

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Victoria and District Cricket Association v.  
West Coast Cricket Organization,*  
2024 BCSC 65

Date: 20240112  
Docket: S229996  
Registry: Vancouver

Between:

**Victoria and District Cricket Association, and North Vancouver Cricket Club,  
dba North Shore Cricket Club**

Petitioners

And

**West Coast Cricket Organization, and Mr. Amjad Bajwa**

Respondents

Before: The Honourable Justice Shergill

## Reasons for Judgment

### Application to Remove Counsel of Record

Counsel for Petitioners:	J.S. Sheikhupura
Counsel for Respondent, West Coast Cricket Organization:	D. Gautam
Counsel for Respondent, Mr. Amjad Bajwa:	K.S. Sukhija
Place and Dates of Hearing:	Vancouver, B.C. May 17, 2023 July 21, 2023 September 22, 2023
Place and Date of Judgment:	Vancouver, B.C. January 12, 2024

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**I. OVERVIEW**

[1] In this application, the Petitioners seek an order disqualifying Deepak Gautam and Kanwardeep Sukhija, who are counsel of record for the West Coast Cricket Organization (“Cricket BC”) and Mr. Amjad Bajwa (“Mr. Bajwa”), respectively.

[2] Cricket BC is a non-profit society registered under the *Society Act*, R.S.B.C. 1996, c. 433 [1996 *Society Act*].<sup>1</sup> It is the provincial sports organization for cricket in British Columbia and is an affiliate of Cricket Canada. Part of its stated purposes are to promote the development and regulation of cricket throughout BC, and to select teams for competition. Mr. Bajwa was the President of Cricket BC during the relevant period and has also served as Director of Cricket Canada.

[3] In the underlying petition (the “Cricket BC Petition”), the Petitioners, Victoria and District Cricket Association (“VDCA”) and the North Vancouver Cricket Club dba North Shore Cricket Club (“NSCC”) allege that there were irregularities and breaches of Cricket BC’s bylaws and the *Societies Act*, in relation to an election held in November 2022. Further, they say that Cricket BC failed to implement the directions and orders of this court and the Court of Appeal, which were made in a related proceeding. Those Reasons are indexed at *Delta Patriots Cricket Club v. West Coast Cricket Organization*, 2021 BCSC 854 (“*Delta Patriots BCSC No. 1*”), and *Delta Patriots Cricket Club v. West Coast Cricket Organization*, 2021 BCCA 433 (“*Delta Patriots BCCA*”). Consequently, they seek to have the election results set aside and a new election held at which only those members who they say are qualified to vote and stand for nomination are permitted to participate.

[4] This application to remove counsel is based on allegations that both Mr. Gautam and Mr. Sukhija are in disqualifying conflicts of interest. The Respondents deny the allegations and ask that the application be dismissed in its entirety.

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<sup>1</sup> The 1996 *Society Act* was replaced with the *Societies Act*, S.B.C. 2015, c. 18 [*Societies Act*]. There is no dispute that the societies registered under the previous legislation, are now subject to the *Societies Act*.

## **II. ORDERS SOUGHT**

[5] The Petitioners seek the following relief in their notice of application filed April 25, 2023 (the “NOA”):

1. An order disqualifying Mr. Deepak Gautam and Gautam and Associates as counsels for the Petitioner Association;
2. An order disqualifying Mr. Sukhija as counsel for Mr. Amjad Bajwa;
3. An order pursuant to Section 59(1) of the *Societies Act*, directing Mr. Gautam and/or Gautam and Associates to refund any retainer fees paid to the Respondent Organization;
4. The Applicants are [sic] entitled to costs and disbursements in any event of the cause.

(the “Disqualification Application”)

[6] In relation to term 1 of the Disqualification Application, it is evident based on the Petitioners’ submissions that the reference to the “Petitioner Association” is a misnomer and should in fact read “Respondent Organization” (i.e. Cricket BC).

## **III. ADMISSABILITY OF GUPTA AFFIDAVIT**

[7] On the second day of this hearing (which occurred after a two-month break in the proceeding), counsel for the Petitioners (Mr. Sheikhpura) brought an application seeking to have a new affidavit entered into evidence (the “Gupta Affidavit Application”). The application concerned the first affidavit of Sanjiv Gupta which was filed May 30, 2023 (the “Gupta Affidavit”) and sworn May 29, 2023.<sup>2</sup>

[8] Both Respondents object to the admission of the Gupta Affidavit. However, in the event that the Court allows it into evidence, they ask that they be permitted to rely on the third affidavit of Vimal Hardat, made and filed on July 12, 2023 (“Hardat Affidavit #3”). This affidavit was prepared in response to the Gupta Affidavit.

[9] Before I turn to whether the Gupta Affidavit should be admitted into evidence, I will set out a brief chronology of events.

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<sup>2</sup> The Gupta Affidavit purports to have been sworn on May 29, 2022. However, based on the dates referenced in the body of the affidavit, it is evident that it was actually prepared in 2023.

[10] This matter was originally set to be heard on the regular chambers list on May 17, 2023. The time estimate provided by all counsel was “less than two hours”. This time estimate proved to be grossly inadequate. After using up the entire afternoon for his own submissions, Mr. Sheikhpura advised the Court that he would require an additional “10 minutes” to complete his submissions. After discussions with opposing counsel, I directed the parties to set the matter down for a full day for continuation of the hearing.

[11] The parties returned before me on July 21, 2023, at which time Mr. Sheikhpura advised the court that he wished to rely on the Gupta Affidavit. As Mr. Sheikhpura only intended to rely on the Gupta Affidavit during his reply submissions, I agreed to defer the issue of the admissibility of the Gupta Affidavit until after submissions by the Respondents had been completed.

[12] Mr. Sheikhpura took approximately 1.5 hours to complete his remaining submissions. Although the Respondents’ counsels stayed relatively true to their time estimates, given Mr. Sheikhpura’s overuse of time, the matter still did not complete. A further continuation was scheduled.

[13] The parties returned before me on September 22, 2023, to make their submissions on the Gupta Affidavit Application. I reserved judgment on the issue, with reasons on the Gupta Affidavit Application to be provided in conjunction with my reasons on the Disqualification Application.

[14] Counsel agree that the decision to permit late-filed affidavit material is discretionary on the court. However, they disagree on the appropriate test that should be applied.

[15] Rule 8-1(14) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], on which the Petitioners rely, permits the admission of affidavits filed outside the time limits set out in the *Rules*, subject to consent of the parties or court order.

[16] Counsel for the Petitioners submits that the appropriate test to be applied to admit the Gupta Affidavit is set out in *Rosenstein v. Atlantic Engraving Ltd.*, 2002

FCA 503, at para. 8, where the Court held that late-filed affidavits could be admitted into evidence if the following requirements were met: (a) the evidence adduced will serve the interests of justice; (b) the evidence will assist the court; and (c) the evidence will not cause substantial or serious prejudice to the opposing party. I note that at para. 9, the Court adds a fourth element—that the party seeking leave to file the additional affidavit material must show that the evidence sought to be adduced was not available prior to the date on which it was due.

[17] The Respondents characterize this application to adduce additional affidavit evidence as a request to “reopen” the Petitioners’ case. Consequently, they submit that the appropriate test to be applied is that articulated by the Court in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8 at 775, for the admission of evidence that existed at the time of trial but was not presented in court.

[18] The *Palmer* test provides as follows: (a) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases; (b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; (c) the evidence must be credible in the sense that it is reasonably capable of belief; and (d) the evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[19] While conceding that the discretion to admit new evidence is wider on an interim application than on the final order on appeal (see *Can-West Development Ltd. v. Parmar*, 2018 BCSC 1716 at para. 12), the Respondents submit that the general principles laid out in *Palmer* still apply to the circumstances of this case.

[20] I do not agree that the Gupta Affidavit Application is similar to a request to reopen the Petitioners’ case. The Petitioners’ case was still open when the Gupta Affidavit Application was brought, and Mr. Shekhupura had not finished his main submissions on the Disqualification Application. As such, the factors in *Palmer* do not have direct application to this case.

[21] In *First National Financial GP Corporation v. 0734763 B.C. Ltd.*, 2020 BCSC 1349 (“*First National*”), counsel sought to rely on *Palmer* in circumstances where the application to adduce further evidence was brought after submissions were completed but while the matter was under reserve. In rejecting the argument that the *Palmer* test applied, Master Elwood (as he then was), held as follows:

[58] The full *Palmer* test, which is generally applied on appeals, does not apply to evidence which is submitted to the court for consideration while an application such as this is under reserve. That being said, the rule against splitting one’s case applies to applications as well as trials. As a general rule, an applicant should not be permitted to split his or her case by leading evidence by way of a supplementary affidavit which the applicant should have known would be necessary to counter a position advanced during the hearing: *Ulrich v. Ulrich*, 2004 BCSC 95, at para. 42-43 and 45.

[59] Moreover, Rule 8-1(14) prohibits additional affidavit evidence following the deadline for reply affidavits without leave of the court. Although the court has discretion to consider further evidence prior to judgment, that discretion should be exercised sparingly to avoid an injustice: *Ivarson v. Lloyd’s M.J. Oppenheim Attorney In Fact In Canada for Lloyd’s Underwriters et al*, 2002 BCSC 1627 at para. 25; *Muller v. Muller*, 2015 BCSC 370, at para. 15.

[22] I also find that the *Rosenstein* factors relied on by the Petitioners are inadequate to address the unique circumstances of this case. The *Rosenstein* factors are used when the application to rely on late-filed affidavits is brought before the hearing commences. Here, the application was brought once submissions on the main application had already commenced.

[23] None of the counsel were able to locate any authority directly on point, and it is unclear whether such authority exists. However, there exists jurisprudence that provides useful guidance on this issue.

[24] The *Rosenstein* factors relate to the balancing exercise that the court conducts when deciding whether to admit late-filed affidavits prior to the commencement of the hearing. This exercise has sometimes been described as an attempt to strike a balance between the interests of “truth-seeking, fairness, and prejudice”: *Mann-Campbell v. JUUL Labs Canada Ltd.*, 2023 BCSC 2153 at para. 15.

[25] In *Mann-Campbell*, Justice Giaschi was faced with such an application, which was brought prior to the commencement of a certification hearing. In admitting the affidavit into evidence, Justice Giaschi held as follows:

[15] The test to be applied to admit the evidence in a proceeding such as this is flexible. I am to balance the interests of truth-seeking, fairness, and prejudice. The objective is to ensure that each party has a full and fair opportunity to present its case... In [*Tietz v. Affinor Growers Inc.*, 2022 BCCA 307] at para. 71, Justice Willcock observed that "Of all the imperatives in the rules of civil procedure, none carries more weight than the objective of attaining a just result".

[citations omitted]

[26] In *Proctorio, Incorporated v. Linkletter*, 2021 BCSC 1154, (appeal quashed 2022 BCCA 150), the Court considered an application to admit two late affidavits prior to the application hearing. At para. 68, the Court held that whether to admit the additional affidavits "is an exercise of discretion to be exercised sparingly, only in clearly meritorious cases, and where excluding the evidence would result in a substantial injustice". With the exception of admitting one small portion of an affidavit to avoid a "substantial injustice", the Court dismissed the application, largely on the grounds of relevance: para. 97.

[27] In *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 190 at para. 29 the Court noted that relevance of the proposed evidence is the "minimal" requirement for its admission. To exercise discretion to admit the late-filed evidence, the court should consider factors such as necessity and the explanation for the failure to tender the evidence earlier: paras. 31-32.

[28] The jurisprudence leads me to conclude that the exercise of the court's discretion to admit affidavit material filed after a hearing has already commenced, but before the hearing has concluded, requires the court to balance the interests of "truth-seeking, fairness, and prejudice". This balancing exercise should be done having regard to the following non-exhaustive factors:

1. the relevance of the evidence to the issues before the court;



2. the necessity or importance of the evidence to deciding the issues;
3. whether the evidence is reasonably capable of belief;
4. the timing of the application;
5. whether the evidence existed prior to the commencement of the hearing;
6. the explanation for the delay in providing the evidence;
7. whether there is any prejudice to the opposing party by the late admission of the evidence; and
8. whether any prejudice can be mitigated by, for example, permitting the objecting party to file responding affidavits and/or make additional submissions, or the making of a costs award.

[29] I turn now to considering these factors as they relate to this case.

[30] Mr. Gupta is a Director and the Treasurer for Cricket BC, and served in this capacity during the material times. The Gupta Affidavit speaks to three key issues:

1. whether the orders of the Court in *Delta Patriots BCSC No. 1* and *Delta Patriots BCCA* were implemented by Cricket BC at its February 26, 2022 AGM;
2. whether Mr. Gautam's conflict was waived by his client in accordance with the Cricket BC bylaws; and
3. the nature of Mr. Sukhija's conflict of interest, including whether he sought consent from Cricket BC to act as legal counsel for Mr. Bajwa.

[31] I am satisfied that the Gupta Affidavit is relevant to the issues before the Court. In coming to this conclusion, I disagree with Mr. Gautam's assertion that the process for the appointment of counsel has no bearing on the issue of conflict of interest. The Petitioners rely in part on the "bright line rule" and argue that

Mr. Gautam is conflicted because he is acting for clients that are adverse in interest. Consent is a relevant consideration for determining if the “bright line rule” has been breached: *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 at paras. 8-9, 37, 47 (“CNR”).

[32] With respect to the second factor, while the Gupta Affidavit is relevant to the question of the implementation of the earlier court decisions, it is not necessary to determine that issue. There is other evidence before this court, which, if believed, supports the contention that the court orders from *Delta Patriots BCSC No. 1* and *Delta Patriots BCCA* were not implemented by Cricket BC.

[33] However, on the question related to waiver of conflict, Mr. Gupta’s evidence is necessary as there is no other evidence before the court that clearly addresses this concern. Similarly, the Gupta Affidavit is necessary to address the issue of whether Mr. Sukhija is in a disqualifying conflict of interest, given the lack of other evidence.

[34] Turning to the third factor, I am satisfied that Mr. Gupta’s evidence is reasonably capable of belief. While Cricket BC has provided evidence in Hardat Affidavit #3 to contradict some of Mr. Gupta’s assertions, that does not mean that Mr. Gupta’s evidence will not be given weight. Rather, Mr. Hardat’s evidence raises the prospect that the court may prefer his evidence over that of Mr. Gupta. It will be the task of the justice hearing the petition to ultimately determine which version of events will prevail.

[35] The fourth factor concerns the timing of the Gupta Affidavit Application. There is no dispute that the Gupta Affidavit was tendered after the May 17 hearing had already commenced and well after the timelines prescribed in the *Rules*.

[36] In relation to the fifth factor, a distinction must be made between the affidavit which is sought to be put into evidence, versus the events which form the substance of the affidavit. The Gupta Affidavit was not made until May 29, and as such, it can be said that this evidence (in the form of an affidavit) did not exist prior to the commencement of the hearing. However, the events that Mr. Gupta speaks of

occurred well before May 17, and were also within his knowledge prior to that time. Thus, while the physical affidavit did not exist previously, the information to which Mr. Gupta avers, was in existence before the hearing had commenced.

[37] In relation to the sixth factor, no satisfactory explanation was provided for why counsel did not obtain Mr. Gupta's affidavit evidence earlier. It is evident that the impetus for this application to adduce further evidence is an attempt to remedy a perceived deficiency in the Petitioners' case. It is unclear whether this deficiency came to light prior to or after the May 17 hearing date.

[38] I turn now to the seventh question—that of prejudice. A responding affidavit has already been filed by Mr. Hardat on behalf of Cricket BC, and the Petitioners agree that the Respondents should be permitted to rely on it if the Gupta Affidavit is admitted. For his part, Mr. Bajwa does not wish to adduce responding evidence. The parties were also given an opportunity to make fulsome submissions with respect to the late filed evidence, in the event that it is admitted. Consequently, the prejudice in this case is limited to the costs associated with the continuation of the proceeding to hear submissions on the Gupta Affidavit Application. As noted earlier, the hearing on the Disqualification Application could not complete on July 21, 2023, due to lack of time, and the parties had to return in September 2023 to complete submissions on the Gupta Affidavit Application.

[39] Turning then to the eighth and final factor, in my view, the prejudice to the Respondents relating to the costs of having to return on another day to complete submissions, can be adequately addressed through a costs award.

[40] After balancing all of the considerations in this case, and to ensure that the interests of justice and fairness are met, I exercise my discretion to order that the Gupta Affidavit and the Hardat Affidavit #3 be admitted into evidence.

[41] I further order that costs related to the parties' attendance in court on September 22, 2023, including any disbursements incurred by the Respondents

(such as any filing fees associated with the filing of the Hardat Affidavit #3), be payable by the Petitioners to the Respondents in any event of the cause.

[42] In my view, this order admitting the Gupta Affidavit and the Hardat Affidavit #3 into evidence, and compensating the Respondents for their costs associated with the Gupta Affidavit Application, adequately balances the interests of truth-seeking, fairness, and prejudice.

[43] I now turn to the main application before me, starting with the litigation history that precedes the parties' attendance in court on this matter.

#### **IV. LITIGATION HISTORY**

[44] Most of the following background information is uncontroverted. It relates to the timing of key events that are relevant to the Disqualification Application and the underlying Petition. Where the parties have differing views of the facts, I have set those out where relevant.

[45] Given the nature of the allegations of a disqualifying conflict, it is necessary to delve into some detail regarding other litigation that involves some of the same parties or issues that are raised in this Petition. In so doing, I make no findings about the merits of those other proceedings.

[46] It is important to also clarify that any references to the evidence in these Reasons, are made solely for the purposes of determining the matters before me. None of my comments should be taken as binding on the court that will ultimately decide the Petition and will be in a better position to make determinations of credibility and findings of fact.

[47] Further, where I have referred to clubs or societies that are members of another organization, I do so to explain the relationship between the various entities. My comments should not be interpreted to mean that I have made a finding on whether that entity is a legal entity, or whether their membership is valid. Insofar as a

party is challenging the validity of an entity's membership in Cricket BC or another society, that issue will need to be determined at a different time.

**A. Delta Patriots Petitions**

[48] There are two leagues that organize cricket in BC: the VDCA, which is a Petitioner in this proceeding, and the British Columbia Mainland Cricket Association ("BCMCA") of which the Petitioner NSCC is a member. During the relevant times, both the VDCA and BCMCA were league members of the Respondent Cricket BC. The NSCC also has been, or is, a club member in Cricket BC.

[49] The Delta Patriots Cricket Club ("Delta Patriots" or "DPCC") has held membership in the BCMCA. At all material times, Mr. Gautam was a member of Delta Patriots, played with the club, and also acted as their secretary and legal counsel.

[50] Around November 2020, Mr. Gautam in his capacity as legal counsel for Delta Patriots, filed a petition in the New Westminster Registry seeking relief against Cricket BC and the BCMCA, as well as eight other cricket clubs in the lower mainland area (the "First Delta Patriots Petition").<sup>3</sup>

[51] The dispute centred around Delta Patriots' membership status in the BCMCA. It arose in 2019 when Delta Patriots applied to the BCMCA to add a second team to BCMCA's cricket league. According to Delta Patriots, BCMCA declined their application asserting it was not a member in good standing as it had requested and received a refund of its membership fees for 2020, when the cricket season was cancelled due to the Covid-19 pandemic. Shortly thereafter, BCMCA admitted two new clubs and eight new teams. Delta Patriots took issue with this and filed a petition seeking various orders against Cricket BC, BCMCA, and the eight new teams.

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<sup>3</sup> BC Supreme Court File No. 232627, New Westminster Registry.

[52] The First Delta Patriots Petition sought various orders relating to BCMCA’s management, determination of its standing as a member, and postponement of Cricket BC’s annual general meeting (“AGM”).<sup>4</sup> The petition was amended on January 18, 2021, to seek declarations that the bylaws of Cricket BC contravened the *Societies Act*, and that only natural persons or legal entities could be members for voting purposes.

[53] Historically, there were 44 voting members of Cricket BC: 42 individual club members and two league members (the VDCA and BCMCA). The VDCA had 13 cricket clubs that were members, while the BCMCA had 29 member cricket clubs. Each of these 42 cricket clubs and two leagues held membership and exercised voting rights in Cricket BC.

[54] On March 12, 2021, Mr. Gautam appeared before Justice Harvey in Supreme Court chambers in New Westminster, to argue for part of the relief sought in the First Delta Patriots Petition. The remainder of the petition was adjourned generally. Justice Harvey reserved judgement, with written reasons to follow.

[55] On April 6, 2021, a few weeks after submissions had been completed on the preliminary matters raised before Justice Harvey, Mr. Gautam started a second petition (the “Second Delta Patriots Petition”).<sup>5</sup> This too was filed on behalf of Delta Patriots. With the exception of Cricket BC (who was not a party to this second petition proceeding), all of the other Respondents were identical. The relief sought in the Second Delta Patriots Petition was substantially similar to that sought in the First Delta Patriots Petition, with the main difference being that the orders sought were in relation to the bylaws of the BCMCA.

[56] The parties returned before Justice Harvey on April 27, 2021, to argue the remaining issues on the First Delta Patriots Petition. Upon learning of the Second Delta Patriots Petition, Justice Harvey adjourned the hearing, and ordered that the First and Second Delta Patriot Petitions be heard together: *Delta Patriots Cricket*

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<sup>4</sup> See *Delta Patriots BCCA* at paras. 1-2.

<sup>5</sup> BC Supreme Court File No. 237452, New Westminster Registry.

*Club v. West Coast Cricket Organization* (27 April 2021), New Westminster S232627 (B.C.S.C), (unreported), at paras. 1-5. The joint petition hearing was subsequently scheduled for August 2021, before Justice Jenkins.

[57] On May 5, 2021, Justice Harvey issued his written Reasons for Judgment on the preliminary matters raised in the First Delta Patriots Petition. The hearing concerned the following two declarations from paras. 10 and 11 of the First Delta Patriots Petition:

10. A declaration that section 23(2) of the by-laws (“By-Laws”) of [Cricket BC] is *ultra vires* the *Societies Act*, R.S.B.C. 2015, c.18 (“*Societies Act*”) and an order that each members [sic] of [Cricket BC] is entitled to one vote at any meeting of the members of [Cricket BC], including at the annual general meeting.

11. A declaration that only natural persons or legal entities can be the members that are entitled to a vote in the meeting of members of [Cricket BC] including its annual general meeting.

[58] In addition, Delta Patriots sought an order scheduling an AGM at which voting rights would be restricted to members that were natural persons or legal entities: *Delta Patriots BCSC No. 1*, at para. 23.

[59] The central issue before Justice Harvey was the “apparent” conflict between Cricket BC’s bylaws, and the *Societies Act* provisions. Section 84(2) of the *Societies Act* allows a voting member of a society to only exercise one vote. In contrast, pursuant to Bylaw 23(2), a member club can have more than one vote at the meeting of the members of Cricket BC, based on the number of teams represented by that member club. Furthermore, some of the members of Cricket BC were not registered legal entities. Though this was ostensibly permitted under Bylaw 2(a), it was contrary to the *Societies Act* which requires that only persons can be members: *Delta Patriots BCSC No. 1*, at paras. 10-12; *Delta Patriots BCCA*, at paras. 5-8.

[60] At the hearing before Justice Harvey, Cricket BC acknowledged the “apparent conflict” between its bylaws and the *Societies Act*. Nevertheless, Cricket BC argued that Justice Harvey should not grant the declaration sought by Delta Patriots, but should instead direct a general meeting and identify the “members who are entitled

to vote so as to remediate the apparent conflict between the bylaws and the [*Societies Act*].” Essentially, Cricket BC wished members to exercise a vote at the court-ordered AGM, regardless of whether they are persons or not: *Delta Patriots BCSC No. 1*, at paras. 13-14, 21; *Delta Patriots BCCA*, at para. 9.

[61] Justice Harvey did not accede to Cricket BC’s position. He granted the declaration sought by Delta Patriots at para. 10 of the petition, in the following manner:

[33] In my view, granting the proposed declaration can be done by reading down the impugned Bylaw to read, as follows: 23(1) Any member in good standing referred to in By-Law 2(a) herein is entitled to one vote at a meeting of the members. Bylaw 23(2) should be redacted from the Bylaws entirely, for failing to conform to the requirements of s. 84 to of the SA.

[62] Justice Harvey also exercised his discretion under s. 105 of the *Societies Act* and ordered a general meeting or extraordinary general meeting be held within 45 to 90 days of his Reasons, at which only “persons” could vote, and at which each member could cast only one vote. The purpose of the AGM was to conduct the normal business of Cricket BC and to address the issues of membership and the payment of dues: *Delta Patriots BCSC No. 1*, at para. 34.

[63] Cricket BC appealed the orders of Justice Harvey, and the matter was argued on October 22, 2021. On appeal, Cricket BC sought an order that the present “weighted voting system” and other rules would still apply at the court-ordered meeting. It argued that the chambers judge had failed to recognize that the demise of the “balance of power” that had been created by a weighted voting system, would make the society’s operations unworkable: *Delta Patriots BCCA*, at paras. 17, 22.

[64] The Court of Appeal released its decision on November 17, 2021. In dismissing the appeal, the Court noted that it would be unlawful to order a meeting at which bylaws that contravene the *Societies Act* would apply: *Delta Patriots BCCA*, at paras. 22-24.



[65] The Court ordered Cricket BC to hold its general meeting between 60 and 105 days from the date of the Court of Appeal's order: *Delta Patriots BCCA* at para. 25.

[66] On February 16, 2022, Justice Jenkins delivered his Reasons on the joint petition hearing that had preceded before him in August 2021: *Delta Patriots Cricket Club v. British Columbia Mainland Cricket Association*, 2022 BCSC 247 ("*Delta Patriots BCSC No. 2*"). At para. 22(c) of his Reasons, Justice Jenkins made the following substantive order:

Order no. 3, seeking to set aside the resolution dated January 11, 2020 granting membership in the BCMCA to the Chilliwack Cricket Club and the West Mission Strikers Cricket Club is granted, on the basis that the applicants did not have legal status as of January 11, 2020. As well, that portion of the order sought to set aside the resolution allowing six existing clubs, specifically, Surrey United Cricket Club Society, Newton Surrey Cricket Club, Richmond Cricket Club, PakCan Cricket Club Ltd., Surrey Stars Cricket Club and West Vancouver Cricket Club to field one additional team each is granted on the basis that the resolution was contrary to s. 84(2) of the *Societies Act*, which limits each member society to one vote as per the order of Justice Harvey and the Court of Appeal.

[67] Cricket BC held an AGM and election on February 26, 2022 (the "February 2022 AGM"). The election was to fill various executive positions. To maintain staggered elections, some of the executive positions that were up for election were for two-year terms; other positions, such as the President, Second Vice-President, and Treasurer, were set to expire by the next AGM (held in November 2022).

[68] On March 29, 2022, the parties appeared before Justice Jenkins on the Second Delta Patriots Petition. Justice Jenkins made the following order in relation to BCMCA's bylaws:

Sections 11 and 45 of the bylaws of the British Columbia Mainland Cricket Association are *ultra vires* the *Societies Act*, SCBC 2015 c. 18. Only cricket clubs, not teams or playing members, are members of the BCMCA who are each entitled to 1 vote at any meeting including an AGM of the British Columbia Mainland Cricket Association.

[69] On June 13, 2022, Justice Jenkins awarded lump sum costs and disbursements to Delta Patriots, against BCMCA, in the amount of \$11,500 in

relation to the hearing of the First and Second Delta Patriots Petitions (together, the “Delta Patriots Petitions”). It is unclear whether a separate costs award was made against Cricket BC in relation to the First Delta Patriots Petition.

**B. Gautam Petition**

[70] On July 13, 2022, various individuals commenced a petition on behalf of themselves and on behalf of two cricket clubs, against the BCMCA, Harjit Sandhu, and Mr. Gautam (the “Gautam Petition”).<sup>6</sup> Through it, the petitioners sought amongst other things, the following relief against Mr. Gautam, Mr. Sandhu, the BCMCA and/or the BCMCA Management Committee:

1. A temporary injunction against BCMCA Management Committee, and in particular Mr. Sandhu and Mr. Gautam, from imposing Rule 10 of the BCMCA Governing Rules on individual amateur cricketers participating in the BCMCA league and LMS league;
2. Additionally, and alternatively, an Order prohibiting Harjit Sandhu, Deepak Gautam and the BCMCA Management Committee from imposing Rule 10 on individual amateur cricketers participating in the BCMCA league and LMS league;
3. A declaration that Rule 10 of the BCMCA Governing Rules is *ultra vires* the *Societies Act*, S.B.C. 2015, C. 18 (the “Act”);
4. Additionally, and alternatively, a declaration that Rule 10 of the BCMCA Governing Rules is *ultra vires* the by-laws and constitution of the BCMCA;
5. A declaration that the revival of 2019 applications by Harjit Sandhu and Deepak Gautam is *ultra vires* the Act, the BCMCA By-Laws and Constitution and the Governing Rules;
6. Pursuant to s. 104 and 105 of the *Societies Act*, an order directing the BCMCA Management Committee to comply with the Act, the BCMCA By-Laws and Constitution and the Governing Rules;
7. A declaration that the conduct of BCMCA Management Committee, Harjit Sandhu and Deepak Gautam, in the manner in which they have targeted the Petitioners by imposing Rule 10 on individual amateur cricketers and thereby prohibited them from participating in LMS league, is oppressive to the Petitioners contrary to s. 102(1)(a) of the *Societies Act* and unfairly prejudicial to the Petitioners contrary to s. 102(1)(b) of the *Societies Act*.

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<sup>6</sup> BC Supreme Court File No. S225670, Vancouver Registry. The Petitioners are Redowan-UI-Islam Chowdhury, M. Emrul Hasan and M. Emrul Hasan Inc. DBA Last Man Stands Canada, Bhavjit Jauhar on behalf [of] himself as an individual cricket player and on behalf of, North Vancouver Cricket Club, DBA North Shore Cricket Club.

8. An order compensating the Petitioners for the losses suffered as a result of the oppressive and unfairly prejudicial conduct of the BCMCA Management Committee, Harjit Sandhu and Deepak Gautam;
9. Costs of this Petition;
10. Special Costs; and
11. Such further and other relief as this court deems just.

[71] The petitioners in the Gautam Petition amended the pleading on September 16, 2022. The amended pleading removed orders 1, 2, 5, 7, 8, and 10, above, such that it no longer sought any relief directly against Mr. Gautam or Mr. Sandhu. In addition, a new term 7 was added seeking an order for “damages to be assessed”.

[72] Concerns about Mr. Gautam’s conduct raised in the Gautam Petition relate in part to alleged actions taken by Mr. Gautam in his role as the Chair of the Protest and Discipline Committee for the league operated by the BCMCA, i.e. the BC Mainland Cricket League (“BCMCL”). In addition to being named as a party to this litigation, there is some evidence that Mr. Gautam briefly acted for his co-Respondent Harjit Sandhu.<sup>7</sup>

[73] No steps appear to have been taken in the Gautam Petition since the fall of 2022.

### **C. BCMCA Petition**

[74] On October 28, 2022, NSCC filed a petition against BCMCA (the “BCMCA Petition”).<sup>8</sup> The petition sought various forms of relief including:

1. an injunction cancelling elections that were scheduled for November 1, 2020 [sic];
2. a declaration that a monetary penalty and suspension imposed on the Petitioner are invalid and contravene the *Societies Act* and BCMCA bylaws;

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<sup>7</sup> Affidavit #2 of Bhavjit Jauhar, made March 2, 2023, at para. 10.

<sup>8</sup> BC Supreme Court File No. S228719, Vancouver Registry.

3. alternatively, a declaration that the continued invalidation of nominations of three members of the Petitioner contravene the *Societies Act*;
4. a declaration that Mr. Sukhija's nomination is invalid as he had previously withdrawn his nomination; and
5. a declaration that nominations received from Delta Patriots (including Mr. Gautam's nomination) were invalid as Delta Patriots was not a member in good standing due to the ramifications of orders pronounced by Justice Jenkins on February 16 and March 29, 2022, in *Delta Patriots BCSC No. 2*.

[75] The BCMCA election proceeded in November 2022, and Mr. Gautam was elected to the position of First Vice-President of the BCMCA and Chair of the Protest and Discipline Committee of BCMCL.

[76] On January 4, 2023, Mr. Gautam filed a response to the BCMCA Petition on behalf of BCMCA, resisting all relief sought against it.

[77] On February 16, 2023, the petition was amended and the relief sought was revised such that rather than seeking an interim injunction for the election which had already occurred, the petitioner now sought to have the BCMCA November 2022 election results set aside.

[78] On February 22, 2023, NSCC filed an application in the BCMCA Petition seeking to disqualify Mr. Gautam and his law firm as counsel for BCMCA. It was argued that Mr. Gautam was in a disqualifying conflict of interest since the petition raised allegations about Mr. Gautam's conduct in his role as Chair of the BCMCL Protest and Discipline Committee, and as Director and Vice-President of the BCMCA.

[79] On February 24, 2023, Mr. Gautam sent an e-mail advising Mr. Sheikhpura (who was acting for NSCC in the BCMCA Petition) that he was voluntarily

withdrawing as counsel in “light of the allegations made in [the] amended petition.... regarding conduct of the election of BCMCA in which I was a candidate”.

[80] The BCMCA Petition has not yet been set down for hearing.

**D. Cricket BC Petition**

[81] Cricket BC held an AGM and election on November 5, 2022 (the “November 2022 AGM” and the “Election” respectively), at which the current executive was elected. Elections were held for the positions of President; Vice-President; Treasurer; Junior Cricket Coordinator; and two Members at Large.

[82] The Cricket BC Petition was filed by VDCA and NSCC on December 15, 2022. This is the petition underlying this application. In it, the Petitioners allege the following:

1. The Election process was mismanaged, causing the Election to be unfair and biased.
2. Cricket BC failed to address or remedy the irregularities regarding membership that were noted in the earlier court decisions arising from the First Delta Patriots Petition. Specifically, Cricket BC has never held a general meeting (as directed by Justice Harvey and the Court of Appeal) to address issues of membership and payment of dues.
3. BCMCA and the VDCA<sup>9</sup> are not members in good standing with Cricket BC, as they have not paid annual membership dues to Cricket BC as required by Cricket BC’s bylaws. Consequently, they were not entitled to vote at either the February 2022 AGM or the November 2022 AGM or related elections.

[83] They seek the following substantive relief as summarized from the Petition:

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<sup>9</sup> See para 26 of Mr. Jauhar affidavit #2.

1. An order setting aside the results of the Election.
2. An order directing Cricket BC to produce all membership records relating to member clubs and member leagues.
3. A declaration that Cricket BC and Mr. Bajwa acted oppressively and in an unfairly prejudicial manner to the Petitioners, in ignoring irregularities during the Election, and permitting unverified clubs and unverified individuals to be nominated and to vote and participate in the Election.
4. An order directing Cricket BC to comply with the orders and directions of Justice Harvey and the Court of Appeal relating to issues of membership and dues.
5. An order directing Cricket BC to bring itself in compliance with the *Societies Act*, its own bylaws, its Constitution, and Cricket Canada's bylaws.
6. An order prohibiting "unelected individuals like Mr. Bajwa" from participating in the internal affairs of Cricket BC for a stipulated period of time.
7. An order directing Cricket BC to resolve the irregularities in compliance with the *Societies Act*, its bylaws, its Constitution, and Cricket Canada's bylaws, within a stipulated timeline.
8. An order directing Cricket BC to call for fresh nominations, and upon verification and identification, to call for fresh elections.

[84] The Cricket BC Petition raises the following concerns with respect to how the Election was conducted:

1. During the AGM/Election, the member and voter registration desk was being managed by Mr. Bajwa, who was the President of Cricket BC. Mr. Bajwa failed to conduct a verification or ID check in order to ensure

that the correct and duly authorized official from the member club was present to vote. The verification identification process is important because the 43 voting club members of Cricket BC consist of at least 90 management executives, and over 1,600 players or members.

2. A number of clubs that were permitted to vote, were not legally entitled to do so. Despite the fact that the notice for the AGM required all clubs to be registered societies in order to vote, some of the clubs did not meet this criteria. For example, some of the clubs which were permitted to vote were corporations and not registered societies; some clubs were community groups; and at least one member club had inactive legal status.
3. In some cases, individuals were permitted to vote on behalf of a member club, even though they had not been formally authorized by that club to vote on its behalf.
4. Mr. Bajwa and Cricket BC arbitrarily made decisions to favour particular persons who were standing for election, which severely compromised the integrity of the election process. Consequently, the Election was unfair and biased.
5. Mr. Gautam acted as a Scrutineer during the Election. Concerns about the irregularities in the election process were brought to Mr. Gautam's attention by the President of the VDCA, but Mr. Gautam failed to address them.

[85] On January 10, 2023, the Petitioners filed an application seeking, amongst other things, an interim injunction staying the results of the Election and all subsequent resolutions passed by the current management committee (the "Stay Application").

[86] Mr. Gautam was retained by Cricket BC in this matter, around January 16, 2023. Mr. Sukhija was retained sometime around January 26, 2023.

[87] The parties appeared before Justice Wilkinson on January 23, 2023, at which time Cricket BC's request for an adjournment of the Stay Application was granted. Though Mr. Gautam appeared on behalf of Cricket BC at this proceeding before Justice Wilkinson, neither his client nor Mr. Bajwa had yet filed a response to the Cricket BC Petition. The parties were directed to set the Stay Application for hearing during the week of February 20, 2023, or sooner, depending on counsel availability.

[88] Mr. Gautam filed his Response to Petition on behalf of Cricket BC, on February 21, 2023. Mr. Sukhija filed his Response to Petition on behalf of Mr. Bajwa, on February 27, 2023.

[89] In its Response to Petition, Cricket BC denies there were any irregularities during the Election process. Further, it asserts that the issues raised by Justice Harvey, and the Court of Appeal in the First Delta Patriots Petition, were addressed in an AGM held on February 26, 2022. In his Response to Petition, Mr. Bajwa denies all allegations and asserts that the Petitioners' allegations lack particulars and evidence.

[90] The Disqualification Application was filed on April 25, 2023, seeking removal of Mr. Gautam and Mr. Sukhija. It came for hearing before me on May 17, 2023. Due to gross underestimates of time, the matter had to be continued for a full day on July 21, and another half day on September 22, 2023, before it finally completed.

**V. SHOULD MR. GAUTAM AND HIS LAW FIRM BE DISQUALIFIED AS COUNSEL FOR CRICKET BC?**

[91] The Petitioners argue that Mr. Gautam's multiple legal and professional roles in various cricket organizations in BC, and his direct participation in the impugned Election, create disqualifying conflicts of interest which require his removal.

[92] There are three main allegations advanced against Mr. Gautam, each of which the Petitioners say result in a disqualifying conflict:

1. Mr. Gautam's involvement as counsel against Cricket BC and BCMCA in the Delta Patriots' petitions;



2. Mr. Gautam's involvement in the impugned Election as a Scrutineer; and
3. Mr. Gautam's involvement at the executive level in various cricket organizations.

[93] During the relevant times, Mr. Gautam was:

1. Legal counsel for Delta Patriots *against* Cricket BC and BCMCA, in the Delta Patriots' Petitions. Mr. Gautam obtained orders and directions against both Cricket BC and the BCMCA in the First Delta Patriots Petition. As NSCC and the VDCA are both members of BCMCA, compliance with the Court orders by Cricket BC is a live issue in the present Cricket BC Petition.
2. Legal counsel *for* Cricket BC in this Cricket BC Petition brought by NSCC and VDCA. Both these societies are members of Cricket BC. NSCC is also a member of the BCMCA, which in turn is a member of Cricket BC. Mr. Gautam is taking the position in this litigation that the court order in the First Delta Patriots Petition has been complied with.
3. Election Scrutineer for the impugned Cricket BC Election. It is alleged in the present petition that concerns regarding the conduct of the Election were brought directly to Mr. Gautam in his capacity as Scrutineer.
4. Club member/player, Secretary, and legal counsel for Delta Patriots, which plays in the BCMCL, and is a member of the BCMCA and Cricket BC.
5. Past legal counsel for BCMCA in the BCMCA Petition commenced by NSCC. Delta Patriots' membership in BCMCA and its entitlement to field candidates in BCMCA elections (including the candidacy of Mr. Gautam) are at issue in that petition. Mr. Gautam removed himself as counsel for the BCMCA following the filing of an application by NSCC to have him removed due to a disqualifying conflict of interest.

6. Respondent in the Gautam Petition, where actions taken by him in his official capacity with the BCMCA are at issue.
7. First Vice-President of the BCMCA since February 2022, and member of the Management Committee of BCMCA.
8. Chair of the Protest and Discipline Committee of the BCMCL. NSCC plays in the BCMCL. Mr. Gautam's actions in his role as Chair of the Protest and Discipline Committee are in issue in the BCMCA Petition.

[94] According to the Petitioners, as a result of these various positions, Mr. Gautam has conflicting duties to his clients and to the court. Further, there is a potential that he will testify as a witness in this proceeding. Consequently, he is disqualified from acting as counsel for Cricket BC in this litigation.

[95] Cricket BC submits that this application is wholly without merit and brought for tactical reasons. It is Cricket BC's position that a disqualifying conflict of interest has not been established. Further, if it is required to replace Mr. Gautam, it will be at a significant cost to the society, as another lawyer will not possess Mr. Gautam's unique knowledge, and will need to spend time and resources understanding the issues in this case. Consequently, Cricket BC's right to counsel of choice should not be interfered with.

#### **A. Legal Framework**

[96] The source of the court's power to remove counsel of record arises from its inherent jurisdiction to control the litigation process. The Supreme Court of Canada in *CNR*, explained it as follows:

[13] Courts of inherent jurisdiction have supervisory power over litigation brought before them. Lawyers are officers of the court and are bound to conduct their business as the court directs. When issues arise as to whether a lawyer may act for a particular client in litigation, it falls to the court to resolve those issues. The courts' purpose in exercising their supervisory powers over lawyers has traditionally been to protect clients from prejudice and to preserve the repute of the administration of justice, not to discipline or punish lawyers.

[97] It is well established that the client’s right to counsel of choice in civil matters is an important principle that must be safeguarded. Consequently, the court is required to exercise a high degree of restraint before it interferes with this choice: *Kaiser (Re)*, 2011 ONCA 713 at para. 21.

[98] The right to counsel of choice should only be impinged on “when some real and identifiable public interest intervenes that such a relationship must yield under an impropriety or ‘appearance of impropriety’ concern”: *Alberta Treasury Branches v. Leahy*, 1998 ABCA 286 at para. 5.

[99] The decision to remove counsel requires a balancing of competing values – the client’s right to choose their own counsel versus maintaining the high repute of the legal profession and the administration of justice.

[100] The court must ask whether a fair-minded and reasonably informed member of the public would conclude that the proper administration of justice requires the removal of the solicitor: *Beacon Hill Service (2000) Limited v. Esso Petroleum Canada*, 2011 ABQB 138 (“*Beacon Hill ABQB*”) at para. 35, aff’d 2012 ABCA 269 (“*Beacon Hill ABCA*”).

[101] The balancing of interests is rooted in the particular facts of the case and must be based on the “realities of the situation”: *Beacon Hill ABCA*, at para. 3.

[102] Removal of counsel of choice is an extreme remedy and should only be granted in the clearest of circumstances: *Antongiovanni v. Phung*, [2001] O.J. No. 4569, 20 C.P.C. (5th) 77 at para. 58.

[103] The decision to remove counsel of choice can arise when a lawyer’s duty to the client or to the court are compromised.

[104] A lawyer has a duty of loyalty to their client and is obliged to act in their client’s best interests: *CNR* at para. 19.

[105] In *CNR*, the Supreme Court of Canada confirmed the bright line rule which was set out in *R. v. Neil*, 2002 SCC 70. The bright line rule provides that a lawyer

(and law firm by extension) cannot concurrently represent clients adverse in interest without first obtaining their consent: *CNR* at para. 8. The bright line rule is based on the “inescapable” conflict of interest inherent in some situations of concurrent representation, and reflects the essence of the fiduciary’s duty of loyalty: *CNR* at para. 31. A breach of the bright line rule normally attracts the remedy of disqualification: *CNR* at para. 11.

[106] The lawyer’s duty of loyalty to the client is beyond merely avoiding conflicts of interest. In *Neil* at para. 16, the Supreme Court of Canada held that the “duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship.” In defining the duty of loyalty, the court stated:

[16] ...The lawyer fulfills squarely Professor Donovan Waters’ definition of a fiduciary:

In putting together words to describe a “fiduciary” there is of course no immediate obstacle. Almost everybody would say that it is a person in whom trust and confidence is placed by another on whose behalf the fiduciary is to act. The other (the beneficiary) is entitled to expect that the fiduciary will be concerned solely for the beneficiary’s interests, never the fiduciary’s own. The “relationship” must be the dependence or reliance of the beneficiary upon the fiduciary..

(D. W. M. Waters, “The Development of Fiduciary Obligations”, in R. Johnson et al., eds., *Gérard V. La Forest at the Supreme Court of Canada, 1985-1997* (2000), 81, at p. 83).

...

[107] In *Kamloops-Cariboo Regional Immigrants Society v. Herman*, 2015 BCSC 886, the court said the following about fiduciary relationships:

[133] At the core of a fiduciary relationship is the idea of “exercising a discretion that affects another, and the expectation that this will be done in that other’s best interests”: *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2009 BCCA 34 at para. 57.

[134] In *Schlenker v. Torgrimson*, 2013 BCCA 9, Donald J.A. for the Court of Appeal noted that there is “little difference in the duties of a director of a business corporation and a society” (at para. 44)...

[108] The duty of loyalty includes a duty of commitment to the client’s cause throughout the action: *Neil* at para. 19.

[109] However, commitment to the client’s cause cannot blind a lawyer from fulfilling their duties to the court, which include candour, objectivity, and detachment.

[110] A concern arises when there is a conflict of interest between a lawyer’s “obligation of objectivity and detachment, which are owed to the court, and his obligations to his client to present evidence in as favourable a light as possible”: *Hazelwood v. Schlotter*, 2022 ABKB 739 at para. 60, citing *Urquhart v. Allen Estate*, [1999] O.J. No. 4816, 93 A.C.W.S. (3d) 753 (S.C.) at para 27.

[111] This need to balance the dual duties is further affirmed in the *BC Code of Professional Conduct*, B.C. Reg 205/98 [*Code*]. Though not binding on the court, the provisions in the *Code* have persuasive value: *Rice v. Smith et al.*, 2013 ONSC 1200, at para. 17.

[112] The following provisions from the *Code* articulate the lawyer’s duties to the client and the court:

2.1-2(c) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused’s guilt or innocence, in the justice or merits of the client’s cause or in the evidence tendered before the court.

...

2.2-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

...

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

...

5.1-2 When acting as an advocate, a lawyer must not:

...

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

[113] The conflict between the lawyer's duty to the court and to the client, is a conflict that cannot be waived by the client, because it arises between counsel and the court/justice system: *Hazelwood* at para 27.

**B. Purpose of the Application**

[114] Cricket BC argues that this Disqualification Application is brought for tactical rather than bona fide reasons. It is designed to make Cricket BC expend valuable resources in retaining new counsel, and to delay these proceedings. I do not agree.

[115] First, I note that there are merits to the underlying petition. Second, it is speculative to conclude that because the Petitioners had filed the Stay Application, which was adjourned at the Respondent's request, the issue of conflict of interest would have fallen to the wayside.

[116] Third, even if the Petitioners did not bring this Disqualification Application, there is a real likelihood that the court would have raised the issue on its own motion, as was done in *Hazelwood*: para. 2.

[117] Fourth, there is evidence that the Petitioners successfully sought the removal of Mr. Gautam in the BCMCA Petition. That application to remove Mr. Gautam was filed around the same time as the events in this case were unfolding. In the BCMCA Petition proceeding, Mr. Gautam agreed that he was in a conflict of interest, and removed himself voluntarily after the application to have him removed was served. In that context, it is reasonable to infer that the Petitioners brought this Disqualification Application because they believed their position in this proceeding would also prevail.

[118] I also do not agree with Cricket BC that the timing of the Disqualification Application suggests that it was brought for tactical reasons.

[119] There is no dispute that the timing of the application to disqualify counsel may be relevant to determining whether it has been brought for tactical reasons. If, after learning of the conflict, the applicant waits several months before seeking a

disqualification order, they must rebut the inference that the disqualification has been brought for tactical reasons. A failure to rebut that inference supports a finding of waiver on the part of the applicant: *Frey v. Bank of Montreal and Dresler*, 2002 NBCA 69, at para. 94.

[120] The Respondents submit that the application was brought after a delay of four months since the commencement of the proceeding, and more than three months after the Petitioners' failed attempt to have their interim application for a stay heard. However, that summary overlooks some key events that transpired. The evidence indicates that within hours of learning that Mr. Gautam was going to act for Cricket BC, Mr. Sheikhpura e-mailed Mr. Gautam on January 11, 2023 and raised concerns about a conflict of interest. The grounds advanced in the e-mail objection were substantively the same as in this application.

[121] In the ensuing weeks after Mr. Gautam learned of the Petitioner's concerns of a disqualifying conflict, the parties had communications about when the proposed application should be heard. Around March 7, 2023, Mr. Sheikhpura served an unfiled copy of an application seeking disqualification of counsel in this matter, and sought dates for the application to be heard. Due to limited counsel availability the parties were not able to agree on any dates prior to May 2023.

[122] Thus, while the Disqualification Application was filed on April 25, 2023, there were concrete steps taken well before that time. Having regard to these circumstances, I do not find that there was an inordinate delay in bringing this Disqualification Application.

[123] In conclusion, I find no basis to support the assertion that the Disqualification Application was brought for tactical reasons.

[124] I turn now to the allegations of a disqualifying conflict.

**C. Conflicting Duties to Clients**

[125] The Petitioners say that Mr. Gautam is representing two clients that are adverse in interest: the Delta Patriots and Cricket BC. In the Delta Patriots Petitions, Mr. Gautam represents his own club, the Delta Patriots, in actions against Cricket BC and the BCMCA. However, in the petition at bar, he is acting on behalf of Cricket BC in a matter where implementation of the court's decision in the Delta Patriots petition is at issue. It is submitted that these circumstances give rise to the bright line rule, which requires Mr. Gautam to obtain the consent of both his clients, prior to representing parties adverse in interest.

[126] The court in *CNR* articulated at para. 41, the following additional principles which apply in relation to the bright line rule:

1. The rule cannot be rebutted or attenuated.
2. The rule applies to concurrent representation in both related and unrelated matters.
3. The rule is of limited scope, and applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting.
4. It applies only to legal interests, as opposed to commercial or strategic interests.
5. It cannot be raised tactically.
6. It does not apply to circumstances where it is unreasonable for a client to expect that a law firm will not act against it in unrelated matters.
7. In circumstances where the bright line rule does not apply, the court should ask whether concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would be



materially and adversely affected by that lawyer's own interests or by their duties to another current client, former client, or third person.

[127] The bright line rule does not directly apply in this case. Mr. Gautam is not and has not acted for the Petitioners in any court proceeding; the Delta Patriots are not a party to the Cricket BC Petition; and there is no evidence that the Delta Patriots are opposed to Mr. Gautam acting on behalf of Cricket BC in the matter before me.

[128] In circumstances such as these, where the bright line rule does not apply, I must also inquire into whether Mr. Gautam's concurrent representation of Delta Patriots in the Delta Patriots Petitions, and Cricket BC in the within petition, creates a substantial risk that his representation of Cricket BC in this litigation will be materially and adversely affected by his duties to the Delta Patriots. This involves a contextual analysis: *CNR* at para. 38.

[129] There is an insufficient basis at this time for me to conclude that Mr. Gautam's representation of Cricket BC will be materially and adversely affected by his duties to the Delta Patriots. It is not unusual for members of a society to take legal action against the society to effect some change. In this case, the Delta Patriots commenced a petition against Cricket BC and the BCMCA to remedy what they viewed was a legal transgression. Cricket BC lost in *Delta Patriots BCSC No. 1* and appealed the matter. Cricket BC was unsuccessful before the Court of Appeal, and did not seek to challenge the decision further.

[130] The Delta Patriots Petitions litigation ended with the final costs ruling made by Justice Jenkins. Following the conclusion of the Delta Patriots Petitions, Mr. Gautam's interests, both as a member of the Delta Patriots executive and as its legal counsel, are not necessarily any longer at odds with Cricket BC.

[131] It is in both Delta Patriots and Cricket BC's interests to ensure that the court's ruling in *Delta Patriots BCCA* is complied with. To that end, there is no indication that Cricket BC is taking any legal action to avoid implementation of the court's rulings in the Delta Patriots Petitions. To the contrary, it asserts in this litigation that its

obligations under the Delta Patriots Petitions have been complied with. While I appreciate that the VDCA and NSCC may disagree with that assertion, that does not mean that Delta Patriots and Cricket BC remain adverse in interest.

[132] Further, and most importantly, there is no indication that Delta Patriots oppose Mr. Gautam's representation of Cricket BC in this litigation. As noted by the court in *Hazelwood* at paras. 54-55, there is a strong presumption that a lawyer is acting in accordance with a client's instructions. The Petitioners have not tendered sufficient evidence to overcome this presumption.

**D. Self-Interest and Duty to the Client**

[133] I turn next to allegations regarding Mr. Gautam's self-interest and its potential impact on his duty to his client Cricket BC. This concern arises within the context of Mr. Gautam's role as a Scrutineer in the Election.

[134] Mr. Alphonso Franco is the President of the VDCA. He has previously served as Vice-President of Cricket BC and was also a member of Cricket BC's Bylaw's Committee. In his first affidavit filed December 15, 2022, Mr. Franco places Mr. Gautam squarely in the events that unfolded on November 5, 2022 during the Election. In particular, Mr. Franco avers that:

1. At the Election, club members objected to the voting eligibility of a representative of an inactive club member, Windies Sports and Cultural Association ("Windies"). Mr. Franco brought the objection to Mr. Gautam. At Mr. Bajwa's direction, Mr. Gautam, as Scrutineer, proceeded with the Election despite the objection.
2. Mr. Gautam was Scrutineer and also presided at the elections. He had full knowledge of the legal requirements for voting eligibility, including valid registration, and the judgment of *Delta Patriots BCSC No. 1* due to his roles with the Delta Patriots.

3. At the Election, certain individuals attempted to vote on behalf of Islanders Cricket Club and Alcos Cricket Club, but other members objected alleging they were not properly authorized to vote. Mr. Gautam overlooked the objections and allowed the votes.
4. Mr. Gautam arbitrarily asked ineligible voters to sign-in as members and vote, in order to benefit certain candidates.

[135] Mr. Gautam has not provided any affidavit evidence to refute the statements made by Mr. Franco. It is this decision that gives rise to concerns about his ability to meet the needs of his client over his own self-interests.

[136] Mr. Gautam correctly notes that Cricket BC is not obliged to file affidavits to refute all of the evidence tendered by the Petitioners. It is of course Cricket BC's prerogative to decide whether to challenge any of the evidence relied on by the Petitioners. However, where the evidence potentially goes to a material issue, failure to provide a responding affidavit may have a material and adverse impact on the client's interests.

[137] To that end, I disagree with Mr. Gautam that the allegations made by Mr. Franco regarding Mr. Gautam's conduct, have no bearing on the issues raised in the Cricket BC Petition. The Petitioners challenge the fairness of the election process, and the impartiality of the persons who conducted the Election on behalf of Cricket BC or assisted in the Election process. This includes actions taken by Mr. Gautam while he was an Election Scrutineer. The Respondents' affiants, Mr. Hardat and Mr. Bajwa, in their first affidavits filed February 21, 2023, attempt to narrow Mr. Gautam's role as Scrutineer. However, even if the role was narrowly prescribed, this does not mean that the Mr. Gautam did not do what Mr. Franco alleges him to have done; nor does it mean that Mr. Gautam's actions could not have impacted the fairness of the Election process. Mr. Franco's evidence about actions taken by Mr. Gautam (or not taken by him), when considered within the context of the entire Election process and the allegations advanced in the Petition, may have a material impact on the outcome of the Petition.

[138] There is also no basis for me to conclude that Mr. Franco's evidence will be rejected outright or that it lacks credibility. I accept that there is an anomaly in Mr. Franco's affidavit arising from the fact that an exhibit attached to his affidavit appears to have been created a few weeks after the affidavit was ostensibly sworn. This anomaly may ultimately need to be explained before the judge hearing the underlying petition. For my purposes, this anomaly does not diminish the veracity of Mr. Franco's uncontroverted evidence regarding his interactions with Mr. Gautam on the day of the Election.

[139] While it remains to be seen how much weight the judge presiding over the petition will place on Mr. Franco's affidavit, I have no difficulty in concluding that Mr. Franco's evidence regarding his interactions with Mr. Gautam is reasonably capable of belief.

[140] Where then does this leave Mr. Gautam and his client?

[141] The Court noted the following in *Hazelwood*:

[48] The prejudice of concern in this instance is the risk that "the lawyer 'soft peddles' his representation of a client in order to serve his own interests": *CNR* at para 23. With respect to a current client, the lawyer must not place themselves "in a situation that jeopardizes effective representation": *CNR* at para 23. A lawyer must be a zealous advocate for their client's interests: *CNR* at para 25. Effective representation is threatened where the lawyer is tempted to prefer their own interests over those of their client: *CNR* at para 26.

[142] In his submissions, Mr. Gautam stated that it was "good" for the Petitioners if he did not provide any affidavit refuting Mr. Franco's allegations, as it left Mr. Franco's evidence uncontroverted. The corollary to that is that the absence of an affidavit from Mr. Gautam may in fact be "bad" for his client as it would prevent the client from challenging Mr. Franco's version of events.

[143] On account of Mr. Franco's evidence, and the allegations advanced in the Petition, Mr. Gautam has found himself in a "dilemma" which cannot be easily resolved by simply deciding not to provide his own affidavit.

[144] Mr. Gautam does not deny that he was present as a Scrutineer in the Election. While the court may ultimately agree with Mr. Gautam that his actions as a Scrutineer have little bearing on the issues before it, there is a real risk that it may take the opposite view. It is difficult to imagine how Mr. Gautam will be able to disprove Mr. Franco's assertions in that happenstance, without providing his own affidavit evidence in response. Prudence would dictate that counsel take steps to avoid such a situation and ensure that the client's interests are not compromised.

[145] In relation to conflicts of interest and duty to the client, the *Code* provides as follows:

1. "Conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person: Rule 1.1-1;
2. "A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code": Rule 3.4-1;
3. "...Effective representation may be threatened where a lawyer is tempted to prefer other interests over those of his or her own client [including]... the lawyer's own interests...": Rule 3.4-1, Commentary [3];
4. "...[A] close personal relationship... may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client.": Rule 3.4-1, Commentary [11][d].

[146] The fact that Mr. Gautam has chosen not to provide his own affidavit evidence, leaves open the very real possibility that he is not acting with objectivity or detachment, but rather in self-interest. By not providing an affidavit on a matter that may be material to the ultimate question, Mr. Gautam may be able to advance his own interests by distancing himself from the events in question and retaining his client. However, these considerations (even if they arise sub-consciously) directly

conflict with his duty of undivided loyalty to the client, who may otherwise benefit from Mr. Gautam's affidavit.

[147] It is possible that Mr. Gautam not providing an affidavit to refute Mr. Franco's allegations, ultimately serves Cricket BC's interests. However, the opposite may also be true. The only way in which the court will have confidence that the client's interests have not been compromised, is if the decision of whether Mr. Gautam should provide an affidavit is made by a lawyer who can approach the matter with objectivity and detachment.

**E. Duty to the Court**

[148] Objectivity and detachment also feature heavily in the lawyer's duty to the court.

[149] The Petitioners argue that there were irregularities in the Election process which impact the validity of the Election results. They say that Mr. Gautam was a witness to or participated in those irregularities, and may be motivated by self-interest not to be forthcoming with the court.

[150] For the following reasons, I agree with the Petitioners that Mr. Gautam is compromised in his ability to fulfill his duties to the court, by continuing to act for Cricket BC in this litigation.

[151] First, there is a real possibility that Mr. Gautam may be motivated by his own self-interest to not disclose evidence relating to his actions as a Scrutineer. This could arise out of a desire either to protect his client, or to protect himself and his professional reputation. While minimizing his involvement in the Election may align with the needs of his client to support Cricket BC's contention that there were no irregularities in the election process, it may impair Mr. Gautam's ability to be candid with the court.

[152] Second, the Petitioners allege that Windies was a club with inactive status that was permitted to vote in the Election on the strength of its purported

membership in the BCMCA. As indicated elsewhere, Mr. Gautam was elected as Vice-President of the BCMCA in early 2022 and was serving in that capacity at the time of the Election. While the interests of the BCMCA may be aligned with Cricket BC, Mr. Gautam's duty to the court requires him to be forthcoming regarding any evidence about the membership status of Windies, and its entitlement to vote in the Election at which he was a Scrutineer. There is a real prospect that he may be compromised in his ability to fulfil that duty by virtue of his position with the BCMCA.

[153] Third, even if Mr. Gautam believes that he did not do anything improper, he may be reticent to disclose anything that could be seized on by the Petitioners. This is particularly of concern since there are other lawsuits pending related to some of the same parties, including Mr. Gautam. In that regard, there is evidence that Mr. Gautam has already been named personally in the Gautam Petition, in which the Delta Patriots nomination of him to the BCMCA is being challenged. Given the myriad of litigation surrounding these cricket societies, there is a real possibility that Mr. Gautam may be motivated to minimize his involvement in the Election so as to avoid the prospect of further litigation being commenced against him.

[154] Fourth, there is some evidence that Mr. Gautam may already have fallen short on his duty of candour in relation to the Gautam litigation. While Mr. Gautam disclosed to this Court the existence of the Gautam Petition, he did not disclose that he was named as a party to that petition, nor did he provide a copy of that pleading in any of the material filed before the court. The Affidavit #1 of Mr. Bajwa, filed February 21, 2023, refers at para. 32 to the existence of the BCMCA Petition and the Gautam Petition. While a copy of the BCMCA Petition is attached to it as an exhibit, the Gautam Petition is not attached. Rather, the Court is directed to the affidavit of S. Bajwa sworn January 20, 2023. This affidavit was not included in the application record, nor was it filed electronically. It is only after a search of the Gautam Petition file that the court is able to learn of the nature of the Gautam Petition allegations, and the fact that Mr. Gautam is named as a party. It is possible that this failure to be candid was an oversight; on the other hand, there is a real prospect that this information was omitted because of Mr. Gautam's reticence

(conscious or unconscious) to avoid providing information that may portray himself in a bad light.

[155] Fifth, the Petitioners in this case argue that Cricket BC has not complied with the court orders in the Delta Patriots Petitions, and that Mr. Gautam has taken a contrary position in the Delta Patriots Petitions compared to the case at bar. Based on the record before me, it is not readily apparent that Mr. Gautam has taken a contrary position. However, I do agree that the existence of issues related to compliance with the court orders made in the Delta Patriots Petitions, raises concerns about Mr. Gautam's ability to be candid with the court.

[156] The court orders in the Delta Patriots Petitions were obtained by Mr. Gautam. They impact not only the Delta Patriots, but all club and league members of Cricket BC, including the Petitioners in this case. Mr. Gautam's position that the court orders in the Delta Patriots Petitions have been complied with, is consistent with his representation of Cricket BC, but may be inconsistent with his duty to the court. There is thus a potential for real tension in this case to arise between Mr. Gautam's duty as an officer of the court to candidly disclose what steps have been taken in relation to compliance with those court orders, versus his duty to Cricket BC to try to establish that the court orders have been complied with. As noted in *Hazelwood*, there may be omissions made during that process (whether intentional or inadvertent), such that the court does not have confidence that it will have all the information needed to make a just and fair determination.

[157] After having regard to all of the evidence in this case, and the applicable jurisprudence, I find that the Petitioners raise a valid concern that Mr. Gautam's ability to be objective and detached from these court proceedings is compromised by virtue of his involvement as a Scrutineer in the Election, and by his personal involvement with the various societies. These lead to a reasonable conclusion that he has a personal interest in the litigation, which may compromise his ability to be candid and forthright with the court.



[158] My conclusion that Mr. Gautam may be motivated by self-interest is not a slight on his character as an individual, but rather a reflection of the tenuous situation that he has placed himself in professionally, by continuing to act for Cricket BC in the face of serious concerns about his ability to maintain his objectivity.

**F. Lawyer as a Witness**

[159] In light of my above finding, it is not necessary for me consider whether Mr. Gautam is also disqualified from acting for Cricket BC, on the grounds that he may be a potential witness. However, I will address this issue for the sake of completeness.

[160] There is no dispute that a lawyer should not act as both witness and advocate on the same matter: *Code*, Rules 2.1-3(k) and 5.2-1; and *Hazelwood*, at para. 66.

[161] However, the parties disagree on the threshold that is required to establish that such a conflict has arisen in this case.

[162] The removal of counsel should only be done to relieve the risk of real mischief, rather than a mere perception of mischief: *Chapman v. 3M Canada Inc.*, 25 O.R. (3d) 658, 1995 CanLII 7128 (Ct. J. (G.D.)) at 8-9.

[163] In *Forward v. Zurich Insurance Co.*, 2002 ABCA 123, at para. 7, while the court agreed that the mere possibility that counsel may give evidence is insufficient for a removal application, the court does not require definitive evidence that the lawyer will be called as a witness. Rather “[a]ll that need be established is that [the lawyer] is a likely witness”.

[164] As noted in *Gondosch v. Gondosch*, 2022 ONSC 6110:

[18] “Real mischief” may come in the form of a conflict of interests for the lawyer in question. Two forms of conflict are in issue here: the conflict which arises when counsel to one of the parties in the litigation is also to be a witness, and the conflict which arises when counsel acts for more than one party whose interests are not aligned.

[19] Principles respecting both of these kinds of conflict are helpfully summarized in the judgment of Leach J. in *Rice v. Smith, et al*, 2013 ONSC

1200. As to the former, Leach J. wrote as follows (at para. 19, citations omitted):

The particular conflict of interest prohibition dealing with “lawyer as witness” is intended to prevent the inevitable conflict of interest a lawyer otherwise would have between the duty owed to his or her client, and duties of independence otherwise owed to others, especially the Court. In particular, lawyers are independent officers of the court, and a trial judge must be able to rely upon counsel for a high degree of objectivity and detachment. That fundamental relationship is compromised, and the administration of justice and integrity of the system accordingly are undermined, where the objectivity and credibility of counsel necessarily are subjected to challenge in the course of determining the substantive merits of an underlying dispute.

[20] Leach J. then set out a series of factors to consider when determining whether counsel should be removed because they may be required to give evidence. Those factors include the likelihood that the witness will be called and the significance of the evidence to be led (see *Smith v. Rice, supra*, at para. 20).

[165] The factors that should be considered when dealing with an application for disqualification were cited with approval in *Rice v. Smith et al.*, 2013 ONSC 1200 at para. 20, and summarized by the court in *Corporation of the Essa (Township) v. Guergis; Membery v. Hill*, 15 O.R. (3d) 573, 1993 CanLII 8756 (S.C.D.C.), at 583.

These include:

- a. the stage of the proceedings;
- b. the likelihood that the witness will be called;
- c. the good faith (or otherwise) of the party making the application;
- d. the significance of the evidence to be led;
- e. the impact of removing counsel on the party’s right to be represented by counsel of choice;
- f. whether the trial is by judge or jury;
- g. the likelihood of a real conflict arising or that the evidence will be “tainted”;
- h. who will call the witness; and
- i. the connection or relationship between counsel, the prospective witness and the parties involved in the litigation.

[166] I agree with Mr. Gautam that the absence of an affidavit in these proceedings from Mr. Gautam, poses a significant challenge for the Petitioners regarding the likelihood that Mr. Gautam will be compelled to testify as a witness.

[167] Rule 16-1 of the *Rules* provides for petitions to be heard in a summary fashion through the use of affidavit evidence. There is no automatic right to cross-examination of witnesses. Thus, while the Petitioners may express a desire to cross-examine Mr. Gautam, they have not shown the pathway by which they intend to obtain such an order. Nor has counsel for the Petitioners provided any legal basis on which such evidence could be compelled from Mr. Gautam in the absence of any affidavit from him.

[168] In addition, while the Petitioners could apply under Rule 16-1(18) to have the matter transferred to the trial list, the Petitioners have not provided any evidence that they intend to bring such an application.

[169] However, even where a party does not bring such an application, the court retains the discretion to order cross-examination on affidavits under Rule 22-1(4)(a), or order the examination of a party or witness under Rule 22-1(4)(b). The court may also remit the matter to the trial list under Rule 22-1(7)(d). In that regard, I note that there are significant conflicts in the affidavit evidence relied on by the parties, which a court hearing the petition will likely be unable to resolve without the benefit of cross-examination on the affidavits, or receiving the *viva voce* testimony of the witnesses.

[170] For example, Mr. Bajwa in his first affidavit accuses Mr. Franco of “not being truthful with this court” and of attempting to mislead the court (paras. 11, 19-21). He also accuses Mr. Jauhar, another affiant on behalf of the Petitioners, of making false statements. Allegations that a witness for the opposing party is lying, together with direct contradictions in the evidence on material matters, increase the likelihood that the judge presiding over the petition may remit the matter to the trial list or require cross-examination on affidavits. Further, in light of the allegations made about Mr. Gautam’s involvement during the Election, it is possible the court may order

Mr. Gautam to be cross-examined under Rule 22-1(4)(b) as a material witness to the events in question.

[171] Having said that, it is premature at this time for me to conclude that there is a likelihood that these prerequisite events will occur such that Mr. Gautam will be a likely witness in this proceeding.

[172] In *Hazelwood*, the court considered a potential conflict of interest on the part of the plaintiff's counsel. At para. 42, the court determined that it was premature to remove counsel for conflict of interest at the current stage of that proceeding, noting that the court may revisit the situation at a later stage if the circumstances change (see also paras. 64-65).

[173] I come to a similar conclusion here. While there is a strong likelihood that the court will ultimately order the matter to be remitted to the trial list (given the numerous conflicts in the evidence bringing credibility of witnesses into issue), the chance that Mr. Gautam will be required to testify remains a mere possibility at this juncture. The existence of this possibility is insufficient to override the right to counsel of choice.

[174] As such, the Petitioners have failed to establish a conflict of interest arising on the grounds that Mr. Gautam may be a witness in this proceeding.

### **G. Conclusion**

[175] The Petitioners have succeeded in establishing that Mr. Gautam is in a disqualifying conflict of interest which impacts his duty to his client and duty to the court. As such, I conclude that he should be removed as counsel of record for Cricket BC in this proceeding.

[176] In my view, a fair-minded and reasonably informed member of the public would conclude that based on the circumstances of this case, the proper administration of justice requires the removal of Mr. Gautam.

[177] In coming to this conclusion, I am aware of the repercussions on Cricket BC if they are denied their choice of counsel. Cricket BC has provided affidavit evidence that the decision to retain Mr. Gautam as counsel in this litigation was done based on the society's view of his expertise and his in-depth knowledge of the game of cricket, his familiarity with its organizational structure and that of the various entities that are involved with this litigation, and his willingness to work at a reduced fee. I accept that if Cricket BC is required to replace Mr. Gautam, it will be at a significant cost to the society. However, to allow Mr. Gautam to continue in the circumstances that I have outlined above, would undermine the proper administration of justice.

[178] To the extent that Cricket BC has to expend additional resources to replace Mr. Gautam with other counsel, this problem is largely a part of Mr. Gautam's own doing. In my view, Mr. Gautam should have recognized that there was a real possibility that his extensive involvement in the cricket community and cricket organizations, and his presence as a Scrutineer at the Election, created the potential for a disqualifying conflict of interest.

[179] I turn to the issue of whether the Court should also prohibit Mr. Gautam's law firm from acting on behalf of Cricket BC.

[180] In *Forward* at para. 8, the court endorsed the following reasoning from *Harvard Investments Ltd. v. Winnipeg (City)*, [1994] 6 W.W.R. 127, 1994 CanLII 16691 (Man. Q.B.) at 137, which in turn was approved in *Fraresso v. Wanczyk* (1995), 40 C.P.C. (3d) 123, [1995] B.C.J. No. 1046 (S.C.):

It is reasonable to begin with the proposition that all members of a firm are identified as one in the eyes of the law. One must expect and require all members of a law firm to be loyal to one another and have mutual respect. A counsel who appears in court is expected to serve the interests of his client, but must also exhibit reasonable objectivity in advancing the case for his client. The role of counsel, in my view, is compromised when a member of the advocate's firm is called upon to testify for the client. Counsel is expected to be loyal to his firm member who is now a witness. How can counsel properly discharge his obligation as counsel if he is, in fact, honour bound to be loyal to a witness? How can counsel in such circumstances be expected to argue an issue of credibility with respect to the evidence of his firm member? Furthermore, the client may also ask whether the counsel's loyalty to the witness surpasses his loyalty to the client's interest.

[181] Those words are apt in this case. In the eyes of the public and the law, the members of a law firm are all identified as one. The concern in *Harvard Investments Ltd.* with respect to loyalty is heightened here with Mr. Gautam being a senior lawyer who would yield considerable influence at his firm. Further, the lawyer deciding whether Mr. Gautam should provide evidence in this case should not be Mr. Gautam or a member of his firm; rather, this decision should be made by a lawyer who is able to be objective and detached, with only their duty to the client and to the court in mind.

[182] In *Beacon Hill Service (2000) Limited v. Esso Petroleum Canada*, 2012 ABCA 269 at para. 7, the Court agreed with the chambers judge's conclusion "that the lawyer's law firm would be unable to approach the litigation with any greater detachment than the lawyer was also not unreasonable under the circumstances. The firm, like the lawyer, would arguably have a reputational if not also a financial stake in the outcome". I find that similar concerns are raised in this case, with respect to Mr. Gautam's law firm continuing to act for Cricket BC.

[183] Consequently, term 1 in the NOA is granted, such that I order that both Mr. Gautam and all members of his law firm are removed as counsel of record for the Respondent, Cricket BC.

**VI. SHOULD MR. GAUTAM OR HIS FIRM BE ORDERED TO REFUND ANY RETAINER FEES PAID TO CRICKET BC?**

[184] Though the Petitioners seek this order, they have provided very little legal justification or rationale to support it.

[185] In his Affidavit #2, Mr. Jauhar avers that Mr. Gautam was provided with an initial retainer fee of \$8,000. That is confirmed by Mr. Hardat in his Affidavit #3, wherein he states that Mr. Gautam's retainer cheque of \$8,000 was co-signed by Mr. Gupta. It is unclear whether the retainer funds have been used up, or whether there were other monies paid to Mr. Gautam after the initial retainer. Mr. Hardat deposed that Cricket BC created an "email group" of most directors of Cricket BC, to

which he e-mailed the retainer agreement. He stated that nine of the 12 directors approved Mr. Gautam's appointment as lawyer.

[186] The Petitioners submit that they are required to pay for Mr. Gautam's legal fees indirectly through a special levy of \$500 imposed against the players of Cricket BC. No evidentiary foundation was provided for this assertion.

[187] The only legal authority the Petitioners provided is contained within the wording of the order sought in the NOA, which is pursuant to s. 59(1) of the *Societies Act*. This section provides as follows:

- 59(1) Directors of a society who
- (a) vote for a resolution passed at a meeting of directors, or
  - (b) consent to a consent resolution of directors
- authorizing a distribution, contrary to this Act or the bylaws, of money or other property are jointly and severally liable to restore to the society any money or other property that is so distributed and not otherwise recovered by the society.

[188] Counsel for the Petitioners did not provide submissions on s. 59 of the *Societies Act*. The Petitioners did not provide any legal basis for why they have standing to demand that Mr. Gautam be ordered to refund any retainer fees paid to Cricket BC, or how s. 59 assists in this regard. There is no explanation for how a thread on an "email group" constitutes a "resolution" at a "meeting of directors" or a "consent resolution", or how any resolution that authorized the retainer contravened the *Societies Act* or Cricket BC's bylaws within the context of s. 59.

[189] Having failed to establish any legal basis for the order sought, term 3 of the NOA is dismissed.

**VII. SHOULD KANWARDEEP SUKHIJA BE DISQUALIFIED AS COUNSEL FOR AMJAD BAJWA?**

[190] The same legal principles set out above with respect to the removal of counsel apply here. I will not repeat them.

[191] The issue of Mr. Sukhija being in a disqualifying conflict of interest was first raised by the Petitioners with Mr. Sukhija, in an e-mail dated January 22, 2023. In this e-mail, counsel relayed that his clients had just learned Mr. Sukhija is a Director of Cricket BC, and were concerned about a “possible” conflict of interest. Mr. Sukhija was advised that the Petitioners would “bring it to the notice of the court and leave it to Mr. Sukhija to provide assurances to the court.”

[192] The Petitioners argue that Mr. Sukhija is in a disqualifying conflict of interest due to his following roles:

1. He is a member and Director of the Richmond Cricket Club.
2. He is a Director in both BCMCA and Cricket BC, against whom NSCC has filed Petitions. Mr. Sukhija’s nomination in the BCMCA elections is being challenged in the BCMCA petition.
3. He is the Secretary of the BCMCA and a member of its legal committee.
4. He is a member of the Cricket BC Governance committee.
5. He is legal counsel for Mr. Bajwa who is a Respondent in this proceeding and past President of Cricket BC.

[193] In contrast to Mr. Gautam, there is no suggestion that Mr. Sukhija was a witness to the events that give rise to this Petition. Rather, the Petitioners submit that Mr. Sukhija has a personal interest in the litigation because he is a Director for BCMCA and his appointment as Director of Cricket BC is based on his nomination by BCMCA. If the BCMCA nomination in the BCMCA Petition is nullified then his standing with Cricket BC will also be nullified – thus, he has a personal interest.

[194] The Petitioners also take issue with Mr. Sukhija acting as Mr. Bajwa’s legal counsel because Mr. Bajwa, in this Petition, is facing allegations that he favored one side in the manner in which he conducted the Election.



[195] Mr. Sukhija does not deny that he has played these various roles, and continues to do so. However, he submits that the Petitioners are speaking about his conflict of interest in the abstract, without any actual points of conflict identified. He notes that he has never acted as legal counsel to Cricket BC or the BCMCA.

[196] The submissions provided by counsel in relation to Mr. Sukhija's disqualifying conflict of interest, were minimal and difficult to follow.

[197] The thrust of the Petitioners' submission appears to be that they take issue with Mr. Sukhija acting as a Director for BCMCA and Cricket BC, while also wearing the hat of legal counsel to Mr. Bajwa. The Petitioners submit that the fiduciary duties that Mr. Sukhija has to both the organizations for which he is Director, are not to the benefit of an individual, but to act in the best interests of the organizations and their members as a whole.

[198] The Petitioners also raise the fact that Mr. Bajwa, in this Petition, is facing allegations that he favored one side in the manner in which he conducted the Election for Cricket BC.

[199] I do not see how Mr. Sukhija's duties as a Director in either the BCMCA or Cricket BC, are impacted by virtue of Mr. Sukhija acting for a former President of Cricket BC. This is particularly so where Mr. Bajwa's interests and Cricket BC's interests are aligned as they are in this case, by virtue of the positions they are taking in this Petition. Even if their interests were not aligned, there is no evidence or even a suggestion, that Mr. Sukhija acted as counsel for Cricket BC such that he should be disqualified from acting as counsel for Mr. Bajwa.

[200] I also find that neither the bright line rule nor the "substantial risk" tests from *CNR* apply, given that there is no issue here of "concurrent" representation of two clients: *CNR* at para 41. Mr. Sukhija has not represented the Petitioners in any legal proceeding. Additionally, Mr. Sukhija has never acted as legal counsel to Cricket BC or the BCMCA.

[201] Outside of the scenario of concurrent client representation, the lawyer's duty to the client may also be compromised if the lawyer has other competing interests such as fiduciary duties or self-interest.

[202] As noted above, the Petitioners' main submission appears to be that Mr. Sukhija's fiduciary duties to both the organizations for which he is Director, BCMCA and Cricket BC, compete with his obligations as legal counsel to Mr. Bajwa.

[203] The *Societies Act* sets out the duties of a director at s. 53:

(1) A director of a society must, when exercising the powers and performing the functions of a director of the society,

(a) act honestly and in good faith with a view to the best interests of the society,

(b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,

(c) act in accordance with this Act and the regulations, and

(d) subject to paragraphs (a) to (c), act in accordance with the bylaws of the society.

(2) Without limiting subsection (1), a director of a society, when exercising the powers and performing the functions of a director of the society, must act with a view to the purposes of the society.

(3) This section is in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors of a society.

...

[204] There is no indication that Mr. Bajwa, BCMCA or Cricket BC have concerns with respect to Mr. Sukhija's duties.

[205] The existence of the BCMCA Petition also does not give rise to a disqualifying conflict of interest on the part of Mr. Sukhija. He is not counsel in the BCMCA Petition. Mr. Sukhija has no reason to "soft peddle" his representation of Mr. Bajwa in this Petition due to the possible impact the BCMCA Petition (which he is not counsel in) may have on his status as Director of Cricket BC.

[206] The Petitioners have failed to establish that Mr. Sukhija is in a disqualifying interest. In the circumstances, there is no basis to exercise my discretion to remove Mr. Sukhija as counsel for the Respondent, Mr. Bajwa.

[207] The order sought at clause 2 of the NOA, is dismissed.

### **VIII. COSTS**

[208] Costs follow the event. In this case, the Petitioners have been successful in their application to have Mr. Gautam and his law firm removed as counsel of record. Consequently, the Petitioners are entitled to their costs of this application hearing, against Cricket BC, in any event of the cause, subject to the costs award made in favour of the Respondents at paragraph 41 of these Reasons.

[209] The Petitioners were unsuccessful in their application to have Mr. Sukhija removed as counsel for Mr. Bajwa. As such, Mr. Bajwa is entitled to his costs of this hearing, in any event of the cause.

[210] If there are matters which the parties wish to bring to my attention that may impact this costs award, they may seek leave of the court to file written submissions. Failing the receipt of further submissions, this costs award shall stand.

“Shergill J.”