

SUPREME COURT OF YUKON

Citation: *Yukon Government (Registrar of Societies) v. Humane Society of Yukon*,
2013 YKSC 8

Date: 20130201
S.C. No. 12-A0098
Registry: Whitehorse

Between:

**YUKON GOVERNMENT
(REGISTRAR OF SOCIETIES)**

Petitioner

And

**HUMANE SOCIETY YUKON AND SHELLEY CUTHBERT,
MARYANNE BAER, GERALD THOMPSON, ISABELLE COTÉ-MICHAUD
(DIRECTORS)**

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

Philippa Lawson
Rebeka Breder

Counsel for the Petitioner
Counsel for the Respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a petition by the Yukon Government (Registrar of Societies) (“the Registrar”) seeking a number of items of relief against the Humane Society Yukon (“HSY”) and four individuals who were formerly members of the HSY board of directors. The hearing of the petition was on December 13, 2012. For reasons of urgency, which will become obvious later in these reasons, I was asked to and did make an order on December 14, 2012, granting certain items of relief, one of which was to order that HSY hold its annual general meeting (“AGM”) on December 20, 2012, for the purpose of electing a new board of directors and presenting a financial statement to HSY’s

membership. I adjourned the balance of the relief sought in the petition to a date to be set, which I am informed is now February 20, 2013. When I made the order, I indicated my written reasons would follow. These are those reasons.

[2] The Registrar brought this proceeding in the public interest and in the interest of HSY, including its donors, funders, patrons, supporters and members. He seeks the assistance of this Court in clarifying the fiduciary and related legal duties of the individual respondents in their capacities as former directors of HSY, a charitable society, and in directing the individual respondents to fulfill those duties.

ISSUES

[3] At the hearing, the parties indicated their agreement that the AGM should be held as soon as possible. Further, HSY did not oppose the Registrar's appointment of an independent person to chair the AGM.

[4] The issues which required immediate resolution were as follows:

- 1) Did the individual respondents breach their fiduciary duties to HSY by failing to comply with certain of their statutory and contractual obligations under the *Societies Act* (the "*Act*"), R.S.Y. 2002, c. 206, the *Societies Regulations* (the "*Regulations*"), O.I.C. 1988/124, and the HSY Constitution and Bylaws (the "*bylaws*") by:
 - a) improperly denying membership to individual applicants;
 - b) screening membership applications on the basis of criteria not specified in the HSY bylaws and not approved by the HSY membership;
 - c) failing to process membership applications in a timely manner;

- d) failing to permit members to inspect the register of members (the “membership list”) at HSY’s registered office at any reasonable time;
 - e) refusing to act on a petition of not less than 20% of members for a special general meeting, pursuant to s. 11 of the *Regulations*; or
 - f) by refusing or failing to comply with an order of the Registrar made on September 10, 2012, pursuant to s. 21(3) of the *Act*?
- 2) Whether the HSY board of directors should be ordered to present a financial statement to the membership at the AGM pursuant to s. 9 of the *Regulations*?

FACTS

[5] I find the following facts:

- 1) HSY is a charitable society incorporated under the *Act* in 1990. Its bylaws were filed with the Registrar in 1998 and do not appear to have been amended since then. The bylaws vary in some respects from those in Schedule A of the *Regulations*, however to the extent that the bylaws are silent on matters provided for in Schedule A, then the latter provisions govern HSY by default.
- 2) HSY held an AGM on August 23, 2011, at which time seven individuals were elected to the board of directors, including two of the respondents, Shelley Cuthbert (“Cuthbert”) and Maryanne Baer. Over the following year, five of the elected directors resigned. On January 24, 2012, Cuthbert was appointed president, after the elected president stepped down for personal

and health reasons. On April 23 and May 29, 2012, respectively, the board of directors appointed Gerald Thompson and Isabelle Côté-Michaud as directors. Debbie Sokoprud was also appointed as a director, but she has since moved from the Yukon and has not been named as a respondent because of her lesser involvement in the subject matter of the petition.

- 3) In January 2012, HSY entered into a contract with a company owned by Paul Girard, carrying on business as Ovation Construction (“Ovation”), to do some maintenance and repair work at the Mae Bachur Animal Shelter (the “Animal Shelter”) operated by HSY.
- 4) In April 2012, a dispute arose between HSY and Ovation over the quality of the work performed. On April 6, 2012, Cuthbert provided written notice to Ovation that HSY was terminating the contract, sending a complaint to the Better Business Bureau, and refusing to pay the outstanding invoices.
- 5) Paul Girard is the brother of Madeleine Girard (“Girard”) and at the material time was in a relationship with Marta Keller (“Keller”). Both Girard and Keller were directors of HSY at the time of the construction work. Girard opposed HSY’s refusal to pay Ovation’s invoices and, on April 9, 2012, she resigned from the board of directors in protest over the issue.
- 6) On April 11, 2012, Ovation’s lawyer sent HSY a demand letter for the outstanding invoices. On April 26, 2012, Ovation sued HSY for the debt in Small Claims Court.
- 7) On May 2, 2012, Girard and five other members of HSY prepared a complaint claiming that the HSY board of directors breached various

statutory and other duties. This complaint was filed with the Registrar on May 8, 2012, requesting the appointment of an investigator under s. 21(1) of the *Act*, the removal of Cuthbert as president and authorization to the HSY membership to elect a new acting president.

- 8) The Registrar determined that most of the allegations in the complaint involved internal disputes that should be resolved by the parties, but that the allegations regarding denials of membership and refusal to provide members with access to society records warranted further investigation by the Deputy Registrar.
- 9) On May 22, 2012, the Deputy Registrar wrote to the complainants and the HSY board of directors giving notice of the investigation and requesting further particulars from the complainants.
- 10) Also on May 22nd, HSY's lawyer wrote to Keller, who was then still an HSY director, about her communications with the board of directors regarding the Ovation dispute, which was before the Small Claims Court. The lawyer informed Keller that, because of her relationship with Paul Girard, she was in a conflict of interest. The lawyer then warned Keller not to contact the board or members of HSY concerning the contract dispute.
- 11) On June 7, 2012, the Deputy Registrar wrote to the HSY board of directors forwarding the particulars received from the complainants and requesting a response by June 14th. In particular, the Deputy Registrar attempted to correct a misunderstanding Cuthbert had about privacy legislation superceding the provisions in the *Act* and HSY's bylaws

regarding the rights of members to inspect the membership list and other records of the society. The Deputy Registrar informed Cuthbert that her understanding of the law was “incorrect”, stating:

“...there is no question of any privacy law “superceding” bylaw or other provisions requiring disclosure of the society’s membership list ... member rights to inspect the society’s membership list are established by s. 22(2) of the *Societies Act*, not just by s. 34 of the bylaws.”

Cuthbert acknowledged her misunderstanding in a subsequent letter to the Yukon Privacy Commissioner on June 9, 2012.

- 12) Also on June 9, 2012, Cuthbert wrote to the Deputy Registrar providing HSY’s response to the complaint investigation. In that letter, Cuthbert stated that the board had not reviewed any membership applications since February 14, 2012. Cuthbert further acknowledged the absence of any membership criteria in the legislation or in HSY’s bylaws. However, she stated that in the absence of such criteria, the board “developed an internal guideline to follow”. Cuthbert further stated that the legislation and HSY’s bylaws prohibited the board from providing copies of HSY’s membership list to members. Cuthbert also stated that responding to Keller’s request for information about board meetings and other matters would constitute a “violation of the [lawyer’s] no-contact letter issued to Ms. Keller during this contract dispute”. This was a reference to the letter from HSY’s lawyer to Keller dated May 22, 2012. However, that letter only asked that there be no communication between Keller and the board

regarding the contract dispute, it did not ask that Keller not communicate with the board on other matters.

- 13) On July 5, 2012, after reviewing materials submitted by the complainants and the board, the Deputy Registrar wrote to the parties and specifically reminded the board of certain of its legal obligations, in particular:
 - a) its statutory obligation to maintain a complete and current membership list and to allow members to inspect the list at any reasonable time, including any time during HSY's business hours;
 - b) its bylaw obligation to admit members and its general legal obligation to process membership applications within a reasonable period of time;
 - c) its bylaw obligation to provide members with access to other society records; and
 - d) its regulatory obligation to present a financial statement at the AGM that covers a period ending not more than four months before the AGM is held.
- 14) On July 6, 7 and 12, 2012, the Registrar received complaints that HSY was refusing to grant members access to society records and was denying memberships to applicants who had paid the applicable fee.
- 15) On July 18, 2012, the Registrar wrote to the board reminding them of their legal obligation to provide members with access to the society's records.
- 16) On July 20, 2012, Cuthbert wrote to the Registrar and enclosed a membership list for the fiscal year ending March 31, 2012 ("membership

list #1”). The list did not include any past members and was missing some current members.

- 17) On July 26, 2012, the Registrar wrote to Cuthbert informing her that he had appointed the Deputy Registrar as an investigator under s. 21 of the *Act* and specified the complaints being investigated. He further asked that certain information and documentation be provided to him by July 31st, together with other information previously requested. He again explained HSY’s legal obligations regarding access by members to society records and processing membership applications and encouraged Cuthbert to “rectify any non-compliance with the *Act* in a timely way so that there is no need for me to issue an order”. The Registrar made particular reference to the internal “Guideline” which the board was apparently using to screen membership applications, and advised Cuthbert that the criteria set out in the Guideline were ineffective until adopted by the membership via a bylaw amendment. He further stated:

“HSY’s bylaws do not expressly permit the board of directors to establish membership criteria themselves through a guideline or otherwise. Nor do they establish any criteria for membership. Hence, HSY has no effective membership criteria and thus no legal basis on which to deny membership.

...

Anyone who applies for membership and pays the applicable fee should be accepted as a member without delay.” (emphasis already added)

- 18) On July 31, 2012, Cuthbert wrote to the Registrar expressing the hope that the investigation would include “the previous Board’s alleged breach

of the *Act*, regulations, and by-laws". The letter failed to enclose any of the information which the Registrar asked to be provided with as of that date.

- 19) On August 2, 2012, Keller provided written notice of her resignation as a director to the board. Among the reasons she stated for her resignation were the unexplained failure of the board to communicate with her or provide her with access to HSY's records since April 2012.
- 20) On August 5, 2012, Girard wrote to the Registrar complaining that she had received a letter from HSY dated July 31, 2012, denying her application for renewal of her membership and banning her from entering the Animal Shelter.
- 21) On August 8, 2012, HSY provided the Registrar with a revised membership list for the fiscal year ending March 31, 2012 ("membership list #2").
- 22) On August 10, 2012, the Registrar received a copy of a petition dated August 9, 2012, addressed to HSY and signed by 23 people claiming to be HSY members. The petition demanded that a special general meeting be held no later than September 3, 2012, to vote on a special resolution to dissolve the current HSY board of directors and to elect a new board.

Section 11 of the default bylaws in Schedule A of the *Regulations* provides:

"The directors may, when they think fit, convene a special general meeting, but the directors shall call a special general meeting if requested to do so in writing by not less than 20% of the members eligible to vote at the meeting." (my emphasis)

The Registrar therefore expanded the investigation to determine whether the signatories to the petition met this 20% threshold.

- 23) Also on August 10, 2012, the Registrar received two letters from HSY's lawyer. The first purported to address, among other things, the rationale for the board reviewing and denying certain applicants for membership, as follows:

"Paragraph 3 of the Society bylaws states that "... no person ... who satisfies the criteria for membership shall be denied membership". The bylaws seem to set out the following criteria:

1. The applicant must apply for membership (paragraph 3).
2. The applicant must pay annual membership dues (paragraphs 5, 6(d)).

Based on paragraph 3, where an applicant does not meet these criteria, their application for membership can be denied. This implies that there is a person denying the membership. Since the Directors are charged with overseeing the Society, it makes sense that the Directors would be responsible for reviewing membership applications and either accepting or denying them.

Paragraph 4 of the Bylaws require[s] members to uphold the constitution and to comply with the Bylaws. If the Board believes that an applicant will not uphold the constitution or comply with the bylaws as a member, then the Board can deny the application for membership. (my emphasis)

The second letter from HSY's lawyer stated that the board intended to tentatively hold the next AGM on November 23, 2012. Under s. 13 of the default bylaws in Schedule A, an AGM must be held not more than 15 months after the last preceding AGM, which in this case was held on

August 23, 2011. Therefore, the proposed date was the last possible date on which HSY could have held its AGM.

- 24) On August 16, 2012, the Registrar's office received an email from one of the 23 (special general meeting) petitioners proving that she was an HSY member, but that her name did not appear on membership list #2.

Accordingly, the Deputy Registrar asked HSY to provide an updated membership list. This request was repeated on August 29, 2012.

- 25) On September 5, 2012, HSY's lawyer provided a revised membership list for the fiscal year ending March 2013 ("membership list #3"). In her covering letter, HSY's lawyer acknowledged that the list was missing the names of two of the 23 petitioners but said that those names "will be added shortly". No explanation was provided as to why or to what extent membership list #3 was incomplete. The letter further announced that the board of directors did not intend to hold a special general meeting in response to the petition, because there were several signatories to the petition who were not members: "It appears that the 20% threshold has not been met and therefore a special meeting will not be called by the Board of Directors."

- 26) On September 6, 2012, the Deputy Registrar completed her investigation report and found, among other things, that:

- a) The board had denied access to the membership list and other society records to active members, including a board member, for several months in some cases, but had eventually provided this

information to all requesting members during the course of the investigation;

- b) The board had denied at least six applications for membership for reasons set out in letters of denial dated July 31, 2012;
- c) Some applicants had been provided with a document purporting to set out criteria for membership (the Guideline referred to earlier by the Registrar), which criteria had not been approved by the membership;
- d) HSY's membership list was incomplete and missing at least two current members; and
- e) The petition for a special general meeting to elect a new board of directors had been signed by 20% of voting members based upon the membership list available to the petitioners at the time they signed the petition.

27) On September 10, 2012, after reviewing the Deputy Registrar's investigation report, the Registrar issued a document entitled "Findings and Orders". He found that HSY had breached a number of statutory and bylaw requirements and, pursuant to s. 21(3) of the *Act*, ordered HSY to rectify the breaches. In particular, he ordered HSY to:

- a) "... maintain a complete membership list that includes past as well as current members, that is not limited to a fiscal year and that includes all members on record going back at least to August 2007. (This will ensure that any 5-year memberships granted in August 2007 are included in the list.) The HSY board is to provide me with a copy of its complete list, with the information required under s. 22 of the *Act*, by September 20th."

b) "... report to me by September 14th providing the name of the accountant preparing its financial statements, explaining why it has not yet prepared financial statements for 2011 – 2012, setting out what financial records are missing, and identifying a date by when it will have draft financial statements for 2011 – 2012 completed."

c) "... ensure that an up-to-date version of its member registry is always accessible to members at the HSY registered office for viewing at any time during the shelter's business hours, and to instruct its staff to provide such access upon request by any member. Alternatively, the society may satisfy the s. 22(2) requirement by sending a copy of the registry to a member requesting the same within two business days of the member's request."

d) "... immediately grant memberships to the six applicants to whom membership was denied by way of letters dated July 31, 2012, as well as to any and all other individuals who have applied to date. I order the HSY board to ensure that future membership applications are processed, as a matter of course, without delay and without a standard screening process by the board, unless and until the HSY membership adopts bylaws permitting such screening and such bylaws are approved by my office."

e) "... hold a special meeting of members for the purpose of electing a new board of directors (or an Annual General Meeting if the financial statements can be prepared in time) no later than October 5th, with at least 10 days notice of the meeting and purpose of the meeting provided to all members (as of the date of the notice) and posted in the local newspapers. In keeping with my previous order, new members should be accepted up to and at the meeting.

...

The meeting should be held at a neutral location ..."
(emphasis already added)

- 28) One hour and four minutes after the Registrar issued these orders, Cuthbert replied to him by email stating, "This email is to inform you that we will be proceeding to supreme court for a jurisdictional review [as written] over your orders of denial of memberships and the special meeting."
- 29) On September 14, 2012, HSY's lawyer wrote to the Registrar's counsel stating:
- "Humane Society Yukon is currently considering an application for judicial review of the Registrar's findings concerning membership denials, the August 9th petition for a Special General Meeting, and Member access to other HSY records. Therefore no action will be taken by Humane Society Yukon on these items until such consideration is complete."
- 30) On October 18, 2012, the Registrar charged HSY and the four individual respondents with offences under s. 23(1) of the *Act*, for failing to comply with his orders regarding membership denials and the convening of a special general meeting by October 5, 2012.
- 31) On October 24, 2012, the Registrar received a complaint from Jordi Mikeli-Jones, a past president of HSY and a former HSY member, stating that she had arranged for delivery of 14 membership applications, together with payment of the applicable membership fees, to the Animal Shelter on September 21, 2012, but that none of the applicants had yet received confirmation of their memberships, over a month later.

- 32) To date, HSY has not filed an application for judicial review of the Registrar's September 10th orders, nor has it applied for a stay of those orders.
- 33) The HSY board of directors did not comply with the Registrar's order to provide a complete, up-to-date membership list by September 20, 2012. On December 5, 2012, in response to the Registrar's petition, Cuthbert filed her affidavit and attached as exhibit M a revised membership list, again for the fiscal year ending March 2013, updated to November 2, 2012. The list still fails to include past members going back to August 2007, as did the previous three membership lists provided to the Registrar.
- 34) In early November 2012, the HSY board issued a notice to members that it would hold an AGM at the Animal Shelter on November 23, 2012. At that time, a number of former HSY members had been banned by the board from entering the Animal Shelter. Therefore, contrary to the Registrar's order, the board failed to select a "neutral location" for the AGM.

[6] The hearing of this petition was originally scheduled for November 20, 2012, which would have preceded the AGM scheduled for November 23rd. However, at a case management conference on November 19, 2012, HSY's newly retained counsel sought and obtained an adjournment to December 13, 2012. As a result, counsel agreed that an order cancelling the AGM was appropriate and that a new date would be set when the petition was heard.

ANALYSIS

1. Did the Individual Respondents Improperly Deny Memberships?

[7] Near the beginning of these reasons, I stated the first two issues as: (a) improperly denying membership to individual applicants; and (b) screening membership applications on the basis of criteria not specified in the HSY bylaws and not approved by the HSY membership. I did this to track the language used in the order that I made on December 14, 2012. However, because the denials were based on certain criteria utilized by the board, these two issues are really interrelated and are best dealt with together.

[8] HSY's current counsel submitted that the majority of the relief sought by the Registrar stems from the denials of memberships. In HSY's defence, counsel stated in her outline:

“The HSY's Board of Directors says that the denials were grounded in a desire to prevent harm to the society, as it believed the applicants would harm the HSY if they were to become members. The applicants were currently engaged in, or directly related to persons who were participating in, an active lawsuit against the society, and/or had previously acted in detrimental ways toward the HSY.”

HSY's counsel argued that, so long as the respondents honestly believed that they were acting in the best interests of the society, and providing they were motivated by loyalty to the society, were free of conflict of interest, and were acting in good faith, then their decisions to deny memberships must be upheld.

[9] Thus, as will soon become apparent, HSY's defence centers on the subjective belief of the individual respondents that they were acting in the best interests of HSY at all material times. However, there are two fatal flaws to this position: (1) it ignores HSY's

own bylaws; and (2) the respondents cannot be said to have been acting in good faith if their decisions to deny memberships were based on unreasonable grounds.

a) HSY's bylaws do not authorize the board to screen membership applications.

[10] It is important to note that the relevant provision in the default bylaws under Schedule A regarding membership states:

“3. An individual or corporation may apply to the directors for membership in the society and on acceptance by the directors shall be a member, but no person or corporation who satisfies the criteria for membership shall be denied membership.” (my emphasis)

However, the provision in HSY's bylaws states:

“3. An individual or corporation may apply for membership in the society, but no person or corporation who satisfies the criteria for membership shall be denied membership.”

As can be seen, the words in the default bylaw emphasizing directors' approval of applications would seem to have been intentionally removed in HSY's bylaw. Further, the only “criteria for membership” in HSY's bylaw are that one must “apply for membership” and pay the appropriate “membership dues [or] fee” (See ss. 5 and 6(d)). Therefore, as the Registrar correctly informed the HSY board in his letter of July 26, 2012, anyone who applies for membership and pays the applicable fee should be accepted as a member. There is no discretion to screen applicants.

[11] At the hearing, HSY's current counsel adopted and relied upon the argument of HSY's former counsel, in her letter to the Registrar's counsel dated August 10, 2012, that screening criteria could be implied in HSY's bylaw. In that letter, HSY's former counsel referred to s. 4 of HSY's bylaws, which states: “Every member shall uphold the

constitution and comply with these by-laws”, and concluded that, if the board “believes” that an applicant will not uphold the constitution or comply with the bylaws, then it could deny that person’s application for membership. HSY’s former counsel argued that this anticipatory consideration of future misbehaviour by an applicant is similar to the situation in *Peel (Regional Municipality) v. Greater Toronto Airports Authority* (1999), 5 M.P.L.R. (3d) 101 (Ont. S.C.). In that case, the Regional Municipality of Peel applied to the court for a declaration that the board of directors of the Greater Toronto Airports Authority (“GTAA”) breached its bylaws by failing to appoint Peel’s nominee to the board. The bylaws required the board to appoint each nominee who: (a) met the qualifications for membership; and (b) met the conflict of interest requirements specified in the bylaws. The qualifications for membership excluded corporations, undischarged bankrupts and government employees, and included such criteria as being a Canadian citizen and possessing the requisite knowledge and skills to operate the GTAA properly. There was no issue that Peel’s nominee met these qualifications. However, the board was not satisfied that the nominee would meet the conflict of interest requirements on a prospective basis, because of a concern that he may make decisions for the betterment of Peel and not the GTAA. Peel objected to this finding of an anticipatory breach of the conflict of interest provisions in the bylaws.

[12] Cullity J., at para. 60, held that a power to reject a nominee for such an anticipatory breach would require “clear words” in the bylaws, or arise by “a necessary implication” from them. However, he did not believe “that the existence of a general power to screen, and accept or reject, nominees [could] be inferred from the requirement of an appointment by the board.” Further, Cullity J. held, at para. 67, that

while he was prepared to find that the board had jurisdiction to reject nominees on the basis of an anticipatory breach, “compelling evidence... with a high degree of probability” would be required:

“67 While I believe I would not be justified in concluding that a valid anticipatory revocation or disqualification would never be possible in cases of personal conflicts, or that such decisions could never be made on the basis of the nominee's intention to act against the best interests of the respondent, I believe that, to be valid, such decisions would require compelling evidence of the existence of such an intention or, if that is too high a standard, evidence that does so with a high degree of probability. I do not believe that the by-laws can reasonably be construed as conferring power on the board to disqualify a nominee by way of an anticipatory revocation simply because the board decides it is more probable than not that the nominee will not always act in the best interests of the respondent. A fortiori, the board cannot exclude nominees simply because it is doubtful whether their future conduct will be properly motivated, because of doubts that their views of the best interests of the respondent will coincide with those of the incumbent members or because it is anticipated that they may be difficult to work with. Nor do I accept that it is the role of the board to speculate "conceptually" about the possibility that facts might arise that would cause a nominee not to act in the best interests of the respondent.”

Cullity J. further emphasized, at para. 70, that “the indeterminate nature of the inquiry suggests that cases in which the evidence will be sufficiently clear and unambiguous are likely to be rare.”

[13] In her letter of August 10, 2012, HSY's former counsel suggested that the bylaws at issue in *Peel* are “similar” to those of HSY “in that applicants who meet the criteria must be accepted”. I disagree. There are no criteria for acceptance in the HSY bylaws other than the necessity of making an application for membership and paying the current fees. The bylaws in *Peel* were much more extensive in setting out the criteria for

membership and the specific necessity for directors to be free of conflict of interest. Furthermore, it was incumbent upon the board in *Peel* to review each nominee for the board of directors to determine if they met these criteria. In the case at bar, as correctly noted by the Registrar in his decision of September 10, 2012, this issue is about the denial of simple membership applications. Therefore, Cullity J.'s decision in *Peel* is clearly distinguishable from the case at bar.

[14] In effect, what HSY's former and current counsel assert is that a board power to screen membership applications can be inferred or implied from the wording of s. 4 of HSY's bylaws. Once again, I disagree. In *Kaila v. Khalsa Diwan Society, et al.*, 2003 BCSC 1223, McKinnon J., at para. 13, approved of the general principle that "the exact terms of the [society's] bylaws must be read to determine membership eligibility." He further held, at para. 25, that the executive of the society in that case could not "by a tortured interpretation of the bylaws" infer a power not expressly provided therein. Rather, the parties were "bound by the wording of any bylaws or constitution governing the entity of which they are a part" (para. 34).

[15] HSY's current counsel argued that implicit board authority to screen prospective members must necessarily be implied to prevent a potentially absurd result – that the board would have to accept as a member even a known animal abuser. Again, I disagree. Under its current bylaws, the board has no such screening authority. However, in the event such a result is obtained, the board or the members could immediately attempt to expel the new member by a special resolution of members passed at a general meeting pursuant to s. 7 of the Schedule A default bylaws. The Registrar came to the same conclusion in his report of September 10, 2012.

b) The respondents were not acting in good faith.

[16] I will turn next to what I say is the second fatal flaw in HSY's defence. HSY's counsel argues that, so long as the respondents honestly believed that they were acting in the best interests of the society, and providing they were motivated by loyalty to the society, were free of conflict of interest, and were acting in good faith, then their decisions to deny memberships must be upheld. Counsel even went so far as to suggest that, so long as these provisos were extant at the time of each decision to deny, then, even if the respondents were acting unreasonably, the decisions remain unimpeachable. In other words, it is acceptable that the respondents may have acted with an honest but unreasonable belief in rejecting any particular applicant.

[17] This proposition flies in the face of what was said by Kelleher J. in *Coastal Contacts Inc. v. Muhlbach*, 2010 BCSC 1415. At paras. 39 - 41 of that decision, Kelleher J. was discussing fiduciary duties owed by a director to a corporation, which duties are premised on the three cornerstones of utmost good faith, trust and confidence, all with a view to what is in the best interests of the corporation. Further, as Kelleher J. stated at para. 42, it is not sufficient for a director to simply assert a subjective belief that he or she is acting in the corporation's best interests:

“42 Additionally, it is clear that the subjective and sincerely held belief of a director that he is acting in the best interest of the corporation is insufficient where objectively that is not the case. See *Itak International Corp. v. CPI Plastics Group Ltd.* (2006) 20 B.L.R. (4th) 67 at para. 44 (Ont. S.C.J.). The fact that a director honestly believes his conduct was in the best interest of the company does not mean that the conduct is not a breach of fiduciary duty.”(my emphasis)

[18] Further, *London Humane Society (Re)*, 2010 ONSC 5775, determined that the directors of charitable organizations are held to an even higher standard than directors

of commercial corporations (para. 20), and “are required by the common law to consistently act in good faith” (para. 28). The London Humane Society (“LHS”), like HSY, was a charitable organization faced with an issue of approving membership applications. The relevant provision of the LHS bylaws stated:

“The members of the Corporation shall be those persons who are approved by the Board of Directors and who pay to the Corporation the dues or fees determined by the Board of Directors.” (my emphasis)

The directors had received 117 applications, approved 109, and declined 8 applications without providing any reasons. One of the issues in the case was whether the decision to reject the eight membership applications was valid.

[19] At para. 16, Granger J. observed that the relationship between members of charitable organizations and the directors of those organizations is considered to be “contractual in nature” and is governed by the relevant legislation, the documents creating the organization, its bylaws and “fiduciary obligations and duties of good faith”. However, the fiduciary duties are owed by the directors to the corporation (or society) and not to the membership (para. 23). On the other hand, vis-à-vis the members, the directors were said to have an obligation to deal fairly and in accordance with the rules of natural justice (paras. 29 and 30). With respect to those persons applying for membership, the directors owed no contractual duty, nor a duty to comply with the rules of natural justice (para. 30). Therefore, a refusal to admit somebody as a member will not normally be reviewable by a court, unless the directors failed to act in good faith (paras. 30 - 31).

[20] At paras. 31 - 36 of *London Humane Society*, Granger J. expanded on this notion of good faith. He held that it included an element of reasonableness and excluded

arbitrariness. In the evidence, there was some suggestion that one of the applicants had been rejected on the basis of “ideological differences” and Granger J. said that was “an inappropriate exercise of the Board’s power” (paras. 35-36). He also suggested that mere “public disagreement” with the Board would also fail to constitute a legitimate reason for refusing an applicant. Because these paragraphs are so central to my decision on this issue, I am quoting them at length:

“31 Any order requiring the Board to admit the eight applicants previously refused must be based in a failure of the Board to act in good faith, as required by the common law. “Good faith” is defined in *Black’s Law Dictionary*, 9th ed. (St. Paul: Thomson Reuters, 2009) as

[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.

32 Bad faith is defined as “[d]ishonesty of belief or purpose.” The evidence in the present matter is that the Board is unable to articulate a specific reason for refusing to admit the eight refused applicants as members to the LHS, other than that Ms. Blosch would not support the objects of the corporation. However, there was nothing in Ms. Blosch’s application that indicated that she opposed the objects of the LHS. She was involved in other community activities related to animal welfare and had been a member of the LHS the previous year. At a minimum, the Board’s decision regarding Ms. Blosch was arbitrary.

33 While arbitrariness is not part of the above definition of bad faith, the arbitrary exercise of discretion has been associated with bad faith in a number of cases. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121, the Supreme Court of Canada stated at para. 140:

In public regulation of this sort there is no such thing as absolute and untrammelled “discretion”, that is that action can be taken on any ground or for any reason that can be

suggested to the mind of the administrator, *no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable* for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. [Emphasis added]

34 While the LHS Board is not a public body, it does derive its authority to act from its bylaws, which are enacted under discretion granted by the *Corporations Act*. As such, arbitrariness alone may ground a decision that the LHS Board acted in bad faith.

35 There is some suggestion in the evidence that the decision regarding Ms. Blosch's application was founded in political or ideological divisions. It is improper for a Board of Directors to reject members on the basis of ideological differences. In *Pathak v. Hindu Sabha* (2004), 48 B.L.R. (3d) 207 (ON S.C.J.) at para. 9, Fragomeni J. quoted Wilkins J. (in an unreported related decision):

The purpose for the refusal to renew appears to be that Inderjit and likely Ashok have expressed public disagreement with the Board. There is no evidence before me to show Inderjit or Ashok has engaged in activities which are adversarial to the charity. No legitimate reason is present for the refusal to renew their membership.

The Court has ample jurisdiction under s. 332 of the *Corporations Act*, section 10 of the *Charities Accounting Act*, and the common-law jurisdiction [*Public Trustee v. Humane Society*, [1987] O.J. No. 534] to direct the Board of the respondent to admit the two Applicants to membership.

36 In my view, it appears likely that the eight rejected applicants, if not rejected arbitrarily, were refused because of possible ideological differences. As noted by Wilkins J., this was an inappropriate exercise of the Board's power." (my emphasis)

[21] Notwithstanding that HSY's counsel seemed to argue that reasonableness was not a factor within the concept of good faith, she curiously made an alternative submission relying on the "business judgment rule", referred to in *Maple Leaf Foods Inc. v. Schneider Corporation* (1998), 42 O.R. (3d) 177 (C.A.). That case generally held, at paras. 36 - 39, that if the directors of a commercial corporation make a decision honestly and in good faith, without any conflict of interest, and based on the best information available, then so long as that decision is "within a range of reasonableness", the courts should give due deference to the decision.

[22] In *Peel*, cited above, Cullity J., at para. 76, applied the business judgment rule to the decision of the GTAA board of directors, but added: "However, in determining whether a decision is within the range of reasonableness, the nature of the question and the degree of proof [clear and unambiguous evidence] cannot be ignored."

[23] Cullity J.'s decision was appealed to the Court of Appeal for Ontario and is cited at 130 O.A.C. 68. On the appeal, the parties did not take issue with Cullity J.'s application of the business judgment rule. Therefore, the Court of Appeal held, at para. 12, that it was not necessary to decide the point:

"... [I]t is not necessary to decide whether the applications judge was correct in finding that the Board's decision was entitled to the same degree of deference as it generally would with respect to decisions made in the management of the company's affairs. See *Maple Leaf Foods Inc. v. Schneider Corp.*...for an application of what has been referred to by the parties as the "business judgment rule". In this case, it is agreed that any rejection of [Peel's nominee] that was based on evidence falling short of the "clear and not ambiguous" test would fall beyond the scope of the Board's authority under the By-law."

[24] Consequently, it remains an open question as to whether the business judgment rule has any application to charitable organizations. It would seem to be a debatable proposition, given that the directors of such organizations “are held to a higher standard” than those of for-profit corporations in the exercise of their fiduciary duties: *London Humane Society*, cited above, at para. 20. However, even if the rule does apply, because we are dealing with anticipatory breaches in the case at bar, the high standard of proof of clear and unambiguous evidence would still apply. For reasons which follow, I will attempt to show that the respondent’s decisions to refuse applicants for membership clearly failed to meet that standard.

[25] On July 31, 2012, the HSY board of directors wrote to each of the six applicants for membership, purporting to explain the reasons for denial in each case. Girard had applied for a renewal of her membership (note also that, although Girard’s membership was to have expired on August 23, 2012, she resigned as a director on April 9, 2012), whereas the other five individuals had apparently applied for membership for the first time. Common to all six letters was a reference to HSY’s mission statement, which the board stated as follows:

“To foster a caring, compassionate atmosphere; to promote a humane ethic, and to prevent and suppress cruelty to domestic animals.”

[26] In the letters to Girard and Sabine Alstrom, the board noted in the first paragraph of each of the letters that the applicants “are not meeting” (my emphasis) this mission statement. This suggests some current conduct by the applicants that caused the board to subjectively believe that they were not honouring HSY’s mission statement.

[27] In the case of Girard, it is clear from para. 29 of Cuthbert's affidavit that the board's biggest concern was Girard's perceived conflict of interest:

“In regard to Girard, specifically, it is clear that she was, and remains, in a conflict of interest, and she was, and is, not acting in the best interests of HSY; it is likely she will continue to put her personal interests ahead of those of HSY.” (my emphasis)

While the Registrar's counsel concedes that Girard may indeed have been in a conflict of interest while she was acting as a director of HSY, once she resigned as a director, she could no longer be accused of being in a conflict by simply being a member of HSY. I agree. As a member, she had no fiduciary duties towards the society. Therefore, the board's position in that regard was not reasonable. In any event, as I will shortly demonstrate, the board's real concern about Girard was prospective, rather than retrospective.

[28] In the case of Ms. Alstrom, I am unable to see how she can be accused of not honouring HSY's mission statement when she was not yet even a member. Thus, the board's position in that regard was clearly unreasonable.

[29] In the letters to Susan Baker, Doug and Brenda Oulton, Faye Tangermann and Ms. Siver, the board asserted in the first paragraph of each that these persons “will not meet” (my emphasis) HSY's mission statement; thus, clearly referring to some type of future wrongdoing or an anticipatory breach of HSY's bylaws.

[30] The reasons given by the board for the denial of membership in each case are as follows:

a) Girard:

“Your behaviors since April 2012 which include but are not limited to: repeated personal attacks on the Board of

Directors, filing of vexatious complaints to anyone that will listen, sending out defamatory emails to the members who wish not to be contacted and have expressed the fact that they do not appreciate these types of vexatious emails depicting the Board and Staff in a negative light and breaching of confidentiality by sending out documents that is property of HSY non-members.” (my emphasis)

b) Sabine Alstrom:

“Your email that was sent around on July 12, 2012 to undisclosed recipients outlined very serious allegations against the trainer had brought up, depicted the staff is being trained to abuse animals, and appears to be deliberate attempt to sabotage fundraisers for the Animal Shelter which are needed for day-to-day operations.” (my emphasis)

c) Susan Baker:

“You are currently employed under a contract with Ovation Construction as a consultant in which we are in the middle of a contract dispute. Therefore, it is reasonable to assume you may breach our Constitution and bylaws if you were a member.” (my emphasis)

d) Doug and Brenda Oulton:

“You wrote an article in the paper defaming the staff of the shelter and the training methods they received. You did not take the time to discuss this issue with the staff or Board of Directors. The article depicted the staff in a negative light by insinuating they were trained to abuse animals in our care. We as a board are responsible to ensure the staff and animals are well cared for, work in a safe manner, and are free of harassment from the public, members, volunteers and patrons.” (my emphasis)

e) Faye Tangermann:

“You posted on [Facebook] a social network your dissatisfaction with the fact that we brought a trainer up to assist us in training our dogs we have in care. You did not attend this training session therefore, you commented based on the media instead of making an informed decision on your own, and you chose not to discuss this with the Board of Directors. You also made it very clear you are stopping all

donations you provide to the shelter for the care of the animals.” (my emphasis)

f) Ms. Siver:

“You applied for membership on February 10, 2012, but it was not received until May 2, 2012 when it was dropped off by Ms. Margie Klein. The staff member at the time claims that Ms. Klein slammed the paperwork on the desk and demanded your membership card and receipts. You have also displayed vexatious, negative behaviors towards the Board of Directors without taking the time to request a meeting to discuss your concerns when it was offered in an email and demanded documents when you are not a member of society.” (my emphasis)

[31] For each of the applicants, except Susan Baker, the board went on to conclude that “we believe” the individuals would not comply with the mission statement and would violate HSY’s Constitution and bylaws. In Susan Baker’s case, the board concluded that she “may” commit such a breach. That the board’s concerns were prospective is confirmed by Cuthbert’s statements about these applications in her affidavit. At para. 25, she deposed that:

“HSY ultimately refused to admit six applicants; namely because it was, and remains, HSY’s belief that given their previous harmful actions toward HSY, these individuals were either in a conflict of interest, and/or would not uphold the HSY Constitution and comply with its bylaws, and/or would not act in the best interests of HSY and would indeed harm HSY.” (my emphasis)

Thus, it seems clear that the board’s main reason for denying membership to each of these applicants was because of a perceived anticipatory breach of HSY’s Constitution and bylaws. Therefore, according to the Court of Appeal’s decision in *Peel* (at para. 12), any rejection of these applicants on evidence falling short of the “clear and

unambiguous” test would fall beyond the scope of the board’s authority under the HSY bylaws.

[32] Further, at paragraph 26 of her affidavit, Cuthbert deposed:

“... [T]he main reasons HSY denied membership to Oulton, Tangermann and Alstrom is because of the numerous times they depicted HSY in a negative light in the media and/or public. They also boycotted HSY’s fundraisers...” (my emphasis)

This suggests that the board’s reason for denying membership to these applicants, and indeed the same could be said about Ms. Alstrom, was also founded in political or ideological differences regarding animal care and training. According to *London Humane Society*, such reasoning constitutes an inappropriate exercise of the board’s authority. I would go further and say that it also constitutes evidence of arbitrariness, such that the board cannot be said to have acted in good faith.

[33] In Ms. Baker’s case, the suggestion that she “may” breach HSY’s Constitution and bylaws because she is employed as a “consultant” by Ovation is simply untenable. Even assuming that the board’s statement of fact here is correct, one presumes that a consultant would be acting as an occasional contractor to Ovation, as opposed to acting as a full-time employee. Thus, I am unable to see how anyone could logically or reasonably conclude that the fact that Ms. Baker occasionally has commercial dealings with Ovation as an independent contractor could cause her to dishonour HSY’s Constitution or bylaws.

[34] In Ms. Siver’s case, Cuthbert deposed at para. 27 of her affidavit:

“The HSY also denied membership to Siver because not only was she aggressive, but she did not even submit your application itself to HSY; instead, it was submitted through Marjie Klein...”

Cuthbert further alleged that Siver backdated her application to February 2012 and that this constituted a “breach of trust”.

[35] Thus, among the reasons for rejecting this applicant is the board’s assertion that Ms. Siver displayed aggressive conduct, when in fact the alleged aggressive conduct was committed by another person altogether. Further, the assertion that the backdating of an application could constitute a “breach of trust” is rather absurd. Once again, the board cannot be said to have acted reasonably in denying this applicant membership.

[36] Further, the Registrar concluded in his report of September 10, 2012, at p. 17, that there was no evidentiary basis for denying Girard’s application, nor any evidence with respect to the other applicants:

“With respect to allegations of disruptive and vexatious behaviour, Ms. Girard vehemently denies such characterization of her behaviour by the HSY board, and no evidence has been provided to support the board’s allegations regarding such behaviour. In particular, I am aware of no evidence supporting the board’s contention that the behaviour of any of the rejected applicants would jeopardize the mission of the society.” (my emphasis)

[37] In summary, Cuthbert has confirmed under oath that the true reason these memberships were denied was because of the board’s “belief” that, on a prospective basis, these individuals would somehow do something to harm HSY. However, for the reasons indicated above, that is pure speculation and does not meet the standard of clear and unambiguous evidence. Accordingly, the board cannot be said to have acted in good faith in denying these applications for membership.

2. Did the Individual Respondents Fail to Process Membership Applications in a Timely Manner?

[38] In her letter to the Deputy Registrar dated June 9, 2012, Cuthbert admitted that the board had not reviewed any applications for membership since February 14, 2012. That is a delay of approximately 4 months, which I find to be unreasonable. However, according to the minutes of HSY board meetings, the board did not process any membership applications between its AGM on August 23, 2011 and its meeting on July 28, 2012. This allegation was repeated in the outline of the Registrar's counsel and was undisputed in the outline of HSY's counsel. That is a delay of about 11 months, which is even more unreasonable.

[39] On July 5, 2012, the Deputy Registrar wrote to the HSY board stating that membership applications "must be reviewed and accepted or denied within a reasonable amount of time". The Deputy Registrar suggested that such reviews should take place "at least monthly, if applications are not automatically accepted".

[40] In her report dated September 6, 2012, the Deputy Registrar stated:

"Applications for membership had not been reviewed on a regular basis since the last AGM in August 2011. Since this investigation has begun the board has started to review applications for membership at every board meeting, however if a member of the public was to attend the shelter to request a membership, and pay a fee, they would not be advised whether their application was approved or not until after the next board meeting. This change of process from the prior process of anyone submitting the appropriate fee and the membership application being approved for membership was not approved by the membership at a general meeting." (my emphasis)

It is undisputed that the HSY board met on July 28, 2012, and processed 15 membership applications, 9 of which were accepted and 6 of which were denied.

However, the allegation that there was a delay in processing applications between the AGM in August 2011 and the July 28, 2012 board meeting to my knowledge has not been denied.

[41] The board held another meeting on August 9, 2012, when they processed additional membership applications.

[42] In his report of September 10, 2012, the Registrar acknowledged the July 5th direction of the Deputy Registrar to the HSY board that it deal with all incoming membership applications within 30 days of receipt, and ordered the board:

“... to ensure that future membership applications are processed, as a matter of course, without delay and without a standard screening process by the board, unless and until the HSY membership adopts bylaws permitting such screening in such bylaws are approved by my office.”

[43] Notwithstanding the Deputy Registrar’s direction of July 5th and the Registrar’s order of September 10th, there was a further delay by the HSY board, of over seven weeks, in processing additional membership applications between August 9 and September 30, 2012, when the board next met to process applications.

[44] In addition, 14 membership applications, together with payment of the applicable membership fees, were submitted to HSY on September 20, 2012, but as of the date of hearing of this matter, had still not been processed by the board. The reason given by Cuthbert in her affidavit, at para. 41 was stated as follows:

“... The HSY Board of Directors noted that all of these individuals are within the Mikeli-Jones and Girard “camp”, who have defamed HSY publicly many times, both in public and on the Internet; we therefore decided to put these applications on hold until we receive clarity from this Court in regard to the processing of membership applications....”

As I noted earlier, Mikeli-Jones is a former member and past-president of HSY. HSY never made an application to this Court to receive direction on whether these applications should be processed. It was only in response to the Registrar's petition, filed November 1, 2012, that Cuthbert provided this explanation.

[45] For all these reasons, I have no difficulty in concluding that the individual respondents failed to process membership applications in a timely manner.

3. Did the Individual Respondents Fail to Permit Members to Inspect the Membership List at HSY's Registered Office at any Reasonable Time?

[46] In her letter to the HSY board dated June 7, 2012, the Deputy Registrar reminded the board of its obligations under s. 22 of the *Act* to ensure that HSY's membership list is made available for members to inspect upon request "at any reasonable time". This reminder was repeated by the Deputy Registrar in her letter of July 5, 2012, in which she suggested that "any reasonable time" includes during business hours and at any other time convenient to both the member and the person providing the access, and that there was nothing stopping HSY from providing a copy of the membership list to members. Finally, the Deputy Registrar advised HSY:

"... As the member registry must be maintained at the society's registered office, there should be no reason to delay providing access to members who appear at the office during business hours and who provide identification proving that they are a person listed in the registry as a member in good standing."

[47] In his letter of July 18, 2012 to HSY, the Registrar reminded the board for the third time that they were required by law to provide HSY members with access to the membership list.

[48] In his letter of July 26, 2012 to the HSY board, the Registrar stated that his office had received a number of complaints about HSY, including one that members are not being permitted to inspect the membership list at any reasonable time. After reminding the board again of its obligations under s. 22 of the *Act*, the Registrar stated:

“... These obligations are critical elements of society governance, and in particular, of the ability of members to hold their elected directors accountable. It appears that you have been unreasonably denying such access [my emphasis], but that you are finally now agreeing to provide access to the member registry upon certain conditions.

...

You are legally obliged to grant HSY members access to the membership list quote at any reasonable time”.

While it is not unreasonable to request that members make appointments in advance to view the membership list, this is not a legal requirement. “Any reasonable time” would include, in my view, any time during the shelter’s business hours, with or without notice. I therefore expect you to provide such access to any member who attends at the shelter during business hours, with or without notice.”
(emphasis already added)

[49] In her report dated September 6, 2012, the Deputy Registrar noted that, notwithstanding the several reminders from her and the Registrar to the HSY board of its obligations in this regard, the board did not provide a copy of the membership list to those members requesting same until August 8, 2012. Although an earlier list was provided by the HSY board on July 20th, it was not in compliance with s. 22 of the *Act*, which the Deputy Registrar addressed as follows:

“It has been found that the membership lists provided by HSY during this investigation are limited to “Fiscal year”, are missing past members, and are missing people who claim to be current members.”

[50] This problem was expanded upon by the Registrar in his report of September 10, 2012:

“The HSY president provided a copy of its membership list to me on July 20th. This list was limited to current members during the fiscal year April 2011 – March 31, 2012. An updated version of the same list was provided on August 8th, showing new members admitted by the board on July 28th as well as 6 individuals whose applications were refused. On September 5th, the HSY board provided a new membership list entitled “Fiscal Year April 2012 – March 2013”. This list again appears to include only current members (with the exception of the 6 denials on July 28th) and does not include four members from the previous list whose memberships expired in late August 2012. Moreover, one membership granted for the year following March 30, 2012 appears on the Sept. 5th list but not on the two earlier lists provided, and another member who provided proof of current membership to my office does not appear on any of the lists. This raises questions about who else is missing from the HSY’s list of current members.”

[51] In the result, the Registrar ordered the HSY board to maintain a complete membership list that includes past as well as current members, that is not limited to a fiscal year, and that includes all members on record going back to at least August 2007. The Registrar stated that would ensure that any five-year memberships granted in August 2007 are included in the list. The complete list was to be provided by September 20, 2012.

[52] Cuthbert’s response on this point was that HSY no longer has membership records in its possession prior to 2010. At para. 36 of her affidavit, Cuthbert mused about the possible reason for that state of affairs: “I suspect that the previous shelter administrator, Marjie Klein, destroyed these records which is why we only have membership records of 2010, onward [my emphasis].” Not only is there absolutely no evidence to support this statement, Cuthbert appears to have jumped from a suspicion

to a conclusion of fact about the missing records. She then went on to depose that HSY has advertised on Facebook to see if anyone would come forward to confirm their membership prior to 2010.

[53] Incidentally, I agree with the Registrar's counsel that merely posting a notice on Facebook does not constitute due diligence. There is no suggestion that the HSY board took any other reasonable steps to obtain this information, such as posting a notice on the HSY website, placing advertisements in local newspapers and on local radio stations, and/or posting hardcopy notices within Whitehorse and other Yukon communities.

[54] However, returning to the issue of permitting members to inspect the membership list at any reasonable time, the Registrar concluded, in his report of September 10, 2012:

“I find that the HSY board improperly denied some of its members access to its member registry in violation of s. 22 of the *Societies Act*. This denial was inexcusably prolonged, especially after I had advised the HSY Board of its legal obligations to provide such access without delay.”

[55] In summary, given the critical importance to members of the right to inspect an up-to-date and accurate membership list in order to hold the society's elected officials accountable, as noted above by the Registrar, I have no difficulty concluding that the inaction of the individual respondents in this regard constituted a failure to permit members to inspect the membership list at any reasonable time.

4. Did the Individual Respondents Refuse to Act on a Petition of Not Less Than 20% of Members for a Special General Meeting?

[56] On August 9, 2012, 23 individuals, who believed they were active members of HSY, signed a petition pursuant to s. 11 of the Schedule A Bylaws. It demanded that the HSY board convene a special general meeting for the purpose of dissolving the board and electing a new one. The petition was delivered to the Registrar the following day and he directed the Deputy Registrar to expand her investigation to include a determination of whether the petition was legitimate.

[57] Section 11 of the Schedule A Bylaws reads:

“The directors may, when they think fit, convene a special general meeting, but the directors shall call a special general meeting if requested to do so in writing by not less than 20% members eligible to vote at the meeting.”

[58] On September 5, 2012, HSY’s former counsel wrote to the Registrar providing a revised membership list (membership list #3) and acknowledged that the list was missing the names of two persons who had signed the above petition, but provided no explanation as to why or to what extent the list was incomplete. She further stated that the board did not intend to convene a special general meeting pursuant to the petition because “[it] appears that the 20% threshold has not been met”.

[59] In her report of September 6th, the Deputy Registrar made a finding that the petition had indeed been signed by 20% of voting members based on the membership list available to the petitioners at the time they signed the petition.

[60] In his report of September 10th, the Registrar confirmed that the membership list of August 8, 2010 listed 56 current members, which meant that the petitioners had met the 20% threshold. He further admonished the HSY board as follows:

“The HSY Board argues that members admitted at its meeting of August 9th should be included in the calculation, and that if this is done, the 20% threshold is not met. Needless to say, to include in the s. 11 calculation new members admitted on the very day that the Petition was finalized would be patently unfair. The petitioners could not have been aware of these new members when gathering signatures for the petition. They should be able to rely upon the membership list provided to them by the society before they submitted the petition.”

The Registrar then went on to order the board to hold a special general meeting no later than October 5, 2012.

[61] The board failed to comply the Registrar’s order and has provided no explanation for not doing so. When Cuthbert addressed this issue in her affidavit, she simply stated: “HSY has already agreed to this as is reflected in the Case Management Conference Order of November 19, 2012.” That statement does not constitute an explanation for the board’s failure in this regard.

[62] Even HSY’s former counsel used somewhat tentative language in her initial letter of September 5, 2012, when she indicated that it did not *appear* that the 20% threshold had been met. Further, there were several irregularities and inaccuracies with HSY’s membership lists at that time, some of which were admitted by HSY’s former counsel. Thus, given the critical importance of the s. 11 remedy to the HSY members who signed the petition, and given the context of the widespread conflict between the board and certain members at that time, if there was any doubt on the board’s part about whether the 20% threshold had been met, the board should have erred on the side of caution and convened the special general meeting in any event.

[63] In summary, I have no difficulty in concluding that the individual respondents refused to act on the petition.

5. Did the Individual Respondents Refuse or Fail to Comply with the Orders of the Registrar?

[64] As noted repeatedly above, on September 10, 2012, the Registrar acted on his authority under s. 21(3) of the *Act*, and made several orders against the HSY board, which the individual respondents have failed to comply with. However, the Registrar's petition did not seek relief with respect to all of the orders. Further, some of the issues addressed by the Registrar in his report were largely rectified by the individual respondents during the course of the investigation. For example, as of August 8, 2012, members were provided access to HSY's membership list. Thus, it is only necessary for me to address those declarations sought in para. 9 of the petition which relate to ongoing breaches by the individual respondents at the time of the hearing. The particulars of these breaches have been discussed above. In summary, the orders breached by the individual respondents which are relevant for present purposes are as follows:

- 1) failing to grant memberships to the six applicants to whom membership was denied by way of the board's letters of July 31, 2012;
- 2) failing to process "without delay and without a standard screening process" membership applications received by the board after the Registrar's order of September 10, 2012, for example, the 14 membership applications submitted to HSY on September 20, 2012; and
- 3) failing to convene a special general meeting or an annual general meeting by October 5, 2012.

6. Should the HSY Board of Directors be Ordered to Present a Financial Statement to the Membership at the AGM ?

[65] This relief was implicitly sought in para. 5 of the petition.

[66] Pursuant to s. 9 of the *Regulations*, the HSY board “must” present the financial statement for the previous fiscal year at the AGM. Further, if the fiscal year ended more than four months before the AGM, the board must present a financial statement that includes the period from the end of the fiscal year to a date not more than four months before the AGM (s. 9(2)). In this case, because I ordered the AGM to be held on December 20, 2012, the board was required to provide a financial statement covering a period which includes the previous fiscal year and extending to August 20, 2012. Further, because HSY is a “category A society” (s. 9(3)), the financial statement must be prepared by a professional accountant. The mandatory wording of s. 9(1) is as follows:

“A society must present the financial statement for its most recently completed fiscal year to its members at the annual general meeting.”

[67] Further, s. 4 of the *Regulations* provides:

“4(1) Every society shall keep a record of all monies received where they were received from and all monies disbursed and what they were dispersed for.

4(2) Every society shall keep a record of all capital and fixed assets of the society.”

[68] In his report of September 10, 2012, the Registrar observed that the financial statement for the previous fiscal year had not been completed, even in draft form. He therefore ordered HSY to report to him by September 14, 2012:

- 1) providing the name of the accountant preparing its financial statement;

- 2) explaining why he has not yet prepared the financial statement for 2011 – 2012;
- 3) setting out what financial records are missing; and
- 4) identifying a date by when it will have a draft financial statement for 2011 – 2012 completed.

[69] Cuthbert's response to this order was to indicate that HSY has complied "to the best of its ability".

[70] On July 26, 2012, the Registrar wrote to Cuthbert requesting that a financial statement for 2011 – 2012 be provided to him by July 31, 2012.

[71] On August 7, 2012, the Deputy Registrar wrote to Cuthbert reminding her of the Registrar's request of July 26th, which was then outstanding.

[72] The respondent, Gerald Thompson ("Thompson"), has been a director since April 23, 2012. He was also HSY's treasurer during the relevant time.

[73] On August 9, 2012, the Deputy Registrar spoke with Thompson and was advised that he was hoping to have the financial statement ready for review by the accountant in 10 days.

[74] On September 10, 2012, the Registrar issued the above order.

[75] On September 11, 2012, Thompson replied to the Deputy Registrar stating that the accounts were completed and would be sent to the accountants by the end of the week.

[76] On September 14, 2012, Thompson wrote to the Registrar providing the name of HSY's accountant and the reason why the financial statement had not yet been prepared. He explained that there was a delay in obtaining financial records from

Girard, but that he finally received them in late June 2012 and completed his review of the records in late August. However, he did not explain what other financial records were missing and did not identify a date by which the financial statement would be prepared.

[77] On August 9, 2012, the HSY board scheduled its AGM for November 23, 2012, and that date was confirmed at a later board meeting on September 30, 2012.

Presumably, the board was aware of its obligation to provide a financial statement at the AGM when the AGM was scheduled.

[78] On October 12, 2012, the Deputy Registrar wrote to Thompson again requesting the draft financial statement, but received no response.

[79] On October 17, 2012, Cuthbert wrote to the Deputy Registrar enclosing what she described as “the first draft financial for 2011-12 fiscal year”, and explaining that the documents which were missing were tax receipts for donations made from April 2011 to October 13, 2012. Cuthbert concluded by stating, “The final review should be returned to us in approximately 3 weeks.”

[80] On November 23, 2012, the Deputy Registrar wrote to Cuthbert again requesting HSY’s completed financial statement. Cuthbert responded by stating, “As we have stated before all matters related to the Registrar’s office is going through our attorney [as written].”

[81] According to the Deputy Registrar, the draft financial statement provided by Cuthbert on October 17th “appear to be internal statements”, and that, as of November 30, 2012, the Registrar’s office had received no further financial statement from HSY.

[82] At para. 46 of her affidavit, Cuthbert deposed further about the missing tax (donation) receipts, as follows:

“... I highly suspect that the previous HSY administrator, Marjie Klein - who resigned on October 1, 2012 - and/or previous HY administrative assistant, Meghan Lanither - who was dismissed with cause on October 13, 2012, took these donation receipts. It is because of their actions that HSY is now at risk of losing its Charity status (as the originals can not be found).” (my emphasis)

Once again, Cuthbert jumped from a suspicion to a conclusion of fact about the reason for the missing receipts. However, no evidence has been provided as to who is responsible for the missing donation receipts or whether any investigation has been conducted in that regard.

[83] Notwithstanding the problem with the missing donation receipts, Cuthbert deposed in her affidavit sworn December 5, 2012, at para. 49, “Apparently, the Accountant now has all the information she needs, and expects to have the final financial statements completed shortly.”

[84] As of the hearing date on December 13, 2012, the financial statement had not yet been provided by HSY.

[85] The board is required as a matter of law to provide the financial statement for the previous fiscal year at the AGM, as described above. None of the individual respondents sought to deny their awareness of this legal obligation. Indeed, the Registrar reminded the board of its obligation in his letter of July 26, 2012, and on September 10th made his order in that regard. HSY’s own evidence is that the reasons for the delay have been addressed and that the financial statement is expected imminently from the accountant. Thus, in the absence of any cogent or compelling

reason for not doing so, I order the HSY board to provide the financial statement in time for the AGM.

[86] The remaining outstanding matters and issues arising from the petition may be spoken to when this hearing continues on February 20, 2013.

GOWER J.