

CANADA / JUDGMENT

Gill v. Kalgidhar Darbar Sahib Society

2018 BCSC 813

COURT

Supreme Court of British Columbia

DECIDED

18 May 2018

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2018 BCSC 813 Gill v. Kalgidhar Darbar Sahib Society

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gill v. Kalgidhar Darbar Sahib Society,

2018 BCSC 813

Date: 20180518

Docket: S192478

Registry: New Westminster

Between:

Swarn Gill

Petitioner

And

Kalgidhar Darbar Sahib Society

Respondent

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Petitioner:

D. Letkemann

Counsel for the Respondent:

D.A. Strebchuk

Place and Dates of Hearing:

New Westminster, B.C.

January 9 and February 5, 2018

Place and Date of Judgment:

New Westminster, B.C.

May 18, 2018

- [1] The petitioner, Swarn Gill, seeks orders allowing him to bring a derivative action in the name of the respondent Kalgidhar Darbar Sahib Society (the "Society") against three members of the Executive Committee of the Society (the "Executive"): Sarabjit Sarai, Rajwinder Aulakh, and Sukhpal Boparai (the "Proposed Respondents").
- [2] The proposed action seeks the following relief: a declaration that all three of the Proposed Respondents contravened provisions of the Societies Act, S.B.C. 2015, c. 18, and/or the bylaws of the Society; removal of the Proposed Respondents as members of the Executive; and removal of Mr. Sarai and Mr. Aulakh as Directors of the Society.
- [3] In their stead, the proposed action seeks to have the petitioner, Swarn Gill, Jaspal Gill, and Randhir Grewal appointed as President, Vice President, and Recording Secretary respectively, for a period of not less than six months until such time as a new Religious Advisory Committee is appointed which then can select a new Executive pursuant to the Society's bylaws.
- [4] Finally, the proposed derivative action seeks an order that the Proposed Respondents reimburse the Society for the funds spent in contravention of the bylaws.
- [5] The Society, through the voice of the current Executive, opposes the relief sought.

Background

- [6] The petitioner is a member of the Society and was formerly a member of the Executive from 2005 to 2009.
- [7] The Society is governed by bylaws that establish two leadership groups: the Executive and the Religious Advisory Committee (the "RAC"). The Executive is comprised of 13 members holding various positions including President, Vice President, General Secretary, and Treasurer. Some, but not all members of the Executive are also Directors of the Society and members of the RAC.

- [8] The RAC is comprised of five members whose duties include oversight of the selection of the Executive. Five members of the Executive -- the President, Vice President, General Secretary, Assistant General Secretary, and Treasurer -- are responsible for selecting the RAC. The three Proposed Respondents are all current members of the Executive. Both Mr. Sarai and Mr. Aulakh are Directors of the Society.
- [9] According to counsel for the Society, discussions are underway between the two opposing factions -- that headed by the petitioner and that headed by the Proposed Respondents -- to amend the Society's bylaws to provide for a more transparent, democratic procedure.
- [10] The income of the Society consists primarily of membership fees, donations from members, and fees for services performed by the Society such as weddings.
- [11] In the period from January to September 2016, under the leadership of the Proposed Respondents, the expenditures of the Society exceeded its income by approximately \$160,000.
- [12] The petitioner alleges the shortfall, or a significant portion of it, stems from breaches of the Society's spending bylaws by the three Proposed Respondents.
- [13] In the period from January to September 2016, the Treasurer authorized payments in excess of \$55,000 for legal fees without pre-approval of the Executive and/or a majority of the members of the Society as required by the bylaws. Such forms the major complaint supporting the proposed action.
- [14] The petitioner also alleges that Mr. Sarai personally, or his wife, Manpreet Badwal, received multiple cheques in various amounts without explanation as to the purpose behind them. In or about March 2017, the petitioner's solicitor wrote to the Society demanding the Society commence legal proceedings against the key members of the Executive, Messrs. Sarai, Aulakh and Boparai, for breach of their duties as Directors and for breach of the bylaws.

The Legal Authority

- [15] The legal authority relied upon by the petitioner is contained in Section 103 of the Societies Act which states:

103 (1) In this section, "complainant", in relation to a society, means a member or director of the society or another person whom the court considers to be an appropriate person to prosecute or defend, under this section, a legal proceeding in relation to the society.

- (2) A complainant in relation to a society may, with leave of the court,
- (a) prosecute a legal proceeding in the name and on behalf of the society
- (i) to enforce a right of, or a duty or obligation owed to, the society that could be enforced by the society itself, or

(ii) to obtain damages for any breach of a right, duty or obligation referred to in subparagraph (i),
or

(b) defend, in the name and on behalf of the society, a legal proceeding brought against the society.

(3) Section 233 of the Business Corporations Act applies for the purposes of this section.

[16] Further, pursuant to Section 233 of the Business Corporations Act, S.B.C. 2002, c. 57, the court may grant leave to bring a derivative action if:

(a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,

(b) notice of the application for leave has been given to the company and to any other person the court may order,

(c) the complainant is acting in good faith, and

(d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[17] The Society opposes the proposed action. Mr. Sarai, on its behalf, denies any wrongdoing as is alleged in the material and, alternatively, argues the proposed action is not brought in good faith. Instead, he says it is more in the nature of a political coup by a group of disaffected members who have lost control of the Society and appear unwilling to wait for any electoral process that might return them to power.

[18] Central to the relief claimed in the proposed action is the ousting of the present ruling bloc, and installation of the petitioner and those who would follow him onto the Executive.

The Relevant Bylaws and Allegations of Breach

[19] The Executive of the Society is constituted in accordance with the bylaws. They provide, according to para. 11 of Section 2, that "[t]he Executive may from time to time set the quorum necessary to conduct business and unless so set the quorum is 51% of the Executive then in office".

[20] Paragraphs (A)(4) and (6) of Section 3 provide for the duties and responsibilities of the Executive as follows:

The Committee members shall help to run and carry out the objectives of the Society.

The Committee shall meet at least once a month.

[21] As to the provision for payment of expenses, para. A(7) of Section 3 provides that "[t]he President, the General Secretary and the Treasurer shall each be authorized to spend up to Five Hundred Dollars (\$500) upon the approval of such amount by the Executive, such expenditures to be for the purposes of Gurudwara Sahibg Ji. Further expenditures must be approved by majority of the registered members".

[22] Paragraph G(2) of Section 3 provides:

Any expenses over One Thousand Dollars (\$1,000.00) incurred on the Society's behalf by the Treasurer shall be approved in advance by the Executive Committee, but such expenditures shall not exceed Ten Thousand (\$10,000.00) Dollars. Any expenditure in excess of Ten Thousand Dollars (\$10,000.00) must be pre-approved by the majority of the Registered Members.

[23] Finally, para. G(4) of Section 3 provides that:

The treasurer shall pay the authorized expenses of the Society including those relating to employees, as and when they become due.

[24] The business of the Society is recorded in a minute book comprised of three volumes. The most recent of which, Volume 3, covers business transacted by the Executive for the period from December 22, 2016 until present.

[25] Volume 2, which covers transactions by the Executive for the period of March 2008 until December 2016, is alleged to be in the possession of Joginder Singh Chahal, an alleged supporter of Swarn Gill, the petitioner.

[26] It is alleged that Mr. Chahal has failed or refused to surrender and deliver up the minute book to the Society despite demands such that in September 2017, the Society issued a petition out of the Chilliwack Registry wherein it seeks orders, amongst other things, directing the surrender of the Volume 2 of the minute book back to the Society.

[27] The Society says that it is at a significant disadvantage in attempting to respond to this petition to court and pleadings without the documents relating to the expenditures said to be in breach of the authority of the Directors and the Executive.

[28] The respondents concede the Society paid legal fees of approximately \$55,000 to the Society's solicitors over the period referenced in the petition. The bulk of those funds have seemingly been spent defending actions brought against the Society by Mr. Gill or other members of the bloc that support his endeavors to regain leadership of the Society.

[29] Repeating the history of those various actions and their outcomes is unnecessary to the resolution of this petition.

Analysis and Conclusions

- [30] The primary allegation against the three Proposed Respondents is that they have authorized spending decisions for the Society in contravention of the bylaws in an amount approaching \$140,000 and, as a result, the Society has recorded a net loss of \$159,000.
- [31] Specifically, the petitioner alleges three separate classes of breaches, being spending over \$500; spending over \$1,000; and spending over \$10,000.
- [32] Only Mr. Sarai filed an affidavit on behalf of the Society in response to the petition. In it, he did not deny that he and the Executive failed to obtain the approval and authorization for expenditure said to exceed \$10,000 as they relate to the issue of legal fees. However, no one cheque exceeds the \$10,000 ceiling.
- [33] Nor is it clear from his evidence, at least his evidence sworn in the proceeding, that the Treasurer obtained the approval of the Executive for expenses in excess of \$1,000. The Proposed Respondents suggest they have been hampered in answering the allegations because of the missing minute book that records the business of the Executive.
- [34] In his affidavit, Mr. Sarai says that he "sought" approval for the expenditures; he does not say that he obtained approval.
- [35] In addition to cheques made payable to Mr. Sarai and his wife, Mr. Gill points to a number of expenditures made to the Society's legal representatives in defence of legal actions commenced against the Society.
- [36] The petitioner notes that some of the legal expenses, although under \$10,000 in each remittance, were written in quick succession. I am asked to infer that the only reasonable inference is that the law firm's account(s) was in excess of \$10,000 but paid in separate instalments so as not to contravene the bylaw requiring approval of one-half the general membership for expenses in excess of \$10,000.
- [37] It is clear that the Society routinely incurs expenses in excess of \$1,000 for matters such as mortgage, insurance, and others of a similar ilk without first getting the approval of the Executive and then recording such in the minute book.
- [38] Mr. Sarai testified that the same procedure was in effect when Swarn Gill was the President of the Society between 2005 and 2009. Mr. Gill does not deny those assertions.
- [39] Both petitioner and respondent agree that it is unrealistic to expect the Directors as presently constituted to sanction an action against themselves. As such, in the circumstances, there is no requirement Mr. Gill attempt to convene a Directors meeting to discuss the matter. A letter from the applicant's solicitor demanding the Directors take action against themselves constitutes the reasonable efforts required under Section 233(a) of the Business Corporations Act: see *Park v. Sunrich Processors Ltd.*, [1999] B.C.J. No. 807 (S.C.) at para. 26; *Holdyk v. Adolph*, 2012 BCCA 37 at para. 17.

- [40] As to notice, on March 31, 2017 a letter was sent to the respondent Society demanding it commence an action against the three Proposed Respondents. In July 2017, this petition was served on the Society and the three Proposed Respondents.
- [41] While not deciding the matter on its merits, it would appear that the allegation of improper spending, specifically, expenses in excess of \$1,000 without the necessary pre-approval, has a reasonable chance of success. In particular, it appears that the necessary approval for payments in excess of \$1,000 made for legal defence did not receive the proper pre-approval from the Executive.
- [42] It is not clear, as suggested by the petitioner's counsel, that the pre-approval of a majority of the membership was required because payments made in two separate installments to the legal firm representing the Society exceeded the \$10,000 maximum found in para. 3(G)(2).
- [43] Having determined there is an arguable case that there has been a breach of the spending bylaws, does it follow that (1) the petitioner, Mr. Gill, is acting in good faith; and (2) does it appear to be in the Society's best interest for the proposed proceeding to go forward?
- [44] Then answer to both those questions is "no".
- [45] In *Bennett v. Rudek*, 2008 BCSC 1278 [Bennett], Madam Justice L. Smith discussed the good faith criterion, at paras. 45-46:
- [45] The applicant for derivative leave bears the onus to show positively that the application is brought in good faith: *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.*, [1996] 4 W.W.R. 54, 13 B.C.L.R. (3d) 300 (S.C.) at para. 32, varied, [1997] 2 W.W.R. 129, 26 B.C.L.R. (3d) 357 (C.A.); *Tkatch v. Heide* (1996), 29 B.L.R. (2d) 266, [1996] B.C.W.L.D. 1481 (S.C.) at para. 24. Good faith is ultimately a question of fact to be determined on all of the evidence and with attention to the particular circumstances of the case.
- [46] The test for good faith is whether the action is primarily for the purposes of pursuing a claim on the company's behalf, and factors to be considered in applying this test include the applicant's belief in the merits of the proposed claim, existing disputes between the parties, and alleged ulterior motives: *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1998), 50 B.C.L.R. (3d) 195 (C.A.), 177 W.A.C. 255 at para. 5; *Gartenberg v. Raymond*, 2005 BCCA 462, 8 B.L.R. (4th) 227 at para. 25.
- [46] On the question of whether it appears to the court that it is in the best interests of the Society for the legal proceeding to be prosecuted, Abrioux J.'s discussion in *Jordan Enterprises Ltd. v. Barker*, 2015 BCSC 559, at paras. 33-39, is helpful. He notes that "the threshold for the applicant to meet is that there is an arguable case that the derivative action is in the interest of the corporation". Abrioux J. continues:
- [35] "[a]ppears to the court" does not mean trying the case. It encompasses a determination of whether the proposed action has a reasonable prospect of success or is bound to fail, whether a defence raised is bound to be accepted, and whether the potential relief will

justify the cost and inconvenience to the corporation: *Luft v. Ball* at para. 54, citing *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1997), [1997] B.C.J. No. 1766 at para. 20, 40 B.C.L.R. (3d) 43, aff'd (1998), 50 B.C.L.R. (3d) 195; *Mikulic v. Peter*, 2013 BCSC 941 at para. 11; *Holdyk v. Adolph* at para. 19.

- [36] There is no distinction between the test that a case is "arguable" and the test that a case has a "reasonable prospect of success": *Carr v. Cheng* at para. 21.
- [37] For a court to determine whether an action has a reasonable prospect of success, it must know what the cause of action is, the facts alleged to give rise to it, and the loss alleged to have been suffered by the corporation: *Mikulic v. Peter* at para. 12.
- [38] "Best interests" can only be interpreted as speaking to a more rigid consideration of what is good for the corporation than what would be required under "interest". "Best interests" can be defined as the maximization of the value of a corporation. It is best for a corporation to be profitable, well-capitalized, and with strong prospects. The deterioration of a corporation's financial stability should be avoided. See *Carr v. Cheng* at para. 25.
- [47] Further, in *Safarik v. Hall*, 2006 BCCA 222, Madam Justice Huddart described the test of best interest and good faith as being intertwined with one another.
- [48] While acknowledging potential breaches with respect to the payment to the Society's legal firm to defend -- sometimes unsuccessfully -- challenges by the petitioner and others, it is unrealistic, in my view, to think that the Proposed Respondents will be held "jointly and severally liable for expenditures authorized by the respondent on behalf of the Society contrary to the bylaws of the Society".
- [49] More importantly, on the evidence, I do not conclude that the proposed action is "primarily for the purposes of pursuing a claim on the company's behalf".
- [50] As was referenced in *Bennett*, I conclude that the proposed action is primarily motivated by ulterior motives, specifically the petitioner's objective of regaining control of the Society.
- [51] The underlying tension between the petitioner, along with his camp within the Society, and the respondents and their camp within the Society, needs to be determined not through courtroom proceedings substituting one body for the other, but rather an election by the membership at large of the RAC and the Executive.
- [52] I agree with the respondent that the petitioner, Mr. Gill, is not acting in good faith. Rather, he is attempting to regain control of the Society through court proceedings rather than through the electoral process.
- [53] Assuming the proposed derivative action obtained court sanction, it would, in my view, lead to further political infighting and expense to the Society in prosecuting a claim more properly fought in another forum.

- [54] I note, as an aside, the financial statements for the Society were presented to the membership at large.
- [55] The legal expenses complained of were incurred, largely, as a result of action taken by either Mr. Gill or others who support him.
- [56] On the evidence before me, I find the motivation underlying the petition is primarily political and thus does not meet the good faith requirement.
- [57] In the result, the petition is dismissed.
- [58] The respondent Society is entitled to its costs on Scale B.
- "Harvey J."

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Prepared on 28 October 2026 · Esheria