

CANADA / JUDGMENT

Szeto v. Shon Yee Benevolent Association

2020 BCSC 1543

COURT

Supreme Court of British Columbia

DECIDED

18 September 2020

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2020 BCSC 1543 Szeto v. Shon Yee Benevolent Association of Canada

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Szeto v. Shon Yee Benevolent Association of Canada,

2020 BCSC 1543

Date: 20200918

Docket: S228645

Registry: New Westminster

Between:

Eric Szeto, Norton Lee, Ernie Lee, Timmy Siu, Victor Tong, Robert (Y.S.) Chan, Chi Tim Chan, Tony Chang, Jack Siu, Andrew Gock, Sen Yow Chan, Simon Li, Tim Choy, Philip Lam, Foon Ping Lee and Harry Lee

Petitioners

And

Shon Yee Benevolent Association of Canada,

Bunn Lam, Garry Jang and Barry Ko

Respondents

Corrected Judgement: the text of the judgment was corrected
on November 6, 2020

Before: The Honourable Madam Justice W.A. Baker

(via Teleconference)

Oral Ruling Re Petition to Have Election Results Certified

In Chambers

Counsel for the Petitioners:

T. Yu

Counsel for the Respondents Bunn Lam,

Garry Jang and Barry Ko:

P. Harrison

Place and Date of Trial:

Vancouver, B.C.

September 8 & 9, 2020

Place and Date of Ruling:

Vancouver, B.C.

September 18, 2020

- [1] THE COURT: This is a petition brought by certain members of the Shon Yee Benevolent Association of Canada, which I will refer to as "Shon Yee", seeking to have election results certified following an election for directors of the Shon Yee general headquarter division held on March 30 and 31, 2019.
- [2] The petition is opposed by certain other members of Shon Yee, who also seek to have election results certified, albeit with a different result than that sought by the petitioners.
- [3] On this application I received affidavits from 13 members of Shon Yee, and transcripts of cross-examinations conducted of seven of the affiants. The parties agreed that this matter was suitable for resolution on the evidence before me, and no referral to the trial list was required. I agree.
- [4] Shon Yee is a society formed in 1914, which continues as a benevolent organization doing charitable work, with approximately 1,000 members in three different branches located in Calgary, Victoria and Vancouver. Shon Yee has three main divisions: the general headquarter division, an athletic division, and a senior division. The general division is the subject of this petition.
- [5] In the ordinary course, the directors of the general division would have been elected in the fall of 2018 and a new election would be planned for the fall of 2020. However, the 2018 election did not happen as planned and was postponed until March 2019. That election resulted in a dispute as to the outcome, and as a result, the Shon Yee general division has been without a board of directors since the fall of 2018.

- [6] On August 19, 2018, the members of the general division directed the then directors to form an 11-member election committee to deal with the election procedures for the upcoming elections. The election committee was appointed by the directors on September 30, 2018. A dispute arose between various members of the general division regarding the setting of the date for the election in the fall of 2018.
- [7] A petition was filed challenging the date set for the election in early December 2018. On November 30, 2018, an order was made enjoining Shon Yee from holding the election until matters raised in that petition were determined. Ultimately, members representing the two different factions of the split board of directors agreed to election guidelines and agreed to reset the dates for the election to March 30 and 31, 2019.
- [8] The Constitution of Shon Yee permits each club, which is defined as each of the headquarters in Vancouver and the branch divisions in Victoria and Calgary, to set its own election bylaws and regulations. It was common ground before me that the election guidelines were created under the club's power to create its own election bylaws and regulations. The election guidelines were approved by the general membership at a special general meeting held on February 24, 2019. The first petition was resolved by way of a consent order entered on April 4, 2019.

The election March 30 and 31, 2019

- [9] On March 30 and 31, 2019, 25 directors of the Shon Yee general division were to be elected.
- [10] The election guidelines included the following requirements:
- a) The 25 candidates with the most votes would be elected directors. If the 25th director could not be determined because of a tied vote, the tied candidates' names would be put in a box and the last director would be selected by lottery.
 - b) The election committee was to prepare a ballot, which was 11 x 17 inches and showed the candidates names in both Chinese and English.
 - c) The election would be held from 10:00 a.m. to 3:00 p.m. on March 30, 2019, and from 10:00 a.m. to 1:00 p.m. on March 31, 2019.
 - d) Four election officials, Garry Jang, Barry Ko, Ernie Lee and Timmy Siu, or any replacement picked by the person who cannot do it, would supervise the election, verify the eligibility of the members to vote, provide ballots to the members eligible to vote, safeguard the ballot boxes, and supervise the counting and recording of the ballots.
 - e) Each ballot must be signed by one of Garry Jang or Barry Ko, and by one of Ernie Lee or Timmy Siu, or by the replacement therefrom, before being given to the member to vote.
- [11] There were two factions among the membership and candidates, which were known as the Norton group and Bunn group. Garry Jang and Barry Ko represented the Bunn group, and Ernie Lee and Timmy Siu represented the Norton group, as election officials.

- [12] The petitioners are members of the Norton group, and the respondents are members of the Bunn group.
- [13] The election was held on March 30 and 31, 2019. Approximately 200 members participated in the election. Quite a bit of attention in the application was paid to exactly how many members voted in the election. The witnesses for the Norton group say that 205 members voted, while the witnesses for the Bunn group say that 203 members voted. The respondents argued that the petitioner's evidence that there were 205 voters was designed to mislead the court, and the respondents challenge the credibility of their evidence as a result. I do not agree.
- [14] There was no agreement between the two groups as to the validity of the record of votes purportedly taken during the election. None of the witnesses could recall who determined the actual count. They each heard a voice shout out a total, but nobody could identify the voice they heard, and none of the witnesses identified themselves as the person who tallied the count. As such, I have no reliable evidence upon which to determine an accurate number of voters who participated in the election. However, for the reasons that follow, nothing turns on a determination of the correct number.
- [15] On March 31, 2019, the voting concluded, and the vote counting began. At approximately 7:00 p.m., the members stopped for dinner. The members were able to take a photograph of the large white board where the votes were recorded. It is the record of the votes at 7:00 p.m. which the petitioners argue is to be certificated.
- [16] The respondents disagree, and say that two more votes were counted for the results to be certified. These two votes were described at the hearing as the "Disputed Ballot" and the "Voided Ballot."
- [17] The election was extremely close. The inclusion of either or both the Disputed Ballot and the Voided Ballot would change the outcome of the election results as they were recorded as 7:00 p.m. The inclusion of either or both of the Disputed Ballot or the Voided Ballot would increase the number of elected directors from the Bunn group, likely changing the balance of power on the board of directors.

Disputed Ballot

- [18] Mr. Szeto deposed that during a counting of the ballots, he would point out the names on each ballot to Barry Ko. Mr. Ko would then read out the names and mark off the names as they were counted. The votes were recorded by a volunteer on a white board visible to the members. Once the ballot had been counted, it was passed to an election official who would then sign the ballot. Under cross-examination Mr. Foon Ping Lee confirmed the process to read and record the ballots. This process was also eventually confirmed by Mr. Ko under cross-examination. Mr. Ko also agreed under cross-examination that after he read a name, he would place a mark, either a dot or a stroke, against the name on the ballot.

- [19] Mr. Szeto deposed that at the beginning of the counting, after the votes were recorded, the ballots were signed by Ernie Lee. After some time, Mr. Ernie Lee was replaced by Barry Jang. In his affidavit, Mr. Ernie Lee confirms this process was followed during the election. Mr. Ernie Lee confirmed that on each ballot he signed, Mr. Ko had placed markings to indicated that the names had been read. Mr. Ernie Lee deposed that uncounted ballots had no markings placed on them by Mr. Ko.
- [20] I find that the election process was for Mr. Szeto to point out each name on a ballot to Mr. Ko, following which Mr. Ko would read the name aloud and place a mark by the name he just read. A volunteer would then place a mark on the white board beside the candidate's name. The ballot would then be passed to an election official who would sign the back of it. The first election official was Mr. Ernie Lee, who was replaced by Mr. Garry Jang.
- [21] The issue with the Disputed Ballot arose when one ballot was counted and passed to Mr. Jang to be signed. Mr. Szeto deposed that he pointed out the names on the Disputed Ballot for Mr. Ko to read, following which Mr. Ko read off the names, marked them on the ballots and passed the ballots to Mr. Jang to be signed. The names were also marked on the white board at that time. Mr. Tim Choy deposed that he observed that the Disputed Ballot was counted and placed on the pile for Mr. Jang's signature. Mr. Szeto deposed that before Mr. Jang signed the Disputed Ballot, he (Mr. Jang) left the table to use the washroom. While Mr. Jang was away from the table, the table was moved and water spilled on the table. This was confirmed by Mr. Tim Choy. Mr. Szeto confirmed under cross-examination that he saw Mr. Ko place a microphone on a bundle of uncounted ballots before the table was moved.
- [22] Mr. Foon Ping Lee deposed that he observed Mr. Jang had not signed the ballot before getting up to leave the table, and he asked Mr. Jang to sign the Disputed Ballot, to which Mr. Jang replied that he would sign it after he returned from the washroom. Under cross-examination, both Mr. Szeto and Mr. Choy confirmed that they heard this exchange between Mr. Foon Ping Lee and Mr. Jang. Mr. Ko denies the exchange took place.
- [23] Mr. Szeto deposed that after the water was cleaned up, Mr. Jang returned, and the Disputed Ballot was placed on the uncounted pile. This was confirmed by Mr. Foon Ping Lee and Mr. Tim Choy. Mr. Szeto deposed that Mr. Jang said it had not been counted because he had not signed it. Mr. Szeto deposed that it had been counted. He stated, he watched the Disputed Ballot being read, marked and counted with the results recorded on the white board. Mr. Norton Lee and Mr. Foon Ping Lee deposed that the disputed ballot was counted. Mr. Foon Ping Lee deposed that he stated that Mr. Jang had not yet signed the ballot, a statement which is confirmed by Mr. Choy. Mr. Timmy Siu also confirmed these facts. Mr. Foon Ping Lee testified under cross-examination that at the time of the dispute about the ballot, when Mr. Jang had returned to the table, he was standing directly behind Mr. Jang and Mr. Szeto and could see everything which was happening.
- [24] Mr. Foon Ping Lee was cross-examined on this evidence, and I found his evidence to be detailed and credible. He had a clear recollection as follows:

But the ballot that you talked about is very important. So that ballot was marked by Ko. So after that ballot was read out, it was handed over to Jang. Jang should not sign - he did not sign it. He got up. I said, Mr. Jang, this ballot has been read out; you have to sign it. He said, can I just go to the bathroom first and I will come back and sign it. And when he was back from the washroom, he pick up the ballot and he was about to put it amongst those ballots which was not yet read out.

I said, you already read out this ballot; it's just that you haven't signed it. He said, I haven't sign it. I haven't read it out. So Mr. Ko who did the reading out held the ballot in his hand and said, oh, I think I have already read this ballot out. And Jang said, no, I haven't signed this ballot. I don't agree. So Szeto and the few of us started to have an argument. Szeto said, well, this ballot has already been read out; it's just that you haven't signed it.

[25] Mr. Ernie Lee deposed that he looked at the Disputed Ballot and confirmed that it had markings made by Mr. Ko on the candidates' names consistent with ballots that had been counted. Mr. Ernie Lee deposed that there was no reason for the Disputed Ballot to have these markings on it if it had not been counted.

[26] Mr. Ko, however, disputes this evidence. Mr. Ko deposed that the Disputed Ballot was underneath the microphone that had placed on the uncounted ballot so they would not be disturbed when the table was moved.

[27] In his affidavit, Mr. Ko disputes the statements made by Mr. Szeto, Mr. Norton Lee, Mr. Foon Ping Lee, Mr. Choy and Mr. Siu. Mr. Ko deposed that he left the use the washroom, and when he came back and resumed counting ballots, he noticed a ballot which has markings on it, and he questioned whether it had been counted or not. Mr. Ko said in his affidavit and confirmed under cross-examination that Mr. Jang confirmed it was not counted because Mr. Jang had not signed the back of it.

[28] Mr. Jang also denies he spoke with Mr. Foon Ping about the Disputed Ballot. Mr. Jang deposed that he was in the washroom when the table was moved and the water was spilled, but he suggests that Mr. Ernie Lee was the election official signing the ballots at the time he left the use the washroom, and states that he only took over from Mr. Lee after he returned from the washroom. Mr. Jang confirms Mr. Ko's evidence that it was Mr. Ko who raised the question of the validity of the Disputed Ballot. However, Mr. Jang does not confirm Mr. Ko's evidence that Mr. Jang stated that he, meaning Mr. Jang himself, had not signed a ballot and therefore it was not counted. Mr. Jang deposed that he told the group that "it had not been reviewed and counted because there was no scrutineer's signature at the back to indicate it had been read." Mr. Jang's statement is not consistent with him being the person responsible for signing the ballots at the time the dispute arose.

[29] Mr. Paul Wong deposed that he did not hear Mr. Foon Ping Lee tell Mr. Jang to sign the ballot. However, Mr. Wong also has no recollection of the water-spilling incident, which all the other affiants confirm happened. As such, I do not find his evidence particularly reliable regarding events occurring at or around the time the Disputed Ballot was dealt with.

- [30] On balance, I do not accept the evidence of Mr. Jang on the sequence of how matters unfolded after the break when the table was moved. I found his evidence to be not credible, and to be evasive. It was at odds with the evidence of all witnesses, including Mr. Ko, as to who was responsible for signing the ballots. In reviewing the cross-examination of Mr. Jang, I found his evidence to be not credible on a number of points.
- [31] For example, Mr. Jang stated that he did not know which candidates were part of the Bunn group, and which were part of the Norton group. Given Mr. Jang's role as an election official on behalf of the Bunn group, the heated differences between the two groups, Mr. Jang's own candidacy for director on behalf of the Bunn group, and the history of the dispute between the groups going back to 2018, I found this statement by Mr. Jang to be not credible. Mr. Jang also stated under cross-examination that he could not identify the signature of Mr. Ko. Again, in the context of this election, where both Mr. Ko and Mr. Jang were required to sign many different documents together, I found this evidence to be not credible and evasive. Overall I found Mr. Garry Jang was not a reliable witness, and his evidence is entitled to little weight.
- [32] After considering all of the evidence before me, I find the balance of probabilities favours the description of events given by Mr. Szeto, Mr. Foon Ping Lee, Mr. Choy, Mr. Norton Lee and Mr. Siu, and I reject the description provided by Mr. Jang and Mr. Ko.
- [33] I find that Mr. Ko read the names off the Disputed Ballot, and these names were marked on the white board by volunteers. I find that the Disputed Ballot was passed to Mr. Jang for his signature but, before he signed it, he left the table to use the washroom. When he returned, Mr. Jang was asked to sign the Disputed Ballot but refused, stating that it had not been counted. I find that Mr. Jang was either untruthful or mistaken. I find that the Disputed Ballot was counted and recorded on the white board.
- [34] All affiants agree that there was a dispute about the ballot, however, that dispute arose, and, rather than resolving the dispute at that point in time, the parties agreed to put the Disputed Ballot to one side and continued counting the remaining ballots.
- [35] Mr. Szeto deposed that the last of the ballots was counted by 6:30 p.m., and at that time Mr. Barry Ko announced that the election was finished and they could all go to dinner. Mr. Ernie Lee and Mr. Choy also deposed that they heard Mr. Ko state that the election was finished and the members could go to dinner. They say no issue was raised by anyone regarding the Disputed Ballot before they left for dinner. Mr. Szeto, Mr. Choy and Mr. Ernie Lee deposed that members were invited to take pictures of the white board at that time, and they understood that at that time the election was complete. These facts were further confirmed by Mr. Timmy Siu. Under cross-examination Mr. Siu agreed he did not hear someone specifically say the counting was finished, but he reiterated that the counting was finished, and the members were leaving for dinner. Mr. Siu stated Mr. Ernie Lee left the room before him, and he, meaning Mr. Siu, left before the members of the Bunn group.

- [36] Mr. Ko denies he told people they could go for dinner. He deposed that he raised the issue of the Disputed Ballot before the membership dispersed, but it was late in the day and people were anxious to get to dinner. In fact, Mr. Ko deposed that there was an agreement between the election officials to discuss the validity of the Disputed Ballot after dinner, a fact which is denied by Mr. Ernie Lee and Mr. Siu. Mr. Brian Jang deposed that he did not hear Mr. Ko state the ballot counting was complete, and the members could go to dinner. Mr. Garry Jang deposed that Mr. Ko stated in a loud voice that the Disputed Ballot had not been determined and no final count could be tallied, but nobody seemed to pay attention to him. Under cross-examination Mr. Ko agreed that the membership started tabulating the results before they left for dinner, and Mr. Ko agreed that the membership thought the election was complete, even though he says he did not expressly say that to them.
- [37] I find that the state of counting was not clarified for the membership before they disbursed for dinner. Further, I find that the four election officials did not reach agreement on whether the count was complete before they left for dinner. The election officials for the Norton group understood the count was complete. The election officials for the Bunn group understood that the Disputed Ballot still needed to be addressed.
- [38] Mr. Szeto deposed that he asked Mr. Jang and Mr. Ko to seal all the ballots in the ballot box, although he did not see them seal the ballots in the ballot box. Mr. Ko deposed that the ballot box was not sealed until after dinner, and that the Disputed Ballot was included in the ballot box.
- [39] Mr. Szeto deposed that at the dinner following the election, Mr. Barry Ko and Mr. Garry Jang stated that the members were to return to the Shon Yee headquarters after dinner to address the disputed ballot. These facts were confirmed by Mr. Choy under cross-examination. Mr. Ko and Mr. Jang attempted to contact Mr. Lee and Mr. Siu to request their re-attendance at the Shon Yee headquarters, but neither of these election officials returned to the headquarters. Mr. Ernie Lee deposed that his wife told him someone was calling for him to return to the Shon Yee headquarters, but he did not return as the election was over. Under cross-examination, Mr. Timmy Siu agreed that someone telephoned him wife and asked him to come back to the headquarters. He did not agree to go back because he understood the election was over and he had another engagement to go to.
- [40] Mr. Ko and Mr. Jang and number of other members, including Mr. Szeto, returned to the headquarters after dinner. Somewhere between 15 and 30 people returned to the headquarters after dinner. Mr. Szeto deposed that Mr. Ko produced the Disputed Ballot and stated that it needed to be counted. Mr. Szeto and others protested and stated that the Disputed Ballot had already been counted before dinner.
- [41] Mr. Szeto deposed that Mr. Victor Tong suggested the ballot be marked with a red mark on the white board to indicate that it was in dispute and its validity still needed to be determined. Mr. Szeto's evidence was confirmed in Mr. Choy's affidavit. A red marker was used to indicate the results of the Disputed Ballot on the board. Mr. Ko deposed that Mr.

Tong agreed the ballot should be counted. Mr. Garry Jang deposed that all the people present at the time agreed the ballot should be counted. This is disputed by Mr. Szeto and Mr. Choy. Mr. Ko and Mr. Garry Jang agreed the ballot was marked with a red marker on the white board.

- [42] All affiants agree that Mr. Ko and Mr. Jang signed the white board after the Disputed Ballot was marked in red. Mr. Ko and Mr. Garry Jang deposed they did this to indicate their approval of the election results and because neither of the election officials from the Norton group were present to add their signatures. Under cross-examination Mr. Ko agreed that fair election procedure required one election official from each of the Bunn and Norton groups to consult on issues, and that he and Mr. Jang decided in the absence of either official from the Norton group that the results of the election were finalized with the inclusion of the Disputed Ballot.
- [43] Mr. Szeto took a photograph of the Disputed Ballot for the record and insisted that all ballots be marked in a ballot box and sealed with tape. Mr. Szeto deposed that at that point Mr. Garry Jang, Mr. Barry Ko, Mr. Tim Choy and Mr. Eric Szeto put their signatures on the sealing tape around the ballot box, and the parties left the Shon Yee headquarters. This is confirmed by Mr. Choy. Mr. Szeto deposed the Disputed Ballot was not placed in the sealed ballot box but was retained by Mr. Barry Ko and Mr. Garry Jang. Mr. Ko disputed this statement by Mr. Szeto.
- [44] Mr. Ko deposed that only him and Mr. Szeto signed the sealing tape, and Mr. Szeto did so as a representative of the Norton group because the election officials from the Norton group were not present. Mr. Wong deposed that only Mr. Szeto and Mr. Ko placed their signatures on the sealing tape.
- [45] On April 6, 2019, the members met again at the Shon Yee headquarters to try to resolve the issue of the Disputed Ballot. Mr. Szeto says that on April 6, 2019, he discovered the ballot box had been tampered with and his signature on the tape was no longer present. None of the respondents denied that Mr. Szeto's signature was missing from the ballot box on April 6, 2019. Mr. Howard Lam deposed that all signatures were intact on April 29, 2019. However, he does not identify whose signatures were on the sealing tape on April 29. Nor does he identify whose signatures were placed on the sealing tape on March 31, 2019. As such, the evidence of Mr. Lam is not helpful.
- [46] Because the ballot box had been tampered with, the petitioners say that a recount could not be done. As such, the petitioners argue that the only valid recording of the election is the one set out in the photograph of the white board taken before the dinner on March 31, 2019.
- [47] Mr. Szeto deposed that on April 13, 2019, lawyers for the two groups met to try to resolve things, but because the ballot box had been tampered with, they were unable to recount the ballots. This evidence is not disputed by the respondents.

- [48] I find that the ballot box was tampered with following March 31, 2019. I cannot determine who tampered with it or how it was tampered with. However, I find that the contents of the ballot box could not be used to reliably assist in a recount to determine the election results. For this reason, I find the evidence as to the number of votes cast on the voting day is irrelevant in deciding the issues before me.

Voided Ballot

- [49] According to the election guidelines, for a ballot to be valid, an election official from each of the two groups must sign it before it was given to a member to record their vote. The ballot stated on its face that a member was to place a tick in the box to the right of the candidate's name to record their choice. The ballot also stated on its face that if a member chose more than 25 candidates, their ballot would be null and void.
- [50] Under cross-examination, Mr. Ko agreed that before the election all four election officials signed a blank form of ballot to indicate their approval to the form of ballot to be used in the election. Only one blank ballot was in evidence before me which included all four signatures of the officials.
- [51] Both Mr. Jang and Mr. Ko, under cross-examination, conceded that at lunch on March 31, 2019, before the votes were counted, the election officials made an agreement that they would accept marks other than ticks, as long as it was clear who the member intended to vote for. Mr. Ko referred to the undated blank ballot, which all four election officials signed, and which contained a handwritten statement that any clear marking inside the box would be acceptable.
- [52] Under cross-examination both Mr. Siu and Mr. Ernie Lee denied that any such agreement was made. They were shown a copy of the ballot with the alleged handwritten agreement between the four election officials, and both Mr. Siu and Mr. Ernie Lee stated that when they signed the document, the handwritten agreement was not present. They say that they signed the document to confirm that the ballot itself was the correct form for the election, as did the other election officials, and that it was signed prior to the election.
- [53] Mr. Ko agreed that prior to the election, the four officials signed a blank ballot to confirm its use in the election. The only blank ballot signed by all four election officials is the one with the handwritten agreement added to it. Mr. Ko said this agreement was only reached after the voting was completed, but before the counting started. As such, I find that the four officials signed the blank ballot before the voting started, and only after the voting was completed were the handwritten words added to the ballot suggesting an agreement between the officials was reached. I find the disputed handwriting was not on the ballot when the Norton officials signed it.

- [54] During the election on March 30 and 31, 2019, if an issue was taken with respect to a ballot by any volunteer checking the ballots, the election officials would examine the ballot, and if all four election officials agreed it was void, the ballot would be marked void and all four election officials would sign it to indicate their agreement that the ballot was void.
- [55] Six ballots marked void were produced on the hearing, and were put to the various affiants when they were cross-examined. On the whole of the evidence, it was clear that one ballot was not signed by an election official from each of the Bunn and Norton groups. As such, this was not a valid ballot. There was a dispute between the parties as to whether this was a "void" ballot or an "invalid ballot". However, with respect to my decision, nothing turns on this distinction.
- [56] Of the remaining five ballots, they were all validly endorsed by two election officials prior to voting. Two of the five recorded votes for 26 candidates, and were therefore null and void. The remaining three ballots contained irregular markings. One ballot had tick marks to the left of the candidates' names, as opposed to ticks to the right of the names. One ballot used a mixture of ticks and X's. One ballot used ticks and the number "11". All five ballots were marked void, and all were signed by all four election officials indicating that they agreed the ballots were void.
- [57] Mr. Ko deposed that on April 1 or 2, 2019 he found the voided ballots, which not been placed in the sealed ballot box, and determined that one of them ought to have been counted. The ballot which he says ought to be recorded is the one where choices are marked with a mixture of X and ticks.
- [58] Mr. Ko says the Voided Ballot should have been counted because of the agreement between the officials to accept marks other than tick marks. The Norton officials deny any such agreement was reached.

I was not provided with any evidence that would indicate that other ballots with markings other than tick marks were accepted by the election officials during the course of the election. On the evidence before me, I find there was no agreement between the election officials to accept ballots with marks other than tick marks indicating a voter's choice of candidates.

- [59] Mr. Ernie Lee deposed that on April 5, 2019, Mr. Ko and Mr. Jang met with him and wanted Mr. Lee to validate one of the voided ballots. This meeting was confirmed by Mr. Ko under cross-examination. Mr. Ernie Lee deposed that he refused to validate the ballots as it had been confirmed as void during the election by all four of the election officials.
- [60] Mr. Szeto deposed that at the April 6, 2019 meeting, Mr. Ko and Mr. Jang produced a ballot marked void, and they said that this ballot ought to have been counted as part of the election. Mr. Ko denies he was at the April 6 meeting. He produced a document indicating he was required at the courthouse for jury selection that day, so he could not have attended the meeting. I note that there is no evidence to establish what time of day the meeting took place, and the fact that Mr. Ko was required for jury selection on the same day does not

necessarily mean he could not have also attended the meeting on the same day. Mr. Bunn Lam denies that Mr. Ko was at the meeting. Nothing particularly turns on whether Mr. Ko was present, as the outcome of the meeting is not contested.

- [61] Mr. Ernie Lee and Mr. Timmy Siu deposed they were present at the April 6, 2019 meeting and refused to validate the Voided Ballot. Mr. Szeto and Mr. Choy also disagreed with counting the Voided Ballot at the April 6th meeting.

Should the Disputed Ballot be included in the count?

- [62] I have already found as a fact that the Disputed Ballot was counted and included on the tally on the white board as it stood at 7 p.m. on March 31, 2019.
- [63] However, I will address some of the arguments raised by the respondent in relation to this issue.
- [64] The respondents argue that Mr. Siu and Mr. Ernie Lee abdicated their duties as election officials, and took steps to thwart the fair and appropriate supervision of the election. They point to the fact that Mr. Siu did not sit at the table where the votes were being counted, and Mr. Ernie Lee moved to the back of the room after he completed his turn signing off the completed ballots. They also point to the fact that neither Mr. Siu nor Mr. Ernie Lee agreed to return to the meeting after the dinner on March 31, 2019. The respondents state that as soon as Mr. Siu and Mr. Ernie Lee confirmed that had the Norton group had won by a slim margin, they left the meeting room and refused to return to deal with the Disputed Ballot.
- [65] I do not accept this argument by the respondents. The obligation on the election officials was to supervise the election process. They were not required to physically undertake every step in the election. The evidence was clear that volunteers were involved in many aspects of the election process, including inspecting ballots and recording votes. Mr. Siu and Mr. Ernie Lee were present throughout the election observing and supervising. There is no evidence that either Mr. Siu or Mr. Ernie Lee left the room before the initial counting of ballots was complete. I have already found that they both understood that the election was complete before they left, and I attach no significance to the fact that they left the room before the Bunn election officials did.

Similarly, they understood the election was complete and did not understand why they were required to return to the meeting room after dinner. I attach no improper motive to the actions of Mr. Siu or Mr. Ernie Lee and do not agree that they abdicated their duties as election officials.

- [66] The respondents also argue that Mr. Siu and/or Mr. Ernie Lee may have delegated their responsibilities as election officials to others, such as Mr. Szeto. They point to the election guidelines, which allow the election officials to pick a replacement if they cannot do the job.

- [67] I do not accept the fact that Mr. Siu or Mr. Ernie Lee picked any replacements for them, or were unable to do the job as election officials. If a replacement was to have been picked, I find that there would have to have been some kind of announcement or written document to inform the membership as a whole that Mr. Siu or Mr. Ernie Lee were no longer acting as election officials for the Norton group. This did not happen, and I find that no intention to replace them can be inferred on the evidence before me.
- [68] The respondents argue that there was a requirement to complete the vote count and declare the results of the election on March 31, 2019. In their submission, this justified the decision of Mr. Ko and Mr. Jang to "approve" the results of the election by signing the white board at the end of the evening, recognizing the Disputed Ballot.
- [69] I find nothing in the election guidelines which requires the votes to be counted and the results declared on March 31, 2019. In the circumstances, it was incumbent upon Mr. Ko and Mr. Jang to secure all the ballots, including the Disputed Ballot and all the void ballots, until a time when all four election officials could be present to determine any outstanding issues before finalizing the results of the election. Mr. Ko and Mr. Jang had no authority to finalize the results of the election or determine the outcome of the Disputed Ballot on their own without the involvement of Mr. Siu and Mr. Ernie Lee.
- [70] Because Mr. Ko and Mr. Jang did not secure the ballots, an official recount was not possible.
- Should the Voided Ballot be included in the count?
- [71] There is no application before the Court seeking to certify the ballot described as the Voided Ballot. As such, I question whether I have jurisdiction to address this ballot at all. However, the parties appeared willing to address full argument on the Voided Ballot, so I will provide my determination on the question of whether the Voided Ballot should be included in the final count.
- [72] I find the Voided Ballot should not be included in the final count for the following reasons.
- a) The void ballots were determined in the first instance by the volunteers in the presence of the membership on March 31, 2019. The void ballots were considered by the four election officials on March 31, 2019, and all four agreed that the Voided Ballot was void.
 - b) There was no official request for a recount of any voided ballots made by any party at the close of the day on March 31, 2019. Voided ballots were not protected and secured before they were retrieved by Mr. Ko on April 1 or 2.
 - c) The ballot on its face stated that members must indicate their choice with a tick in the box beside the candidate's name. A tick mark (✓) was illustrated on the face of the ballot. While the respondent suggests this was not mandatory, I do not agree. I found that four election officials did not agree to relax this requirement, and I was provided with no examples where the election officials did relax this requirement during the election. I find it was a mandatory mark. As such, *Janigan v. Harris* (1989), 70 O.R. (2d) 5, 62 D.L.R. (4th) 293 (H.C.J.) is

distinguishable as the relevant statutory requirements for ballots in that case required a ballot to be marked with "a cross or other mark."

- d) In a private society like Shon Yee, the society is entitled to set certain voting rules, as long as they are not impossible to comply with. There is nothing before me to suggest that the vast majority of voters were unable to comply with the rules for completing the ballot.
 - e) On March 31, 2019, Mr. Ko and Mr. Jang approved the results of the election. While I have determined that this was improper and irregular, nevertheless it is inconsistent for the respondent election officials on the one hand to argue that the results at the end of the night on March 31, 2019, were approved results of the election and then several days later to try to affect the results of the election again, all on their own motion.
- [73] For these reasons, I decline to order the inclusion of the Voided Ballots in the final count of the election.

Conclusion

- [74] Pursuant to s. 105(1)(b) and s. 105(2)(a) and (b) of the Societies Act, S.B.C. 2015 c. 18, the court is empowered to correct irregularities which result in a meeting of members being rendered ineffective, and the court is empowered to make any ancillary or consequential orders it determines appropriate.
- [75] In the case before me, the meeting of the members dated March 30 and 31, 2019, wherein they attempted to elect new directors to the Shon Yee general headquarters division, was rendered ineffective due to the improper attempt of the election officials Mr. Ko and Mr. Jang to approve the results of the election in the absence of Mr. Siu and Mr. Ernie Lee. Further, the results of the election could not be recounted by the four election officials due to the failure of Mr. Ko and Mr. Jang to safeguard the ballots of the election following March 31, 2019. I find these actions of Mr. Ko and Mr. Jang represent substantial irregularities which breached the election guidelines agreed to by the members on February 24, 2019, were calculated to affect the results of the election, and justify the intervention with the court: *Gill v. Kalgidhar Darbar Sahib Society*, 2017 BCSC 1423.
- [76] Unlike the situation in *Bector v. Vedic Hindu Cultural Society*, 2014 BCSC 230, in the case before me there has been no valid outcome of the election determined or ratified by the members. There is no election result to set aside or to be declared null and void. The petitioners and the respondents each ask the court to certify a different election result.
- [77] I exercise my powers under s. 105 of the Societies Act to determine and certify the outcome of the March 30 and 31, 2019 election. Having reviewed all of the evidence, I am satisfied that the Disputed Ballot was included in the tally shown on the white board before the members left for dinner on March 31, 2019.

[78] I am also satisfied that the Voided Ballot was properly excluded by the election officials on March 31, 2019, and is not to be included in the tally of votes in the election. As such, I make the orders set out in paragraphs 1 and 2 of the within petition filed June 26, 2019, which certify the election of 21 directors and direct a random draw to determine the remaining four directors to make up the full board of directors of 25 people.

"Baker J."

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