

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Brown v. Brousseau,
2021 BCSC 151

Date: 20210202
Docket: S2012112
Registry: Vancouver

Between:

**Edward Brown, Sharon E. Walker, Nancy
McLeod, Robert Saito and Derek Zeisman**

Petitioners

And

**Richard Brousseau, Moneca Kolvyn, Eliza
Olson and Porsha Kari-Ann Von Kish**

Respondents

Before: The Honourable Madam Justice Ahmad

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.
December 15, 2020

Place and Date of Judgment:

Vancouver, B.C.
February 2, 2021

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Introduction

[1] This case involves a dispute between two groups of directors of the Burns Bog Conservation Society (the “Society”). The first group consists of five directors, Edward Brown, Sharon Walker, Nancy McLeod, Robert Saito, Derek Zeisman (the “Majority Directors”) who are the petitioners. The second group consists of the remaining four directors, Richard Brousseau, Monica Kolvyn, Eliza Olson and Porsha Kari-Ann Von Kish (the “Minority Directors”) who are the respondents.

[2] The Minority Directors have alleged that at the meeting of the board of directors (the “Board”) held on June 25, 2020 (the “June 25 Meeting”), the Board voted to remove each of the Majority Directors as directors of the Society. Since that time, the Minority Directors have taken steps to conduct the affairs of the Society without any input from the Majority Directors.

[3] The Majority Directors contest the validity of the vote. They say they remain directors and are entitled to their say in governing the Society.

[4] The primary issues to be determined concerns whether the vote to remove the Majority Directors was valid and, if not, what remedies should be granted.

Background

[5] Although this petition was brought in respect of the validity of the vote conducted at the June 25 Meeting, the dispute between the Majority Directors and the Minority Directors predates that meeting. I do not intend to review the history in detail, however, I will summarize some background to provide context of the historical dispute, particularly as it relates to the remedies sought. I have included more details where required further in these reasons.

The Society

[6] The Society was incorporated in 1988 and continued under the *Societies Act*, S.B.C. 2015, c. 18 [the *Act*] in July 2017.

[7] The Society's purposes include, among other things, facilitating the ecological integrity of the Burns Bog ecosystem in Delta, British Columbia, for the long-term enjoyment of the public and for future generations.

[8] The Society last held an annual general meeting ("AGM") of its members on May 23, 2019 at which time the Society's members elected each of the Majority Directors and the Minority Directors to its Board.

[9] Of the board members, Ms. Olson was elected as president, Ms. Walker was elected as vice-president and Mr. Brown was elected as treasurer. No one was elected as secretary.

[10] The BC Society Summary filed with BC Registries and Online Services ("BC Registries") after that AGM listed each of the Majority Directors and the Minority Directors as directors.

[11] The Society's bylaws (the "Bylaws") were amended by special resolution made at the May 23, 2019 AGM.

Events Leading up to the June 25 Meeting

[12] Prior to June 20, 2019, in addition to acting as president, Ms. Olson was the executive director for the Society, a position she had held on a volunteer basis since December 2001.

[13] In 2019, a Society employee filed a complaint with the Board in which he alleged that he had been the subject of bullying and harassment initiated by Ms. Olson. As a result of that complaint, at its June 20, 2019 meeting (the "June 20 Meeting"), the Board voted to remove the position of executive director and to establish a Board-Staff Liaison Committee (the "BSLC") to, among other things, oversee Society staff.

[14] The Board made other changes to Ms. Olson's roles and responsibilities as executive director and president at meetings conducted on October 24, 2019 and June 4, 2020.

[15] At its October 24, 2019 meeting (the “October 2019 Meeting”), the Board voted to limit Ms. Olson’s responsibilities as president to chairing meetings and receiving and providing non-binding input into various staff reports. All other duties of the president were transferred to the BSLC. The “preparation and distribution of all meeting agendas” and “organization and convening of all meetings” were specifically included as duties that were transferred to the BSLC.

[16] That motion was passed with all of the Majority Directors voting in favour and, except for Ms. Olson who abstained from the vote, all of the Minority Directors voting against. The results were recorded in the minutes of the October 2019 Meeting, which were approved by the Board at its meeting on November 28, 2019.

[17] Also at the October 2019 Meeting, the Board voted to have Ms. Von Kish serve as the Board’s secretary until the next AGM. However, at its meeting on April 23, 2020 (the “April 2020 Meeting”), the Board voted to remove her from that role and appointed Ms. McLeod, one of the Majority Directors, to act as secretary in her place, effective immediately.

[18] All of the Majority Directors voted in favour of that motion while the Minority Directors were opposed. That vote was recorded in the minutes, which were approved by the Board at the June 25 Meeting.

[19] At its June 4, 2020 meeting (the “June 2020 Meeting”), the Board voted, among other things, to remove Ms. Olson as chair for board meetings, to confirm she was not the executive director of the Society, either on a permanent or acting basis, and to prohibit her and two other of the Minority Directors, Ms. Von Kish and Ms. Kolvyn, from entering the Society’s offices.

[20] Like the vote at the October 2019 Meeting, those motions were passed with all of the Majority Directors voting in favour and, with the exception of Ms. Olson and Ms. Kolvyn who abstained from the vote, all of the Minority Directors voting against. The results were recorded in the minutes of the June 2020 Meeting, which were approved by the Board at the June 25 Meeting.

The June 25 Meeting

[21] As of the June 25 Meeting, the Board consisted of each of the Majority Directors and each of the Minority Directors.

[22] One day in advance of the June 25 Meeting, Ms. Von Kish delivered an email to each of the directors in which she gave notice of a motion to remove the Majority Directors as the Society's directors (the "Removal Motion").

[23] On June 25, 2020, the Board convened a meeting over Zoom. Each of the Majority Directors and the Minority Directors attended the meeting.

[24] Although it was not listed on the agenda used for the meeting, the Minority Directors have alleged that the vote to remove the Majority Directors was held and passed at the June 25 Meeting.

[25] I have set out more details of the June 25 Meeting and the Removal Motion in the Analysis section below.

Events Subsequent to the June 25 Meeting

[26] On September 11, 2020, Ms. Von Kish sent an email to each of the Majority Directors and the Minority Directors. In it, she advised that the Minority Directors had held a board meeting in July 2020 at which they purported to invalidate all motions passed at the April 2020 Meeting (at which Ms. McLeod was appointed as secretary of the Board), the June 2020 Meeting (at which Ms. Olson was removed as chair of board meetings), and, with the exception of the Removal Motion, all motions passed at the June 25 Meeting.

[27] On September 21, 2020, Ms. Von Kish and Ms. Olson removed Evelyn Wedley, the Society's accountant, as the Society's authorized representative with BC Registries and replaced her with Ms. Von Kish. They also filed a notice of change of directors with BC Registries, removing the Majority Directors as directors of the Society.

[28] Relying on the revised BC Registries filing, certain Minority Directors attempted to change the authorized signatories of the Society's bank accounts, re-directed the Society's mail to an unknown address and advised the Society's employees, members and members of the public that the Majority Directors were no longer directors.

[29] As a result of the dispute between the Majority Directors and the Minority Directors regarding the Majority Directors' status as directors, the Society's bank accounts were frozen and Canada Post held its mail, which, among other things, prevented the Society from paying rent, its staff and meeting other financial obligations and receiving donations through the mail and otherwise made the continued operation of the Society's business difficult.

[30] On the application of the Majority Directors, on November 25, 2020, Mr. Justice G.C. Weatherill made an interim order to unfreeze the Society's operations account and to release the Society's mail, pending the outcome of the petition.

Legal Framework

[31] Section 105 of the *Act* (formerly section 85 under the *Society Act*, R.S.B.C. 1996, c. 433) provides this Court with supervisory jurisdiction to regulate the affairs of a society incorporated under the *Act*. *Riley Park Hillcrest Community Association v. Waterston*, 2014 BCSC 1605 at para. 55 [*Riley Park*]; *Gill v. Kalgidhar Darbar Sahib Society*, 2017 BCSC 1423 at paras. 30, 33 [*Gill*].

[32] Pursuant to section 105 of the *Act*, the Court may remedy defects, errors, and irregularities that arise and result in, among other things, a contravention of the *Act*, default in compliance with a society's bylaws, or ineffective resolutions. It provides:

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 meeting of members or directors of the society, 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.

...

The Parties' Positions

[33] The Majority Directors argue that section 105 of the *Act* is invoked in two ways:

- a) The process by which the Removal Motion was presented and purportedly passed at the June 25 Meeting was defective and contravened both the *Act* and the Bylaws; and
- b) The removal of the Majority Directors as directors from the Society's records filed with BC Registries contravened and constituted an offence under section 223 of the *Act*.

[34] They say those defects warrant the Court's intervention to correct the consequences, being the removal of the Majority Directors as directors of the Society.

[35] They also argue that the circumstances warrant the granting of ancillary orders to restore the affairs of the Society as they existed at the time of the June 25

Meeting and to unwind the steps taken by the Minority Directors subsequent to the June 25 Meeting.

[36] On the other hand, the Minority Directors argue that the process by which the Removal Motion was presented and voted on was consistent with past votes of the Board. They dispute there was any defect in the process by which it was passed.

[37] In the event that the voting process was defective, the Minority Directors do not dispute that it would be appropriate to make orders to restore the Majority Directors as directors of the Society.

[38] They argue, however, that it would not be appropriate for the Court to restore the status quo as of June 25, 2020 given their dispute of the motions made at the April 2020 Meeting and the June 2020 Meeting. They say that if any ancillary orders are made, they should ensure that both the Majority Directors and the Minority Directors have a say in the affairs of the Society until an AGM is held.

Issues

[39] In the factual and legal context set out above, the issues to be determined are:

- a) Did either (i) the manner in which the Removal Motion was presented and purportedly passed, or (ii) the removal of the Majority Directors as directors from the records filed with BC Registries constitute a defect, error, or irregularity resulting in a contravention of the *Act*, default in compliance with the Bylaws, or ineffective resolution?
- b) If so, what is the appropriate remedy, if any, to address the consequence of the defect, error or irregularity?

Analysis

Did the manner in which the Removal Motion was presented and purportedly passed constitute a defect, error, or irregularity resulting in a contravention of the Act, default in compliance with a society's bylaws, or ineffective resolution?

Relevant Facts

[40] On June 24, 2020, one day prior to the June 25 Meeting, Ms. Von Kish emailed each of the directors with the proposed motion to remove each of the Majority Directors as board members. Ms. Von Kish's proposed motion reads, in part:

Under bylaws 2.9.1 and 2.9.2, I give notice to Ed Brown, Nancy McLeod, Sharon "Liz" Walker, Bob Saito, and Derek Zeisman.

I move that: Ed Brown, Nancy McLeod, Sharon "Liz" Walker, Bob Saito, and Derek Zeisman, have failed to comply with bylaws 2.5.1 and 6.2.1 a, b, c, d. As they have blatantly violated those bylaws and others, they shall be removed as board members, either by they honourably resign or are voted out. And since this is regarding five members, they will have the opportunity to speak, but not to vote, due to conflict of interests. I further move that should their vote be counted, and they vote against this motion; it shows they are in agreement that they have violated the Society's bylaws, and will have their directorship terminated.

...

[41] There is no dispute that each of the directors, including the Majority Directors, received Ms. Von Kish's email on June 24, 2020.

[42] Each of the Majority Directors and the Minority Directors was present at the June 25 Meeting. Mr. Brown, one of the Majority Directors, acted as chair.

[43] Although both Ms. Olson and the BSLC prepared and circulated an agenda, the June 25 Meeting proceeded in accordance with the agenda prepared by the BSLC (the "BSLC Agenda"). The Removal Motion did not appear on that agenda.

[44] After a number of previous attempts, Ms. Von Kish finally raised, and the Minority Directors purportedly voted on, the Removal Motion during the vote of Item 7 of the agenda, being the motion to receive and approve the list of new members of the Society.

[45] The relevant portion of the transcript of the June 25 Meeting is as follows:

Mr. Brown [Referring to the vote on Item 7]...Bob?
 Mr. Saito Yes.
 Mr. Brown Thank you. Where's Porsha...um...Porsha, your vote please.
 Ms. Von Kish Ed. The staff have information so they should be able to make things right and I sent an email noting Bev's incorrect date and [Mr. Brown speaking in the background] and I'm going to go, I'm going to, my second email motion, although those in favour...say I.
 Mr. Brousseau I.
 Mr. Brown We'll take that as a no.
 Female I'm in favour.
 Mr. Brown Thank you. Derek?
 Mr. Zeisman Mr. Chair. I am wholeheartedly in favour of this motion [echo / feedback]
 Mr. Brown Thank you. And Nancy, you [inaudible]...
 Ms. McLeod I've got it all.
 Mr. Brown Thank you.
 Mr. Saito Ed, I think you should new to us again, this echo is coming back...
 Mr. Brown Okay, we'll move on to Item 8, approval of past minute meetings. Liz?

[Emphasis added.]

[46] None of the Majority Directors voted on the Removal Motion. There was no further reference to the Removal Motion at the June 25 Meeting.

[47] Despite having been removed as the Society's secretary at the April 2020 Meeting, Ms. Von Kish purported to have taken minutes at the June 25 Meeting.

Those minutes provide:

Porsha- reminds that the staff should have the information, and she sent the email about Bev's correct date. **And she calls for a vote on her second email motion, all those in favour say yea, Richard-yes, Ed muted. Eliza-signaled yes, Monica signal yes. Porsha signal- yes. Motion passed with 100%.** Porsha then sent a chat message to the whole board, and to Ed, Nancy, Liz, Bob, and Derek are no longer Directors, as the motion was passed. {As per bylaws 2.9.1 and 6.6.2.]

[Emphasis in original.]

[48] Although noted on their face to be “approved”, there is no evidence to indicate that the minutes prepared by Ms. Von Kish were, in fact, approved by all of the directors who attended the June 25 Meeting. The Majority Directors dispute that she was authorized to take minutes for the meeting.

Legal Framework

Removal of Directors

[49] Subsection 50(1) of the *Act* governs the removal of directors of a society. It provides that such removal can only occur by way of a special resolution or in accordance with a society’s bylaws.

[50] Pursuant to bylaw 6.4, a director ceases to be a director on one of seven enumerated bases. The only relevant basis in this case is “being removed pursuant to bylaw 6.6”.

[51] Bylaw 6.6, in turn, sets out two ways by which a director can be removed from office. That bylaw provides:

- 1) The members may, by special resolution, remove a director before the expiration of the director's term of office, and may elect a successor to complete the term of office.
- 2) The Board may, by a resolution of which not fewer than 75% of the directors then in office are in favour, remove a director before the expiration of the director's term of office, and may elect a successor to complete the term of office.

[Emphasis added.]

Procedural Rules for Conducting Board Meetings

[52] Part 7 of the Bylaws governs the proceedings of the Board, including notice requirements, voting and the conduct of its meetings.

[53] Bylaw 7.7 provides:

Subject to the Act and the bylaws, the Board may adopt rules of order, but if it does not do so then the most recent edition of Robert’s Rules of Order must be used.

[54] The edition of “Robert’s Rules of Order” that was in effect at the time of the June 25 Meeting was *Robert’s Rule of Order Newly Revised*, 11th ed (Da Capo Press, 2011) [*Robert’s Rules*].

[55] At page 372, *Robert’s Rules* provides that, once adopted, the agenda for a meeting formally become the order of business. In a meeting where an established order of business is being followed, the chair calls for the different classes of business in the prescribed order: *Robert’s Rules* at 26.

[56] Once an order of business is established, any particular item of business can be taken up out of its proper order by adopting a motion to suspend the rules by a two-thirds vote. *Robert’s Rules* at 363 prescribes the following procedure:

Any particular item of business can be taken out of its proper order by adopting a motion to suspend the rules (25) by a two-thirds vote, although this is usually arranged by unanimous consent (pp. 54–56). Hence, an important committee report or an urgent item of new business can be advanced in order to assure is full and unhurried consideration. If desired, before the completion of the advanced question the regular order of business can be returned to by a majority vote—by adopting a motion to lay the pending question on the table (17).

. . . If unanimous consent is given or if this motion is adopted by a two-thirds vote, the member is immediately recognized to introduced the resolution. . . .

The chair himself cannot depart from the prescribed order of business, which only the assembly can do by at least a two-thirds vote. This is an important protection in cases where some of the members principally involved in a particular question may be unable to be present through an entire meeting. . .

[57] *Robert’s Rules* at 32 prescribes three steps for how a motion is to be brought at a meeting:

1. A member *makes* the motion.
2. Another member *seconds* the motion.
3. The chair *states the question on the motion*.

[58] Bylaw 7.4 dispenses the second of those steps, being the requirement that a member seconds a motion.

[59] *Robert's Rules* also provides that “[n]either the making nor the seconding of a motion places it before the assembly; only the chair can do that, by the third step (stating the question).”

[60] Finally, *Robert's Rules* at 42 outlines the procedures for considering a motion:

1. Members *debate* the motion (unless no member claims the floor for that purpose).
2. The chair *puts the question* (that is, puts it to a vote).
3. The chair *announces the result of the vote*.

[61] When putting a matter to a vote, *Robert's Rules* at 44 requires the following:

. . . the chair calls first for the affirmative vote, and all who wish to vote in favour of the motion so indicate in the manner specified; then he calls for the negative vote. The chair must always call for the negative vote, no matter how nearly unanimous the affirmative vote may appear, except that this rule is commonly relaxed in the case of noncontroversial motions of a complimentary or courtesy nature . . .

[Emphasis added.]

Analysis

[62] As the starting point for my analysis, I begin with two premises: (a) Mr. Brown acted, and was entitled to act, as chair for the June 25 Meeting; and (b) he followed the BSLC Agenda as a guide for the conduct of the June 25 Meeting.

[63] With respect to the first of those premises, as noted above, at the June 2020 Meeting, the directors voted that pending the resolution of the bullying and harassment complaints made against her, “Ms. Olson is unable to act as chair of the board of general meetings”.

[64] Although it is unclear how Mr. Brown came to chair the June 25 meeting, the minutes (although not yet approved) reflect that motions to “re-confirm Mr. Brown of as Chair of Board meetings until the Society’s 2020 [AGM]” and to approve the BSLC Agenda” were passed, with all of the Majority Directors voting in favour and all of the Minority Directors voting against.

[65] The directors accepted, however reluctantly, Mr. Brown's authority to do so. It is clear that they also accepted the BSLC Agenda as the agenda that governed the meeting. Ms. Olson's evidence was that, although she did not agree with that approach, she "respectfully deferred to him in the interest of the moving the meeting along".

[66] I am satisfied that Mr. Brown had the authority to act as chair for the June 25 Meeting and that the BSLC Agenda governed the conduct for that meeting.

[67] On that basis, I turn to my consideration of the manner in which the Removal Motion was presented and voted upon. In my view, it did not accord with the procedural requirements set out in *Robert's Rules* in three ways.

[68] I have concluded that the BSLC Agenda governed the conduct of the June 25 Meeting. The directors were only entitled to disrupt the order of business set out in that agenda with a two-thirds vote of the directors. No such vote occurred.

[69] Rather than asking for a vote to hear the Removal Motion, Ms. Von Kish simply took it upon herself to raise the Removal Motion at various random times during the meeting. When she purported to call the motion for a vote, the directors were in the process of voting on Item 7 on the BSLC Agenda, being the motion to approve the membership list.

[70] Having expressly or impliedly accepted the BCLS Agenda, it was not open to Ms. Von Kish, or any of the directors, to deviate from its order without a vote. As no vote was conducted, let alone passed, purporting to call the vote on the Removal Motion when she did, contravened *Robert's Rules* and the Bylaws.

[71] However, even if the Removal Motion was called in order, only the chair was entitled to state the question and put it to a vote after a debate.

[72] Again, rather than allowing Mr. Brown to do so, Ms. Von Kish simply purported to call the motion without the chair's involvement and without any debate on the issue.

[73] Furthermore, contrary to the procedure contemplated by *Robert's Rules*, there was no call for a negative vote. If that step had been taken, the Majority Directors would have been alerted that the issue had been raised. Given the way the Removal Motion was called and voted on, the Majority Directors were not alerted of the issue and did not even know a vote had been conducted.

[74] Considering the gravity of the motion, it is difficult to conceive a vote held in those circumstances can be valid.

[75] The issues that plagued the Removal Motion extended beyond those significant procedural issues. Equally flawed, and perhaps more fundamental, was the manner in which the vote was counted.

[76] As set out above, bylaw 6.6(2) provides that a director can only be removed by vote of the Board if “not fewer than 75% of the directors then in office are in favour”.

[77] As of June 25, 2020, there were nine directors in office. A motion to remove a director required seven votes.

[78] In this case, accepting that all of the Minority Directors voted in favour, there were four votes in favour of the motion. Those four votes were not enough to pass the Removal Motion.

[79] Relying on the conflict provisions set out in section 56 of the *Act*, the Minority Directors argue that the Majority Directors were required to abstain from voting and, effectively, on that basis, they were not counted for the purposes of the vote.

[80] That argument is flawed.

[81] Firstly, while section 56(2)(b) of the *Act* requires a director to abstain from voting on matters on which he or she is conflicted, nothing in that section derogates from the requirement in bylaw 6.6 that a vote to remove a director must have the approval of “not fewer than 75% of the directors then in office. . .”. The bylaw does not require the approval of not fewer than 75% of the directors entitled to vote.

[82] In other words, regardless of the number of directors who are entitled to vote (or, put another way, who must abstain from voting), the Removal Motion still required seven votes to pass (i.e., 75% of the nine directors “then in office”).

[83] I come to that conclusion by assuming, without deciding, that the conflicts provisions apply in this case.

[84] Secondly, in determining who was eligible to vote, the Minority Directors treated the Majority Directors as one “voting block”. Doing so was improper.

[85] Although directors may be elected as “a body” (bylaw 6.3(5)), neither bylaw 6.6 nor any other bylaw contemplates that directors may be removed as a body. To the contrary, bylaw 6.6 contemplates the removal of “a director”. There was no basis on which to exclude all of the Majority Directors from the vote.

[86] The proper way to have conducted the vote was to vote for the removal of each of the Majority Directors on an individual basis. That way, even if assuming the conflicts provisions applied to exclude a conflicted director as a “director then in office”, a 75% vote would require six votes, being 75% of the remaining eight directors voting on the motion.

[87] By excluding the Majority Directors from the vote as one “body” and calculating the votes in the manner they did, in effect, the Minority Directors have purported to remove the Majority Directors with only 44.5% of the directors’ vote. That does not meet the threshold required by bylaw 6.6, being “75% of the directors then in office”. The vote is invalid.

[88] In the ways I have described above, I conclude that the manner in which the Removal Motion was presented, voted upon and purportedly passed was defective. That defect resulted in a contravention of the *Act* and a default in compliance with the Society’s Bylaws, rendering the vote to remove the Majority Directors invalid.

Did removing the Majority Directors from the Society’s filing with BC Registries constitute a defect, error, or irregularity resulting in a contravention of the Act?

Relevant Facts

[89] In 2017, Ms. Wedley was the Society’s authorized representative for the Registry Key that provided access to the Society’s account with BC Registries. As the authorized representative, only Ms. Whitley could make filings with BC Registries, including changes to the listed directors of the Society.

[90] On September 21, 2020, Ms. Von Kish and Ms. Olson filed a document with BC Registries to replace Ms. Wedley with Ms. Van Kish as the authorized representative of the Society. Shortly thereafter, Ms. Von Kish and Ms. Olson filed a notice of change of directors with BC Registries, removing the Majority Directors as directors of the Society, and backdated that filing to June 25, 2020.

[91] On the basis of that filed notice of change of directors, the Minority Directors were able to control the Society’s day-to-day operations such as banking and re-directing the mail.

Legal Framework

[92] Section 223 of the *Act* provides:

Misleading statements an offence

223 (1) Subject to subsection (4), a person who makes or assists in making a statement that is included in a record that is required or permitted to be made by or for the purposes of this Act or the regulations commits an offence if the statement

(a) is, at the time and in the light of the circumstances under which it is made, false or misleading in respect of a material fact, or

...

(2) If a society commits an offence under subsection (1), a director or senior manager of the society who authorizes, permits or acquiesces in the commission of the offence also commits an offence, whether or not the society is prosecuted or convicted.

...

(4) A person does not commit an offence under this section in relation to a statement if the person

- (a) did not know that the statement was false or misleading, and
- (b) could not have known, with the exercise of reasonable diligence, that the statement was false or misleading.

[93] With the exception of section 5, the *Offence Act*, R.S.B.C. 1996, c. 338 applies to offences under the *Act*: the *Act*, s. 220; *Offence Act*, s. 3(1).

[94] The standard of proof to prove that an offence has been committed is the criminal standard of beyond a reasonable doubt: *Offence Act*, ss. 2, 133; *R. v. Seraji*, 2020 BCSC 1417.

Analysis

[95] I have concluded that the Removal Motion was not validly passed. It follows that removing the names of the Majority Directors as directors from the BC Registries records was false or misleading.

[96] However, that conclusion, in and of itself, is not sufficient to conclude that Ms. Von Kish's and Ms. Olson's conduct in filing the change of directors constitutes an offence under section 223 of the *Act* as the Majority Directors allege.

[97] Subsection (4) relieves a person of the offence provisions if the person did not know, or could not have known, that the statement was false or misleading.

[98] With respect to knowledge, the Majority Directors referred me to two letters authored by counsel for Ms. Olson after the June 25 Meeting. Although counsel refers to a number of issues concerning the Board, he made no mention of the purported removal of the Majority Directors and continued to refer to the Majority Directors as directors.

[99] While the content of the letters may reflect the lawyer's understanding, it is not enough to allow me to conclude beyond a reasonable doubt that the Minority Directors were aware the vote was invalid.

[100] There is no compelling evidence to suggest that either Ms. Olson or Ms. Von Kish did not hold the view, however erroneous, that they were entitled to conduct the vote in the manner they did.

[101] I am unable to conclude beyond a reasonable doubt that either Ms. Von Kish or Ms. Olson committed an offence under section 223 of the *Act*.

What is the appropriate remedy?

[102] Having concluded that the process by which the Majority Directors were removed from the Board was defective, the next question to consider is the appropriate remedy, if any.

[103] At para. 33 of *Gill*, Mr. Justice Riley distilled several principles governing the application of section 105, which he referred to as the “irregularity provision”. Regarding that provision, he noted:

- (d) The courts have adopted a “cautious approach” to the application of the irregularity provision: *Bector* at para. 8. To paraphrase language adopted by Hall J.A. in the leading case of *Garcha v. Khalsa Diwan Society – New Westminster*, 2006 BCCA 140 [*Garcha*] at para. 9, courts have shown a healthy reluctance “to interfere with the internal affairs of any corporate body”. An incorporated society should be left to govern itself and make its own decisions, “including what may be seen by some of its members to be mistakes”. Moreover, 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”.

[104] Notwithstanding the reluctance to interfere, the Court of Appeal held that intervention was warranted where “significant irregularities” existed and it was “unrealistic” to suggest “that there was any real possibility that any disagreements could be worked out informally or by some internal process”: *Garcha v. Khalsa Diwan Society – New Westminster*, 2006 BCCA 140 at para. 17.

[105] In this case, the defects in relation to the Removal Motion discussed above deprived the Majority Directors of their legitimate right to participate in the governance of the affairs of the Society. Especially given that result, there is no doubt those defects were significant.

[106] In light of the history and the ongoing animosity between the Majority Directors and the Minority Directors and the positions taken on this application, it is unrealistic to suggest that the parties will be able to agree on an appropriate way to resolve the issues between them.

[107] I am satisfied that this is an appropriate case for the Court to intervene to correct the consequences of the defective vote.

Orders to Negative the Defective Vote (s. 105(2)(a)(i))

[108] The defect in the presentation and vote on the Removal Motion rendered the vote to remove the Majority Directors invalid. I have no hesitation in granting the orders sought to restore the Majority Directors as directors of the Society.

[109] As noted above, without conceding that the vote was invalid, in light of my ruling, the Minority Directors do not dispute that such orders are appropriate.

[110] I make the following orders and declarations to negative the defective vote on the Removal Motion:

- a) a declaration that the Removal Motion is invalid and of no force or effect;
- b) a declaration that the board of directors of the Society consists of Ms. Walker, Mr. Brown, Ms. McLeod, Mr. Saito, Mr. Zeisman, Ms. Von Kish, Ms. Kolvyn, Ms. Olson, and Mr. Brousseau, pending the next election of directors at the next AGM;
- c) a declaration that the notice of change of directors filed with BC Registries on September 21, 2020 is invalid and of no force or effect;
- d) an order that Ms. Olson, Ms. Von Kish, Ms. Kolvyn and Mr. Brousseau;
 - i. cease and desist from holding themselves out as the sole directors of the Society; and

- ii. cease and desist from stating or suggesting that the Majority Directors have been removed or terminated as members of the Board.

[111] In addition, the Majority Directors seek, and the Minority Directors do not oppose, an order that BC Registries re-activate the Society's online account. I will also grant that order and, in the alternative, an order that the directors take steps to re-activate the Society's online account with BC Registries.

Ancillary or Consequential Orders (s. 105(2)(b))

[112] In addition to the orders to negative the defective vote, the Majority Directors also seek a number of ancillary orders to restore the affairs of the Society as they existed prior to the June 25 Meeting and to unwind the steps taken by the Minority Directors subsequent to the June 25 Meeting.

[113] Given the invalid vote, it follows that all actions taken and decisions made by the Minority Directors as the purported sole directors of the Society are also invalid. It is appropriate to make orders to undo those actions and decisions, which I address in more detail below.

Post-June 25 Meetings

[114] The Majority Directors seek a declaration that any board meetings held by the Minority Directors after June 25, 2020 were unauthorized and invalid, and any motions passed or business conducted at any such meetings are of no force or effect.

[115] In light of my ruling regarding the Removal Motion, the Minority Directors do not oppose this form of relief.

[116] I agree that it is appropriate to make the declaration.

Society's Registry Key

[117] Two of the ancillary orders sought relate to the authorized representative for the Society's Registry Key. The proposed declarations are:

- a) a declaration that the filings with BC Registries purporting to change the authorized representative for the Society's Registry Key filed by Ms. Olson and Ms. Von Kish on July 14, 2020 and September 21, 2020 are invalid and of no force or effect; and,
- b) a declaration that Ms. Wedley is the authorized representative for the Society's Registry Key.

[118] The Minority Directors do not oppose the first of those proposed declarations. However, rather than Ms. Wedley, they suggest that it is more appropriate to appoint a director, and preferably the Board secretary, to that role.

[119] I do not agree.

[120] Prior to September 2020, Ms. Wedley had been the authorized representative and had that role since 2017. There is no evidence to suggest that Ms. Wedley's appointment (which was made by Ms. Olson), or continued appointment, was invalid or contrary to the intentions of the Society's Board or management.

[121] The Minority Directors' suggestion to replace Ms. Wedley with a director (or anyone else) would result in an appointment that was not contemplated by the Society's Board or management. In my view, it would be improper to interfere with a decision of the Board or management that was validly made. I decline to do so.

[122] Until the Board or management decides otherwise, Ms. Wedley should remain the authorized representative for the Society's Registry Key.

Bank Accounts

[123] Two of the ancillary orders sought by the Majority Directors relate to the Society's bank accounts. They seek the following orders:

- a) an order that Toronto Dominion Bank ("TD Bank") unfreeze the Society's bank account, and restore the authorized signatories to: Ms. Olson, Ms. Walker, Mr. Saito and Mr. Brown; and

- b) an order that Vancouver City Savings Credit Union (“Vancity”) unfreeze the Society’s bank account, and restore the authorized signatories to: Ms. Walker, Mr. Saito, and Mr. Brown.

[124] The proposed authorized signatories were the authorized signatories for the bank accounts on June 25, 2020.

[125] The Minority Directors do not object to having the bank accounts unfrozen. However, rather than restoring the authorized signatories to who they were on June 25, 2020, they argue it would be more appropriate to continue the interlocutory order that was obtained in November 2020. I am told the interlocutory order provided that Ms. Olson (a Minority Director) and Mr. Brown (a Majority Director) are the authorized signatories on the bank accounts. They argue that arrangement allows both groups to have a say in the conduct of the Society’s financial affairs.

[126] The interlocutory order was made to allow the Society to access its bank accounts and conduct its operations until this petition could be determined. I am told the interlocutory order served that purpose well.

[127] On this final hearing of the petition, the parties have had the opportunity to more fully canvass the evidence and the law. That is what I must consider.

[128] As is the case for the Registry Key, there is nothing to suggest that the pre-June 25 appointment of the authorized signatories for the bank accounts was invalid. There is also nothing to suggest that the authorized signatories have used their authority in some way that is not in the best interest of the Society.

[129] Again, in my view, it is not necessary for me to interfere with a decision of the Board or management that was validly made, and I decline to do so. If the Board concludes that some other arrangement is more appropriate, it can, following its internal process, make decisions to change those authorized signatories.

[130] Until the Board or management decides otherwise, the authorized signatories should remain as they were on June 25, 2020.

Society's Mailing Address

[131] The Majority Directors seek an order that Canada Post restore the Society's mailing address to: P.O. Box 71040 New Orleans P.O, Delta, BC, V4C 8E7, and release the Society's mail that is currently being held to that address.

[132] The Minority Directors do not oppose this proposed order.

[133] I allow the order as sought.

Setting an AGM Date

[134] The Majority Directors seek an order that the Society hold an AGM as soon as possible.

[135] A similar order was considered by this court in *Riley Park Hillcrest Community Association v. Waterston*, 2014 BCSC 1605 [*Riley Park*]. In that case, there was a dispute between two groups within a society, both of whom claimed to be duly elected directors. The dispute resulted in uncertainty, not only with respect to the constitution of the board, but also with respect to the identity of the members and the legitimacy of the memberships accepted by the society. Noting that uncertainty affected the ability of the society to carry out its business, the court held that "[t]he necessary first step is to place the issue of the identity of the directors before a properly constituted annual general meeting of the [s]ociety": *Riley Park* at para. 100.

[136] As was the case in *Riley Park*, the ongoing dispute between the Minority Directors and the Majority Directors has caused significant uncertainty that has disrupted the ability to conduct the Society's business. Notwithstanding my conclusion regarding the constitution of the Board and the expectation that the directors will discharge their duties in accordance with their statutory and legal obligations, it would be unrealistic to suggest that those disputes will not continue. In that case, it appears that the ability to conduct the Society's business will continue to be impaired.

[137] I am satisfied that it is appropriate to order that the Society hold its annual general meeting within 60 days from the date of this decision. In all other respects, the annual general meeting is to be called and held in accordance with the relevant provisions of the *Act* and the Bylaws.

Membership List

[138] Item 7 on the BSLC Agenda for the June 25 Meeting was a motion to approve all new applications for membership in the Society received between April 24, 2020 and June 25, 2020. The list of new applicants, which included the name, application date and amount of the tax receipt issued (the “New Membership List”), was attached to the agenda. Society staff prepared that list.

[139] The Minority Directors disputed and voiced their concerns regarding the New Membership List at the June 25 Meeting. With the exception of Ms. Kolvyn, who was not present for the vote, the three Minority Directors that were present voted against the motion to approve the list. With the exception of Mr. Brown who, as chair, did not vote, the remaining four Majority Directors voted in favour of approving the list.

[140] Having been approved by the majority vote required by bylaw 7.4(1), the motion passed.

[141] Notwithstanding that vote, the Minority Directors continue to dispute the New Membership List. On that basis, the Majority Directors have asked for a declaration that the register of members approved at the June 25 Meeting is an accurate and true register of members of the Society as of June 25, 2020.

[142] The Court of Appeal has held that section 85 of the former *Society Act* (now section 105 of the *Act*) is intended to ensure that the rights of society members under a society’s bylaws are upheld: *Kwantlen University College Student Association v. Canadian Federation of Students - British Columbia Component*, 2011 BCCA 133 at para. 32; *Riley Park* at para. 96.

[143] Referring to that objective, Madam Justice Warren in *Riley Park* noted that “[i]t almost goes without saying that one must be able to identify the members in order to ensure their rights are upheld”: *Riley Park* at para. 96.

[144] On that same basis, I am satisfied that it is appropriate to consider the declaration sought at this application.

[145] The Minority Directors dispute the validity of the New Membership List on three bases: (a) the list did not include what they say was the typical information about the proposed new members that should be on the list; (b) there was an error on the New Membership List; and (c) they were not given the opportunity to fully discuss their concerns at the June 25 Meeting.

[146] I do not accept any of those bases of complaint.

[147] At the June 25 Meeting, Ms. Olson raised her concern that the New Membership List did not contain the members’ phone numbers or email addresses.

[148] Bylaw 2.2(b) and (c) sets out the information that must be included on an application for membership: the name, address, email address and telephone of the applicant as well as the category to which the applicant wishes to belong.

[149] However, the New Membership List is not the application for membership. It is a summary of the new applicants prepared by staff after they have reviewed, and presumably vetted, the applications. The Minority Directors did not present any evidence to indicate that the application forms that were reviewed by staff did not contain the information required by the Bylaws or that staff failed to consider those requirements when they vetted the new application forms before presenting the list to the Board.

[150] It is significant that at meetings conducted on January 24, 2019 and April 25, 2019 the Board, including the Minority Directors, approved, without dispute, new membership lists in the same format, and containing the same or less information than the New Membership List. Neither of the lists approved on those dates

contained the members' phone numbers or email addresses that concern Ms. Olson now.

[151] Given their previous approvals, in my view, the complaint that the Minority Directors now raise about the information contained on the New Members List is a disingenuous attempt to thwart the decision of the Majority Directors. There is no merit to the first complaint.

[152] The Minority Directors have also alleged that the New Membership List contained an error in that it misstated the membership date for one of the proposed new members. However, once that one error (which Mr. Brown disputes was an error) was noted at the June 25 Meeting, the motion to approve the New Membership List was made with the correction made.

[153] Other than that one error, none of the Minority Directors provided any evidence, either at the June 25 Meeting or on the application before me, to substantiate their concern that the New Membership List prepared by staff contained any other errors or was inaccurate, incomplete, or invalid in any way.

[154] In these circumstances, it would be inappropriate to invalidate the New Membership List on the basis of one, now corrected, error.

[155] Finally, the Minority Directors have alleged that they did not have the opportunity to fully discuss their concerns with the New Membership List at the June 25 Meeting. Having reviewed the transcript of the relevant portion of the June 25 Meeting, I reject that submission. I am satisfied that all directors, including each of the Minority Directors that were present, raised their concerns and voted on the motion.

[156] For the reasons above, I reject the assertion that the New Membership List is invalid.

[157] I declare that the New Membership List approved at the June 25 Meeting accurately reflects all new members of Society for the period between April 24, 2020

and June 25, 2020, and I order that the Society amend its register of members that existed on June 25, 2020 to add the names on the New Membership List.

[158] I declare that the register of members, as so amended, is an accurate and true register of members of the Society as of June 25, 2020.

Compliance Order (s. 104)

[159] In addition to the remedies contemplated by section 105, the Majority Directors have also sought an order pursuant to section 104 of the *Act*. That section provides:

Compliance or restraining orders

104 (1) This section applies if

(a) person contravenes or is about to contravene a provision of this Act, the regulations or the bylaws of a society, or

(b) a society is carrying on activities that are inconsistent with or contrary to its purposes.

(2) On the application of a member or director of a society in relation to which this section applies or another person whom the court considers to be an appropriate person to make an application under this section, the court may make an order,

(a) in a case described in subsection (1) (a), directing the person who has contravened or is about to contravene a provision referred to in that subsection to comply with or refrain from contravening the provision, or

(b) in a case described in subsection (1) (b), directing the society to refrain from carrying on activities that are inconsistent with or contrary to its purposes.

(3) If the court makes an order under subsection (2), the court may make any ancillary or consequential orders it considers appropriate.

[160] Relying on section 104, the Majority Directors seek an order that the Minority Directors comply with motions previously carried by the Board, including, but not limited to:

- a) the motion carried at the June 2020 Meeting prohibiting Ms. Olson from entering the Society's office;

- b) the motion carried at the June 2020 Meeting prohibiting Ms. Kolvyn and Ms. Von Kish from entering the Society's office without prior written authorization of the Board; and
 - c) the motion carried at the April 2020 Meeting removing Ms. Von Kish as the Society's Secretary and replacing her with Ms. McLeod
- (the "Pre-June 25 Motions").

[161] The Minority Directors oppose the granting of this proposed form of order. They do not dispute that Ms. Kolvyn, Ms. Von Kish and Ms. Olson have acted in the manner that the Majority Directors seek to restrict. Rather, they dispute the validity of the motions that were made to restrict that conduct on several bases, including procedural fairness and non-compliance with the Bylaws.

[162] However, although the Minority Directors say they may subsequently do so, they have not brought an application seeking to invalidate the Pre-June 25 Motions that they dispute. That being the case, I am not in a position to determine the validity of those motions.

[163] On the evidence before me, all of the Pre-June 25 Motions were made and debated at board meetings. All of the directors voted at those meetings. The votes were recorded in minutes that were approved at subsequent board meetings.

[164] The question is, having been passed, whether there is a basis on which to mandate compliance with the Pre-June 25 Motions under section 104 of the *Act*.

[165] Section 104 is a new section in the *Act* that did not exist under the former *Society Act*. In *Farrish v. Delta Hospice Society*, 2020 BCCA 312, the Court of Appeal considered s. 104 in the context of governance issues within the appellate society. Madam Justice Newbury, for the court, discussed the scope of s. 104 of the *Act* and the court's jurisdiction to interfere in the internal affairs of societies:

[50] British Columbia courts have found it necessary and appropriate on many occasions to "interfere in the internal affairs" of societies where and to

the extent that the bylaws or the Act are being contravened. This includes societies that have express religious purposes. . . . The Court's ability to remedy a contravention was not regarded as a broad jurisdiction, at least under the previous legislation. . .

. . . The new sections 104 and 108 of the Act may be seen as broadening the remedial jurisdiction of the Court to some extent.

[Italics in original; underline added.]

[166] In this case, although the Minority Directors now dispute the validity of some of the Pre-June 25 Motions, they do not deny that they acted in the manner alleged by the Majority Directors in seeking the declaration under section 104. Ms. Von Kish's email of September 11, 2020, in which she advised that the Minority Directors purported to invalidate all motions passed at the April 2020 Meeting and the June 2020 Meeting, is a clear indication that the Minority Directors do not intend to comply with the motions passed at those meetings.

[167] Given the evidence that the Minority Directors do not intend to comply with some of the Pre-June 25 Motions, and in the absence of an application before the Court to invalidate those motions, I find that it is appropriate to grant the order that the Minority Directors comply with Pre-June 25 Motions.

Conclusion and Summary of Orders and Declarations

[168] I have concluded that the manner in which the Removal Motion was presented, voted upon and purportedly passed was defective. That defect resulted in a contravention of the *Act* and a default in compliance with the Society's Bylaws, rendering the vote to remove the Majority Directors invalid.

[169] I have also concluded that those defects were substantial and warrant the granting of relief contemplated by the *Act*. To summarize, I make the following orders and declaration:

- a) a declaration that the Removal Motion is invalid and of no force or effect;
- b) a declaration that the board of directors of the Society consists of Ms. Walker, Mr. Brown, Ms. McLeod, Mr. Saito, Mr. Zeisman, Ms. Von Kish, Ms. Kolvyn,

- Ms. Olson, and Mr. Brousseau, pending the next election of directors at the next AGM;
- c) a declaration that the notice of change of directors filed with BC Registries on September 21, 2020 is invalid and of no force or effect;
 - d) an order that Ms. Olson, Ms. Von Kish, Ms. Kolvyn and Mr. Brousseau:
 - i. cease and desist from holding themselves out as the sole directors of the Society; and,
 - ii. cease and desist from stating or suggesting that the Majority Directors have been removed or terminated as members of the Board;
 - e) an order that BC Registries re-activate the Society's online account, or, in the alternative, an order that the directors take steps to re-activate the Society's online account with BC Registries;
 - f) a declaration that any board meetings held by the Minority Directors after June 25, 2020 were unauthorized and invalid, and any motions passed or business conducted at any such meetings are of no force or effect;
 - g) a declaration that the filings with BC Registries purporting to change the authorized representative for the Society's Registry Key filed by Ms. Olson and Ms. Von Kish on July 14, 2020 and September 21, 2020 are invalid and of no force or effect;
 - h) a declaration that Ms. Wedley is the authorized representative for the Society's Registry Key;
 - i) an order that TD Bank unfreeze, or, in the alternative, that the directors take steps to unfreeze, the Society's bank account, and restore the authorized signatories to Ms. Olson, Ms. Walker, Mr. Saito and Mr. Brown;

- j) an order that Vancity unfreeze or, in the alternative, that the directors take steps to unfreeze, the Society's bank account, and restore the authorized signatories to Ms. Walker, Mr. Saito, and Mr. Brown;
- k) an order that Canada Post restore, or, in the alternative, that the directors take steps to restore, the Society's mailing address to P.O. Box 71040 New Orleans P.O, Delta, BC, V4C 8E7, and release the Society's mail that is currently being held to that address;
- l) an order that the Society hold an annual general meeting within 60 days from the date of this decision. In all other respects, the annual general meeting is to be called and held in accordance with the relevant provisions of the *Act* and the Bylaws;
- m) a declaration that the New Membership List approved at the June 25 Meeting accurately reflects all new members of Society for the period between April 24, 2020 and June 25, 2020;
- n) an order that the Society amend its register of members that existed on June 25, 2020 to add the names on the New Membership List;
- o) a declaration that the register of members, as so amended, is an accurate and true register of members of the Society as of June 25, 2020; and.
- p) an order that the Minority Directors comply with motions previously carried by the Board, including but not limited to:
 - i. the motions carried at the June 2020 Meeting prohibiting Ms. Olson, Ms. Von Kish and Ms. Kolvyn from entering the Society's office without prior written authorization from the Board; and,
 - ii. the motion carried at the April 2020 Meeting removing Ms. Von Kish as the Society's Secretary and replacing her with Ms. McLeod.

Costs

[170] At the conclusion of the hearing, counsel for the Majority Directors advised that he would like to address the issue of costs on the outcome of these reasons for judgment. If that remains the case, any party wishing to claim costs may make written submissions not exceeding 10 pages, footnoting citations with pinpoint references. Any submissions are to be filed and served within two weeks of the date of these reasons for judgment.

[171] The party against whom costs are claimed may file and serve written responsive submissions not exceeding 10 pages, footnoting citations with pinpoint references within two weeks of the service of the submissions of the claiming party.

[172] Written reply submissions not exceeding five pages may be filed and served within one week of service of the opposing party's submissions.

[173] Briefs of authorities do not have to be filed with any of the written submissions.

[174] If neither party files written submissions for costs, costs are awarded to the petitioners at Scale B.

“Ahmad J.”