

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gowing v. Mayne Island Community
Centre Society*,
2023 BCSC 1286

Date: 20230630
Docket: S222392
Registry: Victoria

Between:

**Adrian Gowing, Carol Ashwell, Bruce Roberts,
Robert Wilband, Bernie Peets, Sharon Bunin,
Judy Wolfe, Laurie Cooke, and William Sanders**

Petitioners

And

Mayne Island Community Centre Society

Respondent

Before: The Honourable Justice Basran

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:

S. Gary-Schleihauf

Counsel for the Respondents:

R.J. McDonell

Place and Dates of Hearing:

Victoria, B.C.
June 19–21, 2023

Place and Date of Judgment:

Victoria, B.C.
June 30, 2023

[1] **THE COURT:** The petitioners are a group of tennis players on Mayne Island. They seek orders enabling them, and other tennis players, to use two tennis courts exclusively for tennis. This group was instrumental in fundraising and building these two tennis courts on Mayne Island. They oppose these courts being used for pickleball or any other activity.

[2] The respondent is the Mayne Island Community Centre Society (“MICCS”). It is a registered non-profit society that owns and operates the community centre on Mayne Island. It owns the land on which the tennis courts were built (the “MICCS land”).

[3] The petitioners assert that, based on a 2007 written agreement and a subsequent 2008 amended oral agreement, they are entitled to determine the usage policy for the tennis courts. The MICCS maintains that, as the duly elected members of the society’s board of directors, they are empowered to decide how the tennis courts are used.

[4] For the reasons that follow, I have concluded that the MICCS is authorized to determine the use of the tennis courts, including for pickleball.

The 2007 Agreement

[5] In 2007, the MICCS entered into a written agreement with the “Tennis Group” (the “2007 Agreement”). This latter entity consisted of tennis players on Mayne Island, and members of MICCS, who undertook the task of fundraising for the construction of two tennis courts on the MICCS land.

[6] The 2007 Agreement provided for the establishment of a Tennis Committee as a permanent standing committee of the MICCS. It is common ground that members were never appointed to the Tennis Committee and it did not function or operate in any manner.

[7] The 2007 Agreement established a Tennis Facility Fund to be administered by the Tennis Group and owned and reported on by MICCS.

[8] Pursuant to this agreement, the Tennis Group set the tennis courts usage policy. The MICCS board of directors reserved final approval of this policy taking into account, among other things, other users of its property.

The 2008 Oral Agreement

[9] In approximately 2008, the Tennis Group became known as the Mayne Island Tennis Association (“MITA”). MITA was not incorporated and does not have a separate legal identity.

[10] The petitioners assert that in 2008, MITA and MICCS amended the 2007 Agreement by way of an oral agreement (the “2008 Oral Agreement”). The terms of the purported 2008 Oral Agreement were reduced to writing in a 2022 document.

[11] MITA maintains that the 2008 Oral Agreement confirmed that:

- a) It operated independently of MICCS through its own board of directors;
- b) It owned and operated the tennis courts;
- c) MICCS granted to it the perpetual use of the land on which the tennis courts were built;
- d) The tennis courts are to be used only for tennis; and
- e) MITA would set all usage and other policies and rules for the tennis courts.

[12] Six former directors of MICCS, including the MICCS president in 2008, along with two members of the so-called “MITA executive” signed the 2022 document.

[13] A former MICCS director in 2008, and its president in 2008, affirmed that the terms of the 2022 document reflect the 2008 Oral Agreement.

The Pickleball Request

[14] In the fall of 2021, members of the Mayne Island Pickleball Club (“MIPC”) sought access to the tennis courts to play pickleball. The MICCS refused this request.

[15] At the subsequent MICCS Annual General Meeting on November 24, 2021, five new members were elected to the six person MICCS board. At least three of these new board members were also members of the MIPC.

[16] In April 2022, the MICCS created a Courts Committee to provide advice to the board on the usage of the tennis courts.

[17] On May 1, 2022, the MICCS board announced that pickleball could be played on the tennis courts and reserved 21 hours per week for this activity. It also allocated 21 hours per week to MITA for tennis. To this point, MITA reserved 12 hours per week for its use and the rest of the time was available for public tennis.

[18] The effect of this decision was to reduce public tennis access by 30 hours per week.

Does MITA have the exclusive and perpetual authority to determine how the Mayne Island tennis courts are used?

Relevant Legal Principles

[19] Courts should maintain a healthy reluctance in interfering with the internal affairs of an incorporated society. This type of entity should be left to govern itself and make its own decisions unless it breaches its bylaws or the governing legislation: *Gill v. Kalgidhar Darbar Sahib society*, 2017 BCSC 1423 at para. 33.

[20] Incorporated societies should be left to govern themselves in a democratic fashion and make its decisions including those that some of its members consider to be mistakes: *Garcha v. Khalsa Diwan Society - New Westminster*, 2006 BCCA 140 at para. 9.

[21] Section 52 of the *Societies Act*, S.B.C. 2015, c. 18 reads as follows:

Functions of directors

52 Subject to this Act, the regulations and the bylaws, the directors of a society must manage, or supervise the management of, the activities and internal affairs of the society.

And s. 24(1) provides:

Inspection of records

24(1) A member of a society may, without charge, inspect a record the society is required to keep under section 20 (1) [*records to be kept*].

The Petitioners' Position

[22] The petitioners filed this petition to seek relief for what they describe as the unfair and unlawful actions of the MICCS in granting pickleball players access to the tennis courts. They also assert that the MICCS oppressed them. They seek orders to restore their purported exclusive authority to determine how the tennis courts are used.

[23] The petitioners further assert that the MICCS's creation of the Courts Committee usurped the exclusive role that MITA played in determining the usage policy of the tennis courts. They contend that some of the new members of the MICCS board of directors are in a conflict of interest because of their expressed interest in pickleball.

[24] The petitioners also suggest that MITA's role in building and maintaining the tennis courts over the past 14 years amounts to a well-established tradition or custom that entitles it to retain control of the tennis courts.

[25] The petitioners maintain that MITA has a legal and proprietary interest in the tennis courts sufficient to establish proprietary estoppel: *Cowper-Smith v. Morgan*, 2017 SCC 61 at para. 15. Alternatively, they suggest that MICCS made an implied representation to MITA that they would control the tennis courts and this was the arrangement they operated under for 14 years prior to the pickleball request.

[26] The petitioners ask the court to overturn the MICCS' decision to permit pickleball play on the tennis courts and grant MITA exclusive and perpetual authority to set the usage policy for these courts.

MICCS' Position

[27] MICCS contends that the 2008 Agreement is unenforceable because it does not reflect an agreement between MICCS and MITA. MICCS owns the tennis courts

and exercises its authority over their use through the decisions of its board of directors.

[28] It further asserts that the 2022 document is hearsay and, therefore, inadmissible and that, in any event, this document is not a “proceeding” of the MICCS or an irregularity that warrants the intervention of the court.

[29] MICCS says that the directors elected in 2021 are entitled to make decisions on the use of all of MICCS’ property, including the tennis courts with a view to serving the interests of all Mayne Island users of its assets, including those who wish to play pickleball. The MICCS was therefore entitled to authorize pickleball play on the tennis courts and it set a usage policy that balances the interests of tennis and pickleball players without excluding either group from using its facilities.

[30] MICCS denies that MITA is entitled to exclusively and perpetually determine the use of MICCS assets, including the tennis courts. It is entitled to make these determinations and it has done so in accordance with its statutory authority. For that reason, judicial intervention in its decision is not warranted. It seeks the dismissal of the petition with liberty to address costs.

Discussion

[31] I do not accept the existence of the 2008 Oral Agreement as purportedly memorialized in the 2022 document. This is because I do not believe that MICCS ever intended to cede ownership and/or absolute decision making authority over the tennis courts to MITA, a non-legal entity that does not have the capacity to own anything, let alone land.

[32] Affecting this type of transfer to MITA may have disentitled MICCS to a real property exemption, as a non-profit society, for the MICCS land on which the tennis courts are located. This exemption is available to non-profit organizations for activities “that are of demonstrable benefit to all members of the community where the land is located”. This would of course include those who play pickleball: s. 15 of *the Taxation (Rural Area) Act*, R.S.B.C. 1996, c. 448. I do not accept that MICCS

claimed this exemption since 2008 for the land it purportedly transferred to MITA at that time.

[33] Furthermore, the alleged transfer of the tennis courts to MITA probably would have violated the terms of MICCS' bylaws and potentially jeopardized its status as a non-profit society. This is because one of MICCS' purposes is to promote and foster community involvement in the process of developing the community centre for the benefit of the public. The public served by MICCS includes people who play pickleball. Transferring ownership and/or control of the tennis courts and tennis funds to MITA would contravene these objectives and purposes.

[34] In my view, the 2022 document is little more than a self-serving, aspirational expression of how MITA wished to maintain and exert control over the usage of the tennis courts. Notably, the 2022 memorialization of the 2008 Oral Agreement took place after the 2021 AGM during which pickleball supporters were elected to the MICCS board.

[35] I do not accept the argument that the 2008 Oral Agreement had been in force for the previous 14 years and had not been reduced to writing because MITA and MICCS operated informally. It seems that the 2022 document was created to advance a narrative that is inconsistent with the MICCS' responsibility to manage and use its assets for the benefit of the public and, in particular, all Mayne Island community centre users.

[36] I am not finding that the 2022 document is inadmissible, but I assign little weight to it because two of the petitioners with direct knowledge of the relevant facts, in separate correspondence, contradicted the petitioners' affidavit assertions that MITA, not MICCS, owns the tennis courts and that MICCS and MITA were entirely separate entities.

[37] As of the date in 2022 when the 2008 Oral Agreement was "memorialized", none of its signatories were authorized to execute it on behalf of MICCS.

[38] The evidence clearly establishes that MICCS is the registered owner in fee simple of the land on which the tennis courts were built. It owns the tennis courts. They are assets on its balance sheets as is the bank balance in the tennis fund. This is not merely some financial technicality. The financial reports of MICCS reflect its financial affairs. This includes the tennis courts and bank account as part of its assets.

[39] MITA members and/or the petitioners may have had signing authority over the bank account but that does not make the funds within it theirs. MICCS' earmarking of funds for tennis does not equate with those funds belonging to MITA. MICCS' financial reporting shows all of the funds in its various accounts, including the tennis fund, as its assets. The "tennis fund" belongs to the MICCS, not MITA or any of the individual petitioners.

[40] During oral submissions, the petitioners resiled from their earlier position that MITA owned the tennis courts. Instead, they relied on the suggestion that MITA, an unincorporated, non-legal entity, maintained exclusive and perpetual control over the use of the tennis courts.

[41] I do not accept that MICCS ever intended to vest this unencumbered authority in MITA. In my view, the terms of the 2007 Agreement reflect the understanding between MITA and MICCS. MITA was to operate under the auspices of the MICCS for the purpose of raising funds for constructing and maintaining the tennis courts. It was originally empowered to set the usage policy for the tennis courts but the exercise of this authority was subject to final approval of MICCS which would take into account the interests of other community users of its facilities.

[42] By 2021, pickleball had grown in popularity to the point where some members of the Mayne Island community who play this sport sought access to the tennis courts to play it. There are no dedicated pickleball courts available for public use.

[43] In 2021, the MICCS board declined to provide pickleball players with access to the tennis courts. In response, pickleball supporters elected a slate of directors to the MICCS board who supported their desire to play pickleball on the tennis courts.

[44] In 2007, when the 2007 Agreement was executed, pickleball players may not have been contemplated as one of the “other users”, but by 2021, this sport’s popularity had risen to the extent that several of its supporters were elected to the board of directors of MICCS in 2021. This may have been disappointing for members of the tennis community but it was presumably an expression of the democratic will of the voting members of the MICCS.

[45] I reject the assertion that the newly elected board members were in a material conflict of interest by deciding to facilitate access to the tennis courts by pickleball players. They were in no more a conflict of interest than previous board members who preferred tennis, some of whom were on the so-called “executive” of MITA.

[46] The directors of the MICCS are empowered to determine what sports are played on the tennis courts. This is part of their management of the activities of the MICCS relating to the use of its property. Its decision to facilitate the use of the tennis courts by pickleball players is not an irregularity or some sort of a conflict of a material interest. The doctrine of proprietary estoppel does not apply in these circumstances.

[47] The new board did not oppress any of the petitioners. MITA is not a legal entity and is therefore not capable of being oppressed or otherwise entitled to any relief.

[48] In 2007, the MICCS board ostensibly created a “Tennis Committee” as a standing committee but in practice, this committee never functioned. The 2022 MICCS board’s decision to create a Courts Committee was within its authority and in so doing, it did not abrogate the rights of MITA. Legally, MITA does not exist and therefore it has no rights. The creation of the Courts Committee also did not

abrogate the rights of the petitioners who are one constituency, but not the only one, whose interests the MICCS board must consider and accommodate.

[49] I am satisfied that the MICCS board acted within its authority in seeking the advice of the Courts Committee in the course of formulating a new usage policy that provided access to the tennis courts for both tennis and pickleball.

[50] I appreciate that MITA and the petitioners feel that they ought to have some ongoing authority over the use of the tennis courts by virtue of the vital role they played in establishing, maintaining, and operating them from 2008 to 2021. However, MITA does not own these courts and this unincorporated and therefore inherently unaccountable entity does not now and never did have final authority over how the tennis courts are to be used. That determination is entrusted to the duly elected board members of MICCS pursuant to ss. 52 and s. 24(1) of the *Societies Act* and confirmed in the 2007 Agreement.

[51] In my view, the decision of the MICCS board to enable pickleball play on its tennis courts does not warrant judicial intervention because this is a decision it was empowered to make.

Disposition

[52] The petition is dismissed.

Costs

[53] If the parties wish to make written submissions on costs, they may be filed, not to exceed ten pages, within 30 days of the date of this judgment. If the parties wish to make oral submissions on costs, they may make the necessary arrangements with Supreme Court Scheduling within this timeframe and file the relevant materials accordingly.

[54] If no submissions are received, the respondent will have its costs at Scale B.

“Basran J.”