CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY LAW BULLETIN NO. 260

SEPTEMBER 29, 2011

EDITOR: TERRANCE S. CARTER

WHO'S ON FIRST? KNOWING WHO YOUR DIRECTORS ARE

By Ryan M. Prendergast*

A. INTRODUCTION

Occasionally, non-share capital corporations find themselves in the perilous position of not clearly knowing who the directors of the corporation are. These circumstances can be problematic for a host of reasons. There are two significant reasons, however, why it is important for non-share capital corporations to clearly know the identity of the directors of the corporation:

i) While volunteer service as a director on the board of a charity or non-profit organization is a worthwhile endeavour, those who choose to act as directors are exposed to personal liability through a matrix of common law and various provincial and federal statutes; and
ii) Determining by an action or application to the courts who the directors of a corporation are can be an expensive and lengthy process

As such, both the executive management (if applicable) and the board of directors of non-share capital corporations should always clearly be aware of who is on the board, and whether or not those individuals were validly elected to the board in accordance with the corporation's general operating by-law and incorporating statute. In this regard, considerable expense can be avoided.

Two recently released Ontario Superior Court of Justice decisions involve declarations being sought from the court concerning the identity of the proper directors of non-share capital corporations. This *Charity Law Bulletin* summarizes the decisions of *Nigerians in Diaspora Organization Canada (NIDO) v. Peter*

* Ryan M. Prendergast, B.A., LL.B., is an associate of Carters Professional Corporation, Orangeville, Ontario, Canada.

Ozemoyah and *Saskatchewan WTF Tae Kwon Do Association Inc., v. WTF Tae Kwon Do Association of Canada*, and highlights the lessons that can be learned from these decisions.

B. SUMMARY OF DECISIONS

1. Nigerians in Diaspora Organization Canada (NIDO) v. Peter Ozemoyah

On August 15, 2011, the Ontario Superior Court of Justice released its decision in *Nigerians in Diaspora Organization Canada (NIDO) v. Peter Ozemoyah*[1]. The plaintiff, Nigerians in Diaspora Organization Canada ("NIDO"), a federally incorporated non-share capital corporation under letters patent dated July 9, 2004, sought summary judgment concerning whether the issue of whether the defendants were validly elected as the directors of NIDO was a valid issue for trial.

By way of background, the membership requirements contained in the general operating by-laws of NIDO limited membership to those interested in furthering the objects of the corporation and those whose application for membership into the corporation was approved by the board. The court found that no members were ever admitted into the corporation, and as such, the only members of the corporation were the original incorporators on the application for letters patent.

However, in 2005 certain individuals called a meeting of NIDO and purported to elect an entirely separate board, the defendants, resulting in the filing of conflicting annual reports with Industry Canada.

In this regard, the defendants argued that the intention behind the incorporation of NIDO was that it was to operate under NIDO Americas Inc., a corporate umbrella organization for various NIDO organizations, and was to be the corporate vehicle through which the purposes of NIDO Americas Inc. would be fulfilled in Canada. As such, the defendants noted the fact that a director of NIDO Americas Inc. paid half of the legal expenses in the incorporation of NIDO. The circumstances in the decision only arose as a result of the original incorporators refusing to surrender the corporation to NIDO Americas Inc.

[1] 2011 ONSC 4696 (CanLII)

Nonetheless, the court found that the election and composition of the board is governed by the *Canada Corporations Act*, under which NIDO was incorporated, and the general operating by-laws of the corporation. In this regard, the court adopted the approach of Justice Lederer in the decision of *Warriors of the Cross Asian Church v. Masih*[2], wherein the court found an error that went to the very heart of an election and as a consequence ordered a winding-up of the corporation in that matter.

As the error in this case pertained to the qualification of the individuals who purported to vote in the defendant board or directors, the court found that there was no genuine issue for trial with respect to the identity of the directors of NIDO, as the only directors could be the original incorporators. However, it should be noted that the resignation of one of the original incorporators, for which there was evidence, and the appointment of his successor, for which there was no evidence, meant that the court could only determine that two of the original incorporators were the valid directors of the corporation.

2. WTF Tae Kwon Do Association Inc., v. WTF Tae Kwon Do Association of Canada

On August 30, 2011, the Ontario Superior Court of Justice released its decision in *Saskatchewan WTF Tae Kwon Do Association Inc., v. WTF Tae Kwon Do Association of Canada*[3]. In *Saskatchewan WTF Tae Kwon Do Association Inc.*, the court similarly grappled with an application wherein the applicant, TKD Saskatchewan, a corporate member of TKD Canada, sought declaratory relief, which included that the current board of directors of TKD Canada did not have legal authority to act for TKD Canada, as well as interlocutory and permanent injunction restraining TKD Canada from holding any further directors or members meetings.

The application was brought under section 106 of the *Canada Corporations Act*, which grants the court with the power to order a meeting of members on the application of any director or any member who would be entitled to vote at the meeting.

Similar to NIDO, TKD Canada also incorporated federally under the *Canada Corporations Act* in 1981. TKC Canada receives the majority of its funding through Sport Canada under the Ministry of

[2] 87 O.R. (3d) 169. See also *Charity Law Bulletin* No. 129 at: http://www.carters.ca/pub/bulletin/charity/2007/chylb129.pdf
[3] 2011 ONSC 4982 (CanLII)

Canadian Heritage. In 2004, TKD Canada adopted a new by-law, which was never properly filed with Industry Canada. In 2010, a further new by-law was adopted which was properly filed with Industry Canada, as well as Sport Canada who required certain changes in the 2010 by-law in order for TKD Canada to continue to receive funding. However, it was later discovered that since the 2004 by-law was never the proper by-law of the corporation, the by-law in force at the time of its passing was the 1981 by-law. As a result, the applicants launched their application seeking to set aside the business conducted at various meetings throughout 2010.

The court concluded that the matter was not proper for an application, and should be converted to a trial given certain credibility issues related to some of the affidavit evidence, as well as the facts in dispute.

In addition, given the fact that a representative from Sport Canada indicated to the court that Sport Canada could not confirm that funding would be continued were a new board to be elected, the court concluded that the matters relating to the corporate governance and operations of TKD Canada, as well as the potential impact on its funding, could not be decided via an application.

C. RECOMMENDATIONS AND CONCLUSION

While these lower court decisions are relatively minor in importance in terms of their precedential value, they illustrate to non-share capital corporations the importance of complying with the corporation's incorporating statute, general operating by-laws and the requirements of any other stakeholders to the corporation, such as providers of funding, in establishing and following an electoral process for directors. Otherwise, duelling sets of directors may wind up in court as occurred in the above examples concerning the identity of the validly elected directors.

In addition, as indicated in previous *Charity Law Bulletins*, directors can face exposure to personal liability under various statutes, including the *Income Tax Act* and *Excise Tax Act* for employee remittances, or under the *Charities Accounting Act* in Ontario for breach of trust.

As such, while generally the court will not interfere with the election of directors absent some evidence that irregularities led to the infringement of the rights or privileges of any party, non-share capital corporations

should generally adhere as much as possible to the dictates of corporate law. Therefore, where there is uncertainty concerning who the directors of the corporation are or the proper procedures for their election, reference should be made to the governing documents of the corporation, such as the letters patent and general operating by-law for guidance. A legal audit of the corporation's constating documents could be of assistance in this regard.