

## WILLS &amp; ESTATES

## Non-share capital corporations must apply rules as rigorously and fairly as those with shares

By Terrance Carter  
and Paula Thomas

The Ontario Superior Court carefully canvassed a hospital's governance structure, classes and terms of membership, as well as the calling of special meetings and the interpretation of by-laws in *Chu v. Scarborough Hospital Corp.*[2007] O.J. No. 197.

The decision involved a dispute between an annual member ("annual member") of the Scarborough Hospital (the "Hospital") and the hospital's board of directors (the "Board"). Included in Justice David Brown's decision to grant Chu's application was a sound admonishment of the board of directors for having acted unfairly toward the hospital's membership. In stating that "a board of directors of a *Corporations Act* corporation must interpret and apply its by-laws fairly, reasonably and in good faith," this decision joins a growing body of jurisprudence which indicates that non-share capital corporations must rigorously follow corporate governance procedures.

On Oct. 27, 2006, Lai Chu ("Chu") and other members requisitioned the Board of the Hospital to convene a special members' meeting, but the Board declined to do so on the basis that the memberships of Chu and the others had expired a month earlier. In response, Chu brought an application pursuant to s. 332 of the Act, which pertains to aggrieved members, and for court orders directing the Hospital to recognize her membership and to hold the special members' meeting.

By way of background, the Hospital's directors, honorary

members and annual members were entitled to vote at annual and special members' meetings if they had been properly admitted according to the Hospital's by-laws. The Board had to call special members' meetings upon the written request of at least 10 per cent of the voting members. By-laws could be amended by a majority vote of the Board with the approval of at least a majority of the voting members at a meeting duly called for that purpose.

Early in 2006, the Board's president proposed certain by-law amendments, including decreasing the size of the Hospital's membership, and eliminating the voting rights of honorary members. Consideration of the adoption of these amendments was deferred until the special members' meeting scheduled for Sept. 28, 2006 (the "September meeting").

The Board, acting on its own accord, then proceeded to pass By-law No. 3 which enacted certain amendments to By-law No. 1, including the terms of membership. By-law No. 3 was to continue to be effective until revoked no later than the special members' meeting. The required endorsement of a majority of the Hospital's members was received at the AGM on June 29, 2006, at which only the Board and the honorary members were in atten-

dance; in a departure from past practice, no annual members existed at the time.

Chu and other new members thought they would be voting at the September meeting with respect to new directors and on the proposed changes to the governance renewal process. However, less than one week before the meeting, the Board sent a letter stating that the election of new directors would be the only purpose of the meeting and that the existing by-laws would remain in effect, reasoning that the members would like to have more time to

The Hospital took the position that its only current members were the directors and the honorary members. The membership of each annual member had expired at the close of the September meeting, and the Board would not be admitting new members until the following spring. There was no indication if or when annual members would be afforded a voice with respect to the proposed changes to the governance structure.

With the passage of By-law No. 3, the annual membership term in that year ran for only three months: from June 29, 2006 to Sept. 28, 2006. In that regard, the court rebuked the Board, stating that a reasonable interpretation of the by-laws would not lead to a conclusion that annual members



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were admitted for a period of less than a year.

The court held that Chu remained an annual member of the Hospital

of the board acting on its own accord. This opinion echoes other recent court decisions which insist that the corporate rules and procedures surrounding non-share capital corporations are not to be interpreted in a manner that is more lenient as compared to share capital corporations. Fairness, reasonableness and good faith are expected at all levels of corporate life irrespective of the type of organization in question.

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until June 28, and that she had standing to bring an application pursuant to s. 332 of the Act. As well, the members had properly requisitioned a special members' meeting pursuant to s. 295(1) of the Act and the Board was therefore required to call the meeting and transact the business stated in the requisition within 21 days.

This decision demonstrates that control over governance procedures is to be shared among the various directors and voting members, not concentrated in the hands

consider the proposed by-law amendments.

Within weeks following the September meeting, Chu and 29 other members (representing 20 per cent of the total membership) requisitioned the Hospital in writing for a special members' meeting and included a resolution for 11 named directors to be removed from office. When the Hospital responded negatively, another 40 members quickly added their signature to the requisition and resolution.



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