



COURT OF APPEAL FILE NO. CA 46892

COURT OF APPEAL

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

BETWEEN:

Sharon Farrish, Christopher Pettypiece and James Levin

Respondents
(Petitioners)

AND:

Delta Hospice Society

Appellant
(Respondent)

AND:

Attorney General of British Columbia

Respondent
(pursuant to the *Constitutional Question Act*)

APPELLANT'S REPLY TO THE ATTORNEY GENERAL OF BRITISH COLUMBIA

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LIST OF AUTHORITIES..... 1

A. Broad grants of statutory discretion are valid because they are required to be exercised – including by Judges – in a manner consistent with the *Charter*

1. Contrary to the individual respondents' submission at the August 17, 2020 hearing that "there are no constitutional issues at all" in this case, AGBC factum ¶11, ¶13-14 correctly supports the Appellant's position:

[11] The impugned provisions do not authorize courts to exercise their discretion ... in a manner that is not *Charter* compliant. ... [13] where legislation delegates broad discretion, either to administrative or judicial decision makers, it must be interpreted as requiring the delegate to exercise that discretion in a *Charter-compliant manner* ... [14] the onus is on the decision maker to exercise that discretion in a *Charter* compliant manner, including, in some cases, by properly considering and balancing any applicable *Charter* values. [emphasis added]

2. AGBC's authorities at ¶13-14 correctly and expressly hold that statutory judicial orders are subject to the same *Charter* scrutiny as statutory administrative orders. They also opine that the appellate corrective in such a situation is a s. 24 *Charter* remedy. The contradictory statement at AGBC ¶37 that s. 24 of the *Charter* is not engaged by "judicial orders made in private disputes" is in error. However, since a NCQ has been issued it is largely semantic whether appellate intervention here amounts to a constitutional remedy or not; this court is free to characterize its intervention as either a "non-constitutional ground" by way of correcting the chambers judge's error of law in failing to apply the presumption of constitutionality to the interpretation and application of the *Societies Act* (as AGBC favours at para. 9, and as this court recently did in *AB v. CD*), or as constituting a s. 24 *Charter* remedy (per *Eldridge* and *Brown*).

Eldridge v. British Columbia (AG), [1997] 3 S.C.R. 624, AGBC BoA tab 12, ¶20-21
Brown v. Canada (Citizenship & Immig.), 2020 FCA 130, AGBC BoA tab 9, ¶64-65
AB v. CD, 2020 BCCA 11 at ¶203-217 (no NCQ; *Charter* still considered)

3. The substantive principle, however characterized, is that a chambers judge's failure, even in a dispute between private parties, to consider or balance the applicable *Charter* considerations in an exercise of broad statutory discretion, is an error of law.

B. Interpreting the court's remedial discretion in light of the statutory scheme and the *Charter*

4. The chambers Judge held that the Appellant Society's board's rejection of membership applications from an organized slate of hostile applicants – the product

of a campaign to recruit individuals who oppose the Society's constitutional purposes and seek to change them – was “wrongful” within the meaning of s. 108(2) of the *Societies Act* and in breach of the directors' duty of good faith in s. 53(1)(a). These holdings flowed from the chambers judge's failure to interpret these sections consistently with the statutory scheme, and with s. 2(a) and s. 2(d) of the *Charter*.

i. The statutory scheme

5. The purpose of the *Societies Act* is to facilitate British Columbians' freedom to associate for the maintenance of a diverse civil society and volunteer sector. The *White Paper* indicates that the 27,000 BC Societies which make up much of “the non-profit sector play an increasingly important role ... by helping to provide services that deliver social, cultural and other programs to the public.”

White Paper, Minister's letter, ABoA p. 2621, Appellant's Condensed Book p. 38

6. The *Societies Act* facilitates this by providing a general framework for the incorporation and self-governance of private societies. Section 2 of the *Act* states that a society may be created for any “lawful purpose ... including, without limitation, agricultural, artistic, benevolent, charitable, educational, environmental, patriotic, philanthropic, political, professional, recreational, religious, scientific, social or sporting purposes.”

See also: Norton, Jane, Freedom of Religious Organizations, (Oxford: OUP, 2016)

7. Turning to the “purpose of the remedies provisions in the Act”, the Appellant agrees with AGBC ¶12 that they are “simply to provide the not-for-profit sector with standard court remedies already available to other B.C. corporations... to protect the rights of companies [and Societies] and shareholders [and Society members] and to correct errors” and, per AGBC ¶29, “not ... to infringe the *Charter*.”
8. Per AGBC ¶23 the remedial purpose is to “support accountability and member democracy as well as organizational needs.” “Member democracy” here means to respect the rights of existing members under a Society's bylaws. This clear from the quotation from the *Discussion Paper* at AGBC ¶25 regarding “ensur[ing] protection of the rights of members of societies ... to set the direction of the society... and the ability to collectively act to maintain control.” Had the intent been to grant a universal right to the public to join any society they wished, the Discussion Paper would have spoken of “achieving” or “wresting” control, not “maintaining” it.

9. Per AGBC ¶28, the *White Paper* identifies the purpose of s. 108 of the Act as including “where a person alleges that, despite the fact that they are not listed on the register of members, they are indeed a member and should have the rights of membership.” Thus, the legislative intent is for existing members who are purportedly removed from membership without due process to insist on their re-instatement pending expulsion proceedings in accordance with the bylaws.
10. Thus, the remedies provisions in the *Act*, consistent with the scheme of the *Act* as a whole, exists to vindicate the self-governance of a private society through vindicating existing members’ rights. The remedies sections do not grant the court the power to overrule a private Society’s decisions about the meaning of its purposes or which membership applicants are sufficiently accepting of them, either:
- a. directly, by acting as a ‘superintendent of societies’ to order societies to reflect majoritarian political views (the only exception is the power of the Registrar under s. 2(3) to order a Society to alter its purposes if they are “unlawful”); or
 - b. indirectly, by ordering forced admission of membership applicants who hold opposing views who will then, through the governance machinery of the Society’s bylaws and the *Act*, bring about the same majoritarian result.
11. The Appellant’s constitutional purposes are entirely lawful, and protected by Freedom of Conscience under the *Charter*. The Appellant’s members’ voluntary choice to associate together for collective action through the mechanism of the Appellant Society is, likewise, protected by Freedom of Association.

ii. Freedom of Association and Freedom of Conscience

12. The Appellant’s previous facts identify caselaw and academic commentary which establish that the *Charter* considerations at issue in this case call for judicial respect for the autonomy of private societies to determine the meaning of their constitutional purposes, and to restrict membership to those who accept those purposes.
13. Additional academic commentary in the forthcoming volume of the Supreme Court Law Reports reiterates how the right of the Appellant’s existing members to exclude those who reject their conscientiously-held objection to performing on-site MAiD are protected by s. 2(a) and s. 2(d) of the Charter.

André Schutten, “Recovering Community: Addressing Judicial Blindspots on Freedom of Association” (forthcoming October 30) 2020 S.C.L.R. (2s) Vol. 98 (Toronto: LexisNexis, 2020) at pp. 403-404

Brian Bird, “The Reasons for Freedom of Conscience”, 2020 S.C.L.R. (2s) Vol. 98 at pp. 112, 123, 130, 134, 140, 141, 142,

See also: “Governmental-Funded Religious Associations and Non-Discrimination Rules: On Immunity and Public Funding”, Can. J. L. & Jur. XXXIII No.2 (August 2020) 341-367 at 345.

14. Where a belief receives Constitutional protection under freedom of religion, the same belief where based on freedom of conscience receives equal protection under s. 2(a).

[*Maurice v. Canada \(Attorney General\), 2002 FCT 69 at paras. 8-13*](#)

15. These *Charter* considerations are perfectly in line with the purpose of the *Societies Act*, which is to encourage diversity of private action by providing mechanisms for self-governance, not governance by outsiders through forced judicial admission orders.

iii. The Respondents’ authorities do not permit the court to ignore a Society’s constitutional purposes

16. The chambers judgment hinges on the holding at para. 52 that *Kaila, De Guzman*, and *Yukon Government* “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.”

17. In the case at bar, memberships were denied due to the applicants’ demonstrated opposition to the Society’s purposes set out in its constitution. It is hair splitting of a most arbitrary kind to suggest that a society can validly deny a membership application based on non-compliance with criteria set out in its bylaws filed under s. 11 of the *Societies Act* but that the same society cannot validly deny a membership application based on non-compliance with the society’s purposes which are set out in its constitution filed under s. 10 of the same statute. Such a distinction is particularly unsound for societies like the Appellant and all those who adopt the Model Bylaws which expressly state that “Every member must uphold the constitution of the Society.”

18. Indeed, *De Guzman* at para. 8 found it proper for directors to “consider whether” an applicant had “demonstrate[ed] ... an interest in promoting the goals and objectives of the society,” and *Yukon Government* at para. 31 legitimizes membership denials on the basis of anticipatory breach provided the evidence is “clear and unambiguous.”

C. Conclusion: the chambers judge erred in law in finding a basis to order the forced admission of hostile members

19. The Chambers Judge failed to even mention, much less consider and balance, the *Charter*, as AGBC states was required. This alone is fatal to her decision.

20. Furthermore, her substantive analysis reveals that she did not interpret and apply her grant of discretion in accordance with freedom of conscience and association. She treated the Appellant as a *de facto* public entity with no entitlement to self-determination of its own membership, even to preserve its constitutional purposes.

Appellant's main factum paras. 45-50.

21. The chambers judge's reasoning contradicts section 53 of the *Act* which expressly requires directors to "act with a view to the purposes of the society," and provides that directors' duty of good faith must be exercised "with a view to the best interests of the society" (not of individual existing members, much less to applicants).

22. Per AGBC ¶10, the remedies section of the *Societies Act* are "broadly drafted legislation that is intended to confer discretion on the Court to remedy situations where a society may be acting unlawfully (e.g. by violating a provision in the Act, violating the society's own bylaws, or acting in a manner that is inconsistent with the society's purposes)." The rejection of hostile applicants is none of these.

23. When analyzed through the lens of s. 2(a) and s. 2(d) of the *Charter*, the scheme of the *Societies Act* as a whole, and its remedies sections in particular, the appellant's board's rejection of the hostile membership applications was neither "wrongful" nor a breach of the duty of good faith. It is entirely right for a society's board to reject membership applications from an organized slate of applicants who reject the Society's constitutional purposes and are embarking upon an attempted hostile take-over to appropriate its assets and contracts.

Appellant's main factum para. 104.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, September 30, 2020.



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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.

Societies Act, S.B.C. 2015, c. 18

Part 2 — Fundamental Matters in Relation to Societies

Division 1 — Nature of Societies

Purposes

2 (1) Subject to subsection (2), a society may be formed under this Act for one or more lawful purposes, including, without limitation, agricultural, artistic, benevolent, charitable, educational, environmental, patriotic, philanthropic, political, professional, recreational, religious, scientific, social or sporting purposes.

(2) A society must not have, as one of its purposes, the carrying on of a business for profit or gain, but carrying on a business to advance or support the purposes of a society is not prohibited by this subsection.

(3) The registrar may, in writing and giving reasons, order a society to alter its purposes if the registrar considers one or more of those purposes to be contrary to this Act or otherwise unlawful.

Division 2 — Name and Governing Documents

Constitution

10 (1) A society must have a constitution that sets out

- (a) the name of the society, and
- (b) the purposes of the society.

(2) A society must not have a constitution that contains provisions in addition to the name and purposes of the society.

Bylaws

11 (1) A society must have bylaws that contain provisions respecting the internal affairs of the society, including provisions respecting the following:

(a) membership in the society, including

- (i) the admission of members and any rights and obligations arising from membership,
- (ii) if there is more than one class of members, a description of each class and the rights and obligations that apply to each class, and
- (iii) if members may cease to be in good standing, the conditions under which that may occur;

(b) the society's directors, including

- (i) the manner in which directors must or may be elected or appointed, and
- (ii) the expiry of directors' terms of office, if other than at the close of the next annual general meeting after a director's designation, election or appointment;

(c) general meetings, including

- (i) the quorum for general meetings, if greater than 3 voting members,
- (ii) whether proxy voting is permitted, and
- (iii) if the bylaws authorize indirect or delegate voting or voting by mail or another means of communication, including by fax, email or other electronic means, the rules respecting how that voting is to occur;

(d) any restrictions on

- (i) the activities that the society may carry on, or
- (ii) the powers that the society may exercise.

(2) Without limiting subsection (1), a society may, in its bylaws, adopt, with or without alteration, all or any of the set of provisions that are, by regulation, prescribed and designated as the "Model Bylaws".

(3) A society must not have bylaws that contain a provision that is inconsistent with this Act, the regulations or any other enactment of British Columbia or Canada, and if a provision of the bylaws is inconsistent with this Act, the regulations or any other enactment of British Columbia or Canada, the provision has no effect.

(4) If the bylaws of a society provide for a higher voting threshold than the threshold set out in the definition of "special resolution" in section 1 [definitions] to effect any action that, under this Act, requires authorization by special resolution, the provisions of the bylaws prevail if they

- (a) set out the higher voting threshold as a fraction or percentage of the votes cast or as a specific number of votes,
- (b) establish the higher voting threshold by requiring a unanimous decision of all the voting members, or
- (c) set out a formula for calculating the higher voting threshold.

(5) For certainty, an action referred to in subsection (4) includes altering all or part of one or more provisions of a society's constitution or bylaws.

(6) Despite subsection (4), a society must not have a bylaw that provides for a higher voting threshold to remove a director from office under section 50 (1) (a) [removal of directors].

Part 5 — Management

Division 3 — Role of Directors

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.

Part 8 — Remedies

Division 2 — Proceedings Respecting Records

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).

LIST OF AUTHORITIES

Caselaw	Page # in factum	Para # in factum
<u>Eldridge v. British Columbia (AG)</u> , [1997] 3 S.C.R. 624	1.	2.
<u>Brown v. Canada (Citizenship & Immig.)</u> , 2020 FCA 130	1.	2.
<u>Maurice v. Canada (Attorney General)</u> , 2002 FCT 69	4.	14.

Secondary Sources	Page # in factum	Para # in factum
<i>André Schutten, “Recovering Community: Addressing Judicial Blindspots on Freedom of Association” (forthcoming October 30) 2020 S.C.L.R. (2s) Vol. 98 (Toronto: LexisNexis, 2020) at pp. 403-404</i>	3.	13.
<i>Brian Bird, “The Reasons for Freedom of Conscience”, 2020 S.C.L.R. (2s) Vol. 98 at pp. 112, 123, 130, 134, 140, 141, 142.</i>	4.	13.
<i>“Governmental-Funded Religious Associations and Non-Discrimination Rules: On Immunity and Public Funding”, Can. J. L. & Jur. XXXIII No.2 (August 2020) 341-367 at 345.</i>	4.	13.
<i>Norton, Jane, Freedom of Religious Organizations, (Oxford: OUP, 2016)</i>	2.	6.
<i>Society Act Review Discussion Paper (December 2011). British Columbia Ministry of Finance</i>	2.	8.
<i>Societies Act White Paper: Draft Legislation with Annotations, August 2014.</i>	2, 3.	5, 9.