs**" (emphasis added).[50]

72. To find an infringement under section 2(a) of the *Charter*, it must be shown that Shalom held a strong and sincere belief or practice that has a nexus with his Orthodox faith, and that the Respondents' actions and/or decisions must in some way interfere with Shalom's religious beliefs or practices in a manner that is more than trivial or insubstantial.[51]

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[48] *R v. Big M Drug Mart Ltd.*, 1985 CarswellAlta 316 (SCC), ¶96.
[49] *R v. Big M Drug Mart Ltd.*, 1985 CarswellAlta 316 (SCC), ¶124.
[50] *Mouvement laïque Québécois v. Saguenay (City)*, 2015 SCC 16, ¶69; *Trinity Western University v. Law Society of Upper Canada*, 2016 ONCA 518, ¶87.
[51] *Syndicat Northcrest v Anselem*, 2004 SCC 47, ¶56-57; *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518, ¶88.

73. The state should not be the arbiter of dogma. The question is the content of Shalom's subjective understanding of his religious requirements, obligations, precepts, commandments, customs and ritual.[52] As Justice Iaccobucci stated in *Amselem*, a case involving the nature of the requirement for Orthodox Jews to build a succah during the festival of Succot:

> … the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.[53]

74. The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal religious beliefs that are integrally linked with an individual's self-definition and fulfillment.[54]

75. As demonstrated above, by applying the NDD standard to Shalom, contrary to his religious beliefs, the Respondents have effectively forced their beliefs on him and are requiring him to act in a manner contrary to his sincerely held religious beliefs. They do so without affording the same accommodation offered to millions of Jews in New York State and New Jersey when assessing and determining when death occurs.[55]

SECTION 7 OF THE CHARTER

[52] *Syndicat Northcrest v Anselem*, 2004 SCC 47, ¶43-50.
[53] *Syndicat Northcrest v Anselem*, 2004 SCC 47, ¶50.
[54] *Syndicat Northcrest v Anselem*, 2004 SCC 47, ¶41-42.
[55] Affidavit of Maxime Ouanounou, sworn on October 3, 2017, Exhibits 3 and 4.

76. Decisions made by the Respondents to withdraw mechanical ventilation that will likely result in Shalom's death, engage *Charter* values and protections enshrined in section 7.

77. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. Interference with their ability to make decisions concerning their bodily integrity and medical care trenches on liberty.[56]

78. It is submitted that a presumption in favour of the sanctity of human life is a principle of fundamental justice which must be subject only to limited and narrow exceptions in situations where necessity, autonomy, dignity and respect for individual choice must prevail.[57]

79. With respect to the nonconsensual decisions by the Respondents to unilaterally withdraw mechanical ventilation, despite the fact that Shalom's heart continues to beat and he is alive according to Jewish Law, a presumption in favour of the sanctity of human life must apply.[58]

80. Interfering with Shalom's right to consent to decisions concerning his bodily integrity are an affront to his fundamental rights to life and security of the person as set out in s. 7. They are a further affront to his human dignity and respect for his intrinsic worth and value as a human being.[59]

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[56]*Carter v. Canada*, 2015 SCC 5, ¶66-67.
[57]*Rodriguez v. British Columbia*, [1993] 2 S.C.R. 519 at p.589 para 2-4, p.592 para 2-3, p. 43 para 4-6, p. 48 para 4.
[58]*Rodriguez v. British Columbia*, [1993] 2 S.C.R. 519 at p. 585 para 2-3, p.586 para 1, 5, p.595 para 2-3; *B.(R.) v Children's Aid Society of Metropolitan Toronto*, 1995 CarswellOnt 105 (SCC),¶ 80; *Carter v. Canada*, 2015 SCC 5, ¶63.
[59]*Re S.D*. [1983] B.C.J. No.38 (BC Supreme Court) at p.9 para 38; *Rodriguez v. British Columbia*, [1993] 2 S.C.R. 519 at p.588 para 1, p.592 para 3.

81. Decisions to consent to or refuse medical treatment must be undertaken from the perspective of the incapable person and in accordance with their prior express wishes, values, beliefs and best interests.[60]

82. Section 7 of the Charter guarantees everyone the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice.

83. Determining whether there has been a violation of s.7 involves a two step analysis. The first step is to determine whether there is a deprivation of the right to life, liberty and security of the person. The second step is to determine whether the deprivation accords with the principles of fundamental justice.[61]

84. A decision by a third party to determine brain death without accommodation of religious grounds and to withhold treatment from an incapable person likely resulting in their death, without their consent, engages the protections set out in s.7.[62]

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[60]*Rodriguez v. British Columbia*, [1993] 2 S.C.R. 519 at p.590 para 1; *Eldridge v. British Columbia (Attorney General)* (1997) 151 D.L.R.(4th) 577 (SCC) at p.409 para 77; *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at p.320 para 1, p.368-369 para 80, p.383 para 107; *Carter v. Canada*, 2015 SCC 5, ¶64; *Health Care Consent Act*, 1996, S.O. 1996, c. 2, Sched. A, ss.10(1)(b).
[61]*Rodriguez v. British Columbia,* [1993] 2 S.C.R. 519; *R. v. Morgentaler*, [1988] 1S.C.R. 295.
[62]*Rodriguez v. British Columbia*, [1993] 2 S.C.R. 519, 2-3.

85. The s.7 guarantee of life should not be deprived to disabled and incapable people. On the contrary, the vulnerability of this class of people mandates that the values and protections of s.7 be strictly upheld to safeguard them from the kinds of horrible abuses to which they may be subjected because of their vulnerability. This proposition is broadly reflected in Canadian and American medical and legal traditions:

> "I am satisfied that the laws of our society are structured to preserve, protect and maintain human life and that in the exercise of its inherent jurisdiction this court could not sanction the termination of a life except for the most coercive reasons. The presumption must be in favour of life."[63]

> The State has an interest in protecting vulnerable groups - including the poor, the elderly, and disabled persons - from abuse, neglect and mistake... We have recognized... the real risk of subtle coercion and undue influence in end of life situations...
>
> The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and societal indifference... The State's assisted suicide ban reflects and reinforces this policy that the lives of terminally ill, disabled and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's."[64]

86. The medical profession has historically been as opposed to causing death as the law. The Hippocratic Oath (400 b.c.e.) includes the following vow:

> "To please no one will I prescribe a deadly drug or give advice which may cause his death.

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[63] *Re S.D.* [1983] B.C.J. No.38 (BC Supreme Court) at p.9, para.1; See also *Rodriguez v. British Columbia*, [1993] 2 S.C.R. 519 at p. 585 para 2-3, p.586 para 1, 5, p.595 para 2-3; *B.(R.) v Children's Aid Society of Metropolitan Toronto*., 1995 CarswellOnt 105 (SCC),¶ 80; *Carter v. Canada*, 2015 SCC 5, ¶63.

[64] Endicot at p.42-43 citing, citing Washington v. Glucksperg, 117 S.C.R. 2258 (1997) per Chief Justice Rehnquist.

> Historically, however, where an individual was perceived to have a significant disability, both law and medicine have tended to make exceptions to their own life-preserving rules, or at least to be very uncertain about their application."[65]

87. It is submitted that an improper determination of brain death represents a violation of both the procedural and substantive requirements of the s. 7 right to life, particularly where they fail to consider and accommodate an individual's express religious beliefs.

Protecting the Security of Vulnerable People

88. The Supreme Court of Canada has indicated that interference with the physical and psychological integrity of an individual represents a breach of security of the person.[66]

89. It is submitted that the Respondents' improper determination of death without taking into account and accommodating the religious beliefs of Shalom engages the personal security interest and represents a clear violation of the s. 7 right to security of the person.

90. This is particularly so where the incapable person is completely dependent on third parties to protect and preserve their life.

91. It is further submitted that unilateral withdrawal of life support based upon a wrongful determination of death represents a violation of psychological integrity and amounts to a violation of s.7 Charter rights.[67]

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[65] Endicott at p.8, para 5-6.
[66] *R. v. Morgentaler*, [1988] 1 S.C.R. 295, 8.
[67] *R. v. Morgentaler*, [1988] 1 S.C.R. 295 at p. 16 para 8.

92. The Respondents must apply the criteria for determination of death in a non-arbitrary manner that respects the religious beliefs, life and security interests of patients like Shalom, or risk running afoul of the Charter.[68]

93. These obligations rest upon each of the Respondents as each has a responsibility not to discriminate against Shalom and to accommodate his religious beliefs and fundamental freedoms.

SECTION 15 OF THE CHARTER

94. An infringement under section 15(1) of the *Charter* is established if the decision imposes on Shalom a burden or denies him a benefit in a manner that has a disproportionate effect, or has the effect of reinforcing, perpetuating or exacerbating a historic disadvantage.[69]

95. Section 15 serves two distinct but related purposes. It expresses a commitment, deeply ingrained in our social, political and legal culture, to the equal worth and human dignity of all persons. It also represents a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society.[70]

96. The failure to account for an individual's religious beliefs and the impact of a rule that is on its face neutral was found to be discriminatory, and contrary to the *Human Rights Code* in

[68]*R. v. Morgentaler*, [1988] 1 S.C.R. 295 p.29, para 7.
[69]*Eldridge v. British Columbia* (Attorney General), 1997 CarswellBC 1939 (SCC), ¶53-54.
[70]*Eldridge v. British Columbia* (Attorney General), 1997 CarswellBC 1939 (SCC), ¶54.

Simpson-Sears v. O'Malley.[71] This principle has been frequently adopted by our courts in considering breaches of section 15 of the *Charter* and s. 1 of the *Human Rights Code*.[72]

97. In *Moore*, the Supreme Court outlines the three part test for discrimination by requiring a complainant to show:

(1) they have a characteristic protected from discrimination under applicable human rights law;
(2) they have experienced an adverse impact with respect to the service or benefit; and,
(3) that the protected characteristic was a factor in the adverse impact.[73]

98. Shalom clearly holds strict and fundamental religious beliefs that were made known to the respondents long before he was determined and certified to be dead by neurological criteria.

99. He experienced disadvantage and an adverse impact with respect to the refusal to consider his beliefs as part of the decision making process regarding treatment, unilateral withdrawal of life support, and the incorrect determination that he is dead while his heart continues to beat and he continues to breathe.

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[71] *Simpson-Sears v. O'Malley* [1985] 2 SCR 536.
[72] *Eldridge v. British Columbia* (Attorney General), 1997 CarswellBC 1939 (SCC), ¶63.
[73] *Moore v British Columbia (Attorney General*, 2004 3 SCR 360, ¶33; *Stewart v. Elk Valley Coal Corp*, 2017 SCC 30, ¶24.

100. Substantive equality would allow for proper accommodation of Shalom's religious beliefs by way of a religious exemption from the application of death by neurological criteria, a process that violates Shalom's religious beliefs fundamentally.

101. Shalom's religious beliefs are the reason why determination of death by neurological criteria is prohibited. Shalom's religion and creed is clearly a significant factor in the adverse impact he experienced as a result of the prohibited determination of his death by neurological criteria. Shalom was clearly adversely impacted because of his religion and creed by virtue of the Respondents' actions.

102. By contrast, for others whose express religious beliefs don't impede the determination of death by neurological criteria, they would not experience the same burden as Shalom in the circumstances.. This reflects a clear distinction rooted in Shalom's religion. This distinction is obviously compounded in light of the improper non-consensual decision to remove life support while Shalom is still alive according to jewish law

103. The Supreme Court's decision in *Moore* provides a relevant example of *prima facie* discrimination where a service provider fails to meet the needs of an individual due to the discretionary denial or exclusion of services required to effectively meet the purpose of a benefit plan, akin to the delivery of health care service.

104. In *Moore*, a school board had capped specific funding for disabled children requiring special education assistance and restricted the availability of teaching aids and closed a diagnostic centre that provided for individual assessment of student needs, all for budgetary

reasons. This deprived Moore of an individualized assessment of his learning disability and of effective education.

105. The Supreme Court found that where a service is ordinarily available to the public, it must be available in a way that does not arbitrarily or unjustifiably exclude individuals by virtue of their membership in a protected group.[74]

106. In defining the relevant service at issue, the Supreme Court analyzed the purpose of the program and found as follows:

> 28 I agree with Rowles J.A. that for students with learning disabilities like Jeffrey's, special education is not the service, it is the means by which those students get meaningful access to the general education services available to all of British Columbia's students:
>
> > It is accepted that students with disabilities require accommodation of their differences in order to benefit from educational services. Jeffrey is seeking accommodation, in the form of special education through intensive remediation, to enable him equal access to the "mainstream" benefit of education available to all.... In Jeffrey's case, the specific accommodation sought is analogous to the interpreters in Eldridge: it is not an extra "ancillary" service, but rather the manner by which meaningful access to the provided benefit can be achieved. Without such special education, the disabled simply cannot receive equal benefit from the underlying service of public education.
> > [Emphasis added; para. 103.]
>
> 29 The answer, to me, is that the 'service' is education generally. Defining the service only as 'special education' would relieve the Province and District of their duty to ensure that no student is excluded from the benefit of the education system by virtue of their disability[75]

107. The Supreme Court noted that:

> …….The question then is whether Jeffrey has, without reasonable justification,

[74] *Moore v British Columbia (Education),* [2012] 3 SCR 360, ¶26.
[75] *Moore v British Columbia (Education),* [2012] 3 SCR 360, ¶28-29.

> been denied access to the general education available to the public in British Columbia based on his disability, access that must be "meaningful"….
>
> 36 But if the evidence demonstrates that the government failed to deliver the mandate and objectives of public education such that a given student was denied *meaningful* access to the service based on a protected ground, this will justify a finding of *prima facie* discrimination.
>
> 40 …. *Prima facie* discrimination was made out based, in essence, on two factors: the failure by the District to assess Jeffrey at an earlier stage; and the insufficiently intensive remediation provided by the District for Jeffrey's learning disability in order for him to get access to the education he was entitled to. …[76]

108. The Supreme Court states:

> The Tribunal found that when the decision to close the Diagnostic Centre was made, the District did so without knowing how the needs of students like Jeffrey would be addressed, and without "undertak[ing] a needs-based analysis…
>
> …..
>
> 48 It was therefore the combination of the clear recognition by the District, its employees and the experts that Jeffrey required intensive remediation in order to have meaningful access to education, the closing of the Diagnostic Centre, and the fact that the Moores were told that these services could not otherwise be provided by the District, that justified the Tribunal's conclusion that the failure of the District to meet Jeffrey's educational needs constituted prima facie discrimination. In my view, this conclusion is amply supported by the record.[77]

109. The Meiorin/Grismer approach establishes a unified remedial theory with two aspects:

> …..the removal of arbitrary barriers to participation by a group, and the requirement to take positive steps to remedy the adverse impact of neutral practices.
>
> 62 Meiorin and Grismer also directed that practices that are neutral on their face but have an unjustifiable adverse impact based on prohibited grounds will be subject to a requirement to "accommodate the characteristics of affected groups

[76] *Moore v British Columbia (Education),* [2012] 3 SCR 360, ¶34, 36, 40.
[77] *Moore v British Columbia (Education),* [2012] 3 SCR 360, ¶43, 48.

> within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them" (Grismer, at para. 19).[78]

110. The respondents were aware of Shalom's Orthodox Jewish beliefs when they made the determination of death and certified it based on neurological criteria. Indeed, the hospital staff had previously accommodated Shalom's beliefs by providing such things as kosher food.

111. The respondents' exercise of discretion to deny accommodation of Shalom's religious beliefs in their determination and certification of death is a relevant consideration as part of the analysis of *prima facie* discrimination.

112. The exercise of discretion represented a clear policy choice to disregard Shalom's known religious beliefs, despite the fact that such considerations would not apply or certainly not apply in the same way to a non-orthodox jewish patient. This distinction clearly arises due to Shalom's religion and could have been accommodated.

113. Interpretation of fundamental human rights must take place in a purposive, liberal and contextual manner:

> 360 Fifth, the three-part test for assessing whether a prima facie case of discrimination has been proven already involves a contextual and purposive approach, and assesses whether there has been discrimination in a substantive sense: Doige, para. 43; Hutchinson, para. 84. It is flexible enough for the Tribunal to have regard to all relevant factors, including a consideration of disadvantage, stereotyping, prejudice, vulnerability, the purpose or effect of a rule, policy or law, and any connection between a prohibited ground of discrimination and adverse or differential treatment.
> ….

[78] *Moore v British Columbia (Education),* [2012] 3 SCR 360, ¶61-62.

> 362 Further, and significantly, a case involving whether there has been differential treatment necessarily involves a form of comparative analysis. **Under the traditional prima facie test, this analysis takes place <u>not</u> through the adoption of a formal comparator group, but by a consideration of the relevant contextual circumstances and the purposes of the Code.**
>
> 363 As a result, I am not persuaded that it is necessary to specifically adopt either the Law factors or the more formal comparator group analysis that has been developed under the Charter cases, and will proceed on the basis of the traditional test for assessing whether Mr. Kelly has proven a prima facie case.[79] (emphasis added)

114. The court must properly assess and determine the purpose of the Canadian guidelines for determining neurological death. It must then apply that purpose as part of the contextual framework for the discrimination analysis, including to determine that the guidelines or legal process to determine and certify death in Ontario, made a distinction in the way that they preclude accommodation or even consideration of Shalom's express religious beliefs, however unintentionally.

115. The court must properly identify the Respondents' authority or lack thereof to exercise discretion under the terms of the guidelines to allow for special exemption for those individuals whose religious beliefs preclude determination of death by neurological criteria.

116. Failure to exempt Shalom because of his religious beliefs from determination of death by neurological criteria represents a distinction based directly upon his religion that amounts to a burden and disadvantage that is having an adverse impact on Shalom, particularly because of his religion.

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[79] *Kelly v. British Columbia*, 2011 BCHRT 183, ¶360, 362-363.

117. Shalom urges this court to avoid incorporating artificial barriers in its quality analysis that undermine the quest for true substantive equality:

> 40 It follows that a formal analysis based on comparison between the claimant group and a "similarly situated" group, does not assure a result that captures the wrong to which s. 15(1) is directed — the elimination from the law of measures that impose or perpetuate substantive inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.
>
> 41 As McIntyre J. explained in Andrews, equality is a comparative concept, the condition of which may "only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises" (p. 164). However, McIntyre J. went on to state that formal comparison based on the logic of treating likes alike is not the goal of s. 15(1). What s. 15(1) requires is substantive, not formal equality.
>
> …...
>
> 62 The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).
>
> 63 It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.[80]

> ……the Tribunal erred in concluding that the ordinary meaning of the term "differentiate adversely" in subsection 5(b) requires a comparator group in every case in order to establish discrimination in the provision of services.

[80] *Withler v. Canada (Attorney General)*, 2011 SCC 12, para 40-41,62-63.

> This conclusion is unreasonable as it flies in the face of the scheme and purpose of the Act, and leads to patently absurd results that could not have been intended by Parliament.[81]

118. The guidelines and process to certify death differentiates adversely between Shalom and others to whom the guidelines apply, specifically because of Shalom's religion. Shalom's religion is at the root of the discriminatory and adverse treatment.

DETERMINING DEATH WITHOUT RELIGIOUS EXCEPTIONS IS NEITHER A REASONABLE LIMIT NOR IS IT ADEQUATE ACCOMMODATION

119. That this absolute reliance on Neurological Determination of Death is neither a reasonable limit on Shalom's *Charter* rights nor an adequate accommodation of his rights under the *Human Rights Code* is clearly demonstrated by the steps taken by our neighbours to the south in New York State and New Jersey.

120. Many health care facilities throughout the United States of America voluntarily offer a short-term accommodation as a compassionate measure to help a family cope with a patient's deal. In four states, the duty to accommodate is mandated by law. Statutes and regulations in California, Illinois, New Jersey and New York explicitly and specifically require hospitals to accommodate families asserting religious objections on the patient's behalf after a patient is declared dead by neurological criteria.[82]

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[81] Quoted in *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2, ¶319.

[82] *New Jersey Declaration of Death Act,* NJ Rev Stat § 26:6A-5; *New York*, Determination of Death: 10 CRR-NY 400.16(3);Cal. Health & Safety Code §1254.4; 210 ILCS 85/6.24.

121. The New Jersey statute grants objecting individuals an exemption from the generally accepted standards of determining death. The New Jersey statute requires indefinite accommodation of religious objections by health care providers:

> *Death not declared in violation of individual's religious beliefs: The death of an individual shall not be declared upon the basis of neurological criteria pursuant to sections 3 and 4 of this act when the licensed physician authorized to declare death, has reason to believe, on the basis of information in the individual's available medical records, or information provided by a member of the individual's family or any other person knowledgeable about the individual's personal religious beliefs that such a declaration would violate the personal religious beliefs of the individual. In these cases, death shall be declared, and the time of death fixed, solely upon the basis of cardio-respiratory criteria pursuant to section 2 of this act. L.1991,c.90,s.5.*[83]

122. New York judicially recognized neurological death criteria in 1984, but it also mandated that hospitals are required to accommodate religious or moral objections to those criteria.[84]

123. The fact that neighbouring jurisdictions in New York and New Jersey have adopted religious exceptions to the neurological standard demonstrates that the current regime in Ontario is overbroad in its scope and as such is both a failure to accommodate Shalom's rights under the *Human Rights Code* and constitutes an unreasonable limit on his s.2, 7, and 15 rights under the *Charter*.

124. The Respondents' determination of brain death without consideration or accommodation of Shalom's religious beliefs is untenable in a free and democratic society such as Canada, which is founded upon religious freedom, equality and accommodation.

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[83] *New Jersey Declaration of Death Act,* NJ Rev Stat § 26:6A-5.
[84] *New York*, Determination of Death: 10 CRR-NY 400.16(3).

125. The decision to unilaterally remove mechanical ventilation is likewise an affront to religious liberty and equality while Shalom remains alive under Jewish law.

IRREPARABLE HARM

126. Shalom would suffer the ultimate irreparable harm in the event that this Application is not granted. He would be declared dead in a manner contrary to his religious values and beliefs and would be deprived of accommodation of his most fundamental constitutional and human rights.[85]

BALANCE OF CONVENIENCE

127. The balance of convenience is clear in the circumstances of this case and favours the Applicant.

128. The balance of convenience favours granting the requested relief as the irreversible harm to the Applicant outweighs the relative cost and inconvenience to the Respondents in all of the circumstances.

[85] *Shefer v. State of Israel* [1993], CA 506/88 (Supreme Court of Israel) at p 26, 31-32, 36.

129. The Applicant does not seek an unlimited period of ICU hospitalization from the Respondents which further renders the balance of convenience in favour of the Applicant in this case.

130. The questions at issue are of profound and fundamental public concern to the applicant and to a discrete and identifiable minority group that has been subject to prejudice, disadvantage, and discrimination throughout history.

JURISDICTION OF CONSENT AND CAPACITY BOARD

131. Pursuant to *Rasoul*i, disputes arising with respect to treatment, including the withdrawal of life support, are properly the subject of an application brought by a doctor before the Consent and Capacity Board under the Health Care Consent Act, including in circumstances where a person has been declared brain dead but that determination is disputed.[86] This is so regardless of whether a death certificate is issued as the certification is improper in the event that the patient is alive. This is a matter properly addressed by the CCB at first instance. The Respondents have refused to proceed in this manner at significant cost and distress to the Applicant.

132. As other physicians have recently done in the face of refusal by substitute decision-makers to consent to or accept withdrawal of life support after issuance of a death certificate, the physician Respondents in this case should have made an Application to the *Consent and*

[86] *Cuthbertson v. Rasouli*, 2013 SCC 53, ¶76; *Health Care Consent Act, 1996,* S.O. 1996, c2, Sch A, s.37(1).

Capacity Board and raised as a preliminary objection the fact that the Board has no jurisdiction.[87]

ROLE OF THE CORONER

133. The respondent coroner in this case certified death and issued a death certificate. This is a legal act in exercise of the Coroner's statutory authority to certify death. However, frequently doctors in Ontario both determine and certify death. In doing so, they fulfil a legal function just like the Coroner that subjects their actions to Charter scrutiny and review.

CONCLUSION

134. The failure to allow constitutional and Human Rights protections to those who are legally declared dead based on incorrect considerations, or based on the failure to accommodate religious beliefs would deprive the most vulnerable of individuals from the most powerful action of the state, to legally declare a person dead. This is so whether it is a coroner or hospital doctor that declares and certifies death under the terms of the Canadian Guidelines for the determination of death, or under the Vital Statistics Act or other statutory or legal authority.

135. The determination and certification of death in a manner contrary to a person's religious beliefs, and in the absence of lawful accommodation of those beliefs and religious freedoms by

[87] *UH v Hamilton Hospital* – 16-3084-01, 16-3084-02 (CCB); *TP v. University Health Network*, 17-2884-01, 17-2884-02 (CCB).

way of a religious exemption represents a discriminatory and unconstitutional act that this Court has both the authority and the imperative to remedy.

136. This court should grant the interim injunction sought and permit a determination on the merits of the serious and profound Constitutional and human rights issues raised by this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of October, 2017.

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TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re S.D.*, 1983 CarswellBC 6 (BSSC)
2. *RJR MacDonald v Canada*, [1994] 1 S.C.R. 311
3. *Quizno's Canada Restaurant v. 1450987 Ontario Corp.*, 2009 CarswellOnt 2280 (SCJ)
4. *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295
5. *Jones v. The Queen*, [1986] 2 S.C.R. 284
6. *Scardoni v. Hawryluck*, 2004 CanLII 34326 (ON SC)
7. *R. v. Morgentaler*, [1988] 1S.C.R. 295
8. *Mouvement laïque Québécois v. Saguenay (City)*, 2015 SCC 16
9. *Trinity Western University v. Law Society of Upper Canada*, 2016 ONCA 518
10. *Syndicat Northcrest v Anselem*, 2004 SCC 47
11. *Carter v. Canada*, 2015 SCC 5
12. *Rodriguez v. British Columbia*, [1993] 2 S.C.R. 519
13. *B.(R.) v Children's Aid Society of Metropolitan Toronto*, 1995 CarswellOnt 105 (SCC)
14. *Eldridge v. British Columbia (Attorney General)* (1997) 151 D.L.R.(4th) 577 (SCC)
15. *Simpson-Sears v. O'Malley* [1985] 2 SCR 536
16. *Moore v British Columbia (Attorney General*, 2004 3 SCR 360
17. *Stewart v. Elk Valley Coal Corp*, 2017 SCC 30
18. *Kelly v. British Columbia*, 2011 BCHRT 183
19. *Withler v. Canada (Attorney General)*, 2011 SCC 12
20. *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2
21. *Shefer v. State of Israel* [1993], CA 506/88 (Supreme Court of Israel)
22. *Cuthbertson v. Rasouli*, 2013 SCC 53
23. *UH v Hamilton Hospital* – 16-3084-01, 16-3084-02 (CCB)
24. *TP v. University Health Network*, 17-2884-01, 17-2884-02 (CCB)

Articles Cited:

1. Endicott, Oliver R. "Legalizing Physician – Assisted Death: Can Safeguards Protect the Interests of Vulnerable Persons?" July 2000. Prepared under sponsorship of the Canadian Bar Association "Law for the Future Fund" for Council of Canadians with Disabilities.

TAB B

SCHEDULE "B"

RELEVANT LEGISLATION

The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

***Courts of Justice Act*, RSO 1990, c C.43**

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms
(2) An order under subsection (1) may include such terms as are considered just.

***Rules of Civil Procedure*, RRO 1990, Reg 194**
40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the Courts of Justice Act may be obtained on motion to a judge by a party to a pending or intended proceeding. R.R.O. 1990, Reg. 194, r. 40.01.

***Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A**

10 (1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,

> (a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or
>
> (b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with this Act.

21 (1) A person who gives or refuses consent to a treatment on an incapable person's behalf shall do so in accordance with the following principles:

> 1. If the person knows of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, the person shall give or refuse consent in accordance with the wish.
>
> 2. If the person does not know of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, or if it is impossible to comply with the wish, the person shall act in the incapable person's best interests.

37 (1) If consent to a treatment is given or refused on an incapable person's behalf by his or her substitute decision-maker, and if the health practitioner who proposed the treatment is of the

opinion that the substitute decision-maker did not comply with section 21, the health practitioner may apply to the Board for a determination as to whether the substitute decision-maker complied with section 21. 1996, c. 2, Sched. A, s. 37 (1).

(2) The parties to the application are:

1. The health practitioner who proposed the treatment.

2. The incapable person.

3. The substitute decision-maker.

4. Any other person whom the Board specifies. 1996, c. 2, Sched. A, s. 37 (2).

(3) In determining whether the substitute decision-maker complied with section 21, the Board may substitute its opinion for that of the substitute decision-maker.

New Jersey:

New Jersey Declaration of Death Act, L.1991,c.90.

NJ Rev Stat § 26:6A.

26:6A-1. Short title; declarations in accord with act a. This act shall be known and may be cited as the "New Jersey Declaration of Death Act." b. The death of an individual shall be declared in accordance with the provisions of this act. L.1991,c.90,s.1.

26:6A-2. Declaration of death based on cardio-respiratory criteria An individual who has sustained irreversible cessation of all circulatory and respiratory functions, as determined in accordance with currently accepted medical standards, shall be declared dead. L.1991,c.90,s.2.

26:6A-3. Declaration of death based on neurological criteria Subject to the standards and procedures established in accordance with this act, an individual whose circulatory and respiratory functions can be maintained solely by artificial means, and who has sustained irreversible cessation of all functions of the entire brain, including the brain stem, shall be declared dead. L.1991,c.90,s.3.

26:6A-4. Physician to declare death a. A declaration of death upon the basis of neurological criteria pursuant to section 3 of this act shall be made by a licensed physician professionally qualified by specialty or expertise, in accordance with currently accepted medical standards and additional requirements, including appropriate confirmatory tests, as are provided pursuant to this act. b. Subject to the provisions of this act, the Department of Health, jointly with the Board of Medical Examiners, shall adopt, and from time to time revise, regulations setting forth (1) requirements, by specialty or expertise, for physicians authorized to declare death upon the basis of neurological criteria; and (2) currently accepted medical standards, including criteria, tests and procedures, to govern declarations of

death upon the basis of neurological criteria. The initial regulations shall be issued within 120 days of the enactment of this act. c. If the individual to be declared dead upon the basis of neurological criteria is or may be an organ donor, the physician who makes the declaration that death has occurred shall not be the organ transplant surgeon, the attending physician of the organ recipient, nor otherwise an individual subject to a potentially significant conflict of interest relating to procedures for organ procurement. d. If death is to be declared upon the basis of neurological criteria, the time of death shall be upon the conclusion of definitive clinical examinations and any confirmation necessary to determine the irreversible cessation of all functions of the entire brain, including the brain stem. L.1991,c.90,s.4.

26:6A-5. Death not declared in violation of individual's religious beliefs The death of an individual shall not be declared upon the basis of neurological criteria pursuant to sections 3 and 4 of this act when the licensed physician authorized to declare death, has reason to believe, on the basis of information in the individual's available medical records, or information provided by a member of the individual's family or any other person knowledgeable about the individual's personal religious beliefs that such a declaration would violate the personal religious beliefs of the individual. In these cases, death shall be declared, and the time of death fixed, solely upon the basis of cardio-respiratory criteria pursuant to section 2 of this act. L.1991,c.90,s.5.

26:6A-6. Immunity granted to health care practitioner, provider, hospital A licensed health care practitioner, hospital, or the health care provider who acts in good faith and in accordance with currently accepted medical standards to execute the provisions of this act and any rules or regulations issued by the Department of Health or the Board of Medical Examiners pursuant to this act, shall not be subject to criminal or civil liability or to discipline for unprofessional conduct with respect to those actions. These immunities shall extend to conduct in conformity with the provisions of this act following enactment of this act but prior to its effective date. L.1991,c.90,s.6.

26:6A-7. Obligations of insurance providers unchanged Changes in pre-existing criteria for the declaration of death effectuated by the legal recognition of modern neurological criteria shall not in any manner affect, impair or modify the terms of, or rights or obligations created under, any existing policy of health insurance, life insurance or annuity, or governmental benefits program. No health care practitioner or other health care provider, and no health service plan, insurer, or governmental authority, shall deny coverage or exclude from the benefits of service any individual solely because of that individual's personal religious beliefs regarding the application of neurological criteria for declaring death. L.1991,c.90,s.7.

26:6A-8. Rules, regulations, policies, practices to gather reports, data a. Pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) the Department of Health shall establish rules, regulations, policies and practices as may be necessary to collect annual reports from health care institutions, to gather additional data as is reasonably necessary, to oversee and evaluate the implementation of this act. The department shall seek to minimize the burdens of record-keeping imposed by these rules, regulations, policies and practices, and shall seek to assure the appropriate confidentiality of patient records. b. The Department of Health, the Board of Medical Examiners, and the New Jersey Commission on Legal and Ethical Problems in the Delivery of Health Care shall jointly evaluate the implementation of this act and report to the Legislature, including recommendations for any changes deemed necessary, within five years from the effective date of this act. L.1991,c.90,s.8.

New York:

10 CRR-NY 400.16
NY-CRR
OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
TITLE 10. DEPARTMENT OF HEALTH
CHAPTER V. MEDICAL FACILITIES
SUBCHAPTER A. MEDICAL FACILITIES—MINIMUM STANDARDS
ARTICLE 1. GENERAL
PART 400. ALL FACILITIES—GENERAL REQUIREMENTS
10 CRR-NY 400.16

400.16 Determination of death.

(a) An individual who has sustained either:

(1) irreversible cessation of circulatory and respiratory functions; or

(2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead.

(b) A determination of death must be made in accordance with accepted medical standards.

(c) Death, as determined in accordance with paragraph (a)(2) of this section, shall be deemed to have occurred as of the time of the completion of the determination of death.

(d) Prior to the completion of a determination of death of an individual in accordance with paragraph (a)(2) of this section, the hospital shall make reasonable efforts to notify the individual's next of kin or other person closest to the individual that such determination will soon be completed.

(e) Each hospital shall establish and implement a written policy regarding determinations of death in accordance with paragraph (a)(2) of this section. Such policy shall include:

(1) a description of the tests to be employed in making the determination;

(2) a procedure for the notification of the individual's next of kin or other person closest to the individual in accordance with subdivision (d) of this section; and

(3) a procedure for the reasonable accommodation of the individual's religious or moral objection to the determination as expressed by the individual, or by the next of kin or other person closest to the individual.

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California

Cal. Health & Safety Code §1254.4.

1254.4. (a) A general acute care hospital shall adopt a policy for providing family or next of kin with a reasonably brief period of accommodation, as described in subdivision (b), from the time that a patient

is declared dead by reason of irreversible cessation of all functions of the entire brain, including the brain stem, in accordance with Section 7180, through discontinuation of cardiopulmonary support for the patient. During this reasonably brief period of accommodation, a hospital is required to continue only previously ordered cardiopulmonary support. No other medical intervention is required.

(b) For purposes of this section, a reasonably brief period means an amount of time afforded to gather family or next of kin at the patient s bedside.

(c) (1) A hospital subject to this section shall provide the patient s legally recognized health care decisionmaker, if any, or the patient s family or next of kin, if available, with a written statement of the policy described in subdivision (a), upon request, but no later than shortly after the treating physician has determined that the potential for brain death is imminent.

(2) If the patient s legally recognized health care decisionmaker, family, or next of kin voices any special religious or cultural practices and concerns of the patient or the patient s family surrounding the issue of death by reason of irreversible cessation of all functions of the entire brain of the patient, the hospital shall make reasonable efforts to accommodate those religious and cultural practices and concerns.

(d) For purposes of this section, in determining what is reasonable, a hospital shall consider the needs of other patients and prospective patients in urgent need of care.

(e) There shall be no private right of action to sue pursuant to this section.

(Added by Stats. 2008, Ch. 465, Sec. 1. Effective January 1, 2009.)

Illinois

(210 ILCS 85/6.24)

Sec. 6.24. Time of death; patient's religious beliefs. Every hospital must adopt policies and procedures to allow health care professionals, in documenting a patient's time of death at the hospital, to take into account the patient's religious beliefs concerning the patient's time of death.

(Source: P.A. 95-181, eff. 1-1-08; 95-876, eff. 8-21-08.)