COURT OF APPEAL FILE NO. CA 46892

COURT OF APPEAL

ON APPEAL FROM the order of Madam Justice Shelley C. Fitzpatrick of the Supreme Court of British Columbia pronounced on the 12th day of June 2020 at Vancouver, British Columbia.

BETWEEN:

Sharon Farrish, Christopher Pettypiece and James Levin

Respondents
(Petitioners)

AND:

Delta Hospice Society

Appellant
(Respondent)

APPELLANT'S FACTUM

COUNSEL FOR THE APPELLANT,
Delta Hospice Society

Albertos Polizogopoulos / Geoffrey Trotter / Isabelle Corbeil

c/o Geoffrey Trotter Law Corporation
1700 – 1185 West Georgia Street
Vancouver, BC V6E 4E6

COUNSEL FOR THE RESPONDENTS,
Sharon Farrish, Christopher Pettypiece and James Levin

Brad Dixon / Steve Warnett

Borden Ladner Gervais LLP
1200 Waterfront Center,
200 Burrad St., P.O. Box 48600
Vancouver, BC V7X 1T2

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CHRONOLOGY

Date	Event
1991	Delta Hospice Society ("DHS" or the "Society") incorporated. Nancy Macey is a founding director.
1995-2019	Ms. Macey serves as Executive Director. Ms. Macey and the membership majority consistently interpret the Society's Constitutional purposes as excluding provision of Medical Assistance in Dying ("MAiD").
June 2016	MAiD becomes decriminalized in Canada. DHS does not perform MAiD on site but transfers patients out who request to receive MAiD elsewhere.
December 2017	The Fraser Health Authority ("FHA") mandates that all non-religious hospices must provide MAiD on-site.
January and June 2018	DHS writes to FHA advising that it cannot provide MAiD as to do so is contrary to its Constitutional purposes, the World Health Organization principles of Hospice Palliative Care, and is "definitely opposed" by the majority of its members. The June 2018 letter is drafted and signed by the then-board President, now petitioner/respondent herein, Mr. Pettypiece.
July 2019	Nancy Macey goes on sick leave for cancer treatment. The petitioner/respondent Sharon Farrish becomes Acting Executive Director, begins advocating strongly within the society for MAiD to be offered on site, and commences a membership drive for pro-MAiD members in order to control

	the next general meeting vote. Membership doubles between July and October, and doubles again by November.
September 2019	Ms. Macey's employment is terminated upon giving notice of return to work after cancer treatment.
October 31-November 20, 2019	Ms. Farrish is in contact with Dying with Dignity Vancouver Chapter member Alex Muir who lobbies FHA board chair Jim Sinclair to force MAiD on the Society. Ms. Farrish invites FHA representatives to the November 6 board meeting at which then-board president (now petitioner/respondent) Levin calls a snap vote on whether to permit MAiD, despite the issue not having been part of the notice or agenda for the meeting. A 4-4 tie vote results. Three directors resign to protest the lack of notice. On November 20, another board vote on MAiD is called and the vote passes 4-1.
November 29-30, 2019	At the AGM of the Society, the membership vote out all of the directors who were up for re-election (including the petitioner/respondent Mr. Levin) who had voted to approve MAiD. Mr. Pettypiece had exceeded his term limit and within a few days acquiesced to no longer serving on the board. The newly constituted board meets the next day and reverses the November 20th resolution to permit MAiD.
December 2019	FHA warns the Society that it is in alleged breach of the Operating Agreement between them.
January 2020 – June 2020	The petitioners/respondents are involved in a co-ordinated and public campaign (involving the media and many high-profile local, provincial, and federal politicians), in conjunction with Dying with Dignity, to flood the Society with membership

	applications from persons who want to reverse the recent board election and to have the November 20, 2019 pro-MAiD resolution restored.
February 2020	The Society received notice from FHA advising that the operating agreement would be terminated effective February 2021 because of the Society's refusal to provide MAiD in its facility.
May 2020	The board rejects the membership applications of persons reasonably believed to oppose the society's Constitutional purposes which prohibit on-site MAiD. Notice of Extraordinary General Meeting of the society sent the members, proposing to convert to an expressly religious organization. This would entitle DHS to an exemption under FHA's MAiD policy.
Friday June 5, 2020	Order for short leave obtained. Petition filed and served.
Wednesday June 10, 2020	Society's petition response and affidavits due – 3 business days after service of petition and two days before hearing.
Friday June 12, 2020	Petition heard and granted by Madam Justice Fitzpatrick, including a blanket order that within 14 days the Society admit all rejected members since November 2019 AGM, regardless of any context.
June 18, 2020	Notice of Appeal and Notice of Motion to stay forced membership order filed.
June 25, 2020	Stay motion heard and granted by Justice Goepel on term that appeal be expedited.

OPENING STATEMENT

The Delta Hospice Society ("DHS") is a private, charitable society. Its members are bound together by their support for its Constitutional purposes, and have provided excellent palliative care for the last 29 years, earning them standing in the community. DHS has raised over $20 million, including $8.5 million to build its Hospice, at which it cares for patients, also utilizing operating funds from Fraser Health of about $1.5M per year.

DHS's members have contributed their time and money due to their commitment to their conscientiously held view that as many people as possible should be provided with life-affirming palliative care, which DHS's members believe excludes the provision of MAiD. This is the basis for their choice to associate. The petitioner Pettypiece admitted that the majority of members were "definitely opposed" to DHS providing MAiD as recently as June 2018. The members re-affirmed this commitment at the November 2019 AGM.

The petitioner respondents dissent from DHS's members' belief that MAiD and palliative care are incompatible. For the last 12 months they have organized a political campaign to flood DHS with membership applications from members of the community who disagree with DHS's position on MAiD. Their express purpose is to overwhelm the historical membership in order to reverse the Society's longstanding position on a matter of conscience which goes to its very reason for existence. The flood of memberships was rejected by the board on the basis that these applicants could not uphold the society's Constitution as required by the bylaws.

The court below ordered the compelled admission of all applicants. This amounts to a court-ordered hostile take-over by allies of Dying with Dignity of a private organization which has consistently held that MAiD and palliative care are incompatible. The new majority would appropriate the millions in assets built up by the Society on the strength of their conscientious views. The order does violence to the freedom of association and conscience of DHS's members, and destroys the very reason for their association which is the foundation upon which the members have contributed their time and treasure to the society for the last 29 years. The implications of this legal precedent for all manner of civil society organizations cannot be underestimated.

PART 1 - STATEMENT OF FACTS

The Society and the Irene Thomas Hospice

1. DHS is a charitable society offering palliative care services through the Irene Thomas Hospice and the Harold & Veronica Savage Centre for Supportive Care. The Society's purposes include to "provide compassionate care and support for persons in the last stages of living, so that they may live as fully and comfortably as possible."

2. Since its incorporation in 1991, up to the present time, the Society has consistently interpreted its Constitutional purposes (which expressly mentions "palliative care" so that patients may "**live as fully and comfortably as possible**") to be contrary to the provision of assisted suicide or euthanasia by any name, including Medical Assistance in Dying ("MAiD") as de-criminalized in 2016 (since which time the Society has provided information about access to MAiD and has transferred patients out when they requested it). DHS's members believe that MAiD cannot co-exist with palliative care without undermining the principles and culture upon which palliative care is based. Although not expressly a religious organization, its Constitution and bylaws were historically interpreted through a Christian "sanctity of life" lens.

Affidavit #1 of Nancy Macey, paras. 2-6, 12, Joint Appeal Book, p. 329-330, 332.

3. The Society pays core medical and administrative staff. Much of this operational funding comes from a long-term operating agreement with the Fraser Health Authority ("FHA") which contributes $1.5M per year.

4. True to its non-profit nature, the Society:

    a. is a volunteer-heavy organization, with over 250 volunteers contributing over 35,000 volunteer hours annually; and

    b. is donor-supported, with total donations towards palliative care of approximately $20 million, including a fundraising drive which raised $8.5 million to build the Hospice building, which is located on land leased from FHA.

Affidavit #1 of Nancy Macey, paras. 2, Joint Appeal Book, p. 329.
Affidavit #1 of Angelina Ireland, exhibit O, Joint Appeal Book, p. 296.

2018: The Society, including petitioner Pettypiece, confirms that MAiD is contrary to its Constitutional purposes

5. After MAiD was de-criminalized in 2016, FHA mandated, in December 2017 that all non-religious hospices provide MAiD on-site. In 2018, both DHS founder and 23-year Executive Director Nancy Macey, and then-board President, now petitioner/respondent Chris Pettypiece, wrote to FHA advising that DHS could not do so.

Affidavit #1 of Nancy Macey, paras. 7-8, Joint Appeal Book, p. 330-331.

6. Ms. Macey's January 2018 letter states that "under the DHS Constitution, DHS requires an exemption from [FHA] in the provision of MAiD … based on a conflict of philosophy of care to comfort and support and not to hasten death." Her enclosed report re-states that "DHS is excluded from offering MAiD at the Irene Thomas Hospice by the mandate of its Constitution" and cites the World Health Organization's definition of palliative care as "not hastening death." She also identifies public health reasons why forcing MAiD on the hospice would undermine its ability to serve patient needs, by "creat[ing] barriers to access [for] people who do not personally agree with the philosophy of MAiD" who would avoid entering a hospice where MAiD was practiced due to "fears of vulnerability and their death being hastened."

Affidavit #1 of Nancy Macey, Exhibit B, Joint Appeal Book, p. 343; emphasis added.
Affidavit #1 of Angelina Ireland, Exhibit O, Joint appeal Book, p. 296.

7. Mr. Pettypiece's June 2018 letter states that although staff and volunteers were split 50/50, the board was evenly split 4 – 4 (with petitioners Pettypiece and Levin in favour of MAiD), and the general public was supportive of in-hospice MAiD, that the "Society Membership are quite definitely opposed" and that most DHS members who wrote the board on this issue expressly cited that MAiD is "in conflict with the principles of Hospice Palliative Care as defined by the World Health Organization."

Affidavit #1 of Nancy Macey, paras. 9-11,14, Ex. C Joint Appeal Book, p. 331-332, 350-351.

July – November 20, 2019: certain board members oust long-time Executive Director Nancy Macey, install an acting Executive Director who favours implementation of MAiD, begin a private campaign of recruiting new members to control the next AGM board election, and achieve a board vote in favour of implementing MAiD,

8. Founder and 23-year Executive Director, Nancy Macey, was staunchly committed to the longstanding interpretation of the Society's constitution held by the majority of members. Pro-MAiD board members had conflict with her a as a result.

Affidavit #1 of Angelina Ireland, para. 6, Joint appeal Book, p. 203

9. Ms. Macey went on sick leave for cancer treatments in the Spring of 2019.

Affidavit #1 of Angelina Ireland, para. 7, Joint appeal Book, p. 200.

10. In July 2019 a minority of board members, including Pettypiece and Levin, installed co-petitioner/respondent Sharon Farrish, as Acting Executive Director. This was accomplished without discussion with or a vote of, the board. The chambers judge found that "At some point in 2019, which I take as principally arising from Ms. Farrish's leadership, there was an increasing view that MAiD should be offered by the Society."

Affidavit #1 of Angelina Ireland, para. 9-10, Joint appeal Book, p. 204.
Reasons for Judgment of the Honourable Madam Justice Fitzpatrick, at para. 7, Appeal Record p. 42 ["Reasons for Judgment Below"]

11. Ms. Farrish began working on a then-secret membership drive of pro-MAiD applicants. Pro-MAiD board members Pettypiece and Levin did the same starting no later than October 2019. These were direct efforts by the three petitioners to control the outcome of the upcoming AGM, and predated any effort by the society's majority members to recruit members following the November 20, 2019 board decision to permit MAiD.

Affidavit #1 of Angelina Ireland, para. 13, 21, Joint appeal Book, p. 204, 206.

12. As a result of the petitioners' secret pro-MAiD membership drives, the Society's membership skyrockets:

Date	Number of active members	Evidentiary reference
2009-2017	50-100	Farrish #1 para. 6
July 19, 2019	177 active + 78 lapsed	Ireland #1 para. 14
October 22, 2019	328 active	Ireland #1 para. 15
November 28, 2019	622	Ireland #1 para. 21

13. Upon giving notice that she was fit to return to work on September 3, 2019, Ms. Macey was immediately terminated due to her opposition to MAiD. This was an unpopular decision with the employees and Members of the Society. Ms. Farrish circulated an "Anonymous" letter to certain employees which was highly defamatory of Ms. Macey.

Affidavit #1 of Nancy Macey, para. 15, Joint Appeal Book, p. 332.
Affidavit #1 of Angelina Ireland, para. 7, 6-18, Ex. A, Joint appeal Book, p. 203, 205, 217-218.

14. The Society's AGM was held on October 22, 2019, but the board election did not conclude due to duplicate ballots. However, based on the provisional results, all pro-MAiD incumbents were set to be defeated.

Affidavit #1 of Angelina Ireland, para. 20, Joint appeal Book, p.205

15. In response to learning that her pro-MAiD agenda had not yet achieved majority member support, Ms. Farrish:

    a. wrote to all Society members on October 28th blaming "disruptive members" belonging to the (anti-MAiD) majority for the need to adjourn the AGM board election, and alleging "inadequate management" prior to her tenure – i.e. more veiled allegations against Ms. Macey's then 24 years as Executive Director; and

    b. was in regular contact with Dying with Dignity Vancouver's Chapter member Alex Muir, who in turn was lobbying then-FHA board President Jim Sinclair, advocating for FHA to "deliver" a "wake-up call" to the Society by enforcing its policy of requiring all hospices to provide MAiD on site. Muir subsequently conducted interviews in favour of FHA cutting funding to the Society.

Affidavit #1 of Angelina Ireland, paras. 22, 29-30, Ex. C, E, Joint Appeal Book, p.207, 229-230, 234.
Affidavit #1 of Sharon Farrish, para. 15,19, Exhibit C, Joint Appeal Book, p. 4-5, 20.

16. At the November 6, 2019 board meeting (one week after an e-mail from Muir to Sinclair), FHA representatives, invited by Ms. Farrish, attended the DHS board meeting to discuss MAiD. A snap vote was called by board president Levin on whether to provide MAiD at the Hospice, despite the issue not having been part of the notice or agenda for the board meeting. The result was a 4-4 tie vote. Three of the anti-MAiD

directors resigned immediately thereafter in protest, leaving Ms. Ireland as the sole remaining director representing the majority members' position on the board.

Affidavit #1 of Angelina Ireland, para. 23-25, Joint Appeal Book, p. 206-207.

17. On November 20, 2019, with the AGM a mere 8 days away, at a meeting called on one day's notice, the then-board of directors voted again, this time 4-1, to approve the provision of MAiD at the Hospice.

Affidavit #1 of Angelina Ireland, para. 26-27, Exhibit D, Joint Appeal Book, p. 207, 232.

November 28, 2019: The members revolt at the AGM and vote out all pro-MAiD directors, replacing them with a board committed to the historical position, which immediately votes to return to the historical position that the DHS Constitution forbids MAiD

18. At the November 28, 2019 AGM continuation, the pro-MAiD members admitted into membership under Ms. Farrish's tenure failed to attend in sufficient numbers. The membership who did show up for the meeting revolted and voted out all members of the board who had been up for re-election who voted in favour of the November 20th resolution (including the petitioner Mr. Levin). The revolt was specifically because of those board members' decision eight days earlier to implement MAiD.

Affidavit #1 of Angelina Ireland, para. 28, Exhibit D, Joint Appeal Book, p. 207.
Affidavit #1 of Nancy Macey, para. 17-18, Exhibits D-E, Joint Appeal Book, p.333, 353, 355.
Affidavit #1 of Sharon Farrish, Exhibit E, Joint Appeal Book, p. 4-5, 20

19. Mr. Pettypiece was not up for re-election at the November 28th AGM but had exceeded his term limit under the bylaws and could not continue as a director.

Affidavit #1 of Angelina Ireland, para. 5, 19, 32, Ex. G, Joint Appeal Book, p.203, 205, 208, 244.
Affidavit #1 of Nancy Macey, para. 19-20, Exhibits F, Joint Appeal Book, p. 333, 357.
Affidavit #1 of Sharon Farrish, Exhibit E, Joint Appeal Book, p.28.
Affidavit #1 of Christopher Pettypiece, para. 3, Joint Appeal Book, p. 128.

20. The new board meets the day after the AGM and reverses the November 20th resolution to implement MAiD, and discusses Ms. Farrish's employment in camera, determining to suspend her.

Affidavit #1 of Angelina Ireland, para. 33-34, Joint Appeal Book, p.208.
Affidavit #1 of Sharon Farrish, Exhibit E, Joint Appeal Book, p. 33.

The petitioners campaign to overwhelm the existing membership now goes public, and is expressly to implement a hostile takeover of the Society and change its Constitutional interpretation

21. When newly-appointed board President Ms. Ireland delivered notice of suspension of employment to Ms. Farrish's home on December 1, 2019, Ms. Farrish's husband, unaware that his conversation with Ms. Ireland was being audio recorded, admitted to her that there was a campaign underway to overwhelm the Society.

Affidavit #1 of Angelina Ireland, para. 35-36, Ex I, Joint Appeal Book, p. 208-209, 248-256.

22. Soon after her suspension/termination, Ms. Farrish began posting defamatory remarks against the Society and the new board on Facebook. In January 2020 she founded a Facebook group called "Delta Hospice Discussion" which now made public her previously private campaign of mobilizing pro-MAiD persons to apply for membership in DHS for the express purpose of overwhelming the existing membership, reversing the board election, and overturning and the Society's position on providing MAiD. Ms. Farrish also encouraged individuals to commence litigation against the Society, and repeatedly attended the Society's lands and buildings despite a cease and desist letter to cease trespassing.

Affidavit #1 of Sharon Farrish, para. 12-13, Joint Appeal Book, p. 2-3.
Affidavit #1 of Danielle Martell, para. 6, Exhibit F, Joint Appeal Book, p. 360, 421.
Affidavit #1 of Angelina Ireland, para. 37-39, Ex. J-K, Joint Appeal Book, p. 209-210, 258-274.

23. In early February 2020 an agenda was circulated for a secret meeting between Pettypiece, Levin, Farrish, and the other former pro-MAiD directors who were voted out at the November 2019 AGM, to further their campaign of overwhelming the membership to take control of DHS. They meet again on February 27th, immediately after FHA terminates the Society's operating agreement on 12 months' notice.

Affidavit #1 of Angelina Ireland, para. 40, Exhibit F, L, Joint Appeal Book, p. 210, 240, 280.

24. The petitioners' public campaign succeeds in getting favourable news coverage from the Delta Optimist, and in rallying local, provincial, and federal politicians, including the Mayor of Delta, local MLA's and MP's, and the provincial Minister of Health, to coerce DHS regarding MAiD.

Affidavit #1 of Danielle Martell, para. 6, Exhibit E, Joint Appeal Book, p. 360, 407.

25. A number of organizers and participants of the petitioner/respondents' campaign are affiants in these proceedings, where they complain that their membership applications were rejected. Their public Facebook postings include the following:

    a. **John Darras:** publicly tracks on Facebook how close his 'petition' is to achieving the 30% membership threshold which he believes will enable the pro-MAID faction to requisition a Special General Meeting of the Society to vote out the board and reverse its position on MAiD. He publicly posts on Facebook requesting the contact information for Ms. Ireland's parish priest to cause people to call him, presumably to pressure him to pressure Ireland to reverse course, and solicits society members to commence litigation against DHS.

    Affidavit #1 of Danielle Martell, Exhibit E, Joint Appeal Book, p. 407.
    Affidavit #1 of Angelina Ireland, para. 40, Exhibit P, Joint Appeal Book, p.303.

    b. **Sheila Cessford:** Calls the board's support of a planned rally outside the legislature in Victoria in favour of the Society's freedom of association and conscience "propaganda", and demands that local and provincial politicians "take action" to coerce DHS to change its interpretation of its constitution.

    Affidavit #1 of Danielle Martell, Exhibit C, Joint Appeal Book, p. 382.

    c. **Peggie Boon:** Organizes a letter-writing campaign to the Minister of Finance seeking her intervention in DHS's position on MAiD.

    Affidavit #1 of Danielle Martell, Exhibit D, Joint Appeal Book, p. 390.

    d. **Lydia Elder:** Publicizing politicians co-ordinated efforts to interfere in DHS's position on MAiD, advocates for her church's theological position which was supportive of MAiD, and publicizes pro-MAiD documentaries.

    Affidavit #1 of Danielle Martell, Exhibit E, Joint Appeal Book, p. 406.

    e. **Beth Johnson:** Publicly supports the Darras petition and approves likening the actions of the current board maintaining the Society's 28-year position as similar to "that bit in Animal Farm, when the animals woke up to find that the pigs had rewritten the rules overnight, and insisted they'd always said that".

    Affidavit #1 of Danielle Martell, Exhibit F, Joint Appeal Book, p. 421.

f. **Angelina Delmar:** Mobilizes people to pressure the Ladner Rotary to break ties with Ireland in order to pressure her to reverse course on MAiD; organizes a public march to solicit media attention to attract more pro-MAiD applicants.

Affidavit #1 of Danielle Martell, Exhibit G, Joint Appeal Book, p. 431-432, 435, 438-439.

26. None of the petitioners' affiants deny that they are applying for membership for the purpose of infiltrating the Society and reversing its longstanding Constitutional position on MAiD.

The board responds to the take-over attempt by rejecting membership applications of persons opposed to the Society's constitution

27. Part 2 of the Society's bylaws, on the topic of "Membership" state that admission of new members is at the discretion of the board of directors, and require all members to "uphold the Constitution" of the Society, as follows:

> 4 A person may apply to the directors for membership in the society and on acceptance by the directors is a member. [emphasis added]
>
> 5 Every member must uphold the constitution […]

Affidavit #1 of Angelina Ireland, para. 46-47, Exhibit O, Joint Appeal Book, p. 212, 296.
Affidavit #1 of Danielle Martell, paras. 2-8, Joint Appeal Book, p. 359-361.

28. Accordingly, the board rejected the membership applications of those who sought to infiltrate the Society in order to overwhelm historical members and to encourage activity which conflicts with the Society's Constitution. Given the public campaign to infiltrate the Society and the overwhelming flood of membership applications, the board operated from the precautionary principle and rejected applications if they could not be confident that the member was committed to upholding the Constitution. 310 membership applications were rejected in this way.

Affidavit #1 of Danielle Martell, paras. 2-3, 6, 8-18, Exhibits C-G, Joint Appeal Book, p. 359-362.
Affidavit #1 of Angelina Ireland, para. 42-49, Joint Appeal Book, p.210 -212.

The rationale for the June 15, 2020 meeting

29. FHA's December 2017 policy of requiring hospices to provide MAiD includes an exemption for faith-based institutions, but not for institutions with conscientious beliefs against provision of MAiD which are not religiously based.

Ireland #1 Exhibit E, Joint Appeal Book p. 235

30. In December 2019 FHA warned DHS that it was in breach of its operating agreement by refusing to perform MAiD. When the Society affirmed that its constitution prohibited MAiD, FHA in February 2020 terminated the operating agreement, effective February 2021. Muir of Dying with Dignity was immediately in contact with Pettypiece and Farrish celebrating the decision as "exciting times."

Affidavit #1 of Angelina Ireland, para. 31 and Ex F, Joint Appeal Book, p.208, 240.

31. Consequently, the Board decided to call a general meeting in order to put to a membership vote an amended constitution and amended by-laws of the Society which would make it an explicitly religious institution in order to qualify for the religious exemption in the FHA MAiD policy.

Affidavit #1 of Angelina Ireland, para. 31, Joint Appeal Book, p. 213.

32. The Special General Meeting ("SGM") was set for June 15th, with the Notice delivered 24 days' before. The petitioners and their allies did not choose to requisition their own SGM to put a different resolution to the members even though they had time to do so.

Affidavit #1 of Angelina Ireland, para. 57, Joint Appeal Book, p.214-215.

33. Because the Society's bylaws require votes to be taken by show of hands, which is not possible for electronic meetings conducted pursuant to Ministerial Order M116, the Society proposed that the vote would be taken by mail-in ballots.

Affidavit #1 of Angelina Ireland, para. 58-60, Joint Appeal Book, p. 214.

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34. The petitioners obtained short leave on June 5th to bring proceedings to cancel the Meeting set for June 15th, and other relief. On the basis of the June 15th meeting date, the petition was set for hearing one week later on June 12th, with the Society's Response to Petition and Affidavits to be filed on June 10th – only three busines days after short leave was granted and DHS was served.

35. On June 12, 2020, Madam Justice Fitzpatrick heard the petition and granted (with one small exception which was adjourned) all of the relief sought. Although stating at para. 19 of her reasons that "the focus of this petition proceeding has been on the Meeting

scheduled for next Monday" she went far beyond cancelling the meeting (on the basis that the proposed voting method was not authorized by Ministerial Order M116), which was the only relief which was actually urgent. She went much further, requiring the Society to disclose to the petitioners a current list of all current members and applicants since the November 2019 AGM, and ordering the Society to "rectify" its register of members by admitting as members the 310 pro-MAiD applicants whose applications had been rejected by the democratically elected board after the pro-MAiD faction lost control of the board at the November 28, 2019 AGM. She also required the Society to seek directions from the Court before calling any members' meeting.

36. The Society is not appealing the portions of the order cancelling the June 15th meeting or declaring certain proposed voting methods unavailable. The Society appeals only the portions of the order dealing with whether or not the Society can properly deny membership to applicants who seek to overturn the Society's Constitution, and the requirement to seek directions.

PART 2 - ERRORS IN JUDGMENT

37. The chambers Judge erred as follows:

    a. In finding jurisdiction to order the forced admission of members who do not share the society's purposes, which in turn was based on the following errors:

        i. Treating applicants for membership in a private society as possessing a legal right to be admitted into membership upon making application and paying the required fee, akin to a right to vote in provincial elections;

        ii. Failing to defer to the Society's members' interpretation of its Constitutional purposes, which is a non-justiciable matter of moral philosophy;

        iii. Finding that she had jurisdiction over a private society's membership decision without finding any basis to distinguish the jurisdictional bars in the recent Supreme Court of Canada case of *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 [*Wall*];

        iv. Interpreting her grant of discretion under the *Societies Act* without any consideration of the freedom of association and freedom of conscience of

DHS and its members to not associate with those who do not share their communal conscientious beliefs and purposes as expressed in the DHS Constitution; and

v. If the grant of discretion under the *Societies Act* authorized the order made, failing to read down the relevant provisions as inconsistent with the *Charter;*

b. In ordering the admission of applicants due to wrongly finding that the membership rejections were made in bad faith or for an improper purpose, which in turn rested upon the following errors:

i. Misinterpreting the Model Bylaws upon which the society's membership bylaw is based in finding that it does not grant the board the discretion to reject membership applications submitted by those opposed to the Society's purposes; and

ii. Treating past practice in processing membership applications as binding even in the face of a change of circumstances that fundamentally shifts the parameters of the membership admission process (here, the commencement of a public and co-ordinated campaign to infiltrate the Society and overwhelm the existing membership to reverse the members' interpretation of their own Constitution).

PART 3 – ARGUMENT

A. Jurisdiction: In light of the *Charter* Rights and values at issue, there is no jurisdiction at common law or under the *Societies Act* for the forced admission of members who do not share the society's purposes

i. Overview of argument on jurisdiction

38. DHS's directors rejected applicants who specifically rejected the society's purposes (as interpreted by the current members) and sought to materially change the Society. The chambers judge ordered the forced admission of these hostile applicants. DHS asserts on this appeal that the chambers judge had no jurisdiction to do so. The argument proceeds as follows.

39. First, DHS is a private entity. The chambers Judge's legal reasoning and metaphors show that she was led into error by treating DHS as a public body to which all members of the public had a *right* to participate by becoming members and voting.

40. Second, *Highwood v. Wall,* 2018 SCC 26 is clear that courts do not have the power to over-rule the current members' interpretation of their own Constitutional purposes where they reflect a conscientiously held view – here, that palliative care and on-site MAiD are incompatible. This is a non-justiciable matter of moral philosophy.

Highwood Congregation of Jehovah's Witness (Judicial Committee) v. Wall, 2018 SCC 26 [Wall], para. 12.
Syndicat Northcrest v. Amselem, 2004 SCC 47 [Amselem], paras. 50, 55.

41. Third, despite DHS pleading and arguing the jurisdictional bars in *Wall*, the chambers judge neither mentioned the decision nor distinguished it, yet went on to rely on pre-2018 trial-level cases[1] as providing jurisdiction to order the forced admission of members. The second jurisdictional bar in *Wall* applies here: "there is no freestanding right to procedural fairness" and "Courts may only interfere to address the procedural fairness concerns related to the decisions of religious groups or other voluntary associations if legal rights are at stake."

Response to Petition at para. 84, Appeal Record p. 33.
Wall paras. 12, 19.

42. Fourth, if this court finds that the sections of the *Societies Act* relied upon by the chambers judge (i.e. sections 53, 80, 104 and 108) could, notwithstanding *Wall*, still grant a statutory jurisdiction to order the forced admission of hostile members, that very broad grant of discretion must be interpreted and applied in light of freedom of association and freedom of conscience under the *Charter* which narrows the discretion and does not authorize the order for forced admission of hostile applicants.

43. Fifth, and in the alternative, if this court finds that the *Societies Act* unambiguously grants statutory authority to order forced admission of hostile applicants who do not share the constitutional purposes of the existing members, then those provisions of

[1] The sole exception being a reference to this court's 1999 decision in *Hara v. Khalsa Diwan Society, 1999 BCCA 409* which ordered that an earlier membership list be reverted to, contrary to here, where the chambers' judge ordered the addition of hostile individuals to the membership list.

the *Societies Act* unjustifiably violate s. 2(d) and s. 2(a) [conscience] of the *Charter* and must be read down so as to no longer authorize orders for forced admission in circumstances such as the case at bar.

44. The foregoing five arguments are set out immediately below. A later section of this argument will deal with the chambers judge's substantive errors on the merits of her interpretation of DHS's bylaws and her failure to grapple with the factual context confronting the directors which justified the membership rejections.

ii. The chambers judge's approach wrongly treats the society as an elected public body rather than a private entity

45. The reasons for judgment below reveal that the chambers judge conceived of DHS as, in substance (although not in form), a *public* body in which the entire community had a *right* to become a member and to vote in order to set its course:

> [8] [In late 2019] the MAiD issue caused substantial interest in the community, and motivated people to get involved in the Society [by becoming members] so that they could express their views at the AGM as members of the Society. … [41] [After the November 2019 AGM] the two respective camps within the Society – anti and pro-MAiD – recognized that, if they wanted to control the governance of the Society, they would have to, as the saying goes, *"get out the vote"*. … [63] … In my view, what must be allowed here is, as the petitioners' counsel states, a level playing field so that the community can participate in the Society, as they have been doing for decades now, and properly exercise their views as members toward the future direction of the Society. [emphasis added]

46. The chambers judge thus adopted the petitioners' terminology and submission that their campaign to replace the board and reverse course on MAiD was due to "the board … acting against the wishes of the community."

Affidavit #1 of Sharon Farrish, para. 14, Joint Appeal Book, p. 4. [emphasis added]

47. To "get out the vote" is a political term taken from general elections for public office, in which all citizens are automatically "members" by virtue of their citizenship (or, in some cases, residence). The task is to motivate these universally pre-existing 'members' to get to the polls to vote for a particular candidate. In effect, the chambers judge treated DHS as a public entity to which principles of judicial review applied, something the Supreme Court categorically rejected in 2018.

Wall, para 12.

48. The chambers' judge's approach is fundamentally flawed. DHS is not a public body over which "the community" has a right to "exercise their views as members" to cause DHS to act in accordance with the "wishes of the community." DHS is a *private* society to which decisions around membership belong to the existing members acting through their elected delegates on the board. Although DHS *serves* the wider community it is not *governed* by the wider community; it is governed by its members, including such new members as the *existing* members, acting through the board, choose to admit.

49. The membership application process is not an exercise of legal right by an applicant; it is an exercise of the freedom of (non)association of the existing members. The *Societies Act* is enacted upon a constitutional foundation: freedom of association under s. 2(d) of the *Charter*. It must be interpreted in keeping with that foundation.

50. A private society's board election is not a general election open to all. Otherwise it would simply replicate the results in the legislature. A free and democratic society encourages private societies specifically so that members of the public can organize around shared views different from those held by the political majority, as protected by s. 2(d) of the *Charter*. Through her "get out the vote" analogy, the chambers judge ignored the legitimate gatekeeping function of the membership application process. The jurisprudence confirms that the integrity of an association depends upon it maintaining control over its own membership decisions.

iii. It is for the society's members to interpret their own Constitutional Purposes; the question is non-justiciable, or should be deferred to by the court

51. The Chambers Judge acknowledged that the current board "interpret[s] the Constitution … as excluding the provision of MAiD by the Society" but went on to state that "it is clear enough that this interpretation is not shared by all members, including the petitioners." (para. 47).

Reasons for Judgment Below at para. 47, Appeal Record p. 54.

52. The fact that some members within a private society hold dissenting interpretations of its Constitutional purposes does not give the court the right to prefer the dissenters'

views over those of the majority and their elected board. The interpretation of a society's purposes is a matter for the members' delegates – the directors – to make, who "may exercise all the powers … that the society may exercise and do."

Affidavit #1 of Sharon Farrish, Exibit B, Joint Appeal Book, p. 14.

53. Whether or not the DHS Constitutional purposes as articulated in sections 2.1, 2.4, and 2.5 (which mention "palliative care" twice and "support for persons in the last stages of living, so that they may live as fully and comfortably as possible") can or cannot co-exist with the provision of MAiD is a matter of moral philosophy akin to the interpretation of religious precepts which appear in the bylaws of religious organizations about which the Supreme Court of Canada has repeatedly held are not within the purview of the courts. *Wall* sets a bright line test on this point: these issues are simply non-justiciable. *Wall* expressly applies to both "religious groups or other voluntary associations."

Response to Petition at para. 84, Appeal Record p. 33.
Wall, para. 12.
Bruckner v. Marcovitz, 2007 SCC 54 [Marcovitz], paras. 42, 47.
Amselem, paras. 50, 55.

54. In the alternative, if *Wall* is not binding on this point, then this court's decision in *Kwantlen University* stands for the proposition that while the court may itself interpret "bylaws that define the fundamental rights of members in respect of the society's operations" there is "reluctance of the courts to intervene by substituting the court's judgment for the judgment of the tribunal on a matter of substance within the tribunal's jurisdiction." Whether or not the DHS Constitutional purposes do or do not permit MAiD is a "matter of substance within the tribunal's jurisdiction" which is for DHS to determine, to which the chambers judge was required to defer. With the exception of the 8-day period between November 20-28, 2019 which resulted in a members' revolt, the Society has consistently interpreted its Constitution as precluding MAiD. Mr. Pettypiece admitted this to Fraser Health in June 2018.

Kwantlen University College Student Association v. Canadian Federation of Students – British Columbia Component, 2011 BCCA 133, para. 31., *followed in* *Bhandal v. Khalsa Diwan Society of Victoria, 2014 BCCA 291 [Bhandal].*

iv. No freestanding right to procedural fairness in membership decision

55. The petition's core allegation is that DHS breached procedural fairness in its processing of membership applications. But *Highwood v. Wall* provides that:

> there is no freestanding right to procedural fairness. Courts may only interfere to address the procedural fairness concerns related to the decisions of religious groups or other voluntary associations if legal rights are at stake … mere membership in a religious organization, where no civil or property right is formally granted by virtue of membership, should remain outside the scope of the *Lakeside Colony* criteria.
>
> *Wall, paras. 12, 29.*

56. This principle in *Wall* has been applied by multiple Canadian appellate and other courts to non-religious non-profit associations like DHS:[2]

> The Courts will not intervene in disputes over membership in a voluntary association where no civil or property right is granted by that membership, even if there is an alleged breach of natural justice.
>
> *Bell v. Civil Air Search and Rescue Association et al, 2018 MBCA 96, paras. 11-13.*

> Jurisdiction depends on the presence of an underlying substantive legal right, and only then may a court consider an association's adherence to its own procedures and the fairness of those procedures … a court must find the terms of membership in a voluntary association are contractually binding, in that civil and property rights must be formally granted by virtue of membership … Where a party alleges that a contract exists, that party must show both an intention to form a contractual relationship, and that the general principles of contract law apply to that relationship.
>
> *McCargar v. Métis Nation of Alberta Association, 2018 ABQB 553, paras. 10-12, aff'd 2019 ABCA 172.*
>
> *See also: Cummings v Burlington Radio Control Modelers, 2018 CanLII 123232 (ON SCSM), paras. 20, 26, 29.; Warren v. Football Canada, 2020 NSSC 29.*

57. Since membership in DHS does not bestow any legal right beyond membership *per se*, the court below had no jurisdiction to order the applicants' admission.

58. *Wall* is the modern, binding statement of principle which can be found throughout the earlier caselaw, which confirmed that at common law, no person had a right to become a member of a private society and voluntary association, nor could they claim the

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[2] The only appellate exception is: *Aga v. Ethiopian Orthodox Tewahedo Church of Canada*, 2020 ONCA 10, over which the Supreme Court of Canada granted leave to appeal on June 18, 2020.

benefit of the rules of natural justice in the society's decision of whether or not to admit them as members.

Colgan v Canada's National Firearms Association, 2016 ABQB 412, paras. 37-41.
London Humane Society (Re), 2010 ONSC 5775 [London Humane Society], para 30.

v. The *Societies Act* does not authorize the forced admission of members with whom the majority does not wish to associate on the basis of irreconcilable divergence of conscientious beliefs.

59. The discretion granted under sections 104 and 108 of the *Societies Act* must be interpreted and exercised in accordance with the *Charter* rights or values of freedom of association and freedom of conscience. Rightly interpreted in light of its text, context, and purpose, the otherwise broad grants of authority do not authorize the orders for the forced admission of members with whom the majority does not wish to associate on the basis of irreconcilable divergence of conscientious beliefs.

R. v. Penunsi, 2019 SCC 39, at para. 36.

60. The decision below must be reviewed particularly carefully for two reasons: 1) all of the legal authorities relied upon by the Chambers Judge were trial-level decisions[3] pre-dating *Wall*, and 2) the facts of this particular case heighten the *Charter* implications of a forced admission order. However even before *Wall,* BC courts would intervene only if a society had breached its bylaws, the rules of natural justice, or acted in bad faith. The power under the current and former Act was "limited", and "not very broad … not unfettered" because "the court is always reluctant to interfere in the internal affairs of any corporate body… The court should not presume that those in executive charge of the society will conduct themselves contrary to the interests of the society."

Garcha v. Khalsa Diwan Society - New Westminster, 2006 BCCA 140 at para. 8.
Samra v. Guru Nanak Gurdwara Society et al., 2007 BCSC 882, at para 57.
Basra v. Shri Guru Ravidass Sabha (Vancouver), 2017 BCSC 1696, at para 67.

61. Section 108 of the *Societies Act* authorizes the court to order that a society's "basic record be corrected." Neither the section nor the Act purports to address the Constitutional tension which exists between the general error-correcting jurisdiction in

[3] See footnote no. 1 above.

the section and the freedom of association and conscience of majority members who cannot in good conscience associate with an applicant who rejects the society's Constitutional purposes and seeks to abrogate them. DHS submits that since forced admission of members in such circumstances is authorized neither expressly nor by *necessary* implication in the section, this "[l]egislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed."

R. v. Conway, 2010 SCC 22, paras. 41-44, quoting Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038.

62. This court recently confirmed that courts must be cognizant of *Charter* values implicated by their exercise of otherwise broad and generally valid statutory discretion.

A.B. v. C.D., 2020 BCCA 11 at paras. 203-217.

63. Alternatively, if "a statutory provision is capable of an interpretation that is constitutional and one that is not, then the courts should choose the construction that conforms with the *Charter*."

R. v. Ruzic, 2001 SCC 24 at para. 26.

64. The DHS Constitution and bylaws engage matters of conscience, including whether palliative care and "support for persons in the last stages of living" can co-exist with MAiD. Accordingly, the principles in s. 2(a) *Charter* cases apply.

65. The chambers judge would never have claimed that an "open and democratic" membership application process should be imposed upon a religious charity which clearly has the right under the *Charter* not to be compelled by a statutory order to accept an applicant which the society concludes does not share its religious purposes. Such matters are non-justiciable under *Wall*.

66. The result is no different for an association built around shared conscientious views on matters of moral and healthcare philosophy. Freedom of conscience and freedom of religion are both equally protected under s. 2(a) of the *Charter*. DHS has a corporate conscience which is set out in its Constitutional purposes.

R. v. Morgentaler, [1988] 1 SCR 30, at p. 179; *Loyola High School v. Quebec (Attorney General) [Loyola]*, at paras. 60, 61, 91—97, 135—142.

67. The Supreme Court of Canada's decision in *Mounted Police* is key for the freedom of association rights at issue, and is relied on further below on s. 2(d) itself. It also identifies the intersection between freedom of association and freedom of conscience and religion: "[T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the [s. 2(a)] protection" and this "sphere of civil society" should "grow largely free from state interference". The same is true of communities of conscience which must equally be granted "choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them."

Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1 [Mounted Police], paras. 64, 81-84, 118.

68. Similarly, substituting "conscience" for "religion" in the following quotations confirms that the exercise of discretion under the *Societies Act* must be interpreted cautiously:

> What may appear good and true to a majoritarian religious [or conscientious] group, or to the state acting at their behest, may not, for religious [or conscience] reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority".
>
> *R v. Big M Drug Mart Ltd, [1985] 1 S.C.R., para. 96*.

> [the state must preserve a] neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality [or conscience and the] state neither favour nor hinder any religion [or conscientious belief] and [must] abstain from taking any position on this subject.
>
> *Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16, paras. 74, 132, 137.*

See also: Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), 2004 SCC 48, para. 68. Marcovitz, para 132. See also Amselem, paras. 50, 55.

69. As L'Heureux-Dubé J. remarked in *Adler v. Ontario*, [1996] 3 S.C.R.*:*

> Dissentient minority religious groups have probably suffered most severely from the historic disadvantage which has adhered to religious identity. Examples abound in earlier jurisprudence of this Court. … In today's secular society, it stands to reason that religious subgroups which have attempted to maintain a non-secular lifestyle are even more vulnerable to stereotype, social prejudice and marginalization.
>
> *Adler v. Ontario*, [1996] 3 S.C.R. 609 at para. 80.

70. Unfortunately, the personal aspersions levelled at the current board President for holding fast to the Members' conscientious beliefs about palliative care bear out such concerns of social prejudice and marginalization for their conscientious beliefs, which are likewise protected by s. 2(a) just as much as the religious beliefs at issue in *Adler*.[4]

71. Respect for group autonomy (and thus freedom of association), whether based in conscience or religion, requires protection of membership decisions, which "necessarily requires the ability to exclude." Those who disagree with the society's majority are free to leave and form their own association.

Norton, Jane Calderwood, Freedom of Religious Organizations, (Oxford: Oxford University Press, 2016) at 38.
Aroney, Nicholas, "Freedom of Religion as an Associational Right" (2014) 33:1 University of Queensland Law Journal 153 at 184.

72. While only *some* private societies can claim the protection of freedom of religion or freedom of conscience, *all* private societies can claim the protection of freedom of association. Indeed, membership in a private society (or trade union) is a quintessential exercise of freedom of association under s. 2(d) of the *Charter*.

73. Freedom of association guarantees more than the bare right to associate. It protects associational activity and participation without interference from the state. The "fundamental purpose" of freedom of association is to "protect the individual from state-enforced isolation in the pursuit of his or her ends." It protects the right to do collectively what an individual has the right to do alone.

Mounted Police, paras. 32, 36, 54, 58.

74. The decision below forces the current society membership to choose between their freedom of conscience and freedom of association. They must either recant their conscientious beliefs about palliative care, or hold fast to them and have their associational rights assaulted by forced admission of their adversaries, which will, as

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[4] See for example Affidavit #1 of Angelina, Exhibit M, Joint Appeal Book pages 284, 308, 313, 316, 320 where posts to the "Delta Hospice Discussion" Facebook group refer to **A**ngelina **I**reland as "**A**rtificial **I**ntelligence", a "radical unbalanced woman" "vile woman" practicing "religion, however bastardized," an "extreme right-wing narcissist" and "manipulative & conniving", and suggesting that all applicants who do not support the pro-MAiD position are "religious extremis[ts]".

a practical matter, result in the original members' self-expulsion once the society abrogates its Constitutional position on MAiD. The decision below forces the current members to choose between their s. 2(a) or s. 2(d) rights, with no justification.

75. The individual members of the society clearly have the right to contribute their time, expertise, or money to support their understanding of what palliative care is, requires and ought to be. But as a practical matter, providing hospice care is something which can only be provided in association with others. At a minimum, s. 2(d) "[protects] the right to do collectively what one may do as an individual."

Mounted Police, para. 36.

76. The Supreme Court of Canada has held that the freedom *not* to associate is particularly an issue when forced association would amount to "ideological coercion."

R v. Advance Cutting & Coring Ltd, 2001 SCC 70, paras. 2-4. 7, 28, 201, 231, 232.

77. Considering all of the foregoing, DHS submits that the general error-correcting power in s. 108 of the *Societies Act* does not extend so far as to authorize court orders forcing a private society whose members voluntarily associate with each other around a commitment to shared philosophical and conscientious beliefs, to admit hostile applicants whose beliefs the current membership judges to be fundamentally incompatible with the society's Constitutional purposes. If this court agrees with this submission as a matter of statutory interpretation and constitutional conditioning of judicial discretion, then there is no need for this court to perform a formal *Oakes* analysis as set out next.

vi. In the alternative: The provisions of the *Societies Act* granting the court jurisdiction to order forced admission of members violates sections 2(a) and 2(d) of the *Charter* and should be read down

78. If this court concludes that the provisions of the *Society Act* unambiguously purport to grant the court below the power to order the admission of an applicant hostile to a society's purposes as interpreted by the existing members, then those sections unjustifiably violate the *Charter* rights of the current members under s. 2(a) and 2(d) of the *Charter*, and must be read down as of no force and effect to that extent.

79. It is already settled law that s. 2(d) associational rights under the *Charter* are collective rights that "inhere in" and protect associations themselves. The unresolved question about whether s. 2(a) protects corporate conscience likely need not be answered in this appeal, although DHS submits the *Loyola* minority (which was not contradicted by the majority) should be adopted on this point if the matter must be decided.

Mounted Police, para. 62.
Loyola, paras. 88-102, 138.

80. The infringements of s. 2(a) and 2(d) cannot be justified under *Oakes*. The statutory objective of s. 108 is not to enforce universal suffrage upon private societies, but simply to correct errors in "basic records." Any power to force association between a private society's current members and new applicants hostile to their shared purposes is neither minimally impairing nor proportionate. It likely even lacks a rational connection.

81. The proper remedy would be to read down s. 104 and 108 of the *Societies Act* as not authorizing forced admission of members, at least not in circumstances where the application rejection is based in a board's determination that the applicant does not support the society's Constitutional purposes, particularly on a matter of conscience.

R. v. Appulonappa, 2015 SCC 59, para. 85.

B. Substantive review of the order below

i. Summary of chambers judge's errors on the merits

82. If this court concludes that the common law or the Act bestow a *Charter*-compliant power to order forced admission of hostile members, then DHS says that the chambers judge erred on the merits. Her reasoning proceeded as follows:

a. Until the November 2019 AGM all membership applications were accepted as a matter of course (para. 49);

b. The cases cited at para. 52 "stand for the proposition that, unless the criteria for membership are set out in the bylaws, the directors do not have the discretion to deny membership on some other basis that they themselves determine." Bylaw 4 does not reference substantive criteria for membership and therefore does not "endow the Board with any discretion as to the grounds

upon which membership may be accepted or rejected" (para. 51), such that the "objective of the Society as evidenced by the Act and the Bylaws" is an "open and democratic process." (para. 60);

c. "By dealing with memberships using this screening process, the Board has effectively ensured that people who do not share their views do not become members" or "only allow people into the Society who they have confirmed as willing to vote in favour of the Board's interpretation of the Constitution or who might have a reasonable likelihood of doing that" (paras. 56, 59); and

d. Therefore, the rejections of the petitioners' allies' membership applications were not in good faith (para. 57) or were for an improper purpose (para. 61).

83. Proposition (b) above is an error of law. The caselaw is not a blanket prohibition on directors rejecting applications from persons known to oppose the society's purposes.

84. Proposition (d) is an error of mixed fact and law, which is rests on two foundations. The first is the extricable error of law in (b). The second is a 'past practice' reasoning emanating from (a) which involved a palpable and overriding error as it ignored a crucial factor: the fact that the 'change in practice' was in response to a change in the circumstances that fundamentally shifts the parameters of the membership admission process – namely that the Society became aware of a (by then) public and co-ordinated campaign to infiltrate the society and overwhelm the existing membership with applicants who did not share the members' interpretation of their own Constitution, in order to reverse the Society's policy.

85. Since screening for substantive agreement with a society's purposes in the circumstances of this case is proper, the fact stated in (c) is not evidence of bad faith or improper motive. Rather, it is precisely evidence of the directors taking seriously their duty under s. 53(1)(a) to act "with a view to the best interest of the society" as defined by its own members.

ii. The model bylaws upon which the society's membership bylaw is based, authorizes the board to reject membership applications submitted by those opposed to the society's purposes

86. At paras. 51-52 the chambers judge cited *Kaila v. Khalsa Diwan Society, 2003 BCSC 1223 at paras. 13-14, 25 and 34-36*, *De Guzman v. Philippine Community Centre Society, 2007 BCSC 591 at paras. 7-8;* and *Yukon Government (Registrar of Societies) v. Humane Society of Yukon, 2013 YKSC 8 at paras. 5(17) and 10-15* and concluded that the only location in a society's bylaws where membership criteria can be stated is in the bylaw governing the admissions process. This is an error of law.

87. Furthermore, each of these three cases is distinguishable from the facts at bar:

    a. In *Yukon Government*, the admissions bylaw had removed the language of "upon acceptance by the board." That is, the bylaws themselves had been amended to remove the directors' gatekeeping function and to make membership a purely administrative exercise.

    b. In *De Guzman*, the Court concluded that the society's bylaws conferred no discretion on the admission of new members. Instead, the bylaws permitted the board of directors to confirm that eligibility requirements by prospective members had been met (in that case, that the applicant was of Filipino decent, residing in British Columbia and promises to uphold the "good name" of the society).

    c. In *Kaila*, the Court considered the decision of a board of directors to impose a membership fee when the bylaws did not permit such and in fact, had been specifically amended to remove a membership fee.

88. Since private society bylaws are contractual in nature, they must be interpreted in the context of the entire document with a view to ascertaining the intention of the parties.

Bhandal, para. 28.

89. Since DHS's bylaws #4 and 5 are virtually identical to the Model Bylaws which are Schedule 1 to the *Societies Regulation*, BC Reg 216/2015, they are a standard form contract; the decision below is therefore reviewed on a correctness standard.

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., 2016 SCC 37, para. 24.

90. Where it can be determined that an applicant intends to act contrary to a society's purposes, their membership application can – in good faith – be rejected:

a. In Khalsa Diwan Society of Victoria (Re), 1982 CanLII 564 (BC SC), recently referred to approvingly by this court in *Bhandal*, the court confirmed that:

> [5] Under the society's constitution the executive alone has the power to decide whether an applicant for membership is suitable for registration as such; and no particular procedure is imposed on it by the by-laws for the exercise of this power. The executive, in my opinion, is thus entitled to establish any fair and reasonable procedure for screening and registering applicants. It is also important to keep in mind the requirements for membership which are set out in the society's constitution. The executive has to be satisfied as to the religious [or here, conscientious] qualifications of an applicant, which renders its duties by no means pro forma. They are extremely important to the spiritual community of which the society is the secular arm.

Khalsa Diwan Society of Victoria (Re), 1982 CanLII 564 (BC SC), para 5.

b. Similarly, in *London Humane Society* (relied upon in *Yukon Government* itself) the decision of the board to refuse eight applications for membership was found to be in bad faith because the board's contention that "Ms. Blosh would not support the objects of the corporation" was contrary to the evidence that she "was involved in other community activities related to animal welfare and had been a member of the LHS the previous year." The judgment implies that if Ms. Blosh was in fact opposed to the society's purposes, the board could in good faith reject her application.

London Humane Society, para 12.

c. Again, in *Pathak v. Hindu Sabha*, 2004 CanLII 6233 (ON SC), the court states that it was improper to reject membership applications from two individuals who "have expressed public disagreement with the Board" where "There [was] no evidence … to show [they had] engaged in activities which are adversarial to the charity." Again, this implies that had those individuals engaged in activities "adversarial to the charity" their applications could have been properly rejected.

Pathak v. Hindu Sabha, 2004 CanLII 6233 (ON SC), para. 9.

91. The conduct of the petitioners' affiants summarized at para. 25 and elsewhere is conduct "opposed to the society's purpose" and "adversarial to the charity" which justifies their membership applications being denied.

iii. A change in circumstances, such as a co-ordinated campaign to overwhelm the existing membership, justifies a board commencing to screen membership applicants even if they have not done so previously

92. The Chambers Judge was troubled that the society began to screen membership applications for support for its Constitutional purposes only after the November 2019 AGM. She found this to be evidence of bad faith or improper motive. This was an error.

93. Something drastically changed in the second half of 2019 with respect to membership in the society. In its first 28 years of existence, DHS had a small membership (primarily of its volunteers, donors, and other core stakeholders) who even petitioner respondent Mr. Pettypiece admits were "quite definitely opposed" opposed to MAiD. Then suddenly, at around the time of Ms. Farrish's installation as a pro-MAiD acting Executive Director, and especially after her director allies' near-loss at the abortive October 2019 AGM (election subsequently re-scheduled for November 28), the society received an explosion of membership applications, all of which were approved by Ms. Farrish (and not the board of directors). These applications came not from volunteers, but from members of the wider community who wanted to exercise what they saw as their political franchise to abrogate the Society's MAiD policy. Ms. Farrish admits to having "direct involvement with many" of the new applicants and that "there was considerable concern in the community about the direction being taken by DHS." It was supporters of the petitioner respondents who attempted to 'stack the deck' by a flood of membership applications between July and November 2019. Any membership drive subsequently undertaken by the supporters of the current board was done in response in an attempt to preserve parity. It was only due to poor turnout at the November 2019 AGM by the new pro-MAiD members admitted during Ms. Farrish's tenure as Acting Executive Director that the historical member majority regained control of the board.

Affidavit #1 of Angelina Ireland, para. 13, 21, Joint appeal Book, p. 204, 206.
Affidavit #1 of Danielle Martell, paras. 3, 9-10, Joint Appeal Book, p. 359, 361.
Affidavit #1 of Sharon Farrish, para. 12, Joint Appeal Book, p. 3.
Affidavit #1 of Nancy Macey, Exhibit C, Joint Appeal Book, p. 350.

94. The flood of memberships of those specifically committed to overturning the existing members' interpretation of their own Constitution on the issue of MAiD fundamentally shifts the parameters of the membership admission process and justifies the board starting to do something which it had not previously had any need to do: to screen applicants for support for the Constitution. Doing so is not evidence of bad faith; it is evidence of the directors taking seriously their duty to act in the best interest *of the society* by responding to a new and very public, existential threat.

95. The chambers judge erred at para. 55 in rejecting Bylaw 5 (requiring members to "uphold the Constitution") as forming a valid basis for screening of membership applications. She relied on *Yukon Government* for the odd proposition that applicants cannot be rejected for an "anticipatory breach" and must instead be accepted and subsequently expelled in accordance with the bylaws.

96. Such an approach may be sufficient to protect a society when dealing with just a trickle of hostile applicants, as in *Yukon Government*, but it is clearly not sufficient to deal with a flood of organized applicants, intent on infiltrating and taking over the society. DHS bylaw 8 permits a member to be expelled only by a majority member vote at a general meeting. Obviously, this will provide no protection where the number of new applicants have – intentionally and all at once – overwhelmed the existing membership such that they control all general meeting votes. The *coup* will be a *fait accompli* against which the existing members will have no remedy. Only by keeping hostile applicants out of membership in the first place can the integrity of the society be maintained. If *Yukon Government* does not permit this, it should not be followed by this court; it was not, in any event, even binding on the chambers judge.

Affidavit #1 of Sharon Farrish, Exhibit B, Joint Appeal Book, p. 12.

97. The DHS bylaws are nearly identical to the Model Bylaws in Schedule 1 to the *Societies Regulation*, BC Reg 216/2015, which provide:

> Application for membership
>
> 2.1 A person may apply to the Board for membership in the Society, and the person becomes a member on the Board's acceptance of the application.
>
> Duties of members

> 2.2 Every member must uphold the constitution of the Society and must comply with these Bylaws.

98. The chambers judge committed an error of law, or alternatively of mixed fact and law, in concluding at para. 60 that "the objective for the Society as evidenced by the Act and the Bylaws" is an "open and democratic process" where any applicant is entitled to membership, no matter how hostile to the society's purposes. Directors of societies which utilize the model bylaws – such as DHS – have the legal power to screen applicants for hostility to Constitutional purposes, at least in response to an organized and public campaign to infiltrate the society and overwhelm existing members by those who hold opposing views in order to perform a hostile take-over.

99. If it stands, the chambers judgment will give *carte blanche* to organized groups to employ well-honed tactics – which are perfectly valid in the political sphere for elections to *public* office – and apply those same tactics to perform hostile takeovers of *private* societies who hold minority views. It will mean that the thousands of societies who have some version of these model bylaws can be taken over by any organized group of a few hundred persons. All this 'task force' needs to do is to each submit an application and pay their membership fee and thereby overwhelm the existing members. They can then requisition an SGM or wait for the next AGM to replace the board, and pass a special resolution changing its Constitutional purpose. They will thereby take over control of the assets built up by the historical members – on the basis of the entity's historical purposes which was the only reason those members contributed to the assets in the first place – and repurpose them to a different aim. The target society would be powerless to prevent such a hostile takeover on the reasoning of the chambers judge.

100. This simply cannot be the law. The whole reason for the existence of non-profit societies, and other entities of civil society, is to permit citizens to associate with whose they choose – and not others – in pursuit of shared goals which need not be shared by the political majority as reflected in public institutions. Those who wish to effect change in society have a <u>right</u> to organize politically to impact the <u>public</u> apparatus of government, but do not have a right to force themselves in as the voters of private societies to impose their majoritarian views on an organized minority.

Loyola, para. 33.

101. Private societies are not supposed to be the sites of proxy battles over MAiD or any other controversial political issue. Those who wish to effect change should organize politically for election to public office, or should lobby public officials (as the petitioner respondents and their allies have in fact done). The law should not give them levers to force change on private entities. DHS has no residency requirements. If the decision below stands, both sides will attempt to mobilize as many applicants as possible, even from other provinces. The membership will swell to many thousands. General meetings will become impossible to hold. None of this is in the public interest.

102. On the reasoning of the chambers judge, if enough anti-euthanasia individuals could organize themselves to apply to Dying with Dignity, pay their dues and submit their applications on the same day, they could infiltrate the organization, overwhelm the membership and impose an entirely foreign purpose by special resolution. Political parties could perform hostile takeovers of each other in the same way.

103. This is not how a free society is supposed to work. If members of the community oppose DHS's position on MAiD, they are free to form their own separate society, to state in its Constitution that it believes that MAiD is compatible with or central to, palliative care, and to seek on this basis to attract community support away from DHS, or to attempt to convince Fraser Health to contract with them instead of with DHS. What they are not free to do is to invoke the powers of the court to force DHS to accept members opposed to its beliefs and thereby to force the political majority's views on DHS, to assume DHS's contractual rights, and to appropriate DHS's $8.5M+ in assets. If DHS's members are willing to stand up to Fraser Health's likely unconstitutional edict to impose MAiD against their *conscientious* views (despite Fraser Health accommodating identical beliefs when *religiously* based), and to run all the risks and cost involved in that courageous position, that is a decision for the current members of DHS, not their opponents in the community who have just applied for membership in order to outvote them, to make.

iv. Conclusion: Statutory conditions precedent for orders granted not present; orders must be set aside

104. Since screening for substantive agreement with a society's purposes in the circumstances of this case is permitted by the DHS bylaws, there was no breach of the bylaws or the duty of good faith required by s. 53(1)(a) of the *Act*. As the Act, regulations, and DHS bylaws were fully complied with, the condition precedent for orders under s. 104 was not met. Similarly, as nothing was "wrongly entered… deleted or omitted" from the membership list, the condition precedent for orders under s. 108 was not met. Accordingly, paragraphs 4-9 of the order below must be set aside, and those aspects of the petition dismissed.

PART 4 - NATURE OF ORDER SOUGHT

105. The appellant seeks the following Orders:

a. Setting aside paragraphs 4-9 of the order below and dismissing the corresponding relief sought in the petition, and an order that within 14 days, the Respondents destroy all copies of the information within their possession, control, or power, previously disclosed to them pursuant to paragraph 5 of the Order below;

b. In the alternative, setting aside paragraphs 4-9 of the order below and remitting those matters for a hearing before a different justice of the court below, with the Respondent first being granted the usual 21 days to file its responsive evidence; and

c. Costs in this court and in the court below, or in the alternative costs in this court and no award of costs in the court below.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 16th day of July, 2020.

Albertos Polizogopoulos / Geoffrey Trotter / Isabelle Corbeil
Counsel for the appellant

APPENDIX: ENACTMENTS

Constitution Act, 1982

Fundamental Freedoms

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.

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(a) the *Canada Act 1982*, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Societies Act, SBC 2015, Chapter 18.

Duties of directors

53 (1) A director of a society must, when exercising the powers and performing the functions of a director of the society,

(a) act honestly and in good faith with a view to the best interests of the society,

(b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,

(c) act in accordance with this Act and the regulations, and

(d) subject to paragraphs (a) to (c), act in accordance with the bylaws of the society.

(2) Without limiting subsection (1), a director of a society, when exercising the powers and performing the functions of a director of the society, must act with a view to the purposes of the society.

(3) This section is in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors of a society.

(4) Nothing in a contract or the bylaws of a society relieves a director from

(a) the duty to act in accordance with this Act and the regulations, or

(b) liability that, by any enactment or rule of law or equity, would otherwise attach to the director in respect of negligence, default, breach of duty or breach of trust of which the director may be guilty in relation to the society.

Powers of court respecting general meetings

80 (1) On the application of a member or director of a society, the court may order that a general meeting be called, held and conducted on the notice, on the date, at the time, at the location or in the manner the court directs,

(a) if it is not feasible to call, hold or conduct the meeting on the notice, on the date, at the time, at the location or in the manner required under this Act or the bylaws, or

(b) for any other reason the court considers appropriate.

(2) The court may order that the quorum under section 82 *[quorum]* be varied or dispensed with at a meeting called, held and conducted under this section.

Compliance or restraining orders

104 (1) This section applies if

(a) a person contravenes or is about to contravene a provision of this Act, the regulations or the bylaws of a society, or

(b) (b)a society is carrying on activities that are inconsistent with or contrary to its purposes.

(2) On the application of a member or director of a society in relation to which this section applies or another person whom the court considers to be an appropriate person to make an application under this section, the court may make an order,

(a) in a case described in subsection (1) (a), directing the person who has contravened or is about to contravene a provision referred to in that subsection to comply with or refrain from contravening the provision, or

(b) in a case described in subsection (1) (b), directing the society to refrain from carrying on activities that are inconsistent with or contrary to its purposes.

(3) If the court makes an order under subsection (2), the court may make any ancillary or consequential orders it considers appropriate.

Applications to court to correct records

108 (1) In this section, "basic records", in relation to a society, means

(a) the society's

i. constitution,

ii. bylaws,

iii. statement of directors and registered office,

iv. register of directors, and

v. register of members,

(b) the minutes of any meeting of members or directors, and

(c) any resolution passed by the members or directors, if the resolution is not included in the minutes referred to in paragraph (b).

(2) If information is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, a society's basic records, the society, a member or director of the society or another person whom the court considers to

be an appropriate person to make an application under this section may apply to the court for an order that the basic records be corrected.

(3) On an application under this section, the court may make any order it considers appropriate, including an order

(a) requiring the society to correct one or more of its basic records,

(b) restraining the society from calling or holding a general meeting or doing any other act before the correction is made,

(c) determining the right of a party to the application to have the party's name entered or retained in, or deleted or omitted from, basic records of the society, and

(d) requiring a person to compensate a party who has incurred a loss as a result of a matter referred to in subsection (2).

Societies Regulation, B.C. Reg. 216/2015

Schedule 1

Application for membership

2.1 A person may apply to the Board for membership in the Society, and the person becomes a member on the Board's acceptance of the application.

Duties of members

2.2 Every member must uphold the constitution of the Society and must comply with these Bylaws.

LIST OF AUTHORITIES

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2.	Aroney, Nicholas, “Freedom of Religion as an Associational Right” (2014) 33:1, University of Queensland Law Journal.