

CANADA / JUDGMENT

John v. Korean Senior Citizens' Society

2021 BCSC 1637

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Supreme Court of British Columbia

DECIDED

19 August 2021

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2021 BCSC 1637 John v. Korean Senior Citizens' Society

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

John v. Korean Senior Citizens' Society,

2021 BCSC 1637

Date: 20210819

Docket: S215140

Registry: Vancouver

Between:

Gae Nam John and Sang Bin Seo

Petitioners

And

Korean Senior Citizen's Society

Respondent

Corrected Judgment: the text of the judgment was corrected on the first page and heading I(A) on August 23, 2021

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

In Chambers

Counsel for Petitioners:

T. Brayer

Counsel for Respondent:

C. Gallant

Place and Date of Hearing:

Vancouver, B.C.

August 9, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 19, 2021

- [1] This is a petition brought pursuant to ss. 105 and 102 of the Societies Act, S.B.C. 2015, c. 18 seeking to have new election set for the directors of the Korean Senior Citizens Society ("KSCS"). The petitioners are members and directors of KSCS, and have been involved in it for many years. The respondent is KSCS.
- [2] The petitioners raise issues with respect to certain procedures undertaken in the election for directors in March and April 2021, which they say are contrary to the Bylaws and expectations of the members. These are summarized as:
- a) Irregular receipt of registrations for a number of potential directors;
 - b) A demand for a \$10,000 non-refundable registration fee for any person seeking to run for president;
 - c) Improper removal of certain candidates from the pool of potential directors;
 - d) Holding the AGM by Zoom, and not in accordance with a method accessible to the elderly, non-English speaking membership; and
 - e) Acclamation of 39 directors, in contravention of the Bylaws.

I. Background facts

- [3] The petitioner Mr. John has been involved in KSCS since it was incorporated in 1987. He has also been involved in a society known as the Korean Society of British Columbia for Fraternity and Culture ("Korean Society") since it was incorporated in 1981. Mr. John wished to run for president of KSCS in the 2021 election.

- [4] In March 2021 KCSC announced the election for directors by way of a newspaper advertisement. The advertisement was in Korean. It stated that the election would be held on April 14, 2021 at 11:00 am. It indicated that it would be held at the Korean Community Centre, but if the banning of indoor meetings continued [i.e. due to Covid-19 restrictions], the meeting would be held by Zoom. The Zoom link was provided. The agenda included the election of directors. It also reproduced Articles 35, 36, and 37 of the Bylaws.
- [5] The Bylaws of KCSC are written in English. The parties agreed that the newspaper advertisement accurately translated the relevant Articles into Korean.
- [6] The relevant sections of Articles 32, 35, 36, and 37 of the Bylaws are as follows:

Article 32

- a. A member in good standing present at a meeting of members is entitled to one vote.
- b. Voting shall be proceed by show of hands. If there is a request of secret ballot from more than a member, the secret ballot should be proceeded.
- c. Voting by proxy is not permitted.

Article 35

- a. The directors of the Society shall be elected at the annual general meeting.
- b. The define number of the directors of the Society shall be within 15 in principle. In inevitable cases, the number may be adjusted, altered or supplemented within the range of two. The number shall be changed from time to time at a general meeting.

Article 36

- a. All affairs related with the registration of directors of the Society shall be under the charge of the Director Registration Administration Committee of the Society. The committee shall be composed at least one month prior to the annual general meeting and president of society shall be the chair of the committee.
- b. The procedures for the registration of directors shall be notified in newspapers and must follow the prescribed forms available at the Director Registration Administration Committee.
- c. Candidates who were expelled from the Society, or made serious troubles regarding unsuitable private life and activities, or aggravated disintegration of Korean communities in the past can be denied for director registration by the committee's reviewing of director candidate qualification.
- d. As for director registration, it shall be made a principle for director candidates to register in person. But other people with an appropriate power of attorney shall be acceptable.

Article 37

- c. The term of officers, advisors, and councillors shall be two years. An election may be by acclamation, otherwise it shall be by ballot.

A. \$10,000 fee

- [7] The chair of the Director Registration Administration Committee ("Election Committee") was Ms. Algard, the president before the 2021 election. It was common ground on this hearing that \$10,000 was required as a registration fee for any person seeking to be a candidate for the president position.
- [8] It was not clear exactly who made the decision to require a \$10,000 fee.
- [9] Mr. John swore in his affidavit that no such fee was historically required. He allowed that a \$200 registration fee was historically required of candidates for the position of director. He stated that presidents were encouraged to donate money on top of the \$200 registration fee in the past, but there had never before been a requirement for such a large registration fee for presidential candidates. He also stated that not all presidents made such a donation in the past. Mr. John stated he could find no minutes of a directors' meeting approving such a fee. He had been a director since 2016 and could not recall such a fee being proposed. He noted that many members are elderly and do not have that kind of money.
- [10] The petitioner Mr. Seo denied that a set registration fee for people wishing to be president had been required historically. Mr. Seo stated in his affidavit that he is aware of some presidents not donating significant sums of money. He stated Ms. Algard announced that a \$10,000 fee would be required for any person seeking a position as president.
- [11] Mr. Kun Ho Cho was and is a director of KCSC. In his affidavit he swore that KSCS has never had a policy of requiring a registration fee of \$10,000 for people wishing to become president.
- [12] Mr. Bong Hwan Kim, the current president of KSCS, swore in his affidavit that directors who wished to run for the president have in the past been required to pay \$2,000 and for the 2021 election the \$10,000 fee was approved by the directors, but he exhibited no documents evidencing a motion of the directors approving the fee.
- [13] Mr. Kim stated that because revenues in KCSC were very low due, in part, to the pandemic, Ms. Algard suggested increasing the donation from presidential candidates from \$2,000. Mr. Kim suggested the fee could be \$5,000. Mr. Kim stated he was informed by Ms. Algard that she canvassed 17 directors and received a variety of responses, including from Mr. John who suggested \$10,000 and Mr. Seo who suggested \$20,000. Mr. John denies he was ever contacted by Ms. Algard and denies he suggested a \$10,000 fee. Mr. Seo stated he was not approached by Ms. Algard, but he was approached by an office employee, Mr. Lim. Mr. Seo stated he told Mr. Lim he was opposed to a fee and sarcastically stated if they went that high they should charge \$20,000 or \$50,000. Mr. Seo stated Mr. Lim and he laughed, and it was clear Mr. Lim understood the sums suggested by Mr. Seo were not intended as a serious

suggestion but rather as a sarcastic reflection on how high the proposed fee was.

- [14] Mr. Kim stated that based on the survey conducted by Ms. Algard, the Election Committee selected the amount of \$10,000. Mr. Kim was not on the Election Committee, and did not state the basis for his understanding or attach any documents confirming this decision by the Election Committee. As such, I am unable to rely on his statement regarding this decision. Further, I cannot rely on the information provided to Mr. Kim by Ms. Algard regarding her alleged survey of the directors, as two of the people with direct knowledge of the events, deny that she contacted them, and deny they made the suggestions she attributes to them.
- [15] Mr. John attached to his affidavit as an exhibit a letter from Ms. Algard to counsel for the petitioners. In this letter, she refers to the \$10,000 presidential candidate registration fee, to be provided by certified cheque, and states that Mr. John had previously agreed to make this payment, but then refused.

B. Receipt of candidates

- [16] On the day Mr. John went to submit the paperwork for his candidacy, he says he observed Mr. Kim come into the KCSC office with 28 applications for director positions, together with the required \$200 fee for each. Mr. John objected to this as proxy registrations were not permitted under the Bylaws. Ms. Algard received the applications over Mr. John's objections. Mr. Seo also stated he saw Mr. Kim bring in 28 registrations. Both Mr. John and Mr. Seo delivered their own registration forms to become directors.
- [17] Mr. Kim stated that he did not bring in 28 registrations. He said he brought in 15 registrations.
- [18] Mr. Kim also said the Election Committee determined that because of Covid-19 potential directors did not need to register in person. Mr. Kim was not a member of the Election Committee, and did not state the basis for his assertion. In the absence of a statement as to how he was informed of this decision, or written evidence that such a decision was made, I reject this statement by Mr. Kim as unreliable.
- [19] Mr. John understood Mr. Kim and the candidates submitted by Mr. Kim were all aligned with Mr. Kim and Ms. Algard. Mr. John decided he would not submit a non-refundable \$10,000 registration fee because the election was being conducted outside the Bylaws.

C. Rejection of candidates

- [20] Nine people who submitted registrations were rejected by the Election Committee. Three people, Hyunmoon Jung, Jin Wook Kim, and Wansik Park, were rejected because they were also directors of the Korean Society. Two other people, including Mr. Cho, were permitted to continue with their candidacy, and were ultimately acclaimed as directors, notwithstanding the fact that they were both directors of the Korean Society at the time of the election. Mr.

John stated that he was advised by Kwang Sun Shin that he was told he was rejected because he was too old.

- [21] Mr. Kim stated in his affidavit that people who are on the executive of the Korean Society are not permitted to be directors of the KSCS. The only exception is the president of the Korean Society, who is customarily entitled to sit on the board of the KSCS as a sign of respect. Mr. Kim stated that this restriction has existed since 2019.
- [22] In the letter from Ms. Algard exhibited to Mr. John's affidavit, Ms. Algard states that a decision was made by the directors and executives in June 2019 to disallow joint directorships between the Korean Society and KCSC.
- [23] Mr. John disagreed with the assertion of Ms. Algard and stated that there is no long standing custom preventing members of the Korean Society board from sitting on the board of KSCS and says that historically there have been people sitting as directors on both boards at the same time. He notes that at the time of the 2021 election, four of the directors of KCSC were also directors of the Korean Society. He stated that there was no directors' meeting to consider such a ban, no directors' resolution indicating such a ban, and no vote by the members on such a ban.
- [24] Mr. Cho confirmed that he is a director of both KSCS and the Korean Society, and he was not rejected by the Election Committee. He confirmed that he has been a director of both societies for a number of years, and in past years knows that there have been members sitting as directors of both societies at the same time.

D. Zoom AGM

- [25] On April 21, 2020 a Ministerial Order was made permitting meetings such as the KCSC AGM to proceed by telephone or other communication medium if all the persons participating in the meeting were able to communicate with each other and vote at the meeting. This Order permitted meetings to take place in such a manner despite anything to the contrary in corporate documents, such as the society's Bylaws.
- [26] On March 31, 2021 a Public Health Order was made prohibiting events such as the KCSC AGM from proceeding in a place open to the public, such as the Korean Community Centre.
- [27] As a result of these restrictions, the KCSC AGM proceeded via Zoom.
- [28] Mr. John stated that many of the members are elderly and do not know how to use Zoom. Mr. Seo stated he told Ms. Algard that he disagreed with the use of Zoom as some members are over 90 years of age and are not computer literate.

- [29] Mr. Cho stated that he is 88 years old and is not proficient on Zoom. He did not attend the AGM because it was conducted on Zoom, but would have attended if the AGM had been at the Korean Centre. Mr. John stated the AGM was reset for April 21, 2021 but he did not attend because he does not know how to use Zoom. There is no other evidence of people being unable to attend the AGM due to an inability to use Zoom.
- [30] Mr. Seo stated that the AGM first held on April 14, 2021 had to be adjourned because attendance was so low that quorum could not be reached. Mr. Kim stated that approximately 50 people attended the reset AGM on Zoom. This was not disputed by Mr. Seo who also attended.

E. 39 directors acclaimed

- [31] At the meeting on April 21, 2021, all 39 people who had submitted a registration form and \$200, and had not been rejected by the Election Committee, were acclaimed as directors. Mr. Kim stated a motion was made to acclaim all 39 directors, and the motion was approved by a show of hands. Mr. Seo stated that there was no show of hands and when he tried to object he was muted. Mr. Seo also stated that at the AGM he objected to candidates who had not registered in compliance with the Bylaws being put forward.
- [32] Mr. Seo stated there was no vote to elect Mr. Kim as president. Mr. Kim said he was the only candidate and so was acclaimed. Mr. Seo, Mr. John, and Mr. Cho all stated that they have not received minutes of the meeting confirming the acclamation of the directors and the election of Mr. Kim as president. Mr. John has requested minutes, but they have not been provided.
- [33] Mr. Kim stated in his affidavit that since he has been a member in 2013, all candidates who wished to become directors were elected as directors. He notes that in 2017 and 2019 KCSC elected 22 and 24 directors. He also attached what he said was the Korean language version of the Bylaws, which states that "the number of directors determined at the annual general meeting shall be the correct number."
- [34] Mr. Seo stated that the historical practice of the KCSC is to elect candidates, and at times candidates have been rejected.

II. Were there irregularities in the election?

- [35] Section 105 of the Societies Act authorizes the court to correct or modify the consequences of an omission, defect, error or irregularity in the conduct of the activities or internal affairs of a society which results in certain specified outcomes, including:
- a) A contravention of the Act or the regulations;
 - b) The society acting inconsistently with or contrary to its purposes;
 - c) A default in compliance with the Bylaws of the society; and

- d) Proceedings at a meeting of the members of the society being rendered ineffective
- [36] The petitioners also submit, in the alternative, that the election has been conducted in a manner that is oppressive to them pursuant to s. 102 of the Societies Act.
- [37] In *Gill v. Kalgidhar Darbar Sahib Society*, 2017 BCSC 1423 at para 33 - 34 the court distills the principles governing applications pursuant to s. 105 of the Societies Act. As summarized in para. 34:
- [34] While the case law appears to describe two separate analytical approaches, in reality the analysis is the same under both approaches. The first, more general approach to the application of the irregularity provision involves a three-step analysis in which the court determines (i) whether there has been an irregularity, (ii) if so, the extent of the irregularity, i.e. whether it resulted in a breach of the Act or regulations, society constitution or bylaws, produced an inconsistency with the Society's purposes, or rendered a resolution or proceeding of the Society invalid, and (iii) if so, whether it is appropriate for the court to exercise its authority to remedy the irregularity. The second, more specific approach addresses alleged irregularities in a society's election procedures under a two-step analysis that largely corresponds with the first two steps of the more general irregularity analysis. This makes good sense, because in instances where those two steps of the election irregularity test are satisfied, i.e. where (i) there has been a substantive irregularity in the election, and (ii) the irregularity was calculated to affect the result, then there would be a very compelling basis for the court to exercise its remedial powers under the third branch of the more general irregularities analysis.
- [38] The respondent argues that long standing traditions or customs of KSCS may rise to the status of a rule of the society, relying on *Grewal v. Guru Gobind Singh Temple Association*, 2012 BCSC 1530. In *Grewal*, the petitioner challenged the decision of the executive committee of the society to reject candidates who had nominated themselves. The court found that, although the bylaws of the society were silent as to the content of the nomination forms, the society had adopted the practice of candidates being nominated and seconded by third parties in 1974, and it had been a consistent practice since that date. The court found this long standing tradition had risen to the status of a rule of the society.

A. Receipt of registrations for potential directors

- [39] Article 36(d) of the Bylaws requires people to submit their director registration in person, or through a power of attorney.
- [40] Article 36(b) states that the procedures for registration of directors shall be set out in the newspaper. The newspaper advertisement for the AGM does not permit registration forms to be delivered in any manner other than as set out in Article 36(d).
- [41] There was no reliable evidence before me which would authorize the receipt of registrations in any manner other than as set out in the Bylaws.

- [42] It is clear on the evidence that there was an irregularity in the election procedure in that between 15 and 28 registrations were received in contravention of Article 36.

B. \$10,000 non-refundable registration fee

- [43] The newspaper advertisement does not specify a \$10,000 registration fee or "donation" was required for any presidential candidate. While the Election Committee is authorized to deal with all affairs relating to the registration of directors, it does not appear to have any express authorization to set additional requirements for officers, including the president.
- [44] Further, I have no reliable evidence upon which I can find that the Election Committee approved the \$10,000 registration fee, or that the directors approved the \$10,000 registration fee.
- [45] I find that the registration fee was imposed on presidential candidates, and was enforced by Ms. Algard. The requirement was not included in the registration procedures set out in the newspaper advertisement for the election, as required by Article 36. I find no authority for the imposition of this fee.
- [46] I find the requirement of a \$10,000 fee from candidates for the presidency is an irregularity in the election procedure.

C. Improper rejection of candidates

- [47] The respondents argue that, while there is no written rule prohibiting executives of the Korean Society from sitting as directors of the KSCS, there was a long standing practice in this respect, and the members had an expectation based on this practice that such cross positions would not be permitted. On this basis, the respondents argue, the Election Committee properly rejected those candidates who were on the executive of the Korean Society.
- [48] I find that there was no long standing practice of excluding executives of the Korean Society from the board of the KSCS. The first time this proposition was advanced was in June 2019, after the 2019 election. The 2021 election was the first time such a proposition was used to reject candidates.
- [49] I find that no vote was taken by the membership, and no directors' resolution was passed, authorizing such a restriction.
- [50] Unlike the facts in Grewal, the respondent has not established a long standing tradition to reject candidates who were also directors of the Korean Society.
- [51] The respondent has provided no basis for the rejection of a candidate due to his age.

- [52] The only Article which authorizes the Election Committee to reject a candidate is Article 36(c). The Election Committee may reject a candidate who had been expelled from the Society, or "made serious troubles regarding unsuitable private life and activities, or aggravated disintegration of Korean communities in the past". There is no provision in the Bylaws which would permit the Election Committee to reject a candidate other than in accordance with Article 36(c).
- [53] The alleged restrictions on registration were not included in the registration procedures set out in the newspaper advertisement for the election, as required by Article 36.
- [54] As such, I find that the Election Committee improperly rejected three candidates for the position of director on the basis of them holding positions as directors in the Korean Society.
- [55] Similarly, there is no authority to reject a person on the basis of age. I find the Election Committee improperly rejected one candidate on the basis of age.
- [56] The rejection of these four candidates by the Election Committee is a further irregularity in the election procedure.

D. Holding the AGM by Zoom

- [57] The Ministerial Order and Public Health Order prohibited KSCS from holding its AGM in person. The petitioners argue that the AGM should have been held by telephone because of the age of many of the members. There is no reliable evidence before me, other than the evidence of Mr. John and Mr. Cho as to their abilities with Zoom, that members were unable to use Zoom to attend the AGM.
- [58] Holding the AGM by Zoom was expressly authorized by the Ministerial Order, notwithstanding language to the contrary in the Bylaws. KCSC was prohibited from holding the AGM in the Korean Centre as a result of the Public Health Order. On the evidence before me, I cannot find KSCS acted unreasonably in holding the AGM by Zoom during the Covid-19 pandemic. I also find that, as a result of the Ministerial Order and the Public Health Order, the holding of the AGM by Zoom was not an irregularity.

E. Acclamation of 39 directors

- [59] Article 35 clearly states that the number of directors is 15, plus or minus two. Therefore, no more than 17 directors are authorized under the Bylaws.
- [60] The respondents point to the last two elections, in which more than 20 directors were elected. That may be true. But that does change the fact that in the 2021 election, more than double the number of permitted directors were acclaimed.
- [61] The newspaper advertisement for the AGM expressly incorporated Article 35, which restricts the number of directors.

- [62] I place no weight on the Korean translation of Article 35 provided by Mr. Kim. The authoritative Bylaws are those in English filed with the Registrar. After stating that the number of directors will be 15 plus or minus two, Article 35 does provide that number shall be changed from time to time at a general meeting. I find that Article 35 is intended to restrict the number of directors to a number between 13 and 17, and that the exact number for any given election within that range will be set at the AGM. The members are not entitled to simply increase the number of directors to include every candidate.
- [63] Article 32 requires a vote to be taken at the AGM for the election of directors. There is a discrepancy between the evidence of Mr. Kim and Mr. Seo. I have found Mr. Kim's evidence to be unreliable in a number of respects. As such, I prefer and accept the evidence of Mr. Seo, and I find that no vote was taken in the election of directors. The process for election of directors as set out in Article 32 was not followed on April 21, 2021. Permitting 39 directors to be acclaimed is also in breach of the provisions of Article 35.
- [64] Article 37 does permit the acclamation of officers. While Mr. Kim could be acclaimed as president, he could only be so acclaimed after he was elected as a director. Because his position as director was obtained in contravention of the Bylaws, his position as president is similarly not valid.
- [65] I find the acclamation of the 39 directors was in breach of Articles 32 and 35, and was an irregularity in the election procedure.

III. Should Relief be granted?

- [66] Having found that there were the following irregularities in the 2021 election, namely the receipt of registrations in contravention of Article 36, the demand of a \$10,000 registration fee from presidential candidates, the improper rejection of four candidates by the Election Committee, and the acclamation of 39 directors, the next questions are whether these irregularities were substantive and calculated to affect the result, and whether the court should intervene.
- [67] I have no difficulty finding that the irregularities I have found were substantive and intended to affect the result of the election. All of the irregularities taken together had the result of tailoring the pool of candidates, both by increasing the number in the first instance, and then reducing the pool to eliminate certain candidates for improper reasons. The imposition of a \$10,000 fee in a society comprised of elderly members can only be seen as a way to reduce competition for the position of president, and appears to have been successful in reducing the number of candidates for that position to one. Finally, there is simply no justification for creating a board of directors more than twice as big as the board contemplated by the Bylaws. By proceeding by way of acclamation, rather than voting by a show of hands electing 15 directors, KSCS permitted a glaring breach of its own Bylaws.

[68] I am satisfied that this is a case in which the court must intervene and exercise its remedial powers. Pursuant to s. 105 of the Societies Act, the election for directors of KSCS held April 21, 2021 is set aside due to irregularities, and a new election will be held. Given my conclusion, I will not make orders pursuant to s. 102 of the Societies Act.

[69] I make the following orders to govern the election for directors in 2021:

- a) A new election for directors of KSCS will be held no later than 45 days from the date of this order by way of an extraordinary general meeting of the members of KSCS ("2021 Election").
- b) Within 14 days of this order, a neutral returning officer shall be appointed to manage the 2021 Election in place of the Director Registration Administration Committee as set out in Article 36 of the Bylaws of KSCS, and the returning officer shall exercise all powers and responsibilities of the Director Registration Administration Committee.
- c) No fee may be charged for any person to register as a candidate for director or officer in the 2021 Election, unless such fee has been approved in advance by a special resolution of the members.
- d) The 2021 Election will be announced in newspapers, in compliance with Article 36(b) of the Bylaws.
- e) Candidates for the 2021 Election will register in compliance with Article 36 of the Bylaws.
- f) The returning officer of the 2021 Election shall reject candidates only in accordance with Article 36.
- g) The returning officer shall be the chairman of the extraordinary general meeting for the 2021 Election.
- h) If provincial orders related to the Covid-19 pandemic permit, the 2021 Election will be held at the Korean Centre, 1320 East Hastings Street, Vancouver B.C., otherwise the returning officer shall set the meeting as he deems appropriate in accordance with the provincial orders.
- i) Directors will be elected in the 2021 Election by a show of hands if the meeting is held in person, or by an alternate method set by the returning officer if he has determined that an in person meeting can not be held in accordance with the provincial orders.
- j) The maximum number of directors elected will be 17.
- k) Following the 2021 Election, the directors will elect officers in compliance with Article 37(c) of the Bylaws.
- l) KSCS will pay any expenses related to the 2021 Election including advertising costs and reasonable fees and disbursements of the returning officer.

[70] I order costs in favour of the petitioners.

"W.A. Baker, J"

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