When can party members disrupt or overturn political leadership races?

March 16, 2022

Hours before the results of the B.C. Liberal Party leadership race were revealed on February 5, 2022, Mr. Viramjit Bajwa, a long-standing member of the party, brought an injunction seeking to halt the announcement. Mr. Bajwa claimed that he was denied the opportunity to scrutinize a membership audit that was held prior to the vote, given widespread concerns about irregularity and fraud in voter memberships during the race.

In its decision in *Bajwa v. BC Liberal Party*, 2022 BCSC 194, the Supreme Court of British Columbia denied Mr. Bajwa relief and allowed the announcement of Kevin Falcon's victory. This decision was the first of its kind in Canada to address whether a party member can halt the announcement of an ongoing political leadership race. The Court determined that while there can be grounds to disrupt or even overturn a leadership contest, the *dissatisfaction* of one party member over internal party processes is insufficient to do so. To that end, this case informs party members and political parties of the conditions that must exist in order for ongoing leadership races to be disturbed.

Background

The B.C. Liberal Party (the Party) is an unincorporated association, governed by the *Election Act*, R.S.B.C. 1996, c. 106 as well as its own internal constitution and leadership rules. To administer the leadership race, the Party relied on the Leadership Election Organizing Committee (the LEOC), as well as the Chief Returning Officer of the Party (the CRO) who was required to independently assess voter eligibility and memberships prior to voting.

Mr. Bajwa and several leadership candidates raised concerns about voter fraud and irregularities prior to the race. To address these concerns, the LEOC and CRO conducted a membership audit and liaised with various candidates. The LEOC ultimately concluded that the concerns over irregularities were highly exaggerated and the race would proceed as is, in light of the CRO's power to determine voter eligibility. While the leadership campaigns did not pursue their concerns with the LEOC, Mr. Bajwa maintained his fear of membership issues and demanded to scrutinize the membership audit before the leadership process had concluded.

Analysis

First, the Court determined that it had jurisdiction, albeit limited, to decide disputes between members and their unincorporated associations. That jurisdiction is limited to:

1. Interpreting the contractual documents and whether the party complied with those rules and its own jurisdiction;
2. Whether the actions of the party were contrary to procedural fairness or principles of natural justice; and
3. Whether the party acted in bad faith.

The Court in *Bajwa* determined that it had jurisdiction because the Party's constitution and leadership rules could be considered "contractual in nature".

As Mr. Bajwa sought to challenge the leadership process while the process was *ongoing*, the Court next considered whether injunctory relief should be granted. In line with *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, a court may grant an injunction upon considering the strength of the case, any irreparable harm to the parties, and the balance of convenience. The Court thus considered Mr. Bajwa's argument that:

1. His case was strong because the Party broke the rules by allowing ineligible members to vote and by failing to provide him with sufficient information of the audit;
2. The integrity of the Party and the leadership contest would be irreparably harmed; and
3. The sanctity of the voting process was more important than a 15-day delay of the results, especially considering that a general election was not imminent.

The Party's response was that the LEOC's discretionary decisions did not rise to the level of severity required for Mr. Bajwa to succeed at the injunctory stage, and that any arguments about unfairness or integrity were premature given that the results were not yet revealed. Importantly, the Party stressed that, by granting the injunction, the Court would be allowing one member to "arrest" the political process and disenfranchise and delay thousands of other Party members. Lastly, the injunction would undermine the new leader's ability to engage in public announcements, media appearances, caucus meetings, and the upcoming throne speech – all of which would harm the Party's public engagement and legislative work.

In refusing to grant the injunction, the Court's overarching conclusion was that one member's dissatisfaction is not a basis to obstruct the *ongoing* democratic processes of a major political party. Explaining its decision, the Court characterized the relief sought as a "mandatory" order rather than a "prohibitive" order, meaning that Mr. Bajwa was required to prove the merits of his case on a higher standard – *i.e.* that he must be "very likely" to succeed at trial. The Court found that this standard was not met given that Mr. Bajwa's concerns were largely speculative and unsupported by other members.

The Court also stated that there was not enough evidence to show that the LEOC breached the Party's constitution or that any such breach materially affected the election results (*i.e.* that the impugned votes outnumbered Mr. Falcon's plurality). Mr. Bajwa had

no basis under procedural fairness or the Party's constitution to dispute the substance of the discretionary decisions of the Party regarding membership eligibility determinations, and granting him relief would effectively disenfranchise other members awaiting a decision.

Implications

A key reason for the failure of Mr. Bajwa's claim involved the high threshold needed to obtain injunctory relief, which the Court noted has never been granted before in leadership elections because of its speculative and anti-democratic nature. Instead, the Court advised Mr. Bajwa to challenge the results post-election, as is more typical. In ordinary circumstances, party members that bring post-election challenges need only establish that there were voting irregularities which breached internal rules and materially affected the results of the contest. Thus, political parties can rely on *Bajwa* as favorable precedent for the high standard needed to halt an ongoing leadership vote.

The Court in *Bajwa* drew parallels to other recent leadership challenges, including Shelly Glover's application to overturn the results of the leadership race for the Manitoba Progressive Conservative Party in December 2021. Ms. Glover's complaints of voting irregularities were rejected because she was not able to establish that the alleged irregularities breached internal rules or materially affected the results of the race. Notably, in *Glover v. The Progressive Conservative Party of Manitoba,* 2021 MBQB 267, the Court stated that while the province's election legislation applied to the election of MLAs, it did not govern the internal leadership races of unassociated corporations (*i.e.* political parties). Similarly, the election legislation in B.C. does not set out any rules for leadership contests, except as they relate to financing.

In light of a growing flurry of leader resignations, political parties should be attuned to their procedural obligations while holding leadership races. Parties can rest knowing that a member's mere dissatisfaction with the process or the substantive decisions of party election committees is likely insufficient to halt or overturn ongoing races. Rather, applicants seeking interim relief must be prepared to show a strong case of irregularity, and that the irregularity breached internal rules and was material enough to alter the results of the race. Though, parties must remain aware that any material irregularities in the election process can create risks at the post-election stage.

By

Nikhil Pandey, Alan Ross

Expertise

Disputes, Public Policy & Government Relations

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.