

[3] Although the respondents raise various issues not covered under the application, including the legitimacy of the 2021 Board meeting, the respondents have not brought a cross-application. There is no relief being sought against VAT, its Board or Executive Director.

[4] 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 VAT, which have been commenced by some of the respondents, that are ongoing. This needs to stop.

[5] For the reasons set out below, I have determined that the vote, which occurred after VAT's 2022 AGM was disrupted and adjourned by the Board, was invalid and a nullity. The current Board has sole power and authority over the management of the business and affairs of VAT until the next AGM, when the election of the board of directors will take place. I have also determined that a new AGM must be held forthwith and set out the protocols for such meeting.

Background

[6] VAT is a publicly funded, not-for-profit corporation, created by Letters Patent under *The Corporations Act*, R.S.O. 1990, c. C.38. VAT is also a registered charitable organization. It is governed under the *Not-for-Profit Corporations Act* (Ontario), 2010, S.O. 2010, c. 15 (the "NFPC Act").

[7] VAT provides settlement, adaption and social services and programs to the community in the Greater Toronto Area.

[8] VAT is managed by a board of directors. The board of directors is elected at VAT's annual general meeting of members and appointed in accordance with VAT's by-laws (the "By-Laws").

[9] On or about June 26, 2022, VAT tried to hold its annual general meeting ("AGM"), which is to be convened once a year by VAT's board of directors.

[10] The AGM is a general meeting of all the regular members and distant members of VAT. Under article 10 of the By-Laws, the power to do the following is only available at a general meeting:

- a. Election of the board of directors;
- b. Identification and description of policies of the board of directors;
- c. Non-confidence vote on the board of directors;
- d. Amendment of VAT's By-Laws; and
- e. Resolution to dissolve VAT.

[11] The June 26, 2022 AGM was disrupted by the respondents before it could be called to order.

[12] The Board adjourned the AGM, intending to reschedule the meeting at a time when it could be held in a safe and orderly manner. However, after most of the Board, some members, the auditor, the executive director and the staff left the building, the respondents purported to hold the Vote in Question *in absentia* to appoint themselves as VAT's "interim board."

[13] Following the meeting, the respondents took certain inappropriate self-help measures. They changed the locks on VAT's office and posted a notice of trespass to exclude the Board. The respondents issued a press release advising that the interim board had assumed control and management of VAT and filed notices of change to register themselves as directors and officers of VAT. The respondents also attended at the Bank of Montreal to change the signing authorities on VAT's bank accounts.

[14] The applicants obtained an interim injunction on or about July 11, 2022, where the Court declared, among other things, that:

- a. The current board of directors of VAT has sole power and control over VAT until further order of the Court.
- b. The *status quo* be maintained and the state of the parties and VAT that existed as of June 25, 2022, the date prior to the AGM, continue until further order of the Court.
- c. Until further order of the Court, the respondents are enjoined from:
 - i. Representing themselves as members of an "interim board" of VAT, or having any authority to represent, bind, manage, monitor, supervise, direct or otherwise deal with the business of VAT;
 - ii. Dealing or interfering with VAT's bank accounts; or
 - iii. Filing and Notice of Change, changing the applicant's directors or officers, or otherwise dealing or interfering with VAT's corporate filings;
- d. VAT shall be permitted to pay its expenses in the usual course and/or as reflected in its past practice.

[15] On July 26, 2022, McEwen J. endorsed that the July 11, 2022 order would remain in full force and effect pending the return of the motion, agreement of the parties, or other order of this Court.

Analysis

Was the Vote in Question Valid?

[16] The applicants submit that the respondents' attempt to call the AGM to order after the Board adjourned the meeting was not properly constituted. They argue that the meeting was patently defective because of, among other things, failure to meet quorum requirements or provide sufficient notice to members.

[17] Article 12 of VAT's By-Laws provides:

The Board of Directors has the [responsibility] to inform in writing to all members about date, time, location and agenda at least 2 weeks before annual or Extraordinary General Meeting.

[18] Articles 14.1 and 14.2 of the By-Laws provide:

14.1 The General Meeting session is only valid when attended by more than half the total membership referred to in article 6.1 and 6.2.

14.2 If the first General Meeting convened without a quorum attendance, the second General Assembly will convene four weeks later, and quorum shall reach at least one third (1/3) total membership as stated in articles 6.1 and 6.2 (present and by proxies).

[19] The applicants submit that the Court examined a similar fact scenario in *Ontario Korean Businessmen's Assn. v. Oh*, 2011 ONSC 6991. In that case, certain members of the business association hijacked the annual general meeting shortly after it started and held a vote *in absentia* to vote in a new board after the incumbent board left the meeting. The Court determined that the vote was invalid and a nullity. The Court appointed a Monitor of the affairs of the association until further court order.

[20] The AGM was adjourned by the Board on June 26, 2022. The Board had indicated that it would reschedule the meeting to a future time when the AGM could be held without disruption. All the Board members left except one. The respondents then purported to hold a vote for the directors of VAT. The Vote in Question was held after the adjournment of the AGM by the Board. Based on the By-Laws, there was no authority for the respondents to convene the AGM. The AGM is to be convened once a year by the board of directors (article 11.1, By-Laws) and there must be notice provided to all members at least 2 weeks in advance (article 12, By-Laws).

[21] Similar to *Ontario Korean Businessmen's Assn.*, I am satisfied that the vote, which occurred after VAT's 2022 AGM was disrupted and adjourned by the Board, was invalid and a nullity.

Applicant's request for Continuation of the Injunction

[22] There is an interim injunction that is currently in place subject to further Court order. The applicants argue that the interlocutory injunction ought to continue.

[23] Interlocutory relief is provided to preserve a party's rights before the matter is heard on the merits. The application was heard and I have determined that the Vote in Question was invalid and a nullity. The current Board has sole power and authority over the management of the business and affairs of VAT until the next AGM, when the election of the board of directors will take place.

[24] Accordingly, there is no need to continue the interlocutory injunction.

Membership Issues

[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.

[26] Article 6 of the By-Laws sets out the following 3 types of membership for VAT:

6.1 Regular Members: individuals aged 18 and over, residing in Toronto and the surrounding areas, recognizing the Mission Statement and By-Laws of the Association, **having completed a membership registration form, paid membership dues and having been approved for membership by the Board of Directors.**

6.2 Distant Members: individuals residing outside of Toronto and the surrounding areas and meeting the requirements mentioned in 6.1. A distant member does not have the right to run for or to be nominated for a position in the Board of Directors.

6.3 Honourable Members: individuals or corporate bodies that have actively helped the Association with its activities or development or made considerable financial contribution to the Association. Honourable Members do not have the right to run for or to be nominated for a position in the Board of Directors. Their membership will be invited and confirmed through a board decision. [emphasis added]

[27] Article 7 of the By-Laws sets out the rights of members:

7.1 All the members have the right to engage in all the activities of the Association and are entitled to all the membership rights as provided for in the Association's By-Laws and Regulations.

7.2 Only regular members having their names on a list approved by the Board of Directors prior to the date of the Annual General Meeting have the rights to:

1. Engage in the decisions of the Association through discussions and voting.
2. Vote, nominate and run for the Association's positions.

7.3 Distant Members have the right to discuss, approve, vote and nominate as provided for in the Article 6.2.

[28] At the hearing of the application, VAT requested that the Court confirm that the Board has the power to determine its own membership, including removing any members that have been disruptive. VAT points to article 42 of the By-Laws, which states:

The Board of Directors, after consultation with the Advisory Board, has the right to apply disciplinary measures such as warning, reprimand or expel members who violated By-Law or the Internal Regulations of the Association.

Article 43.1 provides that "the details of citation and disciplinary measures will be defined by the Internal Regulations." The Internal Regulations do not specify the details of citation and disciplinary measures. Accordingly, the membership has not been provided with details of citation and disciplinary measures that may be taken by the Board. Article 43 of the By-Laws further sets out the appeal process.

[29] Section 51 of the NFPC Act provides that any disciplinary action or termination of membership must be done in good faith and in a fair and reasonable manner. It provides in section 51(3) that a procedure is fair and reasonable if, "(a) the member is given at least 15 days' notice of a disciplinary action or termination with reasons; and (b) the member is given an opportunity to be heard, orally, in writing or in another format permitted by the corporation's articles or by-laws, not less than five days before the disciplinary action or termination of membership becomes effective".

[30] The NFPC Act defers to an organization's articles and by-laws with regard to expulsion from membership. Section 50 of the NFPC Act provides:

50(1) Unless the articles or by-laws of a corporation provide otherwise, a membership is terminated when,

- (a) The member dies or resigns;
- (b) The member is expelled or the person's membership is otherwise terminated in accordance with the articles or by-laws;
- (c) The member's term of membership expires; or
- (d) The corporation is liquidated or dissolved under Part XII

(2) Unless this Act, the articles or by-laws provide otherwise, the rights of a member, including any rights in the property of the corporation, cease to exist on termination of the membership.

[31] The respondents take issue with certain new membership protocols introduced by the Board. The respondents state that the membership in VAT has decreased from approximately 200 in 2019 to approximately 50. The respondents state that the Board has not processed approximately 50 membership applications that were made (and fees paid) prior to the AGM. Their position is that the Board has taken steps to restrict membership in VAT. The respondents state that the issues that have arisen are in large part due to the Board's recent approach to membership.

[32] During the pandemic it was necessary, and legally required, for the Board to take certain measures to ensure compliance with the restrictions imposed on gatherings, including for meetings. The Board, for example, requested that members confirm in advance of the 2021 AGM whether they would be attending, so the Board could ensure compliance with the COVID-related gathering restrictions.

[33] However, steps to restrict gatherings should not impact the membership of VAT. It is unclear on what basis the Board has reduced membership of VAT.

[34] The Board's position is that it is free to approve or reject members as it sees fit, provided it has authority to do so under its By-Laws, the decision is made in good faith and in the best interests of VAT and is not exercised in a manner that is contrary to the principles of natural justice. VAT points to *Ho v. Providence Health Care Society (2004)*, [2004] 1 B.L.R. (4th) 234 (BC SC) as authority for the statement that a by-law requiring that members be appointed by the board of directors is not superfluous and enforceable. 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.

[35] 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.

[36] The NFPC Act provides the Court with broad discretion under section 31 to determine any controversy with respect to an election or appointment of a director. Section 31(2) provides:

31(2) On an application under this section, the court may make any order that it thinks fit, including an order,

- a. Restraining a director whose election or appointment is disputed from acting pending determination of the dispute;
- b. Declaring the result of the disputed election or appointment;
- c. Requiring a new election or appointment, and including in the order directions for the management of the activities and affairs of the corporation until a new election is held or appointment made; and
- d. Determining the voting rights of members and of persons claiming to hold memberships.

[37] Under section 31(2) of the NFPC Act the Court has the authority to make an order determining the voting rights of members. I am of the view 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 NFPC Act, continue as members entitled to vote at the next AGM.

Next Steps

[38] VAT is a community organization that is funded by the government and member dues, as well as rental income from a property. The Board and many of the respondents have dedicated significant volunteer time to this organization. The Board and the respondents all appear to care deeply for the organization and its future. There happens to be a rift between the Board and some members, including certain persons involved previously with the board of directors, which has come to a head and is essentially threatening the organization which has been in existence since 1979.

[39] The applicants requested that if the Court determined that the Vote in Question was invalid, the Court provide directions to “right the ship” to permit it to hold the AGM without outside interference or disruption. The applicants submit that this may be done by granting the relief sought by VAT and giving directions on the conduct of the AGM, or by appointing a monitor or supervisor to oversee and manage the election, as was done in *Ontario Korean Businessmen’s Assn.*

[40] VAT submits that it is preferable for the Court to provide directions, as opposed to the appointment of a monitor. VAT states that it is unlikely that the organization will be able to fund the appointment of a monitor/supervisor over the long term due to the prohibitive cost. Further, VAT argues that the more proportionate remedy is for the Court to direct the conduct of the AGM, subject to terms, permitting members to vote in a new board of directors in accordance with the By-Laws.

[41] Section 61 of the NFPC Act also gives the Court the jurisdiction to order a meeting of the members of a corporation to be called, held and conducted in the manner that the court directs in certain circumstances:

- (1) The court, on the application of a director or a member who is entitled to vote at a meeting of the members, may order a meeting of the members of a corporation to be called, held and conducted in the manner that the court directs, if,
 - a. It is not practical to call the meeting within the time or in the manner in which it is otherwise to be called;
 - b. It is not practical to conduct the meeting in the manner required by this Act or the by-laws; or
 - c. The court thinks that the meeting should be called, held and conducted within the time or in the manner that it directs for any other reason.

[42] The Board suggests that the AGM be called within 120 days, due to the requirement in article 18.1 of the By-Laws that candidates to the board of directors must be a regular member for at least 90 days before the date of voting. However, I am of the view that the AGM needs to be convened as soon as possible to “right this ship”. Accordingly, I am ordering that the meeting be held within 60 days.

[43] Notwithstanding article 18 of the By-Laws, for the purposes of this meeting, 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) or have become a regular member for at least 20 days before the meeting.

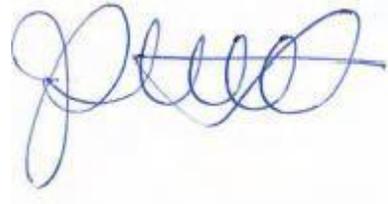
Disposition and Costs

[44] The following is hereby declared and ordered:

- a. The vote held by the respondents on June 26, 2022 to appoint themselves as VAT’s “interim board” was invalid and a nullity;
- b. The Board is authorized to continue managing VAT’s business and affairs in accordance with its By-Laws until such time as VAT can hold its AGM;
- c. VAT shall convene an AGM within 60 days, subject to the following directions:
 - i. VAT shall provide notice of the AGM in the usual course, as evidenced by its past practice;

- ii. The approximately 200 VAT members 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 NFPC 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 VAT members 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 NFPC 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 VAT 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. VAT 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, VAT is permitted to (but not required to) conduct the AGM in person or remotely by video or another online platform.

[45] I would encourage the parties to resolve the issue of costs between them. In the event that they are unable to do so by February 24, 2023, they shall notify my judicial assistant. In this case, any party seeking costs shall deliver written submissions of no more than 3 pages in length (plus Bill of costs and any offers to settle) by March 3, 2023. Responding submissions of no more than 3 pages in length may be delivered by March 17, 2023. Submissions shall be sent by email to my judicial assistant and posted on Caselines.

A handwritten signature in blue ink, appearing to read "J. Steele J.", is centered on the page. The signature is fluid and cursive, with a horizontal line crossing through the middle of the letters.

J. Steele J.

Released: January 30, 2023

CITATION: Vietnamese Association, Toronto v. Duong et al., 2023 ONSC 731

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Vietnamese Association, Toronto

Applicant

– and –

Nga 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

REASONS FOR JUDGMENT

J. Steele J.

Released: January 30, 2023