
COURT ISSUES DECISION ON NOT-FOR-PROFIT ELECTION AND MEMBERSHIP

*By Ryan M. Prendergast**

A. INTRODUCTION

On December 8, 2011, the Ontario Superior Court of Justice released its decision in *Sikh Cultural Society v. Kooner* (“Sikh Cultural Society”).¹ The decision concerns two factions in competition with each other over the leadership of a religious not-for-profit corporation. As with many internal conflicts involving not-for-profit corporations that are dragged into court, the leadership of the faction in power was under scrutiny, as was the list of members. This decision is notable in that it stresses the importance of maintaining adequate recordkeeping for the purpose of establishing the validity of memberships.

As illustrated in this case, it is important to be able to determine the number of valid memberships for the purpose of the processes set out in the *Corporations Act*² (e.g. requisitioning a meeting of members) and, if applicable, the constitution of a corporation (e.g. calling a non-confidence vote). Adequate recordkeeping facilitates a straightforward determination of valid memberships. As well, it can be relied upon as evidence when faced with litigation concerning the validity of memberships. It is also a requirement under the *Corporations Act* for a register of members to be maintained by a not-for-profit corporation.

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¹ 2011 ONSC 5513 (CanLII).

² R.S.O. 1990, c. C.38.

B. SUMMARY OF THE FACTS

The Sikh Cultural Society decision revolved around two factions that were competing for the leadership of a religious and cultural centre for the Windsor and Essex County Sikh community (“the Society”). According to Article V of the Society’s Constitution, the Society was to be governed by seven individuals on an Executive Committee, who were to be elected every two years for a two year term.

One of the factions involved in the dispute was the former Executive Committee (“FEC”) of the Society. For reasons unexplained in the decision, the members of the FEC had not run in the most recently called election in 2009, yet challenged the power of the New Executive Committee (“NEC”). The FEC also supported the creation of a new chief executive officer-like position that was not provided for in the Constitution, which would be known as the “Jathedar”. The Jathedar would be an appointee that would hold office for life, could appoint a successor, and would not be accountable to the Executive Committee or the membership for any decisions made regarding the properties owned by the Society. Members of the FEC were the respondents in this application.

The second faction was the NEC, the members of which were acclaimed in the most recently called election in 2009. Members of the NEC were the applicants in this application.

The conflict between these factions appears to have begun when, contrary to the established practice of the Society, the keys for the centre, the official seal, letterhead, minute books, official correspondence, used and unused receipt books, cheque books and outstanding applications for membership were not turned over to the NEC (who had recently been elected as the Executive Committee) at the Society’s year end in December, 2009.

The NEC commenced an application requesting that the FEC transfer control of the Society to the NEC in January, 2010. R.S.J. Ducharme ordered on an interim basis that the NEC were the proper signing authorities on the Society’s bank accounts and all donations were to be deposited into the Society’s accounts. Although the FEC eventually turned over the books and records to the NEC in February, 2010, the NEC alleged that the FEC continued to accept donations and sign official Society charitable donation receipts up until the end of February, 2010.

In early 2010, the FEC began organizing a non-confidence vote, pursuant to Article XI of the Society’s Constitution, which could be used to replace the NEC. In order to hold the non-confidence vote, the FEC

requested an updated list of members from the NEC. However, the factions disagreed about the number of members due to inadequate recordkeeping by the FEC and steps taken by the NEC to remediate the Society's past practice of not addressing new membership applications in a timely manner. At the time that the NEC was elected, it appears that the FEC had not processed all of the pending membership applications, as was required by the Society's Constitution. When the NEC was acclaimed, it approved these pending membership applications. Accordingly, the FEC disputed the validity of these approved memberships.

The issue of the number of members was also complicated by the NEC's termination of the membership of 20 members in August, 2010. The NEC had given these members written notice of a hearing date for disciplinary action, but none of the members showed up for the hearing or provided a response in writing. The NEC subsequently terminated their membership. Although the Constitution provides that such a decision can be appealed to the membership at the next annual general meeting, no such meeting had been held since the termination of the memberships.

Shortly after the termination of memberships, the FEC held a meeting called for the purpose of conducting the non-confidence motion. The FEC requested that the NEC provide it with a list of members ("NEC's post-election list"). However, the list of members used for the purpose of voting in the non-confidence vote, was not that prepared by the NEC, but was a list that was prepared by the FEC that included more members than that which were on the membership list immediately prior to the election ("FEC's post-election list"). In other words, it appears that the number of members increased even though the FEC lacked the power to approve new memberships. Although the non-confidence motion was successful, the NEC proceeded to take control of the Society and resolved to freeze the granting of new memberships in August, 2010.

C. THE DECISION

1. The Membership List

An interesting aspect of this case is that the FEC argued that the Court should determine the validity of memberships by having a referee determine who the *bona fide* members were based on documentary and other evidence. The referee would have the authority "to make such inquiries as are required to determine whether a putative *bona fide* member meets or could meet the *bona fide* member status criteria as established by the court on the proper interpretation and application of the Constitution and applicable legislation governing the Society."³ In contrast, the NEC argued that the

³ *Ibid.*, para. 43.

Court interpret and apply the provisions of the Society's Constitution and the *Corporations Act* (Ontario).⁴

The Court chose to use the NEC's approach to determine the validity of the memberships. It appears that the Court's censure of the FEC's poor recordkeeping and failure to address pending membership applications in a timely fashion played a significant role in the Court's determination of memberships. The Court noted that the FEC's inadequate and in some cases, non-existent, recordkeeping contributed the difficulties in ascertaining the members.⁵

It should be noted that the court refused to accept the FEC's documentation to support the FEC's post-election list on the basis that the originals of documents were never produced for the Court. A ledger was produced which appeared to be, in the Court's own words, "the result of a "cut and paste" exercise". Without any reasonable explanation, the Court reasonably inferred that the ledger was a reconstruction of the original ledger. The Court also found it suspect that such a high number of photocopied membership applications were apparently obtained from potential members and submitted to the Court for the purpose of determining the membership.⁶ It was difficult to believe that all of the potential members alleged by FEC with pending membership applications would keep a photocopy of their application.⁷

The Court ultimately decided that the NEC's post-election list, which adhered to the criteria for membership under the Society's Constitution, was a valid list. After its election, the NEC was the only body entitled to approve new membership applications, and therefore it was within its right to so approve the pending applications that the FEC failed to process during its term in office. With regards to the membership freeze, the Court found that the resolution by the NEC to implement a membership freeze was validly passed and that the NEC had valid reasons for doing so (e.g. to avoid violence between the parties).⁸ However, the Court also found a pre-election list of members compiled by the FEC was also a valid list, as this particular list referred to memberships that were approved by the FEC while it was still in office. Therefore, any person whose name was on the NEC's post-election list or the FEC's pre-election list were members entitled to vote.

⁴ *Ibid.*, para 42.

⁵ *Ibid.*, para. 46.

⁶ These purported applications appear to have been brought before the Court for the purpose of boosting the number of pro-FEC members.

⁷ *Ibid.*, para. 53-54.

⁸ *Ibid.*, para. 66.

2. Expelled Members Must be Reinstated

The Court held that the members, whose memberships were terminated in August, 2010 by the NEC, must be reinstated as members and given the opportunity for their termination to be reviewed and reversed at an annual general meeting. In this regard, the court found that principles of fairness would require that these individuals be reinstated in order to vote in the elections and to be nominated or positions in the Society. In addition, the Society's Constitution also permitted these individuals to seek reinstatement as members and they had given written notice that they wished to do so.

3. No Non-Confidence Motion

The Court declined to order a non-confidence motion because an election would be the most effective mechanism of oust undesired members of the NEC, if such was actually the case, and legitimize the leadership of the elected candidates.

D. CONCLUSION

This decision illustrates the importance of not-for-profit corporations maintaining adequate records, particularly in relation to members. In the face of internal conflict, records facilitate the determination of who is a member, as well as acts as evidence when attempting to establish the list of members. The ability to ascertain the membership of a not-for-profit corporation is underrated in relation to the day-to-day operations. However, as illustrated in the Sikh Cultural Society decision, as well as in other similar cases that have been recently litigated⁹, the membership list determines which individuals may participate in key decision-making, such as determining the identity of the individuals who will govern the not-for-profit corporation.

⁹ See [Ontario Korean Businessmen's Assoc. v. Seung Jin Oh](#), 2011 ONSC 6991 (CanLII).