

ORIGINAL

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20090616
Docket: S092334
Registry: Vancouver

Between:

Sunny Chohan

Plaintiff

And

Vedic Hindu Cultural Society

Defendant

Before: The Honourable Mr. Justice Nathan Smith

Oral Reasons for Judgment

In Chambers
June 16, 2009

Counsel for Plaintiff:

H. A. Mickelson, Q.C.

Counsel for Society:

P.F. Buxton

Counsel for the Council of Volunteers:

T. R. Britnell

Place and Date of Hearing:

Vancouver, B.C.
June 12, 2009

Place and Date of Judgment:

Vancouver, B.C.
June 16, 2009



[1] The petitioner, Sunny Chohan, headed a slate of candidates (the "Chohan candidates") who sought to become directors of the respondent, Vedic Hindu Cultural Society (the "Society"). They were disqualified from running and another slate was declared elected by acclamation. Mr. Chohan asks the Court to set aside the disqualification and order a new election.

[2] The Court's jurisdiction to intervene in the internal affairs of an incorporated society is contained in and limited by s. 85 of the **Society Act**, R.S.B.C. 1996, c. 433. I must decide if there has been "an omission, defect or irregularity" in the conduct of the society's affairs by which there has been a default in compliance with its constitution and bylaws. If so, I may make an order that either rectifies or validates the consequences of the irregularity.

[3] The Society is unusual in that it has two separate governing bodies. In addition to the Board of Directors (the "Board"), which manages the day-to-day business of the Society, there is a Council of Volunteers (the "Council"), which generally oversees operations and ensures that religious traditions are upheld. One of the specific functions assigned to the Council is to act as the election committee that conducts the election of the Board. That function includes ruling on the eligibility of candidates. (I will at times refer to the Council as the "Election Committee".)

[4] Board elections are conducted every two years according to procedures and timelines set out in the Society's bylaws. Voting members of the Society do not vote for individuals, but choose a single slate of candidates to form the new Board. One of the eligibility requirements for candidates is that they be members of the Society in good standing for at least one year before they are nominated. The dispute in this case centres on the definition of "good standing" in the Society's bylaws and, in particular, a provision that a member who owes a debt to the Society is not in good standing.

[5] The bylaws set out a procedure in which individual candidates submit nomination forms to the Council, which then determines if they are eligible and

informs them of its decision. Candidates declared ineligible may then submit revised applications.

[6] Candidates who have been declared eligible must then join slates, which must be submitted to the Council, which must decide on "the admissibility of the slates" one week later. If a slate is declared inadmissible, a revised slate may be submitted.

[7] Each of the foregoing steps is subject to a deadline set out in the bylaws, beginning with the third Sunday in January, which is when nomination forms for individual candidates must be submitted to the Council. That date in 2009 was January 18. An election is held only if there is more than one admissible slate as of the first Sunday in March. If there is only one slate on that date, the Council declares that slate elected by acclamation.

[8] The Chohan candidates submitted their nomination forms to the Council as required. They, along with a number of others, were initially rejected by the Council, but the Council reconsidered after obtaining a revised membership list and the Chohan candidates received notices that their nominations had been accepted and they were eligible for election.

[9] Mr. Chohan's group then formally organized itself into a slate and submitted the slate to the council. The Chohan slate was initially notified that it was not admissible because of certain irregularities in its material, the details of which are no longer relevant. Mr. Chohan responded to those specific issues in a way that satisfied the Council. Mr. Chohan's response was submitted by February 22, 2009, the date by which, according to the bylaws, a slate declared inadmissible had to resubmit its application.

[10] Meanwhile the Council received a letter on February 18, 2009, challenging the eligibility of Mr. Chohan and seven other members of his slate. That letter came from Mr. Goel, the head of a rival slate.

[11] On February 28, 2009, the Council informed Mr. Chohan that the approval of his slate had been rescinded because he and other members of his slate had not been members in good standing for the required one-year period. The Council relied on s. 2.8 of the bylaws, which states that "if a member owes a debt to the society he is not in good standing so long as the debt remains unpaid."

[12] Mr. Chohan was given 48 hours to provide proof that that he and the other candidates had been members in good standing for one year. On March 2, 2009, the Council received a letter from a lawyer representing the Chohan slate who maintained his clients were and had been members in good standing. However, the Council rejected that submission and, on the same day, declared Mr. Geol's slate elected by acclamation.

[13] In this petition, Mr. Chohan asks the Court to declare the Council decisions invalid and to order a new election that his slate would be eligible to contest. Pursuant to a consent order dated May 2, the Geol slate has not yet taken office and the previous Board has remained in office pending the resolution of this matter. That Board has caused the Society to take a position supporting Mr. Chohan's call for a new election.

[14] The debt on which the Council based its decision arose from an earlier dispute over governance of the Society. Mr. Chohan was president of the Society in 2003, when Council exercised its power to dissolve the Board after a number of members resigned. Mr. Chohan and other remaining directors initially refused to accept their removal, but eventually agreed to a consent order, dated February 27, 2004, that declared they were not board members. Following the consent order, the Society demanded repayment of \$10,000 in Society funds that Mr. Chohan and his colleagues had caused to be spent on legal fees during the dispute.

[15] The Society apparently made few, if any, further efforts to collect those funds until 2007, when Mr. Chohan commenced a Provincial Court action against the Society, claiming an outstanding debt of \$5,000 related to an earlier loan. The

Society then counterclaimed for the \$10,000 it had previously alleged to have been misappropriated.

[16] That matter was resolved at a settlement conference on February 23, 2009, with the terms of settlement being set out in an agreement dated May 26, 2008. Under that agreement, Mr. Chohan paid \$10,624 and the Society paid him \$5,000, with a mutual release of claims. The document also provided for reinstatement of memberships. The Provincial Court action was then dismissed by consent.

[17] The Council's position now is that, as of January 18, 2009, Mr. Chohan and his colleagues had not been members in good standing for the required one year because they had owed a debt to the Society and that debt had been repaid only about eight months earlier, when the settlement agreement was signed.

[18] Section 85 of the **Society Act** states:

85 (1) Despite anything in this Act, if an omission, defect, error or irregularity occurs in the conduct of the affairs of a society by which

- (a) a breach of this Act occurs,
- (b) there is default in compliance with the constitution or bylaws of the society, or
- (c) proceedings at, or in connection with, a general meeting, a meeting of the directors of the society or an assembly purporting to be such a meeting are rendered ineffective,

the court may

- (d) either of its own motion or on the application of an interested person, make an order
 - (i) to rectify or cause to be rectified or to negate 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
- (e) give the ancillary or consequential directions it considers necessary.

(2) The court must, before making an order, consider the effect of it on the society and its directors, officers, members and creditors.

(3) An order made under subsection (1) does not prejudice the rights of a third party who has acquired those rights for valuable consideration without notice of the omission, defect, error or irregularity cured by the order.

[19] The test under the section was summarized in *Hong v. Young Kwang Presbyterian Church*, 2007 BCSC 502, 30 B.L.R. (4th) 254 at para. 41:

[41] The test under s. 85 of the **Act** may be summarized as follows:

- (a) Has an omission, defect, error or irregularity (collectively referred to as an "irregularity") occurred in the conduct of the affairs of the society?
- (b) If there has been an irregularity, does it breach the **Act**, the constitution or the bylaws of the society, or does it render a general meeting ineffective?
- (c) If the answer to (b) is "yes", then the court may make orders to rectify the consequences in law of the irregularity and may make ancillary or consequential directions it considers necessary. However, before making such orders the court must consider the effect of any such order on the society and its directors, officers, members and creditors.

[20] There are numerous authorities that make clear that members of a society should be free to govern themselves in a democratic fashion and the court should always be reluctant to interfere in a society's internal affairs. However, the corollary to that proposition is that the process and procedures by which the members exercise their democratic rights to govern the society are of fundamental importance and must be followed.

[21] In *Samra v. Guru Nanak Gurdwara Society et al.*, 2007 BCSC 882, Smart J. dealt with a dispute over membership enrolment. He said at para. 2:

[2] The requirements for membership in a society and the process by which determinations are made as to whether an applicant has met those requirements are matters of great importance to a society. Further, as it is only members who may vote at general meetings and at the election of a society's executive, the integrity of the membership enrolment process is closely connected to the integrity of the election itself. If membership enrolment is not conducted fairly, then it is unlikely that the election will be fair.

[22] This case does not deal with membership enrolment; however the question of who is or who is not eligible to seek office is equally important to the proper democratic conduct of a society. Just as an election is unlikely to be fair if

membership enrolment is unfair, it is unlikely to be fair if candidates are unfairly prevented from running. The process by which candidates are declared to be eligible or ineligible must be fair, predictable, and impartial.

[23] The process for determining eligibility in the bylaws of the Society begins with s. 15.4, which reads:

15.4 Eligibility: The Election Committee (Council) shall check the Nomination and Acceptance Applications to ascertain that the conditions stipulated in Articles 4.2, 14.5 and 15.3 are complied with. The Election Committee (Council) shall decide the eligibility of all the nominated candidates by the fourth Sunday in January and inform them by using suitable means including the Eligibility form VHCS2.

[24] The other sections referred to, are those that require a candidate to have been a member in good standing for one year; require a board member seeking a Council seat to resign from the Board; require a candidate to be nominated by two members in good standing; and set the deadline for filing nomination forms. The bylaw gives the Council one week to consider nominations in light of those criteria and those are the only matters the Council is permitted to consider.

[25] Section 15.5 then states:

15.5 Resubmission: A candidate declared ineligible, for whatever reason, may resubmit his revised application by 6:00 PM on the first Sunday in February.

[26] It is, in my view, significant that while the bylaws permit the Council to reconsider a declaration of ineligibility on application of the rejected candidate, there is nothing in the bylaws that provides for reconsideration after the Council declares a candidate to be eligible and nothing that provides for reconsideration on the application of anyone other than the affected candidate.

[27] Subsequent sections deal with the admissibility of slates. Section 15.7 requires the disqualification of a candidate who appears on more than one slate, s. 15.8 sets out the form and the date by which slates are presented to the Council and s. 15.9 then says:

15.9 Admissibility: The Election Committee (Council) shall decide the admissibility of the slates by the third Sunday in February. A slate of candidates is an admissible slate if it contains at least twelve but not more than fifteen names of eligible candidates for different positions on the Board of Directors.

[28] I interpret the Council's duty under s. 15(9) as a limited and somewhat mechanical one—it is to ensure that each slate has the proper number of candidates and identifies what board position each candidate is seeking. I do not read the section as allowing the Council, in the process of considering admissibility of slates, to revisit issues of individual eligibility that it was required to decide at an earlier date pursuant to s. 15.4.

[29] Mr. Bhayana, the chair of the Council, describes the process as a “back and forth exchange” between the Council and the candidates that is “fluid and can continue for a few weeks.”

[30] With respect, that is not what the bylaws provide.

[31] The bylaws require the Council to investigate and determine eligibility of candidates well in advance of the election. Candidates and voting members should then be entitled to rely on those determinations. That is what makes the eligibility process fair and predictable. The “fluid” process described by Mr. Bhayana would remove that fairness and predictability. It could leave candidates and voting members uncertain until almost the eve of the election about who the candidates are or whether there will, in fact, be an election. It would invite manipulation and attempts by candidates to gain office not by winning support of the members but by keeping their opponents off the ballot.

[32] I therefore find that there was an irregularity in the conduct of the affairs of the Society in that the Council, having determined candidates to be eligible pursuant to the bylaws on the date the bylaws prescribe for such a decision, reconsidered and reversed that decision on application of a rival candidate when the bylaws make no provision for such application or reconsideration. The reconsideration and reversal was also an irregularity in that it occurred in the context of determining the

admissibility of slates, which is a separate and distinct consideration from the eligibility of individual candidates.

[33] I also find that there was an irregularity in the Council's decision that the Chohan candidates had not been members in good standing because they had owed a debt to the Society. Section 2.8 of the bylaws says that "if a member owes a debt to the society he is not in good standing so long as the debt remains unpaid."

[34] *Black's Law Dictionary*, 8th edition, defines debt as "liability on a claim; a specific sum of money due by agreement or otherwise." The *Concise Oxford Dictionary* defines it as "money owed or due." In *Busby (Guardian ad litem of) v. Cartier*, [1993] 3 W.W.R. 58, 74 B.C.L.R. (2d) 92 (S.C.), this court adopted a definition from an earlier edition of *Black's* that defined debt as "a sum of money by certain and express agreement; ...obligation to pay money or some other valuable thing or things, either in the present or in the future."

[35] All of those formulations include the concept of an obligation to pay. That obligation may arise by agreement or by judicial determination. A debt is to be distinguished from a disputed claim of debt. As of January 18, 2008—one year before they submitted their nominations forms to the Council—the Society claimed that the Chohan candidates owed a debt, but the Chohan candidates were disputing their obligation to pay.

[36] The Council relies on a letter from the Chohan candidates dated June 8, 2004 in which they claimed to be owed \$14,000 and said that the Society, in paying that amount, "may deduct \$10,000 that you allege was paid by us to the lawyer." I cannot accept the Council's submission that this letter constitutes an acknowledgement of the debt. Aside from the fact that it uses the word "allege" the letter is in the nature of a "without prejudice" settlement offer that was not accepted at the time.

[37] I therefore find that the Chohan candidates cannot be said to have owed a debt to the Society on January 18, 2008. The Society was advancing a claim of debt against them and released that claim in the subsequent settlement agreement. The

fact that, as part of the settlement agreement, Mr. Chohan made a payment to the Society cannot be used to retroactively establish the existence of the debt as of January 18, 2008.

[38] I also note that the alleged debt arose out of an earlier dispute concerning governance of the Society. The Chohan candidates spent Society funds for legal advice at a time when they had been and were claiming to still be members of the Board of Directors. The question of whether or not they were within their rights to do so has never been determined. The voting members of the Society may or may not have considered that conduct in determining whether to vote for the Chohan candidates, even if there had been no settlement of the Society's claim, and voters may still choose to consider that issue in determining whether the Chohan candidates are fit to be elected directors.

[39] Having determined that there were irregularities, I must decide whether an order rectifying the consequences of the irregularity is necessary and, if so, whether the order sought by the petitioner is the appropriate one. I must consider the effect of the order on the Society and its directors, officers, members, and creditors.

[40] The petitioner seeks an order that there be a new election, in which he and his slate are eligible candidates. The effect of such an order will be that the Society and its members will have the opportunity to choose the Society's directors in an election, which is how the Society is supposed to be governed. Frequently disputes of this kind that come before the court arise from other political, factional or personal disputes within the society of which the Court is not fully informed. I do not know if that is the case here, but if so, it is even more appropriate and necessary that the general membership be able to decide any such dispute on its merits.

[41] In my view, the order sought is the appropriate one and is in the best interests of the Society and its members. I therefore order that a new election be held in which the Chohan candidates will be eligible to seek office. The consent order extending the term of the previous Board is continued until the new election.

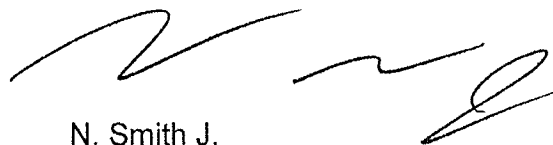
The parties agree that in any new election, the eligible voters will be limited to those who would have been eligible to vote in April 2009, had an election been held at that time. Any memberships that would otherwise expire before the new election date will be extended to preserve the right of those members to vote.

[42] That leaves the question of a date for the new election. The timelines set out in the bylaws should, as far as possible, continue to be observed and govern the new election. Although voting must be limited to members who would have been eligible to vote in April, it does not follow that their choice is necessarily restricted to the candidates who wished to run in April. I presume that both the Geol and Chohan slates will seek election, but additional candidates may also come forward and, if so, the Council must consider their eligibility in accordance with the bylaws.

[43] The bylaws set out a process that takes six weeks from the date candidates must file their nomination to the date when it is finally determined if there will be a contested election. If there is, the bylaws provide for a further two weeks before the election is held. All deadlines and events, including the election, fall on Sundays.

[44] Applying those times to the current situation, the earliest date on which a new election would be possible is therefore Sunday, August 16, 2009. Even that would allow less than a week for potential candidates to become aware of the process and submit their nominations. It would be for the Council to decide whether that is sufficient time, but in any event there will be obvious difficulties with an election date during the summer months. I therefore order that the election be held on a date of Council's choosing within the month of September, with the deadlines leading to that date set accordingly to allow the time prescribed in the bylaws.

[45] All parties will have liberty to apply to me for further directions as necessary.



N. Smith J.

