

CITATION: Vietnamese Association, Toronto v. Duong, 2023 ONSC 6203
DIVISIONAL COURT FILE NO.: 193/23
DATE: 20231103

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Pierce, D.L. Corbett and O’Brien JJ.

BETWEEN:)	
)	
VIETNAMESE ASSOCIATION, TORONTO)	<i>Trung Nguyen</i> , for the Appellant
)	
Applicant / Appellant)	
)	
– and –)	
)	
NGA BICH DUONG, DUY LE, LOC XUAN LE, TU KHIEM TRAN, HUNG QUOC VU, PHONG TIEN DANG, THU LE, DUY NGOC NGUYEN, TAN VAN NGUYEN, NGHIEP THANH TRAN, E DINH NGUYEN and MINH CONG NGUYEN)	<i>Sam A. Presvelos and Evan Presvelos</i> , for the Responding Parties other than Thu Le and Nghiep Thanh Tran
)	
Respondents / Responding Parties)	
)	
)	HEARD: at Toronto by ZOOM, May 9, 2023

REASONS FOR DECISION

D.L. Corbett J.

[1] This proceeding concerns internal governance of the Appellant. By judgment dated January 30, 2023, Steele J. restored the board of directors of the Appellant, as it was constituted on June 25, 2022, and directed terms to conduct board elections (2023 ONSC 731 [the “Decision”]). This appeal concerns five of the terms directed by the application judge, which the Appellant submits should not have been ordered.

Background

[2] The Appellant is a not-for-profit corporation, a registered charity, and a volunteer-managed community organization devoted to promoting and celebrating Vietnamese culture and providing services to the Vietnamese community in the Greater Toronto Area. It was formed in 1972 and has grown to employ 15 persons (most part-time), leases office premises, holds fundraising events, manages an annual budget of about \$900,000, and organizes regular community events.

[3] On June 26, 2022, the Appellant attempted to hold its Annual General Meeting (“AGM”). The AGM was not called to order as the meeting was “disrupted by the respondents” before it could happen (Reasons, para. 11). The AGM was adjourned by the board of directors and most of the board, along with many others, left the building. The respondents then purported to elect

themselves as the Appellant's "interim board" (Decision, para. 12). Following this, the Respondents changed the locks on the Appellant's office and posted a notice of trespass purporting to exclude members of the board of directors. They also changed the signing authority on the Appellant's bank accounts.

[4] On July 11, 2022, the Appellant obtained an interim injunction restoring the June 25 board of directors to control over the Appellant until further court order. On July 26, 2022, the interim injunction was continued until final disposition of the application, which came on for hearing before Steele J. on January 10, 2023.

[5] The application judge found that the steps taken by the Respondents after adjournment of the AGM were invalid. She granted the application and directed that the June 25, 2022 board of directors be authorized to continue to manage the Appellant until an AGM.

[6] In respect to the board election, the application judge directed as follows:

i The Appellant shall provide notice of the AGM in the usual course, as evidenced by its past practice;

ii. The approximately 200 members of the Appellant as at the 2019 AGM, other than any who have resigned their membership, died, or have been expelled in accordance with the By-Laws and Internal Regulations, and in accordance with the *Not-for-Profit Corporations Act*, shall be entitled to notice of the AGM in accordance with the By-Laws and may attend and vote at the AGM;

iii. Any new members of the Appellant who were accepted after the 2019 AGM, other than any who have resigned their membership, died, or have been expelled in accordance with the By-Laws and Internal Regulations, and in accordance with the *Not-for-Profit Corporations Act*, shall be entitled to notice of the AGM in accordance with the By-Laws and may attend and vote at the AGM;

iv. All new member applications that were submitted on or before the deadline of May 26, 2022 shall be processed in accordance with the By-Laws within the next 30 days and any approved members shall be entitled to attend and vote at the AGM;

v. Any person who is not a member under ii, iii or iv, and who wishes to apply for membership with the Appellant in time to attend and vote at the AGM, must do so by no later than 45 days prior to the date of the AGM. The Board shall process any such applications in accordance with the By-Laws within 30 days of receipt;

vi. Notwithstanding article 18 of the By-Laws, for the purposes of this AGM, candidates to the board of directors must have been a regular member at the 2019 AGM (and not have resigned or been expelled in accordance with applicable law), been accepted as a member after the 2019 AGM (and not have resigned or been expelled in accordance with applicable law), or have become a regular member for at least 20 days before the AGM;

vii. If any member(s) disrupts the proceeding of the AGM, he, she or they may be removed from the AGM, in the sole discretion of the Board; and

viii. The Appellant may hold the AGM in any manner it deems fit, in its sole and unfettered discretion, so as to ensure the safety and security of its members. For greater certainty, the Appellant is permitted to (but not required to) conduct the AGM in person or remotely by video or another online platform.

[7] The Appellant appeals the imposition of terms ii., iii., iv., v. and vi. It says that these terms are inconsistent with the Appellant's By-laws and that the application judge erred in law and improperly exercised her discretion when she ordered them.

Summary and Disposition

[8] The application judge had broad discretion to impose terms under which fair board elections will be held at a properly constituted AGM. Such terms include terms to identify persons qualified to vote at the elections, and the process to be followed to identify additional persons who may be qualified to vote. The terms imposed by the application judge are reasonable and designed to achieve these goals. I see no error in principle and no palpable and overriding error of fact that would justify intervention by this court, and so, for the reasons that follow, the appeal is dismissed.

Jurisdiction and Standard of Review

[9] This court has jurisdiction over this appeal pursuant to s.192 of the *Not-for-Profit-Corporations Act*, SO 2010, c. 15. The appeal was initially launched in the Ontario Court of Appeal, which transferred the appeal to this court (per Favreau J.A., March 28, 2023).

[10] The appellate standard of review applies: for questions of law, the standard of review is correctness. For questions of fact, or mixed fact and law without an extricable legal principle, the standard of review is palpable and overriding error: *Housen v. Nikolaisen*, 2022 SCC 33, [2002] 2 S.C.R. 235.

[11] The application judge's exercise of discretion is reversible in this court where the decision is so clearly wrong that it amounts to an injustice, or where the court gave no or insufficient weight to relevant considerations: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 27.

Analysis

[12] I begin by quoting from the application judge's decision as follows:

I am very concerned that this charitable organization, which has done significant positive work in the GTA for many years, may be in jeopardy if this in-fighting does not cease. This is a small organization, with an annual budget of approximately \$900,000, with a staff of 15. There are two other Court actions involving [the Appellant], which have been commenced by some of the respondents, that are ongoing. This needs to stop. (Decision, para. 4)

I agree.

[13] One major cause of the conflict in this organization has been the board's approach to determining who is a member of the organization. The application judge reviewed the history of this issue in detail and found as follows:

It is clear in the By-Laws that the Board has the authority to approve membership. This obviously must be done in good faith and must not be exercised in a manner that is contrary to the principles of natural justice. However, the By-Laws do not refer to members being unilaterally terminated by the Board for failure to file a form. The Internal Regulations do not refer to members being unilaterally terminated by the Board either. (Decision, para. 34)

[14] In respect to payment of dues as a condition of continued membership, the application judge found as follows:

The By-Laws do not speak to members being terminated or removed from membership if there is no annual application, nor do they require members to re-apply annually for membership. The By-Laws do refer to the requirement for members to pay membership dues on an annual basis. Article 9.3 provides that a member whose membership due is not paid after being informed through the AGM invitation will be deemed to have voluntarily withdrawn his or her membership. The Internal Regulations provide that members who do not pay membership fees after three reminders will no longer receive newspapers and documents from VAT. There is no evidence before me that the members claiming membership rights have not paid their annual dues. (Decision, para. 35)

[15] These findings do not disclose any palpable and over-riding error of fact. They comport with the principles of natural justice, a lens through which the board of directors is bound to exercise its discretion respecting membership. It follows that the application judge made no error in finding that "any members as at the 2019 AGM, other than any who have voluntarily resigned their membership, died, or have been expelled in accordance with the By-Laws and Internal Regulations, and in accordance with the *Not-for-Profit Corporations Act*, continue as members entitled to vote at the next AGM" (Decision, para. 37).

[16] The Respondents argued before the application judge that a monitor ought to be appointed to conduct the AGM. The Appellant argued that its reinstated board should have the authority to run the meeting, and that the cost of a monitor would be too expensive for this small organization. The application judge agreed with the Appellant on this point and gave directions for the reinstated board to convene and run the AGM.

[17] The Appellant proposed that the AGM be held within 120 days and proposed various other consequent deadlines. The application judge concluded that the meeting should be held within 60 days, to "right the ship" promptly, and thus shortened other deadlines to fit within this deadline for the meeting. Section 61 of the *Act* provides authority for making this order, and there is no error in principle in the application judge directing abbreviated deadlines in all the circumstances.

[18] The Appellant argues that the application has suspended the operation of Article 18 of the Bylaws for the purposes of the board elections. Subsection 31(2) of the *Act* grants the court broad powers to make “any order that it thinks fit” in response to an application to determine a controversy with respect to an election. In any event, that is not what the application judge ordered. Only to the extent that Bylaw 18 is inconsistent with the terms set out in para. 3(vi) of the order is its operation suspended. Thus, a member is eligible for election if they have been a member for twenty days, rather than ninety days, prior to the meeting – a term required as a consequence of directing a meeting within sixty days, rather than the 120 days advocated by the Appellant. Other aspects of Bylaw 18 continue to apply. With respect, if the application judge had intended to exclude the operation of Bylaw 18 entirely, that is what she would have ordered, rather than the tailored direction that she did make.

[19] The Appellant argued that the application judge erred in failing to apply Article 9.3, which deems memberships “voluntarily withdrawn” if membership fees have not been paid after notice of the AGM. The application judge considered this argument and concluded that it had not been established that any of the roughly 200 members as of 2019 had failed to pay dues as required. That conclusion was available on the record. Members must still comply with Article 9.3 in respect to the upcoming AGM, but the board is precluding from finding members voluntarily withdrew for non-payment prior to the abortive AGM as a result of the application judge’s findings and order.

[20] The Appellant argued that the application judge erred “by citing and applying the 1985 Rules, which [are] clearly outdated and inapplicable.” The application judge found as follows (at Decision, para. 25):

It is clear that some of the issues in the organization have arisen due to changes in membership protocol that have been implemented by the Board, but not reflected in the constating documents.

This finding is reasonable. I see no error in the way in which the application judge reviewed these matters, nor with her conclusion that members as of the 2019 AGM should be permitted to vote at the upcoming AGM (subject to the terms directed by the application judge).

[21] The terms ordered by the application judge confirm the role of the board of directors in determining membership, calling the AGM, and running the AGM, all subject to the constraints imposed by law including principles of natural justice. These terms were well within her discretion pursuant to the *Not-for-Profit Corporations Act*. The appeal is dismissed.

Conduct of the Upcoming AGM


[22] Justice Matheson stayed the portions of the application judge’s order directing an AGM and board elections pending final disposition of this appeal. I would continue the stay until November 17, 2023 so that the deadline for conducting the AGM does not fall in the December holiday period.

Disposition

[23] The appeal is dismissed, with costs in the amount of \$11,000, inclusive, as agreed. The stay of paragraph 3 of the application judge's order is lifted effective November 17, 2023.



D.L. Corbett J.


I agree: _____
Pierce J.


I agree: _____
O'Brien J.

Date of Release: November 3, 2023

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Vietnamese Association, Toronto

Applicant / Appellant

– and –

Nga Bich Duong, Duy Le, Loc Xuan Le, Tu
Khiem Tran, Hung Quoc Vu, Phong Tien
Dang, Thu Le, Duy Ngoc Nguyen, Tan Van
Nguyen, Nghiep Thanh Tran, E Dinh
Nguyen and Minh Cong Nguyen

Respondents / Respondents

REASONS FOR DECISION

D.L. Corbett J.

Date of Release: November 3, 2023