

KEEPING CURRENT

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Court overturns election of Church's board of directors (*Metmeke v. Yigzaw*)

By James R.G. Cook

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While members of not-for-profit corporations should generally try to resolve their differences pursuant to their rules and by-laws before seeking the assistance of the courts, there are circumstances when judicial assistance may be warranted.

The decision of the Ontario Superior Court of Justice in *Metmeke v. Yigzaw*, [2023 ONSC 6557 \(CanLII\)](#), involved a contested election over the board of directors of a Church incorporated under the Ontario [Not-for-Profit Corporations Act, 2010 \(NCA\)](#).

The moving party had been a member of the Church since 2007 and was a director until the pivotal events of October 23, 2022, the date on which an election for the board was scheduled to be held. Notice of the election had been sent to the membership of the Church by way of a message to two groups of Church members via the WhatsApp messaging service. On October 23, 2022, in the meeting room where the election was to take place, a fight broke out and the police were called.

What happened following the fight was in dispute. The member claimed that several people, including himself, another board member whose arm was broken in the fight and some of their family members, left the meeting to seek medical attention at a hospital. He claimed that the police did not allow anyone to remain in the meeting room.

Conversely, the Church's position was that after the fight, most people returned to the meeting room where a peaceful and orderly election proceeded, which was supervised by the police.

The member subsequently brought a motion challenging the validity of the election under the [NCA](#), relying in part upon [section 31\(1\)](#), which provides that a director or member of the corporation may apply to the court to determine any controversy with respect to an election or appointment of a director thereof. Under [section 31\(2\)](#), the court may make any order that it thinks fit, including declaring the result of the disputed election or requiring a new one.

The member's position was that the results of the election were invalid since not all members of the Church received notice of the election, members were allegedly told that only men would be elected, and many people who had been in attendance on October 23, 2022, assumed the election had been cancelled because of the fight and did not vote. In addition, he claimed that some people who were not members of the Church were allowed to vote.

The Church argued that the motion should be dismissed because the election was carried out in accordance with the by-laws of the Church and was therefore valid. In addition, on a procedural basis, the Church argued that either there was no legal basis for the relief being sought or that there were too many facts in dispute for the validity of the election to be determined on the motion.

The motion judge rejected the Church's position. Prior decisions such as *Birhane v. Medhanie Alem Eritrean Orthodox Tewahdo Church*, [2022 ONSC 5732](#), and *Vietnamese Association, Toronto v. Duong*, [2023 ONSC 731](#), aff'd [2023 ONSC 6203](#) (Divisional Court), have affirmed the court's jurisdiction to adjudicate disputes for corporations subject to the *NCA* in appropriate circumstances.

In the case at hand, the motion judge was satisfied that there was a controversy with respect to the election in this case and that [section 31\(1\)](#) of the *NCA* authorized the moving party, as a member of the Church, to seek a determination in court as to the results.

Based on the evidence, the motion judge was not satisfied that the election was compliant with the Church's by-laws. In that regard, the motion judge's interpretation of the Church's by-laws was that at least 51% of the membership had to be present for an election of the board. The Church's evidence did not establish that 51% of the


membership was present on October 23, 2022, nor that the Church knew how many members it had, nor how many people, members or otherwise, were actually present for the election.

Significantly, the Church's official member list was not in evidence at the motion. Further, the member's counsel had asked the Church to produce (a) a list of the members of the Church; and (b) a list of the people who voted in the election, neither of which was produced.

Due to the failure of the Church to put any evidence before the court concerning how many members it had, the number of people in the meeting room following the fight, or how many people voted, the court inferred that the Church did not have any helpful evidence to offer on these points. Accordingly, the motion judge was not satisfied that the October 23, 2022 election was carried out in accordance with the Church's by-laws.

The motion judge also noted a concern with respect to notice of the election sent via WhatsApp. The moving party argued that this form of notice was insufficient, because not all Church members, particularly older members, used WhatsApp. However, the problem was even more fundamental since there was no evidence of a membership list. Accordingly, there could be no way of knowing if all members received notice of the election.

In the court's view, the election could not stand as it would be highly unjust to uphold the results in the absence of evidence of how many members the Church had or of how many members were present at the time of the vote. Additionally, members opposed to the election, were injured in the fight that occurred at the meeting where the election was to take place and were either required to leave or felt intimidated and may not have felt comfortable voting in accordance with their conscience.



In the result, the court declared that the October 23, 2022 election of the board of directors of the Church was invalid and the results were set aside. The board of directors that was in place on October 22, 2022, was reinstated. The election of a new board of directors was ordered to take place in 60 days, to be overseen by an independent lawyer jointly appointed by the parties.

The decision is an example of when a court's intervention may be sought to challenge a not-for-profit corporation's failure to follow the governance rules required by its own by-laws. Elections for a board of directors may hotly contested and acrimonious depending on the current state of affairs. Keeping accurate and official membership lists is a key requirement for many not-for-profit corporations, particularly if elections of the board require that a majority of valid members be allowed to participate. Ensuring that elections are conducted in accordance with the by-laws, after proper notice has been provided to all members, may avoid some of the issues that arose in the case at hand.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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