No. S244011
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN

GAYE O'NEILL, Administrator of the Estate of Sam O'Neill,
DR. JYOTHI JAYARAMAN and DYING WITH DIGNITY CANADA

Plaintiffs

AND

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE
OF BRITISH COLUMBIA, as represented by the MINISTER OF HEALTH,
VANCOUVER COASTAL HEAL TH AUTHORITY and
PROVIDENCE HEAL TH CARE SOCIETY

Defendants

AND

CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA HUMANIST ASSOCIATION, CANADIAN CENTRE FOR CHRISTIAN CHARITIES, CANADIAN PHYSICIANS FOR LIFE, CHRISTIAN LEGAL FELLOWSHIP, DELTA HOSPICE SOCIETY and EVANGELICAL FELLOWSHIP OF CANADA

Interveners

---

# INTERVENER'S WRITTEN SUBMISSIONS
# BRITISH COLUMBIA HUMANIST ASSOCIATION

---

Counsel for the intervener,
British Columbia Humanist Association

Allen/McMillan Litigation Counsel
1625 – 1185 West Georgia Street
Vancouver, BC V6E 4E6

**Wes McMillan / Danielle Wierenga**
Phone: 604-569-2652
Email: wes@amlc.ca / dwierenga@amlc.ca

**Date of hearing**: January 12 – February 6, 2026
**Time**: 10:00 a.m.
**Place**: Vancouver, BC
**Provided by**: Allen / McMillan Litigation Counsel
Submitted pursuant to the case plan order of Chief Justice Skolrood, entered May 14, 2025

Table of Contents

## I. Overview

1. Where the state contracts with a private corporate or institutional actor for the provision of a state service such as healthcare, and permits that private corporate or institutional actor to select the services it will provide (or not provide) based on religion, there is a clear breach of the duty of state religious neutrality. The fight to sustain that relationship as *Charter*-compliant must take place entirely at s.1.

2. State inaction cannot provide an evergreen s. 1 justification. There may be legitimate reasons why the state, in order to achieve its policy objectives, breaches its duty of religious neutrality. It must, however, take steps to remedy its breach. Inaction – or worse – doubling down on the breach cannot provide further justification. Quite the opposite. Learned helplessness is not a justification. It is evidence of a lack of justification.

## II. The State's Duty of Religious Neutrality

3. The state has a duty of religious neutrality. That is not controversial. What, however, does this duty demand of the state?

4. In *S.L.*, Deschamps J. wrote:

> Therefore, following a realistic and non-absolutist approach, state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected.[1]

5. In *Saguenay*, the Supreme Court of Canada further elucidated the state's duty of religious neutrality:

> By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the

[1] *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 at para. 32

> homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals (see *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 31 and 50-51). …
>
> …
>
> When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others.[2]

6. State neutrality requires more than not favouring one religious belief over others. State neutrality means neutrality with respect to religion. Full stop. The suggestion that a state practice that is available to all religions, but not non-religion (i.e. non-belief, atheism or agnosticism) necessarily breaches the state's duty of neutrality.[3]

7. That, of course, is not to say that the state cannot accommodate the diversity of views on religion within broader society. There is an important distinction between: (a) the state accommodating the religious beliefs of one who engages with the state; and (b) the state acting in accordance with the religious beliefs of the person or entity through which the state acts.[4]

8. Public schools provide a suitable example of this. Where a school provides space and resources for its religious students, teachers, and staff to practice their religion, that is accommodation. Where the public school imposes religion (e.g. starting each day with a prayer based on the religion of the teacher or principal), that is not.

## III. State Permission to Opt Out is a Breach of the Duty of Neutrality

9. In *Eldridge*, a unanimous Supreme Court of Canada wrote:

> It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any *a priori* elucidation. *McKinney* makes it clear, however, that the *Charter* applies to private entities in so far as they act in furtherance

[2] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at paras. 74 – 76
[3] *Ibid* at para. 120
[4] This assumes, without accepting, that a non-human organization can hold a religious belief.

> of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

10. Consistent with the foregoing, the state cannot contract out the provision of necessary services and permit its contracting partner to opt out of provision of some of those services based on religion. This naturally flows from the Court's conclusion that the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy.

11. That is not to say that all medical facilities must provide all services. Reasonable resource allocation decisions are permissible and, indeed, necessary. However, those resource allocation decisions cannot be made on the basis of religion.

12. If the private actor acts in accordance with its religion, the state has, in effect, adopted that religion. This is apparent when viewed from the perspective of the individual obtaining state services. The state's insistence that it has not adopted a religious belief or practice rings hollow to the user of government services whose experience is moderated by the religious beliefs and practices of the institution providing those services.

13. Favouring religion writ large over non-religion is itself a breach of the state's duty of religious neutrality. It does not matter that the state makes religious favour available to all religious organizations. As noted above, from the perspective of the individual obtaining state services, such is immaterial. The fact that another institution providing services at some other location imposes different religious dogma is not a response to a specific person in need of services at a specific location.

14. But the court need not go so far as to imbue the state with the religious beliefs and practices of the private actor carrying out state objectives. To focus on the religious beliefs of the private actor is to ignore the original sin. That is, the state's

endorsement of the religious beliefs and practices by expressly permitting the institution to impose its religious beliefs and practices on those with whom it interacts.

15. In *Eldridge,* the court said that "in providing medically necessary services, hospitals carry out a specific governmental objective."[5]

16. Had His Majesty the King in Right of the Province of British Columbia (the "Province") built a healthcare system from the ground up whereby specific institutions could decide to reject otherwise reasonable and legal healthcare services on the basis of religious doctrine, this would be a clear violation of the duty of state neutrality.

17. The medical system in British Columbia is an anachronism. Hospitals and medical care existed long before the Province became involved and eventually moved to a single-payer system. The current medical system reflects that history.

18. In addressing the constitutional questions before it, the court must be careful not to conflate the fact of *what* exists with the issue of *why* it exists. The 'what' addresses whether the state has breached its duty of religious neutrality. The 'why' addresses whether a breach can be justified under s. 1 of the *Charter*.

19. Where the state expressly permits a private actor carrying out a specific governmental objective to opt out of aspects of that objective based on religion, the state has breached its duty of religious neutrality. The question then turns to justification.

*In terrorem arguments are not persuasive*

20. Reference to other governmental policies and objectives is not helpful. In the absence of detailed evidence about another specific governmental policy or objective and how it is implemented by a private actor, one can only speculate. It is not clear that a specific instance of cooperation between government and private, religious institutions would be a breach of the duty of state neutrality. It is even less clear that – if it were a breach – it would not be justified under s. 1 of the *Charter*.

[5] *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC) at para. 51, [1997] 3 SCR 624

21. The Province has suggested that the arguments in this case would apply equally to private faith-based schools.[6] Whether that is so would depend on the evidence in a hypothetical case in which a plaintiff were to challenge some aspect of the province's arrangements with a private, faith-based school or schools.

22. That said, enough is generally known about the education system to allay the Province's concerns. British Columbia provides free, secular education to children throughout the province. Every child can register at and attend the free, secular public school closest to that child's home.[7] No child is compelled to attend an independent, faith-based school.

23. The medical system is different. A patient may end up at a hospital or medical facility because that is where they were taken by ambulance, that is the closest facility to their home, that is where their doctor has privileges[8], or that is where the patient's necessary specialist practices.

24. The fundamental difference is choice.

25. Whether the Province's funding arrangements with independent, faith-based schools are *Charter*-compliant is not before this court and, importantly, not analogous to the issues to be decided in this case.

## IV. The State Cannot Rely on an Evergreen s. 1 Defence

26. Over time, government has become larger and more intertwined with the daily life of British Columbians. As noted by Cory J. in *Just*:

> The functions of government and government agencies have multiplied enormously in this century. Often government agencies were and continue to be the best suited entities and indeed the only organizations which could protect the public in the diverse and difficult situations arising in so many

[6] Closing Submissions of HTMK at para. 207

[7] Subject, of course, to overcrowding and having to attend a different free, secular public school further from one's home.

[8] This is particularly so where one's family doctor also provides maternity care. The well-known shortage of family doctors makes it unrealistic to suggest a patient can select her family doctor based on the hospital at which that doctor has privileges.

> fields. They may encompass such matters as the manufacture and distribution of food and drug products, energy production, environmental protection, transportation and tourism, fire prevention and building developments. The increasing complexities of life involve agencies of government in almost every aspect of daily living. …[9]

27. Increasing government involvement in the lives of Canadians has seen the state gradually enter into fields that were previously the domain of private, often religious, actors. Lebel J. addressed the history of the duty of state neutrality and its relationship to the gradual displacement of religious organizations by the state:

> The duty of neutrality appeared at the end of a long evolutionary process that is part of the history of many countries that now share Western democratic traditions. Canada's history provides one example of this experience, which made it possible for the ties between church and state to be loosened, if not dissolved. There were, of course, periods when there was a close union of ecclesiastical and secular authorities in Canada. European settlers introduced to Canada a political theory according to which the social order was based on an intimate alliance of the state and a single church, which the state was expected to promote within its borders. Throughout the history of New France, the Catholic church enjoyed the status of sole state religion. After the Conquest and the Treaty of Paris, the Anglican church became the official state religion, although social realities prompted governments to give official recognition to the status and role of the Catholic church and various Protestant denominations. This sometimes official, sometimes tacit recognition, which reflected the make-up of and trends in the society of the period, often inspired legislative solutions and certain policy choices. Thus, at the time of Confederation in 1867, the concept of religious neutrality implied primarily respect for Christian denominations. One illustration of this can be seen in the constitutional rules relating to educational rights originally found, *inter alia*, in s. 93 of the *Constitution Act, 1867*.
>
> Since then, the appearance and growing influence of new philosophical, political and legal theories on the organization and bases of civil society have gradually led to a dissociation of the functions of church and state; Canada's demographic evolution has also had an impact on this process, as have the urbanization and industrialization of the country. Although it has not excluded religions and churches from the realm of public debate, this evolution has led us to consider the practice of religion and the choices it implies to relate more to individuals' private lives or to voluntary associations (M. H. Ogilvie, *Religious Institutions and the Law in Canada* (2nd ed. 2003), at pp. 27 and 56). These societal changes have

[9] *Just v. British Columbia*, 1989 CanLII 16 (SCC), [1989] 2 SCR 1228 at 1239

> tended to create a clear distinction between churches and public authorities, placing the state under a duty of neutrality. Our Court has recognized this aspect of freedom of religion in its decisions, although it has in so doing not disregarded the various sources of our country's historical heritage. The concept of neutrality allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society.[10]

28. Consistent with the foregoing, the state has taken over things that used to be the sole or primary domain of the church. Education and healthcare are two examples.

29. With respect to healthcare specifically, Deschamps J. wrote:

> Government involvement in health care came about gradually. Initially limited to extreme cases, such as epidemics or infectious diseases, the government's role has expanded to become a safety net that ensures that the poorest people have access to basic health care services. The enactment of the first legislation providing for universal health care was a response to a need for social justice. …[11]

30. A proper s. 1 analysis does not ignore what existed before the state acted. Nor, however, is the analysis frozen in time.

31. While history matters, it does not rule.

32. The BCHA does not suggest that the state may only enter into new areas by way of rupture; that is, a wholesale state takeover. That could be impractical and present intolerable barriers to desirable state action.

33. The state may reasonably choose to step into the systems and infrastructure that exist, and work cooperatively with those that already occupy a particular industry. In so doing, the state may knowingly breach its duty of state neutrality for an important, pressing objective. For example, a standardized, public education system, or a

---

[10] *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paras. 66 - 67

[11] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 56

single-payer healthcare system available to all British Columbians. This may be understood as part of the dissolution between church and state.

34. But, can the government rely on the state of affairs as they were when the state entered the fray to justify the state of affairs as they are decades later? Does the state have an obligation to remedy its breach of the duty of state neutrality? Put differently, can that which was once justified be justified forever?

35. The state is not entitled to an evergreen s. 1 defence to a *Charter* breach.

36. A s. 1 analysis must consider not only the facts as they are, but also the actions and inaction of the state that led to the facts as they are. Put simply, a s. 1 analysis is not an analysis of a snapshot in time.

37. Where the state enters a pre-existing arena and cooperates with a religious actor in a way that breaches the duty of state neutrality, the state will necessarily point to history to justify its breach.

38. Years later, the state cannot ignore subsequent history in justifying its continuing breach.

39. Circumstances change and a s. 1 analysis cannot speak forever. Changing circumstances may be technological, societal or simply the passage of time. This can cut both ways. Changes may result in that which was unjustified being justified and *vice versa*.

40. In *Hutterian Brethren*, Alberta removed a religious-based exemption from requiring a photograph of one's face in order to obtain a driver's license. The stated reason for the requirement was to reduce the risk of identity theft through use of a factual recognition database. Advances in technology allowed for such a database. The majority of the Supreme Court held that the infringement of the religious freedom of the Hutterian Brethren community was justified. That which was presumably unjustified became justified with the advance in technology.[12]

[12] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37

41. The Supreme Court's decision in *Carter* presents an example in which societal change played a role in finding that which was once justified (i.e. criminal code provisions prohibiting physician-assisted dying) was no longer justified.[13]

42. The BCHA says that the passage of time itself may be a relevant, and perhaps decisive, factor in a proper s. 1 analysis.

43. The state has an ever-present and ongoing duty of religious neutrality. If it finds itself in breach of that duty, it must address that breach and, where necessary, continually justify that breach – both its existence and proportionality. The state cannot rely on a years or decades-old justification as if nothing happened in the intervening years.

44. Every instance of a breach of the duty must be justified. That is not to suggest that a court decision finding that a breach was justified is of no precedential value. Rather, it is to say that a such a decision does not shield any future breach from scrutiny. To the extent things have changed, a fresh s. 1 analysis will be required.

45. Where the state is in breach of its duty of religious neutrality, a proper analysis will necessarily look at how the state got in that position and what it has done to address the breach. The state may not be expected to simply cut ties in order to remedy its breach, but it must take steps to disentangle itself from religion.

46. It is not only necessary to look at what the state has done, but also what it plans to do. Where the state presents a coherent plan to remedy the breach, the court may take comfort that the state's actions are appropriate and the continuing nature of the breach is reasonably justified in a free and democratic society.

47. Conversely, where the state has no plan to disentangle itself from religion and remedy its breach, the court can take no comfort that the ongoing breach is reasonably justified.

48. Ultimately, it is for the state to justify its breach. Where the state argues that the breach is the unfortunate consequence of stepping into a field occupied by religious

[13] *Carter v. Canada (Attorney General)*, 2012 BCSC 886

actors, the state must provide a justification that is both retrospective and prospective. That is, the state must explain why the breach has not yet been remedied and what the state intends to do to remedy the breach.

All of which is respectfully submitted this 30th day of March, 2026.

Wes McMillan

Danielle Wierenga

Counsel for the intervener, British Columbia Humanist Association

## List of Authorities

| Tab | Description |
|---|---|
| **Cases** | |
| 1 | *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 |
| 2 | *Carter v. Canada (Attorney General),* 2012 BCSC 886 |
| 3 | *Chaoulli v. Quebec (Attorney General*), 2005 SCC 35 |
| 4 | *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village*), 2004 SCC 48 |
| 5 | *Eldridge v. British Columbia (Attorney General),* 1997 CanLII 327 |
| 6 | *Just v. British Columbia*, 1989 CanLII 16 |
| 7 | *Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16 |
| 8 | *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 |