CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY & NFP LAW BULLETIN NO. 372

SEPTEMBER 24, 2015

EDITOR: TERRANCE S. CARTER

RIGHTS OF SHAREHOLDERS OF ONTARIO SOCIAL CLUBS

By Theresa L.M. Man*

A. INTRODUCTION

On September 14, 2015, the Ontario Court of Appeal released its decision in *Pruner v Ottawa Hunt and Golf Club, Limited*,[1] in which the Court dismissed the appeal by Mr. Pruner, a member of the Ottawa Hunt and Golf Club's (the "Club"). The Court held that Mr. Pruner is not entitled to keep his voting Class B share if he wants to transfer from being a Fully Privileged Golfing Member to a Senior Social Member. Furthermore, the Court dealt with a jurisdictional issue involving orders under the Ontario *Corporations Act* (the "OCA").[2]

B. THE FACTS

When Mr. Pruner joined the Club in 1984 as a Fully Privileged Golfing Member, he was issued one Class B voting share and five Class A non-voting shares. Following a decline in health in 2012, which prevented him from continuing to play golf, Mr. Pruner requested to transfer his membership to being a Senior Social Member and thereby significantly lowering the membership fee he has to pay. The request to transfer his membership was refused by the Board of Directors of the Club as a result of a new Board policy which required him to cancel his Class B voting share, and reapply for membership in the new category. Mr. Pruner's application to the Superior Court seeking an order requiring the Board to accept his transfer application was rejected, having found that the policy was within the Board's jurisdiction. Mr. Pruner

---

* Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M., is a partner practicing in the area of charity and not-for-profit law.

[1] *Pruner v Ottawa Hunt and Golf Club, Limited*, 2015 ONCA 609 [*Pruner 2015*]; *Pruner v Ottawa Hunt and Golf Club, Limited*, 2014 ONSC 6272.

[2] *Corporations Act*, RSO 1990, c C-38.

renewed his position on appeal to the Ontario Court of Appeal. The appeal therefore turned on whether the policy amounts to a variation of Mr. Pruner's Class B share rights and whether it was a valid exercise of the Board's powers.

C. SHARE CAPITAL SOCIAL CLUBS UNDER THE OCA

At the outset, the Court traced the historical reasons why some social clubs are incorporated under Part II of the OCA. In a nutshell, the OCA is the antecedent to the Ontario *Business Corporations Act* ("OBCA")[3]. Prior to the enactment of the OBCA, all corporate entities, whether capital or non-share capital, were incorporated by letters patent under the OCA or its predecessor legislation. With the introduction of the OBCA in 1971, all corporations that had been incorporated under the OCA came under the jurisdiction of the OBCA, except a few types of corporations.

One of those exceptions are share capital corporations which have "objects in whole or in part of a social nature". These social clubs continued to be governed under Part II of the OCA. The Court noted that historically, social organizations such as country, ski and golf clubs chose to incorporate as share capital corporations under the OCA as a way to raise money. Since social clubs did not carry out purely charitable objects, they could not become registered charities and therefore were unable to fundraise by seeking donations. Instead, social clubs would sell shares to prospective members, which, in addition to initiation fees and annual dues, would cover capital and operating costs.[4] This meant that share capital social clubs often sought to have a large base of shareholders. As a result, many of these social clubs are organized as public share capital corporations rather than private share capital corporations, because private corporations are restricted to no more than fifty shareholders.

D. SHAREHOLDINGS OF THE CLUB

The Club was incorporated in or around 1920 as a share capital corporation under Part II of the OCA. As a share capital corporation the Club has shareholders, but the Club also issued membership to individuals (who may or may not be shareholders) to give them golfing and/or curling privileges in the Club. The shareholders and members are not necessarily the same persons. The Club has 32 categories of

[3] R.S.O. 1990, c. B.16,

[4] It is interesting to notes that the Court referenced a paper by Terrance S. Carter and Theresa L.M. Man, "Share Capital Social Clubs as NPOs: Issues to Consider" (Paper delivered at the Ontario Bar Association Charitable and Not-For-Profit conference, 27 October 2004), online: http://www.carters.ca/pub/article/charity/2004/tlmtsc1027.pdf.

membership, only three of them are permitted to become shareholders of the Club and therefore have voting rights in the Club. These three categories of membership also have to pay much higher fees than other membership categories.

In this regard, the Club's by-law provides that one Class B share is to be issued to "each Fully Privileged Golfing Member, each Senior Golfing 55+ Member and each Associate Intermediate Member when that Member has paid his or her Initiation Fee, and, for the purposes thereof, payment of the Initiation Fee … shall entitle each Fully Privileged Golfing Member, each Senior Golfing 55+ Member, and each Associate Intermediate Member to one (1) Class B Share." Each Fully Privileged Golfing Member is also entitled to 5 Class A non-voting shares. The Court was satisfied that the clear intent is to link shareholding with membership in one of the three permanent golfing categories.

E. VALID BOARD POLICY

Mr. Pruner's request to transfer this membership category was rejected by the Board of the Club as a result of a new Board policy. The policy requires members, like Mr. Pruner, who want to switch from a permanent golfing category to a social category to resign, thereby cancelling their Class B voting share, and reapply for membership in the new category.

Mr. Pruner stated that the policy "forces" him to resign his membership "against his will". He argued that the Board's policy amounts to a variation or restriction of the rights attached to his Class B share, and that as such, the Board cannot impose such a change unilaterally. He further argued that the policy was *ultra vires* the Board because it amounts to a variation of the rights attaching to his Class B share, thus triggering s. 34(4) of the OCA, requiring an application for supplementary letters patent to "vary a preference, right, condition, restriction, limitation or prohibition" attaching to a class of preference shares. The Court rejected Mr. Pruner's arguments.

Instead, the Court agreed with the Club's position that (a) the Board's policy does not affect Mr. Pruner's rights as a shareholder, (b) the policy was within the Board's lawful authority to make, and (c) it was reasonable for the Board to adopt a policy that would prevent members with the least at stake in the affairs of the Club from making decisions affecting the Club's future.

In this regard, the Court agreed that the policy cannot fairly be described as imposing a variation, condition or restriction on Class B shares. Instead, Mr. Pruner is entitled to keep his Class B share, and to continue to exercise the voting rights associated with it. He can do this even if he never plays another round of golf. The Court agreed that "[the] Board is not 'forcing' him to do anything. It is not saying, for example, that a person has to golf a minimum number of times per year to remain a permanent golfing member. It is simply insisting that if Mr. Pruner wishes to keep his Class B voting share, he remain a dues-paying member of a category to which that share attaches."

The Court held that the policy was indisputably a valid exercise of the Board's authority, empowered by various provisions of the Club's by-laws. The Court agreed that the Club's by-laws make it clear that Class B shares are inextricably linked to membership in one of three permanent golfing – i.e. high dues-paying – categories. As such, the Court was satisfied with the Board's rationale of keep voting rights in the exclusive hands of the members with the most at stake – the permanent golfing members who pay the largest share of Club dues. It was a valid concern of the Board that if Class B shareholders are permitted to transfer out of permanent golfing categories while retaining their voting rights, they could have an influence on the future of the Club that would be disproportionate to their financial contribution.

F. JURISDICTION OF THE COURT

After the appeal hearing, the court sought submissions from counsel on whether s. 329 of the OCA applies to this appeal. That section provides that an appeal lies to the Divisional Court from "any order made by a court under" the OCA. The Court held that s. 329 applies and accordingly, the panel sought and obtained the permission of the Chief Justice of the Superior Court of Justice to designate itself as a panel of the Divisional Court and reconstituted itself as a panel of the Divisional Court for purposes of this decision.

G. CONCLUSION

This decision underscores the fact that share capital social clubs need to be aware that shareholders have rights that are separate from the rights that they may have as club members. In other words, the rights of shareholders are distinct from the rights of members. Sometimes they may share the same interests, sometimes they may not. While there is a body of case law governing membership rights, there is another body of case law and legal principles governing the rights of shareholders. In addressing these rights, it is important for clubs to have clearly drafted by-laws and policies that accurately reflect the intent of the clubs.

Other than the potential conflict between membership rights and shareholders rights, there are a number of unique potential issues faced by share capital social clubs, including maintaining tax-exempt non-profit organization status under paragraph 149(1)(l) of the *Income Tax Act*, complying with the requirements of the *Securities Act*, maintaining updated records of who members (shareholders) are; dealing with the issue whether the shares carry any equity value in the club; and dealing with the rights and concerns of shareholders who are active club members and those who are not.[5]

In order to address the anomaly of these public share capital social clubs, they may continue to operate under the *Corporations Act* for five years after the proclamation of the new Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA");[6] but they must, at the end of the five-year period, continue under the new ONCA,[7] the Ontario *Business Corporations Act* or the Ontario *Co-operative Corporations Act.*[8] The shareholders must approve the continuance by special resolution.[9] A social club that fails to continue by the deadline date will be dissolved.[10]

---

[5] For a detailed review of these issues, see paper *supra* note 4.
[6] *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15.
[7] S.O. 2010, c. 15.
[8] New section 2.1 of the *Corporations Act*, as amended by subsection 210(3) of the ONCA.
[9] *Ibid*. If a social club is not able to obtain a special resolution to authorize the continuance, it may apply to the court for an order waiving the requirement for a special resolution.
[10] New subsection 2.1(7) of the OCA. Nevertheless, a corporation is deemed to exist after its dissolution for the following purposes: to hold a meeting of the members in order to pass the special resolution to authorize the continuance; to apply to court for an order waiving the requirement for a special resolution; or to file articles of continuance.