

PROCEDURAL RIGHTS AND REQUIREMENTS IN CLUB DISCIPLINE PROCESS

*By Terrance S. Carter, B.A., LL.B., and Trade-mark Agent
Assisted by Pamela Shin, B.A., LL.B., Student-at-Law*

A. INTRODUCTION

On June 15, 2008, the British Columbia Court of Appeal (“BCCA”) released its decision in *Struchen v. Burrard Yacht Club*¹ (“Decision”). The issue before the court was whether Burrard Yacht Club’s (“Yacht Club” or “Club”) disciplinary process provided the degree of fairness required by law. The Court ruled that at a minimum, individuals in the context of a voluntary association who are facing discipline are entitled to the opportunity to be heard by an unbiased decision maker. This *Charity Law Bulletin* explains the implications of the Decision with regard to discipline procedures of clubs and other not-for-profit organizations, including charities.

B. BACKGROUND: YACHT CLUB DECISION

Mr. McLachlan was a long-standing member of the Yacht Club. During his membership, the Club was required to relocate. As part of that relocation and to protect the Club from future dislocation, the Club incorporated Trident Foreshore (“Trident”) for the purposes of acquiring land. To supplement the Trident lands, the Club entered into a lease with a neighbour. The terms of the lease with the neighbour caused Mr. McLachlan to have concerns about the long-term security of the Yacht Club.

¹ [2008] B.C.J. No. 1178.

Each member of the Club was sold shares in Trident. Each shareholder was entitled to only one vote, no matter how many shares were held. After Trident was incorporated, the Club began purchasing shares from the individual shareholders and eventually acquired the majority of the shares. Mr. McLachlan opposed the Club's ability to vote more than once. The Club then passed a special resolution authorizing the sale of shares to certain members. The transfer included an agreement by the individual obtaining the shares that they would grant a proxy in favour of the Club and that the Club had the option of repurchasing the shares. Nine of the 14 directors were obtaining shares in the transaction, which Mr. McLachlan argued was a conflict of interest. He suggested that there was no quorum for the vote and that the transaction was a sham.

Ultimately, these corporate governance issues arising from the change in ownership rules resulted in certain Club members (including Mr. McLachlan) bringing separate legal proceedings before the Supreme Court of British Columbia, which ultimately ruled in favour of the Yacht Club and an order for costs were made against Mr. McLachlan.

Eventually, the legal dispute over the changes in ownership of Trident and the bitterness caused by the differing views of the best way to secure the Yacht Club's future, led to the expulsion of Mr. McLachlan from membership, as described below. In response, Mr. McLachlan launched a petition (the British Columbia equivalent of an application under Ontario civil procedure) in the British Columbia Supreme Court ("BCSC"), seeking to set aside his expulsion from the Club and be reinstated as a member of the Club. Ultimately, the BCSC declined to order the Yacht Club to reinstate Mr. McLachlan as a member of the Club. Subsequently, Mr. McLachlan appealed the BCSC's decision to the BCCA. The decision of the BCCA with respect to the matters outlined in the petition is explained later in this Bulletin. However, it is important to first understand what happened with regard to the discipline of Mr. McLachlan.

C. THE YACHT CLUB'S DISCIPLINE PROCEDURE

The process leading to Mr. McLachlan's discipline and expulsion started with a petition to the directors of the Yacht Club by the members asking for disciplinary procedures against certain members (including Mr. McLachlan) who had initiated legal proceedings against Trident Foreshore. The directors instigated an investigative committee to decide if members who had contested the Trident Foreshore share issue had violated the Club's bylaws. Upon receipt of the Committee's report, the board of directors of the Club sent a letter to Mr. McLachlan that outlined his alleged misconduct and required his presence at a meeting to

determine his possible suspension or expulsion. The investigative committee made enquiries, but did not receive input, oral or written, from any of the members that the board ultimately disciplined. The committee's report concluded that Mr. McLachlan and two other members had conducted themselves "in a manner which most seriously and injuriously affected the well being of individual members and threatened the very survival of the Yacht Club".² Once the board had received the report, it proceeded with charges and notified the affected members of a meeting for the purpose of considering their possible suspension or expulsion.

The Club's discipline procedure was set out in its bylaws. Members who were liable to suspension or expulsion would be entitled to attend and be given notice of a meeting at which the directors would decide the extent of the appropriate discipline. Affected members would also be permitted to provide any explanations regarding the alleged misconduct. Expelled members would have recourse to an appeal option to the membership of the Yacht Club that would require the support of 75 percent of the active members of the Club.

According to the minutes record, the members who were subject to the discipline proceeding were given an opportunity to respond to the charges and did so. Ultimately, the board of directors decided to expel Mr. McLachlan, who then exercised his right of appeal to the membership of the Yacht Club but was unsuccessful.

D. STANDARD OF PROCEDURAL FAIRNESS: CLUBS, ASSOCIATIONS, AND NOT-FOR-PROFIT CONTEXT

In addressing the question of whether Mr. McLachlan was afforded the proper degree of procedural fairness to which he was entitled as a member of the Yacht Club, the BCCA cited *Lakeside Colony of Hutterian Brethren v. Hofer*³. In that case, the court observed that the three basic requirements of natural justice that applies to membership in a voluntary association are: notice, opportunity to make representation, and an unbiased tribunal. The BCCA ruled that the letter from the board of directors, which states "... the Board has determined that [you have engaged in misconduct] contrary to Club Bylaw 10(3) [...]"⁴ can only be read as a conclusion that the various behaviours set out were committed by Mr. McLachlan. The BCCA decided that a reasonable person would consider that the letter amounted to a predetermination of the factual issues.

² *Ibid.* at para. 11.

³ [1992] 3 S.C.R. 165.

⁴ *Supra* note 1 at para. 36 [emphasis added].

Mr. McLachlan was entitled to appear before a Board that had not made conclusions before hearing from him as to whether he had committed certain acts or not. The BCCA allowed the appeal and reinstated Mr. McLachlan's membership in the Yacht Club.

The BCCA asserted that the question of prejudging a matter is an aspect of the general principle that a body should not proceed where there is a reasonable apprehension of bias. The test for reasonable apprehension of bias was set out in *Committee for Justice and Liberty v. National Energy Board*⁵. In that case, Justice de Grandpre stated [at pp. 394-95]:

... [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information [T]hat test is what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.'

... The grounds for this apprehension must, however, be substantial and I... refus[e] to accept the suggestion that the test be related to the very sensitive or scrupulous conscience'.

The Court further clarified that, "[a]lthough Mr. McLachlan was not entitled to be heard by persons unknowledgeable of the dispute, he was entitled, in my view, to appear before a Board that was not then on the record as concluding, without hearing from him, that he had in fact done as was alleged".⁶

⁵ [1978] 1 S.C.R. 369.

⁶ *Supra* note 1 at para. 41.

E. CONCLUDING COMMENTS

The *Struchen v. Burrard Yacht Club* decision highlights that not-for-profit organizations and charities are not immune from the need to comply with the fundamentals of the administration of justice in carrying out disciplinary proceedings. In addition, the decision outlines the obligation of not-for-profit organizations and charities to ensure that their disciplinary procedures are carried out in accordance with principles of natural justice.⁷ In light of this decision, it would be prudent for the boards of not-for-profit organizations and charities to review their disciplinary policies and procedures to ensure that they reflect appropriate principles of fairness and natural justice.

⁷ For more information about the principles of natural justice that apply to clubs, associations, and not-for-profit organizations see “Natural Justice, Members and the Not-For-Profit Organization: ‘Fair Play in Action’”, dated May 10, 2007, available at <http://www.carters.ca/pub/article/charity/2007/jbr0510.pdf>.