

**ONTARIO
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF AN APPLICATION UNDER Rule 14.05(3) (h) of the *Rules of Civil Procedure* and Section 288(4) of the *Canada Not-for-profit Corporations Act*, SC 2009, c 23

BETWEEN:

THE COLLEGE OF FAMILY PHYSICIANS OF CANADA

Applicant

REPLY FACTUM OF APPLICANT

November 21, 2024

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A. OVERVIEW

1. This factum is in reply to RDOC's memorandum of fact and law dated November 15, 2024.
2. All defined terms have the same meaning as in the CFPC's factum dated November 6, 2024.
3. RDOC has responded to the CFPC's application [the "**Application**"] to bring the "unique and distinct concerns and interests of Family Medicine Resident Doctors" to the Court's attention.¹
4. RDOC does not appear to oppose the Application. Rather, RDOC asks the Court to validate the CFPC's Constatng Documents but order them to be rewritten so that Resident Members are maintained as a separate class of members with voting rights.²
5. Respectfully, the relief sought by RDOC is: i) not fair to the CFPC's other member classes; ii) would unduly burden the CFPC; and iii) is outside the jurisdiction of this Court.

B. FAIRNESS TO ALL MEMBERS SHOULD BE PARAMOUNT

i. The Constatng Documents Reflect the Interests of the CFPC and its Membership at Large

6. The objective of the Application is to restore the CFPC to a state where it can resume its ordinary corporate functions and advance the interests of its membership.
7. In the CFPC's view, the only fair means of accomplishing this objective is for the Court to validate its Constatng Documents.
8. Since the Constatng Documents were voted on and passed by a special resolution of the CFPC's membership at the 2022 AMM (that is, more than two-thirds of the members entitled to vote on the resolution voted in favour of it), they are the most accurate indicator of the intentions and interests of the CFPC and its members.

¹ Memorandum of Fact and Law of the Respondent Resident Doctors of Canada ["**RDOC Factum**"], at para 1.

² RDOC Factum at para 48-50.

9. Contrarily, granting RDOC's requested relief would entail the Court reshaping the CFPC according to interests of one single membership class without any vote or input from the CFPC's broader membership or its Board of Directorship. Such a result would be unfair to the CFPC's broader membership, including the other members who lost voting rights at the 2022 AMM (i.e. Non-Practising Life Members) who do not, like the Resident Members, have a corporate entity like RDOC to organize and advocate on their behalf.

ii. Residents Were Apathetic to the Proposed Changes at the 2022 AMM

10. RDOC's factum states that the CFPC not holding separate class votes to approve changes to its membership structure in 2022 resulted in Resident Doctors losing their voting rights.³
11. This is not accurate.
12. This change occurred because two-thirds of the CFPC's membership who voted at the 2022 AMM *voted in favour of those changes*. All CFPC members were duly notified of the meeting date and topics under consideration and had the opportunity to vote in favour or against the proposed changes; residents included.
13. Residents formerly paid annual membership fees to the CFPC, whereas the current Learner Class does not. Hypothetically, Resident Members who were entitled to vote at the 2022 AMM may have preferred free membership over having voting rights. It is impossible to know with certainty how residents at that time would have voted if a separate class vote were held.
14. If residents were unduly prejudiced or disproportionately impacted by the lack of a separate class vote at the 2022 AMM, as RDOC maintains, one would expect evidence of significant opposition by residents to the proposed changes, or evidence that a large contingent of residents voted against the proposed changes and they were unsuccessful because the vote was not held properly.
15. RDOC did not proffer that evidence. There is also no evidence that RDOC itself, which advocates for residents' interests, opposed the proposed changes.

³ RDOC Factum at para 30.

16. Further, RDOC did not provide any evidence that its members support its intervention in the Application (e.g., an internal poll) and support the resumption of paying membership fees.
17. It can be inferred from the available evidence that there was no such opposition to the proposed changes. There are currently approximately 2,800 residents who are members of the CFPC,⁴ all of whom received notice of this Application. Likewise, a similar number of CFPC members who were residents in 2022 received notice of the 2022 AMM, including the proposed changes to their voting rights and the CFPC's membership structure.⁵
18. At the 2022 AMM, the special resolution passed with 153 votes cast in favour (67.7%) and 73 votes cast against (32.3%).⁶ So even if every vote against the proposed changes was made by a resident member, it would mean that only 2-3% of residents voted against the removal of their voting rights.
19. Given the narrow margins, it stands to reason that even without a separate class vote, a larger contingent of residents voting against the proposed changes could have caused the vote to fail.
20. Respectfully, RDOC requests relief on behalf of residents for which the former Resident Members did not, themselves, vote for when they had the opportunity.

iii. The Impact of the Loss of Voting Rights is Overstated

21. The right to vote does not give members the direct ability to manage and control a corporation or have a say in every decision a corporation makes. Like with shareholders in a business corporation, the control CFPC's members may exert over the management of its affairs is largely limited to their right to elect the board of directors.
22. RDOC's evidence as to the impact of the loss of voting rights is therefore overstated.
23. As the main example of why residents want voting rights restored, RDOC's evidence refers to the recommendation made at the 2023 annual meeting of members to extend the

⁴ RDOC Factum at para 6.

⁵ Mang Affidavit, paras 70-71, page 48 of Application Record.

⁶ Mang Affidavit, para 72, page 48 of Application Record.

length of family medicine residency training from two to three years (this decision was part of a broader project to reform resident training called the Outcomes of Training Project).⁷ This example is illustrative of several key points.

24. First, decisions relating to the Outcomes of Training Project were not the subject of a binding vote at the 2023 AMM. So having voting rights would not necessarily affect whether this change was made. Similarly, with respect to the other example cited in RDOC's evidence⁸, exam fees have not and would not be the subject of a binding vote at an AMM.
25. Second, in large part because of the residents' strong opposition to extending their training period, the CFPC decided to cease implementation of the third year of training. This demonstrates that voting rights are not the only way to influence the CFPC's operations and decision making.
26. Lastly, the level of opposition that residents raised against extending their training period, relative to the residents' lack of voter turnout at the 2022 AMM, is a clear indication that residents are capable of mounting organized opposition to CFPC decisions, yet they were, at the relevant time, apathetic to removal of their voting rights.

C. THE BURDEN ON THE CFPC

27. The Court should also consider the logistical and financial impact that RDOC's requested relief will have on the CFPC.
28. By necessity, an order which restores residents' voting rights will require the CFPC to redraft its bylaws and articles to effectively split the existing "Learner" class into two new classes with new rules governing fees and voting.

⁷ Affidavit of Dr. Santanna Hernandez, at paras. 18-21, Responding Application Record of RDOC, Tab 1, page 7.

⁸ Affidavit of Dr. Santanna Hernandez, at para. 22, Responding Application Record of RDOC, Tab 1, page 7.

29. This would lead to *inter alia*:
- a) loss of the monetary and time investment made to implement the CFPC's current membership structure; and
 - b) the need to invest more money to implement whatever changes are necessary because of the change to membership.
30. It is also expected to cause enormous logistical issues for the CFPC and its ten provincial chapters. Any change to the CFPC's membership through the CCRM Platform will apply to all the chapters as well. This is problematic since the chapters are each governed by their own sets of by-laws and articles, which require voting approval for member class changes.
31. If the Court grants RDOC's relief, leading to a change in the CFPC's membership structure, then the chapters will need to hold special meetings to have their members ratify a corresponding change. If the chapters are not able to hold their meetings before the CFPC is ready to launch its CCRM Platform changes, this would require custom changes that would be enormously costly to the CFPC.
32. The foregoing are easily foreseeable outcomes of the Court granting RDOC's relief. It is also worth noting that there could be unintended consequences of granting the relief which necessitate caution. For instance, other members could become disenchanted with Resident Members' perceived outsized influence within the organization and leave the CFPC.

D. THE COURT LACKS JURISDICTION TO GRANT RDOC'S RELIEF

33. RDOC is asking the Court for an order that the CFPC reshape its membership structure and rewrite its by-laws so that residents can have their voting rights restored.
34. The CFPC respectfully submits that the Court does not have the authority to grant such an order under section 288 of the CNCA.
35. Based on a plain reading of section 288, its object is to allow for the correction of errors in a corporation's constating documents.

36. While the vote which led to the removal of residents' voting rights was not conducted properly, and therefore constitutes an error, the decision to remove residents' voting rights was not itself an 'error.' That decision was made by the CFPC's directorship after extensive consideration and was ultimately voted on and passed at the 2022 AMM.⁹
37. British Columbia courts considering section 105 of the *Societies Act*¹⁰ have consistently observed the following comments from the British Columbia Court of Appeal in *Garcha v. Kahlsa Diwan Society – New Westminster*,¹¹ citing a decision from the British Columbia Supreme Court:

The court must find irregularities or errors before it has jurisdiction under s. 85 [the former version of section 105 of the *Societies Act*]. In my opinion, **there must be some connection between any irregularity proven and the relief sought.** The authority under the section is to correct the problem and make necessary ancillary or consequential directions. The scope of the section is not very broad and the court's discretion is not unfettered.

The court is always reluctant to interfere in the internal affairs of any corporate body. The respondent society should be left to govern itself in a democratic fashion and make its own decisions, including what may be seen by some of its members to be mistakes. The court should not presume that those in executive charge of the society will conduct themselves contrary to the interests of the society or that they will breach the rules of natural justice to the extent those rules apply to the business at hand.

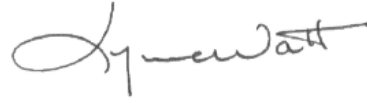
38. Since there is no evidence at all that the lack of a separate class vote resulted in the residents' loss of voting rights, there is therefore no connection between the relief sought by RDOC and the CFPC's voting irregularity. Accordingly, the Court should be hesitant to grant RDOC's requested order.

⁹ Mang Affidavit, para 56, page 44 of Application Record.

¹⁰ [Societies Act](#), SBC 2015, c 18; see paragraphs 83-87 of the CFPC's factum dated November 6, 2024.

¹¹ [Garcha v. Kahlsa Diwan Society – New Westminster](#), 2006 BCCA 140 (BCCA), at para 9 [emphasis added].

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of November, 2024.



per: **D. Lynne Watt**
GOWLING WLG (CANADA) LLP



per: **Nathan Lean**
GOWLING WLG (CANADA) LLP

SCHEDULE “A” – TABLE OF AUTHORITIES

	Cases
1.	<i>Garcha v. Kahlsa Diwan Society – New Westminster</i> , 2006 BCCA 140 (BCCA)

SCHEDULE “B” – RELEVANT STATUTES

	Statute / Regulation
1.	<p><u>Canada Not-for-profit Corporations Act</u>, SC 2009, c 23.</p> <p>Section 288</p> <p>Corrections initiated by Director</p> <p>288 (1) If there is an error in the articles, a certificate or other document except one required by section 20 or 128, subsection 134(1) or section 278, the directors or members of the corporation shall, on the request of the Director, pass the resolutions and send to the Director the documents required to comply with this Act and take any other steps that the Director reasonably requires so that the Director can correct the document.</p> <p>No prejudice</p> <p>(2) Before proceeding under subsection (1), the Director shall be satisfied that the correction would not prejudice any of the members or creditors of the corporation.</p> <p>Corrections initiated by the corporation</p> <p>(3) The Director may, at the request of the corporation or of any other interested person, correct any of the documents referred to in subsection (1) if</p> <p style="padding-left: 20px;">(a) the correction is approved by the directors of the corporation, or the error is obvious on the face of the document or was made by the Director; and</p> <p style="padding-left: 20px;">(b) the Director is satisfied that the correction would not prejudice any of the members or creditors of the corporation and that it reflects the original intention of the corporation or the incorporators.</p> <p>Application to court</p> <p>(4) On the application of the Director, the corporation or any other interested person, a court may</p> <p style="padding-left: 20px;">(a) order the correction of any of the documents referred to in subsection (1);</p> <p style="padding-left: 20px;">(b) determine the rights of members or creditors of the corporation; and</p> <p style="padding-left: 20px;">(c) make any other order that the court thinks fit.</p> <p>Notice to Director of application</p> <p>(5) An applicant under subsection (4) other than the Director shall give the Director notice of the application, and the Director is entitled to appear and to be heard in person or by counsel.</p> <p>Director may require surrender of document</p> <p>(6) The Director may demand the surrender of the original document and may issue a corrected certificate.</p> <p>Date of corrected document</p> <p>(7) A corrected document shall bear the date of the document it replaces unless</p> <p style="padding-left: 20px;">(a) the correction is made with respect to the date of the document, in which case the document shall bear the corrected date; or</p> <p style="padding-left: 20px;">(b) a court decides otherwise.</p> <p>Notice</p> <p>(8) If a corrected certificate materially amends the terms of the original certificate, the Director shall without delay publish notice of the correction in a publication generally available to the public.</p>

2. [Societies Act](#), SBC 2015, c 18.

Section 105

Court may remedy irregularities

105 (1) This section applies if an omission, defect, error or irregularity in the conduct of the activities or internal affairs of a society results in

- (a) a contravention of this Act or the regulations,
- (b) the society acting inconsistently with or contrary to its purposes,
- (c) a default in compliance with the bylaws of the society,
- (d) proceedings at, or in connection with, a general meeting or a meeting of directors, or an assembly purporting to be such a meeting, being rendered ineffective, or
- (e) a resolution consented to by members or directors of the society, or records purporting to be such a resolution, being rendered ineffective.

(2) Despite any other provision of this Act, if an omission, defect, error or irregularity described in subsection (1) occurs,

- (a) the court may, either on its own motion or on the application of a person whom the court considers to be an appropriate person to make an application under this section, make an order
 - (i) to correct or cause to be corrected, or to negative or modify or cause to be modified, the consequences in law of the omission, defect, error or irregularity, or
 - (ii) to validate an act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the omission, defect, error or irregularity, and
- (b) the court may make any ancillary or consequential orders it considers appropriate.

(3) Unless the court orders otherwise, an order under subsection (2) does not prejudice the rights of a third party who has acquired those rights for valuable consideration and without notice of the omission, defect, error or irregularity that is the subject of the order.

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Proceeding commenced at OTTAWA

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