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 REPLY

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"the [DHS] Membership are quite definitively opposed to the implementation of MAiD Services at Irene Thomas Hospice. […] The majority of those who chose to write to us were opposed … on the very specific basis that this procedure was in conflict with the principles of Hospice Palliative Care as defined by the World Health Organization." –Respondent Chris Pettypiece to FHA; June 2018; JAB 350-351

A. 'Fair process' is a trojan horse to breach DHS' members' rights

1. Respondents invite this court to repeat the error of the chambers judge by viewing this case as being "merely" about "fair process" and "proper corporate governance" and "the manner in which … restrictions might be imposed" and that their approach avoids "issues of … dogma." They invite the court to ignore as "irrelevant" the society's understanding of its purposes (called "differing philosophical beliefs" and "subjective interpretations") and its members' freedom of association (a "straw man").

Respondents' factum ("RF"); opening statement; ¶5, 38, 45, 55, 60, 64

2. If the court ignores the philosophical basis for the society's members' choice to associate, it does not avoid these thorny issues, it simply decides them in favour of the respondents by default. What the respondents call "fair process" is letting the public-writ-large control a private society. It is an invitation to "civic totalism" which abrogates members' "right not to associate" with those of opposing conviction "without penalty or reprisal". "Fairness" here is a trojan horse for the statutory imposition of majoritarian political views on a dissenting minority. This undermines the "growth of a sphere of civil society largely free from state interference" protected by s. 2(d).

William Galston, 'Religion and the Limits of Liberal Democracy,' in Douglas Farrow, Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy (Montreal and Kingston: McGill-Queen's University Press, 2004), 41 at 42-43.
Mounted Police Association of Ontario v. Canada (AG), 2015 SCC 1 at paras. 47-66
Alberta Reference, [1987] 1 SCR 313 at 391c-e, 393c-f, 396f
Peter Hogg, Constitutional law of Canada, 5e (Scarborough: Thomson/Carswell, 2007) (loose-leaf) §44.3(f) at 44-18 (noting that 8/9 Justices in Advance Cutting "agreed on the proposition that s. 2 included the right not to associate."
Jamie Cameron, "Big M's Forgotten Legacy of Freedom" (2020), 100 S.C.L.R. (2d)

B. This appeal is about freedom not to perform MAiD, not about religion

3. RF opening statement and ¶3, 28 assert that the current board has "taken control" of DHS to impose a "religious agenda" through the amendments proposed for the June 15 meeting. This is an attempt to shift the issue. There is no appeal from the orders cancelling the June 15 meeting on technical grounds, and the only attempt to impose

an agenda was the respondents' attempt to impose MAiD on the society, beginning in July 2019 and culminated in the November 20 board resolution.

Appellant's factum ¶7-17 and evidentiary references therein

4. The members responded by electing a new board whose sole "agenda" was adherence to the society's consistent Constitutional position on MAiD. Contra RF ¶39 the new board members were not "perpetuating and sustaining their own philosophical position" but rather the members' philosophical position on MAiD (not religion).
5. The board only proposed amendments to adopt religious purposes six months later, in response to FHA's termination of the operating agreement in February 2020. New religious purposes would make the Society qualify for FHA's religious exemption.

Appellant's factum ¶29-31 and evidentiary references therein. Affidavit #1 of Nancy Macey, Ex. B, JAB 343

6. Contra RF ¶3, 13, and 16, the chambers judge found that any anti-MAiD membership drive commenced only after the AGM. It was only the respondents who were engaging in a secret membership drive prior to the AGM.

RFJ para. 41. Appellant's factum ¶11; Ireland #1 paras. 13, 21 at JAB 204, 206.

7. Contra RF ¶42, 88, 90, appellants do not ask the court to assume the "false premise" that it "is currently a religious organization," and contra RF ¶28, there is no evidence that any membership applications were refused on any religious basis. All refusals were due to applicants' rejection of the society's Constitutional purposes which prohibit MAiD. This is not a "tortured interpretation" of the Constitution as alleged at RF ¶88. It is the will of the membership as acknowledged by respondent Pettypiece in 2018. The chambers judge's finding at paras. 53 and 60 that membership rejections were about the June 15th amendments is palpable and overriding error, as it is unsupported by the evidence she relies on at paras. 48 and 58. The proposed new evidence clearly shows that the respondents' focus is the implementation of MAiD.

Appellant's factum ¶27-28 and references therein incl. Ireland #1 para 46; JAB p. 212
Appellant's factum 5-7 and evidentiary references therein

8. The Supreme Court of Canada's decision in *Carter* is conclusive: the society's position on MAiD is protected by freedom of conscience under s. 2(a) of the *Charter*.

Carter v. Canada (Attorney General), 2015 SCC 5 at ¶132; Brian Bird, "The Call in Carter to Interpret Freedom of Conscience" (2018), 85 S.C.L.R. (2d) 107; Mary Anne Waldron, Q.C., "Conscientious Objections to MAiD" (2018), 85 S.C.L.R. (2d) 77

C. Jurisdiction; *Highwood* applies to incorporated societies

9. The appellant agrees with RF ¶49-50, 56 that "the court has jurisdiction, in its discretion, to remedy non-compliance" with "the Bylaws and the *Societies Act*." But rejecting membership applications from persons opposed to a Society's Constitutional purposes is permitted by the Act and *Bylaws* such that an applicant's name is not "wrongly … omitted" from the register of members under s. 108. The statutory jurisdiction does not authorize forced admission of such applicants.
10. Contra RF ¶51-54, *Highwood* was applied to incorporated societies with constitutions and bylaws in each of in *Bell*, *McCargar*, and *Cummings* (appellant's factum ¶56).

D. Leave should be granted on the constitutional validity issue in the NCQ

11. RF ¶63, 65, 71 invites the court to ignore the Constitutional issues on the basis that the chambers Judge was entitled to decide whether or not MAiD is compatible with "support for … living". Per appellant's factum ¶40, 53, that was a non-justiciable matter.
12. Contra RF ¶66, paras. 71, 72, 84 of the Petition Response properly pled the *Charter* issues which are therefore not "truly new". Any technical defect in the giving of a NCQ below impacts only the statutory validity argument in part 3(A)(vi) of the appellant's factum. The *Charter* values/statutory interpretation argument in part 3(A)(v) did not require a NCQ, was properly raised below, and does not require leave in this court.

Appeal Record, pp. 31, 33; Constitutional Question Act, s. 8
AB v. CD, 2020 BCCA 11 at ¶203-217 (no NCQ; Charter still considered)

13. The factors in *Guidon* support this court granting leave on the constitutional validity issue. Respondents July 29th letter to the court acknowledges that the NCQ issue overlaps entirely with the *Charter* values/statutory interpretation argument in part 3(A)(v) of the appellant's factum which is in this court as of right. There is accordingly no prejudice in granting leave on the NCQ issue. To deny leave would be unfair to the appellant whose 'failure' to file a NCQ below was due to the Respondents' short leave order giving only 3 business days to file materials, with a hearing only two days later. There was no "flouting of the notice requirement" and the AG could not have participated on that timeline in any event. Having pled s. 2(d) of the *Charter* below, the appellant should be permitted to also argue the intersection between that section and

freedom of conscience in s. 2(a). Few *Societies Act* cases reach this court which should settle the law regarding forced admission of hostile members.

Guindon v R, 2015 SCC 41 at paras. 15-39; particularly ¶20 and 35
B. C. Teacher's Federation v. School District 39, 2003 BCCA 100 ¶180-187
R v Sharma, 2020 ONCA 478 at ¶134-137.

14. It is clear from both the White Paper and Hansard that the legislature never considered the Charter implications of what became s. 104/108 of the *Societies Act*.

Societies Act White Paper; August 2014; Ministry of Finance, annotations to ss. 101, 105
British Columbia, Legislative Assembly, Official Report of Debates ("Hansard"), 40th Parl., 4th Sess.,Vol. 24:1: April 22, 2015, p. 7521-7522

E. In any event, the exercise of judicial discretion must conform to the *Charter*

15. Contra RF ¶70, para. 203 of *AB v. CD* is, with respect, overstated. The majorities in both *Young v. Young* and *P.(D.) v. S.(C.)* left unresolved the question of the *Charter's* applicability, and *Dolphin Delivery* concerned a court order applying the common law. *Hogg* reconciles the jurisprudence: "where … a court order is issued … in a purely private proceeding that is governed by statute law, then the *Charter* will apply to the court order" because "the statute supplies the needed element of government action." *Hogg* was recently followed in *Nortel* with respect to *CCAA* orders. The modern approach focuses not on the identity of the decision-maker (judge, arbitrator, tribunal, or administrative decisionmaker), but on the invocation of statutory authority.

Peter Hogg, Constitutional law of Canada, 5e (Scarborough: Thomson/Carswell, 2007) (loose-leaf) §37.2(g) at p. 37 – 22 to 24
R. v. Conway, 2010 SCC 22, paras. 41-48, cited at Appellant's factum ¶61.
Nortel Networks Corp., Re, 2017 ONSC 700, paras. 21- 25

16. *AB v. CD* confirms, at ¶205, that even an unambiguously unlimited discretion must be exercised by a chambers judge "tak[ing] into account important underlying values that are embodied in the *Charter* when orders are sought that may interfere with an individual's rights." In *AB v CD* the protection order was overturned in its entirety.

17. The chambers judge failed to acknowledge or consider the *Charter at all*. That is reversible error under *AB v CD* and a failure to consider a "relevant circumstance" which is an error in principle justifying appellate intervention of the exercise of judicial discretion on the test contented for by respondents at RF ¶41.

F. Bylaw interpretation and Bad Faith

18. Contra RF ¶93, appellant's factum paras. 25-26 cites overwhelming evidence of pro-MAiD views by most of the respondents' affiants who were denied membership.

19. In reply to RF ¶46, 54, 64, 72: it is impossible for a society to create a 'prohibited activities list' exhaustively proscribing every possible activity contrary to its Constitutional purposes. A mosque society's bylaws are not required to list as a "prohibited activity" the taking of Christian communion in order for its board to properly reject non-Muslim applicants. As admitted at RF ¶75, the DHS bylaws date back to the former *Society Act* which had no provision equivalent to s. 11(1)(d) of the current *Act*, and when MAiD was a criminal homicide. The 'absence' of a s. 11(1)(d) bylaw prohibiting MAiD cannot properly bar the board from denying pro-MAiD applicants.

20. In reply to RF ¶47-48, 65: Even though the current Constitution bears the board's interpretation prohibiting MAiD, it is in the society's best interest to avoid litigation such as that at bar by putting the matter beyond debate.

21. RF ¶82-83 and 86 'doubles-down' on *Yukon Government* without responding to Appellant's detailed argument about why its position on 'anticipatory breach' is bad legal policy which invites abuse, as evident in this case. Respondents' reading of *Yukon Government* would require DHS to grant membership to those opposed even to palliative care *per se*, and even if MAiD was proscribed by bylaw under s. 11(1)(d).

Appellant's Factum ¶95-96, 99-103

22. In any event, contra RF ¶78, 80, 86, 91, and 95-98 the board is validly applying criteria already spelled out in the Constitution adopted by the membership. This is not an anticipatory breach case of the board rejecting applicants who might breach the bylaws in the future. The board rejected applicants who presently fail to meet the existing eligibility requirement in the bylaws of supporting DHS's constitutional purposes. The chambers judge essentially acknowledged this at para. 59.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, August 6, 2020.

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

APPENDIX: ENACTMENTS

Constitutional Question Act, RSBC 1996, Chapter 68.

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Notice of questions of validity or applicability

(1) In this section:

"constitutional remedy" means a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;

"law" includes an enactment and an enactment within the meaning of the *Interpretation Act* (Canada).

(2) If in a cause, matter or other proceeding

(a) the constitutional validity or constitutional applicability of any law is challenged, or

(b) an application is made for a constitutional remedy,

the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

(3) If in a cause, matter or other proceeding the validity or applicability of a regulation is challenged on grounds other than the grounds referred to in subsection (2) (a), the regulation must not be held to be invalid or inapplicable until after notice of the challenge has been served on the Attorney General of British Columbia in accordance with this section.

(4) The notice must

(a) be headed in the cause, matter or other proceeding,

(b) state

i. the law in question, or

ii. the right or freedom alleged to be infringed or denied,

(c) state the day on which the challenge or application under subsection (2) or (3) is to be argued, and

(d) give particulars necessary to show the point to be argued.

(5) The notice must be served at least 14 days before the day of argument unless the court authorizes a shorter notice.

(6) If in a cause, matter or other proceeding to which this section applies the Attorney General of British Columbia appears, the Attorney General is a party and, for the purpose of an appeal from an adjudication respecting the validity or applicability of a law, or respecting entitlement to a constitutional remedy, has the same rights as any other party.

(7) If in a cause, matter or other proceeding to which this section applies the Attorney General of Canada appears, the Attorney General of Canada is a party and, for the purpose of an appeal from an adjudication respecting the validity or applicability of a law, or respecting entitlement to a constitutional remedy, has the same rights as any other party.

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.

LIST OF AUTHORITIES

Caselaw	Page # in factum	Para # in factum
AB v. CD, 2020 BCCA 11.	3, 4.	12, 15, 16.
Alberta Reference, [1987] 1 SCR 313.	1.	2.
B. C. Teacher's Federation v. School District 39, 2003 BCCA 100.	3-4.	13.
Bell v Civil Air Search and Rescue Association et al, 2018 MBCA 96.	3.	10.
Carter v. Canada (Attorney General), 2015 SCC 5.	2.	8.
Cummings v Burlington Radio Control Modelers, 2018 CanLII 123232 (ON SCSM).	3.	10.
Guindon v R, 2015 SCC 41.	3-4.	13.
Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 SCC 26.	3.	10.
McCargar v Métis Nation of Alberta Association, 2018 ABQB 553.	3.	10.
Mounted Police Association of Ontario v. Canada (AG), 2015 SCC 1.	1.	2.
Nortel Networks Corp., Re, 2017 ONSC 700.	4.	15.
P. (D.) v. S. (C.), 1993 CanLII 35 (SCC), [1993] 4 SCR 141.	4.	15.
R. v. Conway, 2010 SCC 22.	4.	15.
R v Sharma, 2020 ONCA 478.	3-4.	13.
Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 SCR 3.	4.	15.
Yukon Government (Registrar of Societies) v. Humane Society of Yukon, 2013 YKSC 8.	5.	21.

Secondary Sources	**Page # in factum**	**Para # in factum**
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British Columbia, Legislative Assembly, Official Report of Debates ("Hansard"), 40th Parl., 4th Sess.,Vol. 24:1: April 22, 2015.	4.	14.
Jamie Cameron, "Big M's Forgotten Legacy of Freedom" (2020), 100 S.C.L.R. (2d)	1.	2.
William Galston, 'Religion and the Limits of Liberal Democracy,' in Douglas Farrow, Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy (Montreal and Kingston: McGill-Queen's University Press, 2004).	1.	2.
Peter Hogg, Constitutional law of Canada, 5e (Scarborough: Thomson/Carswell, 2007) (loose-leaf).	1, 4.	2, 15.
Societies Act White Paper; August 2014; Ministry of Finance.	4.	14.
Mary Anne Waldron, Q.C., "Conscientious Objections to MAiD" (2018), 85 S.C.L.R. (2d) 77.	2.	8.