

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *West Coast Cricket Association v. Jauhar*,
2024 BCCA 112

Date: 20240312
Docket: CA49711

Between:

West Coast Cricket Association also known as Cricket BC

Appellant
(Respondent)

And

Bhavjit Jauhar, Riaz Dawood, and Alphonso Franco

Respondents
(Petitioners)

Before: The Honourable Mr. Justice Butler
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
February 26, 2024 (*Jauhar v. West Coast Cricket Association*, 2024 BCSC 315,
Vancouver Docket S240301).

Oral Reasons for Judgment

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Place and Date of Hearing:

Vancouver, British Columbia
March 12, 2024

Place and Date of Judgment:

Vancouver, British Columbia
March 12, 2024

Summary:

Cricket BC applies to stay an order requiring it to hold a new election for executive and board positions no later than March 15, 2024. At Cricket BC's November 2023 election, 21 of 45 votes cast for the positions in question were irregular, in that they were cast in violation of Cricket BC's bylaws and the Societies Act, S.B.C. 2015, c. 18 [Act]. Applying, s. 105 of the Act, the judge found that these irregularities were substantive and calculated to affect the result, thus justifying an order requiring a new election. Held: Application allowed, in part. Considering the relative strength of the case, the potential for irreparable harm, and the balance of convenience, the risk of harm in staying the order is greater than the risk of harm in refusing to grant the requested stay. However, it is in the interests of justice to grant a partial stay granting additional time to prepare for the new election. The new election is ordered to take place no later than March 28, 2024.

BUTLER J.A.:

Nature of the application

[1] In a decision rendered on February 26, 2024, Justice Mayer found irregularities in the election of officers and directors of the West Coast Cricket Association (“Cricket BC”), a society formed under the *Societies Act*, S.B.C. 2015, c. 18 [Act]. Applying the provisions of s. 105(2) of the *Act*, he determined that the irregularities justified ordering a new election. He also found that the current president of Cricket BC, who had been elected to that position in 2022, was ineligible to hold the position. Accordingly, he ordered that a new election for officers and directors, including for president, be held no later than March 15, 2024.

[2] Cricket BC has filed a notice of appeal and applies pursuant to Rule 20(1) of the *Court of Appeal Rules*, B.C. Reg. 120/2022 for a stay of execution of the judge’s order pending the outcome of the appeal. The appellant also asks that the appeal be heard on an expedited basis and seeks costs of this application. In the alternative, it seeks a variation of the term of the order that requires the election to be held by March 15, 2024, and asks, instead, that the election be held within 21 days of the date of this decision.

[3] The respondents oppose the application, arguing it is not in the interests of justice to grant a stay of the order.

Background

[4] Cricket BC is the society responsible for the promotion and regulation of the sport of cricket in British Columbia. The respondents are each directors of societies that are members of Cricket BC. The underlying dispute relates to elections held at Cricket BC’s annual general meeting on November 4, 2023, where Cricket BC elected candidates for five positions: vice-president; secretary; and three director member-at-large positions. The margin of votes separating the winners from the losers in the election for executive and director positions was quite small. Each of the three respondents was an unsuccessful candidate for election.

[5] The respondents’ petition advanced two primary arguments. First, they submitted that certain votes were improperly cast in the sense that they were not authorized by Cricket BC’s bylaws (the “Bylaws”). And second, they argued that Vimal Hardat, the president of Cricket BC, was not eligible to be a candidate for that position when he was elected in November 2022. The respondents sought an order setting aside the November 4, 2023 election results and for a new election with the position of president included on the ballot.

[6] The authority to make an order to correct, negate, or modify an omission, defect, error, or irregularity is found in s. 105 of the *Act*, which reads, in part:

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

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

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

(a) the court may, either on its own motion or on the application of a person whom the court considers to be an appropriate person to make an application under this section, make an order

(i) to correct or cause to be corrected, or to negative or modify or cause to be modified, the consequences in law of the omission, defect, error or irregularity, or

(ii) to validate an act, matter or thing rendered or alleged to have been rendered invalid by or as a result of the omission, defect, error or irregularity, and

(b) the court may make any ancillary or consequential orders it considers appropriate.

[7] Justice Mayer rendered his decision allowing the petition in reasons indexed at 2024 BCSC 315.

[8] Dealing with the November 4, 2023 election, the judge found that Cricket BC allowed unauthorized delegate and proxy votes in contravention of the provisions of the *Act* and the Bylaws. Referring to *Gill v. Kalgidhar Darbar Sahib Society*, 2017 BCSC 1423, the judge applied a two-part test for determining whether to make an order to correct the irregularities, as authorized under s. 105 of the *Act*:

a) Were there substantive irregularities in the election?

b) Were the irregularities calculated to affect the result?

[9] The judge found that Cricket BC's decision to allow delegate and proxy votes was a substantive irregularity, and Cricket BC had not met their onus of establishing that this irregularity was not calculated to affect the result of the election. The judge stated that the election irregularity went "to the heart of the integrity of Cricket BC's election process and had a significant impact on election results". The judge concluded that "given the number of impugned votes" at the election, the court had no choice but to order a new election: at para. 53.

[10] The respondents submitted, and the judge accepted, that it was important for Cricket BC to hold the new election as soon as possible as it has to make decisions leading up to the annual general meeting of Cricket Canada which is scheduled to be held on April 13 and 14, 2024. Cricket BC, as a provincial sports organization,

is a member of Cricket Canada. Given the number of member teams in British Columbia, Cricket BC controls almost 20% of the votes at Cricket Canada and has significant influence within that organization. This is a particularly important year for Canadian cricket as Canada has qualified, for the first time, to play in the ICC T20 World Cup which is held this year. The judge ordered that a new election be held no later than March 15, 2024.

[11] On the question of the eligibility of Mr. Hardat for the president’s position, the judge found that he was not a member of one of Cricket BC’s member organizations at the time of his election in November 2022, and determined that his election was a nullity. The judge found that the respondents had proven, without evidence to the contrary, that Mr. Hardat was not, at the relevant time, a “lifetime member” of any of the member organizations he claimed to be and thus, was not qualified under the Bylaws to stand for election as president at its 2022 election: at paras. 71–72. The judge ordered that an election be held for a new president at the same time as the election for the officer and director positions on March 15, 2024.

Legal framework

[12] Pursuant to ss. 30(c) and 33 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, a justice of this Court may grant a stay of all or part of proceedings, including execution, in the cause or matter from which the appeal has been brought.

[13] To succeed on an application for a stay, an applicant must satisfy the three-part test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, 337, 340–42, 1994 CanLII 117, summarized recently in *Skookum Creek Power Partnership v. JVD Installations Inc.*, 2022 BCCA 267 at para. 10 (Chambers):

- a) that there is some merit to the appeal in the sense that there is a serious question to be determined;
- b) that irreparable harm would be occasioned to the applicant if the stay was refused; and

- c) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

[14] The ultimate consideration is whether granting a stay is in the interests of justice: *Equustek Solutions Inc. v. Jack*, 2022 BCCA 453 at para. 11 (Chambers).

Positions of the parties

Appellant/Applicant

[15] The appellant submits that the central question to be determined is whether or not the judge correctly applied the two-part test under s. 105 of the *Act*, in finding that the irregularities were “substantive” and “calculated to affect the result” such that a new election was justified. The appellant describes those, respectively, as the objective and subjective components of the test.

[16] For the objective component, the appellant argues that the judge’s finding that the irregularities were “substantive” was an inference not based on proven fact. It submits there was no evidence that the irregularities “in fact” made a difference. It argues that the irregularities were merely technical and that the respondents failed to satisfy their onus of proving they were substantive. They cite *Chavez-Salinas v. Tower*, 2022 BCCA 43, at paras. 24 and 29, for the proposition that speculation on a material fact is a palpable and overriding error.

[17] Next, the appellant argues that the judge misapplied the test in using the same single fact—the small margin of votes separating the winners from the losers—to satisfy both the objective branch of the test (that the irregularity was substantial), and the subjective branch (that it was calculated to affect the result).

[18] With regard to the subjective, “calculated”, branch, the appellant submits that the judge misapplied that test by failing to consider the required mental element. It says that the authorities in this province establish that where there was no intentional attempt to subvert an election, the subjective element of the test is not

met. This error occurred because the judge improperly collapsed the test into a single branch.

[19] Finally, the appellant submits that the judge committed a palpable and overriding error in finding Mr. Hardat was ineligible to stand for election for president as such a conclusion was not available on the evidentiary record.

[20] With respect to irreparable harm, the appellant submits that absent a stay, Cricket BC and its members will suffer irreparable harm in being required to hold a meeting on short notice, with the associated time and expense, and the current newly-elected directors forced to stand for re-election.

[21] Additionally, the appellant argues that if a stay is not granted the appeal is rendered moot. A subsequent election would remove the live issue on appeal: the legitimacy of the November 2023 election. If the appeal were to proceed and be granted after a new election, an order affirming the results of the November 2023 election would be meaningless as it would not void the results of a new election. Conversely, the appellant submits that the respondents would suffer minimal harm if a stay were granted as there is no evidence that they would have been elected, and no guarantee that they will be elected.

[22] The appellant argues that under the balance of convenience factor, the *status quo* should prevail. Further, any perceived detriment to the respondents can be mitigated by expediting the hearing of the appeal.

[23] The appellant's alternative position is that if a new election is to be held, it should take place three weeks from this order to enable the election to be conducted in accordance with the Bylaws. It submits that it is difficult for a volunteer organization like Cricket BC to take the necessary steps to ensure compliance with its Bylaws and that it is not possible to do that within the timeline established under the order. It notes that it was unable to comply with the Bylaws given the terms of the order of the judge. The need for additional time arises here, in part, because, pursuant to the affidavit evidence of Mr. Pawanjit Joshi, individuals associated with

the respondents have incorporated several new cricket associations in recent days in an attempt to increase the votes available at a new election. It submits that the current board requires time to consider and approve, or reject, any new applications.

Respondents

[24] The respondents argue that the appeal has no realistic prospect of success and is doomed to fail. Alternatively, if the weakness is not fatal, they submit that it weighs heavily against granting a stay.

[25] On the merits of the application, the respondents submit that the judge correctly set out the applicable test and that he did not err in applying either branch of the test. The respondents note that the appellant does not challenge the finding of irregularities in the voting. Accordingly, it is indisputable that almost half of the votes in the election were cast in a manner that was in violation of the Bylaws or the *Act*. The respondents argue, in relation to the objective branch of the test, that the judge’s finding that the irregularities were “substantive” is subject to considerable deference because that conclusion is either a question of fact, mixed fact and law, or an exercise of discretion. Additionally, they submit that the appellant has failed to identify any palpable and overriding error in relation to the determination that Mr. Hardat was ineligible to stand for election as president. Absent a palpable and overriding error, this Court will not intervene.

[26] With regard to the subjective branch of the test—whether the irregularities were calculated to affect the result—the respondents submit that the appellant’s argument is plainly wrong. They argue that the authorities do not require an applicant to show a deliberate attempt to subvert an election result before the Court can order a new election arising from irregularities. Such an interpretation of the cases would produce an absurdity; that those in charge of conducting an election, even if they were negligent or incompetent, could be relieved from doing so in accordance with the *Act* and the Bylaws provided they had no wrongful intent to affect the result.

[27] On irreparable harm, the respondents argue that the appellant cannot rely on the alleged harm to its members as grounds for a stay. In any event, they submit that the current directors and officers will not suffer irreparable harm as they are not precluded from running again, as long as they are eligible.

[28] On the question of mootness, the respondents advance two arguments. First, they submit that holding a new election would not render the appeal entirely moot. The legal issue raised could still be pursued on appeal. If the appeal is granted, the appellant could apply for ancillary relief, including that the new election be declared a nullity. Further, any steps taken by the society in the interim could be reversed. Second, they submit that the merits of the appeal are so low that the question of mootness should be given little weight.

[29] On the balance of convenience, the respondents say they will suffer irreparable harm if the new election does not proceed on March 15, 2024, as ordered. They submit that they represent a large segment of the membership of Cricket BC that has different views about the positions that should be taken at the upcoming Cricket Canada annual general meeting. If the new election is delayed, the respondents (as potential victors in the new election) will have lost the opportunity to be elected in an election conducted in accordance with the *Act* and the Bylaws and would be denied the opportunity to prepare Canada for its participation in the World Cup.

Analysis

[30] I begin my analysis by noting, as stated by Justice Newbury in *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 (Chambers), citing *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333, aff'd [1991] 1 S.C.R. 62, that the three parts of the test on an application for a stay relate to each other and should not be seen as a series of independent hurdles:

[19] ... the three parts of the test are not intended to be separate watertight compartments, but factors that “relate to each other”, such that “strength on one part of the test ought to be permitted to compensate for

weakness on another.” ... Further, [McLachlin J.A. (as she then was)] observed:

The checklist of factors which the courts have developed – relative strength of the case, irreparable harm, and balance of convenience – should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relative to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief.

[31] When I examine the three factors relative to the central issue of risk of harm to the parties, I conclude that it is not in the interests of justice to grant a stay of the new vote pending the appeal; however, I would grant more time for the appellant to prepare for that vote.

Merits of the appeal

[32] On the first consideration of an application for a stay, I am required only to decide whether there is a serious question to be determined. As Justice Harris confirmed in settling an application in a similar dispute relating to the governance of Cricket BC, this is a low threshold: *Delta Patriots Cricket Club v. West Coast Cricket Organization*, 2021 BCCA 281 at para. 24 (Chambers). I need only be satisfied that the issues being raised are neither frivolous nor vexatious. A prolonged examination of the merits is usually neither necessary nor desirable: *Delta Patriots* at para. 24. Here, both parties place considerable reliance on their positions on the merits of the appeal and so it is necessary to examine that issue perhaps more than usual.

[33] First, it is important to note that there is no question that there were numerous irregularities in the November 2023 election. Forty-five votes were cast—22 by way of proxy and eight by way of delegate vote. As the judge found, 13 of the 22 proxy votes were irregular—either granted to ineligible proxies or defective on their face. As delegate votes were not allowed by the Bylaws, all eight of those votes were irregular. In other words, 21 of the 45 votes cast at the election were irregular. As the respondents argue, it is significant that the issue raised by the appellant does not challenge the existence of the irregularities, but rather the judge’s conclusion that the irregularities were “substantive”.

[34] Given the small margins of victory for the winning candidates (ranging from two to seven votes) the judge found that the irregularity in acceptance of the delegate votes was “substantive” (at para. 30) and that the irregularity in the proxy voting was “substantive” (at para. 47). The onus on this branch of the test was on the respondents to show that those irregularities were substantive. The appellant contends that these conclusions amount to inferences that were not available on proven facts. I accept that this is an available argument, but, in light of the significant number of irregularities, it is not strong.

[35] The argument on the second branch of the test has not been advanced directly in any of the cases referred to. It is not entirely clear on the authorities, (*Anderson v. Stewart and Diotte* (1921), 62 D.L.R. 98, 1921 CanLII 412 (N.B.C.A.); *Bector v. Vedic Hindu Cultural Society*, 2014 BCSC 230; *Gill v. Khalsa Diwan Society*, 1999 CanLII 6536 (B.C.S.C.); *Gill; Giesbrecht et al. v. District of Chilliwack* (1982), 18 M.P.L.R. 27 (B.C.S.C.); *Leroux v. Molgat* (1985), 67 B.C.L.R. 29, 1985 CanLII 229 (B.C.S.C.); *Hong v. Young Kwang Presbyterian Church*, 2007 BCSC 502; *Basra v. Shri Guru Ravidass Sabha (Vancouver)*, 2017 BCSC 1696), whether there is a requirement to show that the organization conducting the voting “calculated”—that is, acted with deliberate intent—to subvert the election result before the Court can order a new election arising from irregularities. As I have noted above, the respondents have advanced a contrary argument that there is no requirement on an applicant to show wrongful intent on the part of the association running the election. The respondents stress that at the second stage of the two-part test under s. 105 of the *Act*, the onus has shifted to the organization holding the election, Cricket BC in this case, to show that the irregularities were not calculated to affect the outcome.

[36] I will not consider the merits further except to say that I am satisfied that the appellant’s arguments have sufficient merit to satisfy the relatively low threshold of a serious question to be determined.

[37] Nevertheless, the fact remains that there were numerous uncontested irregularities in the voting in the November 2023 election. This fact is significant when I consider the merits argument in concert with the questions of irreparable harm and balance of convenience.

Irreparable harm

[38] The appellant posits two types of irreparable harm: 1) the time and expense that it will have to incur as a volunteer organization to hold an additional meeting on short notice; and 2) that the appeal will be rendered moot if a new election is held.

[39] I accept that both of these harms can be seen as irreparable in the sense that no order for monetary compensation or other relief is available to compensate the appellant. However, I am of the view that neither should be given much weight. First, the time and expense that will have to be expended for a new election arises, in part, because of Cricket BC's failure, intentional or not, to hold the November 2023 election in accord with its Bylaws and the provisions of the *Act*. Further, all members of the society have been given notice of the new election and will have an opportunity to stand for election for the executive and board positions in accordance with the Bylaws.

[40] Second, if no stay is granted and a new election is held, the appeal is only moot to the extent that the results of the November 2023 vote will be overtaken by the results of the new vote. However, as the respondents argue, the appellant will still be able to pursue the argument, if the division hearing the appeal exercises its discretion to hear it, that the subsequent vote should be declared a nullity if the appeal is successful. Further, the comments of Justice Harris in *Farrish v. Delta Hospice Society*, 2020 BCCA 359 (Chambers), at para. 37, in a similar situation, are apposite here: "it is not apparent to me that any steps taken in the interim that alters the membership or potentially changes the Board could not be reversed".

[41] Further, even if a new election is held, the appellant could choose to pursue—subject to the discretion of the division of the Court that hears the appeal—the legal

issue raised by this appeal: whether the judge applied the correct test in considering ss. 150(1) and (2) of the *Act*. As a result of these considerations, the potential mootness of the appeal carries less weight. In addition, that consideration is, as I have stated, somewhat attenuated by the fact that the irregularities that have given rise to these issues are uncontested.

Balance of convenience

[42] It is at this stage of the analysis that harm to the respondents is considered. I accept that the respondents would suffer harm that is also irreparable in nature. If the ordered election does not proceed, they will have lost the opportunity to secure executive and board positions in an election carried out in accordance with the *Act* and the Bylaws. In turn, they may have lost an opportunity to direct and take part in the management and decision-making process of Cricket BC at a critical time in light of the upcoming Cricket Canada meeting and decisions surrounding the World Cup.

[43] There is another aspect to the balance of convenience that must be weighed. It is very much in the interests of the appellant, as well as the respondents, that the meetings and elections of Cricket BC are conducted properly and on the basis of the Bylaws and the *Act*. I find support for this in Justice Harris’s similar observation in *Delta Patriots* at para. 31. The fact of the numerous uncontested irregularities in the November 2023 election, in my view, must also be weighed in the balance of convenience. In other words, the broad interests of Cricket BC in having its elections conducted properly is important to the overall balancing.

[44] When I consider the three factors in relation to each other, I am of the view that the risk of harm in staying the order is greater than the risk of harm in refusing to grant the requested stay. Accordingly, I deny the application for a stay of the new election pending hearing of the appeal.

[45] However, I am concerned about the difficulties associated with setting up the new election on such short notice. As I have been advised, while notice was given for the March 15, 2024 election, it did not comply with the Bylaws. There is a further difficulty given the attempt by those associated with the respondents (and perhaps

by other members of Cricket BC) to sign up new members before the vote. I accept that the Board, which has discretion to refuse acceptance of any application for membership pursuant to Bylaw 4, will have to be careful in undertaking that task before the next vote. At the same time, I appreciate that it is important that the vote be held in sufficient time that the newly elected executive and board members can prepare for and take part in the upcoming Cricket Canada meeting.

[46] Accordingly, I grant a partial stay of the order such that the new vote that was scheduled to be held on March 15, 2024, will be scheduled to take place on or before March 28, 2024. This should provide Cricket BC with sufficient time to accommodate the various concerns.

[47] In light of the decision I have reached, the parties agree that I need not consider the application for an expedited appeal.

“The Honourable Mr. Justice Butler”