
NON-COMPLIANCE RESULTS IN COURT-ORDERED WIND UP OF NOT-FOR-PROFIT CORPORATION UNDER THE *CORPORATIONS ACT* (ONTARIO)

*By Jacqueline M. Demczur, B.A., LL.B.
Assisted by Kimberley A. LeBlanc, B.A., LL.B., Student-at-Law*

A. INTRODUCTION

In a judgement released on October 3, 2007, the Ontario Superior Court of Justice (the “Court”) ordered that a church, incorporated by letters patent pursuant to the *Corporations Act* (Ontario)¹ (the “Act”), be wound up for various statutory breaches. In *Warriors of the Cross Asian Church v. Masih*², the Court attempted to clarify the application of the Act to not-for-profit corporations. In this regard, some of the case law has been interpreted to stand for the proposition that not-for-profit corporations are not required to strictly adhere to all of the technical requirements of the Act with respect to the corporate procedures of their meetings. However, in this decision the Court took the position that where a corporate breach is not merely technical, but instead affects the results of an election of a not-for-profit corporation’s board of directors by its members, then the Act should be applied more strictly.

B. BACKGROUND

The Warriors of the Cross Asian Church (the “Church”) was incorporated pursuant to the Act as a corporation without share capital on April 3, 1981. The Church’s initial Board of Directors (the “Board”) was comprised of its four founding members, being the original applicants for incorporation, as prescribed by

¹ R.S.O. 1990, c. C-38.

² [2007] O.J. No. 3794.

section 121 of the Act. Between 2005 and 2006, the composition of the Board changed several times. On September 18, 2005, the Board dismissed a director for his continued non-attendance at meetings and the belief that he had voluntarily left the Church. In July of 2006, two additional directors resigned their position (“Resigned Directors”), thereby necessitating an election to fill the vacant Board positions.

On August 3, 2006, one of the Resigned Directors called an emergency meeting to discuss a “Notice of Intention to Dissolve,” which was received in the wake of the resignations. At this meeting, the second Resigned Director purported to withdraw his resignation. Then, on August 4, 2006, the first Resigned Director who had initiated the previous day’s meeting, called a subsequent meeting of the congregation who then proceeded to vote out the president of the Board. The two Resigned Directors then withdrew their resignations and filed a Notice of Change with the Ministry of Consumer and Business Services to that effect.

On August 20, 2006, the congregation, presumably led by the Resigned Directors (“Dissident Group”), went on to elect three new directors to the Board.

A court application was subsequently brought by the Dissident Group for a declaration that the Board of the Church was validly elected at the August 20, 2007 meeting. In response, a second application was brought seeking a determination that the true members of the Church were the four individuals who were the original incorporators of Church and, as such, it was only these four persons, and not the larger congregation of the Church, who were properly able to elect new directors to the Board.

C. SUMMARY OF DECISION

The Court extensively reviewed the provisions of the Act and the Church’s repeated violations thereof. Beginning with the proper forum for undertaking an election of directors, the Court looked to section 287 of the Act, which requires that all such elections take place in a general meeting “by ballot or in such other manner as the by-laws of the corporation prescribe.” The Court found that, given the fact that the Church had never passed a general operating by-law establishing its governance structure, the procedure to elect directors would have to be governed by section 287 of the Act. In determining that the said provision had not been complied with, the Court then reviewed the Act in order to determine whether those who voted at the August 20, 2007 meeting were, in fact, members of the Church with the requisite capacity to elect directors. In this regard, section 124 of the Act sets out that a person or unincorporated association can become a member of the corporation by a resolution of the board of directors, unless any other process has

been provided for within the corporations, letters patent, supplementary letters patent, or by-laws. Although the Dissident Group argued that various mechanisms for determining membership had been employed by the Church (i.e. making a donation to the church and attending services regularly) over the years, the Court found that there had been no such process provided for within the constating documents of the Church and, additionally, “that there had never been a comprehensive determination for the criteria to qualify for membership and no consistent process for admission”. Given the inability to determine who voted at the August 20, 2007 meeting to elect directors to the Board, and whether or not they were qualified to do so as members because the Church did not keep such membership records, the Court found that it was not possible to know if the Board was properly elected by members of the Church as required by section 287 of the Act.

The Court noted that section 287 of the Act additionally requires that the election of directors take place at a “general meeting”, and that notice to that effect be provided for³ in writing and be sent to each shareholder who is entitled to notice at least ten days before the meeting.⁴ The Court determined that the meeting in which the election of directors took place was not properly called or constituted because the notice was not in writing but was instead verbally announced at two consecutive church services. Evidence was also lacking with respect to whether or not the vote resulting in the elections was taken by ballot as required by section 287. The Court, therefore, concluded that the election of the directors on August 20, 2007 was not valid as it did not comply with the statutory requirements of the Act.

The Dissident Group contended that although the election did not technically comply with the provisions of the Act, it should still be declared valid based upon decisions such as *Pathak v. Hindu Sabha*⁵ and *Donald Lee and others v. Lee’s Benevolent Association of Ontario and others*⁶ (“Lee”). They contend that these cases stand for the proposition that:

Non-Profit organizations ... should not be required to adhere rigorously to all of the technical requirements of corporate procedure for their meetings as long as the basic process is fair. Nor should the court be too quick to grant relief in such circumstances that may only serve to encourage a disgruntled member of such an organization to seek such relief. Absent some demonstrated evidence that any irregularities went to the heart of the electoral process or lead to a result which does not reflect the wishes of the

³ *Supra* note 1 at s. 294.

⁴ *Supra* note 1 at s. 93.

⁵ 48 B.L.R (3d) 207.

⁶ Unreported, released March 19, 2004.

majority, the court should be loathe to interfere in the internal workings of such groups.⁷

The Court distinguished the facts of this case from those in *Lee* on the basis that the corporation's violation of the Act in *Lee* was merely technical in nature and did not affect the results of the election. The Court noted that this could not be said for the breaches of the Act in the case of the Church. The Court stated that the issue of whether those who voted were in fact entitled to do so goes to the very heart of an election. In addition, the Court explained that the first sentence in the quotation noted above was *obiter dicta* and did not form the basis of the court's decision in *Lee*.

In support of its position, the Court cited the decision in *Rexdale Singh Sabha Religious Center v. Chattha*⁸ (*Rexdale Singh*) which highlighted the importance of complying with corporate governance issues for both charitable and not-for-profit organizations. In *Rexdale Singh*, the appointment of ten new directors was invalidated because the process used was in contravention of the provisions of the Act, even though the appointments had otherwise been in the best interests of the corporation. The Court noted that, in *Rexdale Singh*, in the face of no proper procedure having been taken, the proper members of that corporation were the original applicants.⁹

Having decided that the elections were invalid at the August 20, 2007 meeting, the Court then looked to whether it would be appropriate in this case to return the responsibility for the Church to the original applicants as sought by the respondents. The Court concluded that:

To return the operations of this church to the initial applicants would put people in charge who have not been involved or shown much interest in the church in some time. To put the church in the hands of either side of this disagreement will, I fear, do nothing more than lead to more disagreement and further disputes and to the end of this church as a place of worship.¹⁰

The Court weighed the harm that would be caused by allowing the Church to continue to operate without the controls provided for by the requirements of the Act, and concluded that the most appropriate remedy was an order to wind-up based upon the judicial discretion provided for under s. 243(d) of the Act.

⁷ *Ibid.* at 12.

⁸ [2006] O.J. No. 328; For more information, see Terrance S. Carter, "Non-Share Capital Corporations Must Strictly Adhere to Corporate Governance Procedures", in *Charity Law Bulletin No. 101*, October 27, 2006.

⁹ *Supra* note 2 at 38.

¹⁰ *Supra* note 2 at 39.

D. CONCLUSION

The judgement in *Warriors of the Cross Asian Church v. Masih* assists in explaining the application of the Act with respect to not-for-profit corporations. Specifically, this decision has attempted to clarify some confusion, which was born out in the case law, as to the level of deference afforded to not-for-profit corporations with respect to the technical corporate procedure requirements for meetings as set out under the Act. The Court in this case appears to be in agreement with the decision in *Lee* to the degree that where an error is technical in nature and does not affect the results of an election of directors or some other serious corporate matter, some leniency may be afforded to the not-for-profit corporation. However, where the error goes to the heart of an important corporate matter, such as the election of directors in this case, then it appears that the courts will demand that the internal workings of the not-for-profit corporation strictly adhere to the requirements of the Act. Where this cannot be, or has not been, achieved, particularly where the original incorporators are no longer part of the said not-for-profit corporation, the courts will invoke their discretion to dissolve a non-share capital corporation outright.