

## **An Ounce of Prevention**

As lawyers, we are often contacted when a dispute arises amongst members of an association. Inevitably, the dispute will devolve into a review of the legality of the actions of one or both sides. Given that most associations are corporations, there are, in fact, laws which must be followed in order that the authority of the corporation is properly wielded. So, when there is a dispute, it does not take long for a suggestion that the person exercising authority did not do so validly. When this happens, a lawyer has to look back at the records of the corporation to determine whether that power is properly wielded.

In situations where the books and records of the organization have been properly kept this determination is usually simple (although, at times open to interpretation). The major difficulty comes when the corporation has not acted according to its bylaws and document the circumstances in which an individual occupies a particular office (such as member or director of the corporation). Unfortunately, this happens so often that it is likely the situation with the majority of charity and not for profit corporations.

The difficulty in a corporation maintaining its records accurately usually comes down to expense and corporate memory. Most charity and not-for-profit organizations change from year to year. For example, they may have new members every year and directors every one or two years. In this way, they are different from the typical small business, which will often have the same directors and shareholders until some sort of generational shift. On the other hand, public corporations which could have millions of shares changing daily, have a very sophisticated method by which these shares are publically traded and reported so that keeping track of the shareholders and directors is advanced and, often aided by the electronic mechanisms of modern stock exchanges.

The difficulty for most charities and not-for-profits is that there exists no universal system to track the changes in directors and members, yet there is a continuous change in both of these groups. Moreover, the task is generally unappreciated by the non-lawyers (and some lawyers) that tend to manage such groups. The situation is not helped by the fact that the bylaws of a group may be customized so that even those who are experienced must learn those changes if they move groups.

In the worst cases, people act as directors, and call themselves directors, but have never been formally elected. The same happens with members where the actual requirements for admitting members was never followed. Untangling the threads to figure out who actually has authority over the corporation can become impossible.

There have been cases from time to time, where Courts are asked to sift through the records, and hand control over the organization to one or the other group when neither group can claim a proper set of records to show which group is necessarily in control. In one case at least, the Court

opted in its Solomonic wisdom not to give control to either group but rather ordered the charity to be dissolved instead of handing authority to either one of these groups.

So what is an organization to do? The key would seem to be education. The group must recognize the paramount importance of its bylaws and other constituting documents. If the organization at least understands the importance of these documents then it will seek to ask the right questions of its advisors in order to ensure that these continuous legal observations are kept. When the terms such as members, directors, and bylaws are understood as technical legal terms with attached responsibilities (and potential liabilities), the association is more likely to pay close attention to its legal requirements.

It is important to remember that the authority wielded by the directors is derived by a chain of events that must be documented and go back to the time of the organization's incorporation. From time to time we have been approached by an organization that is not involved in a dispute and have been asked to clean up their records. This situation can still be difficult, but it is easier than when the organization is involved in a dispute – then it can be too late to and a decision over the name and assets of the organization may need to be put to a judge.