

Court reinstates ousted directors of not-for-profit corporation (Lewis v. Niagara Regional Native Centre)

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Directors were removed from the board of a not-for-profit corporation by a motion supported by loud “cheers, whoops, and yeahs” – but was their removal valid? In a decision of the Ontario Superior Court of Justice, *Lewis v. Niagara Regional Native Centre*, 2024 ONSC 5196, the court reviewed the circumstances in which directors of a not-for-profit corporation were removed and emphasized that it is important for members, directors and all persons involved with the governance of not-for-profit corporations to comply with a corporation’s by-laws as well as the provisions of the *Not-for-Profit Corporations Act, 2010* (Ontario) (the “Act”). A failure to comply with these rules may result in actions taken on behalf of the corporation being deemed invalid and overturned.

The decision in *Lewis* focused on the 8 February 2023 meeting of the members of the Niagara Regional Native Centre (“NRNC”) where some directors were removed from office and new directors were elected, but not in accordance with the Act or NRNC’s by-laws. The Applicants volunteered on NRNC’s Board until they were removed at the February meeting. The Respondents were individuals elected to the Board at the February meeting.

Facts

The events underlying the application began with the resignation of the NRNC’s former executive director in December 2022. The Respondents alleged that the executive director’s resignation was prompted by concerns over improper board governance, the Board’s failure to follow its by-laws, operational overreach by NRNC’s president and Board, and an overall failure to govern the NRNC in the best interests of NRNC members and the community. In response to the executive director’s resignation, several Board members resigned, leaving the Board without quorum.

The Board scheduled a special meeting of the members for 8 February 2023, to fill its vacancies and discuss amendments to the by-laws regarding residency requirements for member eligibility. Importantly, the meeting was not called for the purpose of removing any members or directors of NRNC. Leading up to the meeting, two of the Respondents vocally expressed their discontent with the Applicants on their radio show and podcast. Given the tightly-knit community served by the NRNC, the ongoing conflict between the Applicants and Respondents was contentious and deeply felt by community members.

Nearly 100 people attended the special meeting, including NRNC members, stakeholders, and community members. The meeting ultimately devolved into disorder such that, out of concern for their own safety, the Applicants told the inflamed crowd that they would “stand down from the Board”. A motion was made to “dissolve the Board” which was responded to with shouts and cheers, and six new directors and a new Board president were elected. Immediately after, the Applicants’ access to their NRNC accounts and emails was terminated.

The Applicants brought an application to the court seeking declarations they did not resign from the Board, that they were not validly removed from the Board and that the new Board’s election was not valid. The Applicants also sought an order invalidating all of the acts taken by the Respondents purportedly acting as the Board since the February 2023 special meeting.

The Court’s Findings

First, the court found that the Applicants did not effectively resign from the Board. The regulations under the Act specifically require the resignation of directors to be in writing. Cases cited by the Applicants held that the status of a director must be capable of objective verification. Without a written resignation, objective verification of a director's resignation would not be possible, and the resignation would not be effective. Here, there were no written resignations tendered by the Applicants. The Respondents failed to provide any authority to support their argument that a verbal resignation recorded in the minutes of the meeting would constitute an effective resignation.

Second, the court found that the Applicants were not validly removed from the Board. Neither the Act nor the by-laws contemplate a "motion to dissolve the Board" which was used by the NRNC to remove the Applicant directors. The Act provides that members may remove a director or directors by ordinary resolution at a special meeting of members. Notice of the meeting is required. When such a meeting is called, the director is entitled to give the corporation a statement with reasons opposing their removal unless specifically prevented from doing so by a provision in the by-laws.

The 8 February 2023, meeting was not called to remove the Applicants as directors. There was no prior notice provided and the Applicants had no opportunity to provide a statement opposing their removal. The court found that the governance of the meeting was "fraught with irregularities". Of most concern was the fact that the "motion to dissolve the Board" was not carried by show of hands of voting members but rather by the eruption of "cheers, whoops, and yeahs" from the crowd. The Respondents acknowledged that there was no way for the chair to discern whether the cheers from the crowd were from voting members or from non-members and if the cheers constituted a sufficient portion of the voting members. No separate poll or vote was taken. Accordingly, the court invalidated the motion to dissolve the Board and remove the Applicants as directors.

Finally, the court found that the election of the new president and Board members was not valid. In the same way a meeting must be called for the special purpose of removing directors, the by-laws of the NRNC required a meeting to be called for the special purpose of electing a new Board. Here, the special meeting of February 8 was not called for the purpose of electing a new Board. The court followed the decision of *Ontario Korean Businessmen's Assoc. v. Seung Jin Oh*, 2011 ONSC 6991 which held that gross violations of an association's by-laws and rules should not be rewarded, as otherwise corporate governance would "dissolve into the law of the jungle".

Following the 8 February 2023 special meeting, the NRNC had two more meetings where it re-elected its Board and attempted to cure its electoral irregularities. However, for both meetings, the court found that notice was not properly provided to all of the NRNC members as the Board used an inaccurate membership list. For one, the Applicants were not included on the list. The court found that their memberships had not been terminated properly in accordance with section 51 of the Act which requires a member to be given at least 15 days' notice of the termination with reasons and be permitted to respond to the proposed termination. The NRNC's by-laws also required a member to be given the opportunity to be heard before disciplinary action or termination took place. Accordingly, the Applicants' memberships were not properly terminated and the failure to provide them notice of the two meetings failed to cure the NRNC's electoral irregularities.

The court rejected the Respondents' argument that it should consider the unique characteristics of the corporation and the Indigenous right to self-determination when interpreting the actions taken by the NRNC. The Respondents did not outright challenge the court's jurisdiction to determine the issues in the application nor provide any substantive argument and legal authority to persuade the court that the Indigenous right to self-determination ousted the binding effect of the NRNC's by-laws and the Act. Moreover, the court found that the right to self-determination did not necessarily contradict the NRNC's by-laws and the Act, which are intended to incorporate the fundamental principles of good governance, natural justice, and procedural fairness. These principles, the court found, were not impediments to the Indigenous peoples' right to self-determination but rather were fundamental to the right itself.

Conclusion

Ultimately, the court found that the Applicants were not properly removed as directors of the Board or members of NRNC at the 8 February 2023 meeting and that subsequent meetings did not fix these deficiencies. Using the court's discretionary authority under sections 31, 61, and 191 to ensure compliance with the Act, the court exercised its judicial discretion and re-instated the four ousted Applicants to the NRNC Board of directors. The court further invalidated the actions taken during the 8 February 2023, meeting and held that the NRNC must engage a third party to conduct governance training for the current directors and all future directors.

Despite recognizing that it had broad discretionary authority to make orders to ensure compliance, the court made the unusual decision to not remove the directors elected to NRNC's board following the February 2023 meeting. The court was of the opinion that this might cause more harm than good because of the importance of maintaining institutional knowledge on the Board. The court also declined to invalidate all of the acts taken by the Respondents acting as the Board since February 2023 as this might potentially impact the agreements or contracts NRNC had entered into in the subsequent period. These unusual decisions raise



the question of whether the court interpreted its discretion to act (or to not act) too broadly, as earlier caselaw suggests that the court's failure to act could be perceived as rewarding gross violations of corporate governance.

The decision in *Lewis* shows that, notwithstanding the general presumption that the internal workings and governance of not-for-profit corporations will not be lightly interfered with by a court (*Lee v. Lee's Benevolent Assn. of Ontario*, [2004] O.J. No. 6232 (S.C.J.) at para. 12), if a court finds that there are serious irregularities, it will intervene to invalidate many, though not necessarily all, unlawful actions and to enforce compliance with the Act. At the same time, courts may prioritize pragmatic approaches that will enable the corporation to continue operating, such as allowing certain newly appointed directors to remain on the board. Directors of not-for-profit corporations should be careful to review and comply with the provisions of the Act and their corporation's by-law and governing documents as failure to do so could result in litigation or other disputes among its broader community. Directors may want to consider arranging for their board to receive governance training so that board members can learn about good governance practices and have confidence when dealing with unexpected situations at board and member meetings. A PDF version is available to download [here](#).

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