

**MEMORANDUM**

**To:** Lake Erie Country Club, Ltd. (the “Club”)  
**From:** Gardiner Roberts LLP (“GR”)  
**Date:** April 26, 2024  
**File No.:** 126073  
**Re:** Continuance under the *Not-for-Profit Corporations Act, 2010* (Ontario) (the “ONCA”)

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This memorandum outlines the current structure of the Club and summarizes the proposed steps that would be required for the Club to continue under the ONCA as a corporation without share capital. This memorandum also takes into consideration the other continuance options, including continuation under the *Business Corporations Act* (Ontario) and the *Co-operative Corporations Act* (Ontario).

Our recommendation is to continue under the ONCA as is discussed in more detail below.

**I. MANDATORY CONTINUANCE**

The ONCA came into force on October 19, 2021 and replaced the *Corporations Act* (Ontario) (the “OCA”) for all non-share capital corporations governed by Part III of the OCA. The ONCA does not automatically apply to share capital social clubs. Instead, Section 2.1 of the OCA provides that share capital social clubs have five years to choose whether to continue as:

- (a) a corporation without share capital under the ONCA;
- (b) a co-operative corporation under the *Co-operative Corporations Act* (Ontario) (the “OCCA”); or
- (c) a corporation with share capital under the *Business Corporations Act* (Ontario) (the “OBCA”).

The OCA will continue to apply to share capital social clubs until they transition as noted above. Share capital social clubs will automatically be dissolved five years after the ONCA is proclaimed (i.e. October 19, 2026) unless, prior to that date, they have applied to be continued under the ONCA, the OCCA or the OBCA. Revival options are available if a share capital social club is dissolved after the expiry of this five-year period.

Our recommendation is that the Club continue under the ONCA, and the rest of this memorandum is based on the assumption that this is the option that the Club will pursue. We believe that the ONCA best reflects how the Club currently operates. It is a statute which will allow the Club to operate on a non-profit basis, and with the most amount of flexibility in terms of designing its governance structure.

*Continuance under the OBCA*



If the Club continued as an OBCA corporation, all existing shareholdings could be maintained, since the continuance does not require the cancellation of any shares. Shareholders rights and entitlements would be as set out in the articles of continuance, which could include amendments from the current letters patent and supplementary letters patent. Additional rights and entitlements could be set out in the by-laws.

However, there are two significant issues with the OBCA. First, the purpose of the Club is to provide a benefit to its members, which is not strictly aligned with the for profit purpose of a for profit share capital corporation. From a governance perspective, it would be cumbersome, although not impossible, to layer a membership structure on top of the shareholdings. And, most critically, while it is technically possible for an OBCA corporation to be a tax-exempt entity, it is not certain that the Club would remain tax-exempt if it continued under the OBCA.

Paragraph 149(1)(l) of the *Income Tax Act* (the “**ITA**”) provides an exemption from income tax under Part I of the ITA to a non-profit organization (an “**NPO**”) that meets all of the following conditions:

- a. it is a club, society or association (which, according to the Canada Revenue Agency (the “**CRA**”), is broad enough to include a corporation);
- b. in the opinion of the CRA, it is not a charity within the meaning of subsection 149.1(1) of the ITA;
- c. it is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any other purpose except profit; and
- d. its income is not distributed or otherwise made available for the personal benefit of a proprietor, member or shareholder unless the proprietor, member or shareholder is an association which has as its primary purpose and function the promotion of amateur athletics in Canada.

The difficulty is that a share capital corporation generally provides for distribution of income/profit to its shareholders, and that is inconsistent with the CRA’s interpretation of an NPO being “organized and operated for ... any ... purpose except profit”.

If the Club lost its tax-exempt status as a result of this continuance and re-organization, its revenues would no longer be tax-exempt and it would owe capital gains to the CRA on the disposition of any of its assets in the future.<sup>1</sup>

#### *Continuance under the OCCA*

The Club could also continue as a cooperative corporation under the OCCA. Under the OCCA, it is possible for a corporation to operate with or without share capital. As under the OBCA, however, there is a risk that operating as a share capital corporation could trigger a re-assessment of the Club’s tax exempt status. Furthermore, a co-operative corporation with share capital may have securities act compliance issues and may be regulated under the Financial Services Regulatory Authority of Ontario.

The Club could continue as a cooperative corporation without share capital without the same concerns about losing its tax-exempt status and regulatory compliance. Members would only be allowed to have one

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<sup>1</sup> See *Income Tax Act*, RSC 1985, c 1 (5<sup>th</sup> Supp).



vote, as this is a core tenet of cooperative corporations. The main challenge associated with the OCCA is that it is a very specialized and somewhat complex piece of legislation (reflecting that there are many different kinds of co-operatives with different provisions that might be relevant, depending on the circumstances). Therefore, there are fewer professionals (lawyers and accountants) who are able to advise the Club on operational, governance, and tax compliance matters. From a practical perspective, continuing under the OCCA is likely a more complicated and expensive option because of its specialized nature, and being a non-share capital cooperative corporation does not afford the Club any benefits from a governance perspective beyond what could be achieved under the ONCA.

While we are recommending that the Club move forward by continuing under the ONCA, we are happy to have a discussion if you would like more information about the Club's options under the OBCA or OCCA. For a summary of the differences, please see the appendix to this memorandum.

## II. CURRENT STRUCTURE

The Club was incorporated under Letters Patent ("LPs") as a corporation with share capital under *The Ontario Companies Act* (the predecessor legislation of the *Corporations Act* (Ontario)) on October 18, 1918. Supplementary Letters Patent ("SLPs") were subsequently issued on June 28, 1930 which revised the authorized capital and the shareholdings.

The Club consists of members who each hold one share for every twenty feet of frontage that a member's property has along Lakeside Drive. For the purposes of this memorandum, these members who hold shares will be referred to as "**shareholders**". Shareholders whose membership is continued under the ONCA will be referred to as "**members**".

### Authorized Share Capital

The LPs created 147 shares with a par value of \$200. The SLPs issued in 1930 set out that the 147 shares issued upon incorporation with a par value of \$200/share were changed into 294 fully paid shares without any nominal or par value, and that an additional 294 shares were created. A shareholder was expected to change one share with par value for two shares without par value. Any shareholder who failed to surrender their share certificates representing shares with a par value of \$200 was disallowed from any further participation in the assets of the Club or to exercise any rights as a shareholder.

The SLPs also required that the capital of the Club be equivalent to at least \$100 per every issued share without par value, the sum of any shares with par value, and such other amounts as may be transferred thereto by the bylaws.

After giving effect to the SLPs, the current authorized and issued share capital of the Club is laid out in the below chart.

Item	Common Shares
Authorized	588 (Note that 588 shares is the number authorized by the SLPs, though the bylaws at 3.02(4) limit this amount to 302 shares)
Issued	302



Attributes & Comments	<ul style="list-style-type: none"> <li>• No par value or nominal value</li> <li>• Every 20 feet of frontage of a shareholder’s property along Lakeside Drive entitles a shareholder to one share and one vote</li> <li>• It is unclear if all of the shares with a par value of \$200 were redeemed, but it is assumed that if a shareholder has a right to vote, then they must be holding a share without par value</li> </ul>
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### Current Shareholdings

As of March 31, 2023, there were 302 shares issued, with no par value.

The 2023 financial statements record the stated capital of the Club as being equivalent to \$60,400 and at Note B attributes this value to original property owners purchasing shares at a cost of \$200 per share, with shares being transferred to new land owners upon a change of ownership. The financial statements also note the net assets of the Club as “Members’ Equity”, which is perhaps misleading as it suggests that the current members have a right to the equity in the Club. Our position is that the members would only have a right to the equity in the Club on dissolution; otherwise their shares have nominal value.

The by-laws of the Club limit the transferability of shares by providing at Section 3.02 that every twenty feet of frontage along Lakeside Drive entitles a member to one share. Therefore, a shareholder’s right to share in the distribution of assets on dissolution may be limited to those with at least twenty feet of frontage and limited to 302 shares. The by-laws, at 3.02(4) state that “the value of each share will vary from time to time in proportion to the number of members in Good Standing and the frontages of their Property.”

We understand that in practice, shares have been transferred to new property owners with the sale of a property but it is not clear if current shareholders paid for the shares or if the shares were just transferred to them. Annual fees for shareholders are also not associated with the number of shares they hold, rather, there is one fee per household. We also understand that in practice the Club has associated a \$200 value with all shares, as evidenced by the Club’s financial statements.

### **III. SHARE CANCELLATION**

In order to continue to the ONCA, the Club is required to provide for the cancellation of the issued and outstanding shares in the Club. The LP, SLPs and *Corporations Act* (Ontario) do not appear to give the Club any powers to redeem the shares, but shares may be cancelled if the shareholders authorize the cancellation as part of a special resolution authorizing the continuation of the Club to the ONCA.

As part of the deal, the Club will cancel the shares on continuance and current shareholders’ rights and entitlements will be rolled over into the continued corporation. There would be no change in their entitlements unless the Club decides to make changes to its corporate governance structure.

The Club would have to provide notice to the shareholders of a meeting of the shareholders, and include in that notice the resolutions that are to be put before the shareholders. The Club should include with this notice general information regarding the continuance and that, should the continuance be approved, their shares would revert to the Club for cancellation and the shareholders would be issued memberships in place of the shares, which would carry the same entitlements.



#### **IV. PROPOSED NEW STRUCTURE**

The Club would continue as a not-for-profit corporation without share capital under the ONCA. Instead of shareholders that also hold memberships, the Club would have only members, including different classes of members, if desired, each of which could have different rights and entitlements. The membership classes can be structured in a way that mirrors the current shareholder structure or could be modified to accommodate the desired governance structure going forward.

The ONCA requires that the classes of members be set out in the articles. The articles of continuance will need to include all the membership classes that the Club wants to accommodate, including their voting rights and rights to distribution of the Club's assets on dissolution, and the by-laws will need to include the conditions of membership in each of the various classes.

##### *Membership Classes*

The membership structure proposed below would convert all existing shareholders into voting members with rights mirroring their current shareholder entitlements.

1. **Voting Member:** Every household may annually appoint one individual to be a voting member of the Club. Each voting member could be provided with one vote one vote per 20 feet of frontage of a voting member's property along Lakeside Drive. Alternatively, votes could be calculated on the basis of one vote per voting member. Voting members would have a right to share in the distribution of the assets of the Corporation on dissolution.

We are proposing "household" be defined as owners of a property adjoining the Club or along Lakeside Drive.

2. **Non-Voting Member:** Every household may – in addition to one voting member – have up to 10 non-voting members. Non-voting members may receive notice of and attend meetings of members and use the facilities of the Club but may not vote. Having a clear list of voting and non-voting members may be beneficial to the Club in the event that there is a dispute within a household and more than one member of the household tries to exercise their household's right to vote at a meeting.

As an option, the by-laws could require that each member must be resident on the property a minimum number of days per year.

We have proposed the above membership structure based on the information that we received from you to date. This proposal is for discussion, and an alternate structure could be developed, depending on the Club's governance needs.

#### **V. STEPS REQUIRED TO EFFECT NEW STRUCTURE**

##### **Step 1 – Corporate Records**

This first step is to ensure that the Club's corporate records are up-to-date. This includes reviewing the Club's minute book and other corporate records for annual resolutions, shareholder records and



director/officer records. A corporate profile search will be done to confirm the Club's internal records are properly reflected in the public record and whether there are any outstanding filings required.

**Step 2 – Apply to Continue out of the Corporations Act (Ontario) (the “OCA”)**

*Change of Name*

The ONCA does not permit the word “Limited” to be included in any name of a corporation incorporated or continued under that act. The Club would have to change its name to “Lake Erie Country Club”, which should not be an issued with the Ontario government.

*Shareholder approval*

In order to apply to continue out of the OCA, a special resolution must be passed, meaning a resolution passed by the directors and confirmed with or without variation by at least two-thirds of the votes cast at a general meeting of the shareholders of the corporation duly called for that purpose.

According to the Club's by-laws at section 9.05, quorum shall be at least two shareholders representing not less than 59 votes. According to section 3.02(2) and (3), each shareholder (referred to as a member in the by-laws) shall have one vote per 20 feet of frontage of the shareholder's property along Lakeside Drive, up to a maximum number of 302 votes. If all 302 votes were exercised, at least 202 votes would need to approve the special resolution.

Assuming the approval is obtained, shareholder approval of the continuance will entitle the Club to apply for a certificate of continuance into the ONCA. Once issued, the articles of continuance would apply to the Club and the Club would be governed by the ONCA as if it had been incorporated under that legislation.

The Club will be required to send notice to all shareholders of the meeting and provide them with information regarding the meeting sufficient to allow them to make an informed decision. Proxy voting will need to be provided for, since it is permitted under Section 9.08 of the by-laws. The notice of the meeting to the shareholders should include the proposed resolutions that will a) approve the articles of continuance, and 2) the cancellation the shares. The articles of continuance would contain the membership rights and entitlements that the shareholders will be getting in exchange for their cancelled shares.

If it is possible that there are unknown shareholders or any shareholders whose addresses or contact details are unknown, the Club will need to take reasonable steps to get in contact with these shareholders, and may want to publish notice in a local newspaper of the continuance. The notice to the shareholders needs to be sent out and published in advance of the meeting.

There is always some risk when going to the shareholders for approval, and certainly in cancelling their shares. The Club will want to consider how to carefully socialize the issue with the current shareholders so that when it comes time for the vote, there is as little uncertainty as possible as to whether it will pass. It is important to note that shareholders are not losing rights or entitlements since we will be able to structure the memberships in such a way that they mirror the shareholdings.

If the Club wants to move to a structure where there is a different distribution of voting power than the current structure, this would need to be explained to the shareholders, as well as the benefits with adopting a new voting structure.



There may be shareholders who are reluctant to give up their shares. Our understanding is that it has been the Club policy to require that shareholders give up their shares in the Club when they sell the property with which the shares are associated, and that these shares have been transferred between property owners without consideration or, at most, for not more than \$200 per share. If the Club has documentation to back up this practice, it would be helpful to provide it to us for review and consider what steps may be taken in advance to mitigate the potential risk of certain shareholders objecting to the continuance.

Shareholders may also object to the cancellation of their shares on the theory that they are entitled to a much bigger payout should the Club ever be dissolved. However, if a shareholder or a group of shareholders attempted to dispute the cancellation, the Club would be in a good position to refute any argument that the shareholders are entitled to more than \$200 per share. The courts have been reluctant to use a hypothetical or potential future event to determine what the fair value of the shares in the case of a dispute of the value. In this case, that suggests that the better valuation for the shares would be the market or trading value (set at \$200), and not on a hypothetical value based on the possible future sale of the lands if the Club ever decided to cease operations and sell its assets. That could be, in the eyes of the court, putting an undue premium on the dissenting shareholders' shares.

The shares may be cancelled for no consideration, meaning that the Club would not have to pay out \$200/share. Instead, shareholders would receive in consideration for the cancelled shares, memberships in the continued corporation which, in our opinion, are of equal value to their current shareholders. The Club will need to discuss with its accountant the appropriate reduction in stated capital to account for the cancellation of the shares.

### **Step 3– Finalize Corporate Governance under the ONCA**

1. Issuance of Memberships to Former Shareholders/Members. Once the Club is continued, the former shareholders will receive a (continuing) membership in the continued Club.
2. Issuance of Memberships to New Members. New members would pay an initiation fee and any required annual fees. They could be entitled to a right to vote (if they are a voting member) and to share in the distribution of assets on dissolution. We have also suggested creating a non-voting membership class with no voting rights. Other voting or non-voting classes of memberships are also possible, which could have limited access rights and participation rights. The fees and rights of the members should be set out in revised ONCA-compliant by-laws of the Club.
3. Cancel all issued and outstanding shares. The cancellation will be built into the articles of continuance and will be effected by a special resolution.
4. Finalize new ONCA compliant By-laws. The by-laws of a non-share capital corporation subject to the ONCA must contain certain governance provisions that are not currently in the Club's by-laws. We recommend using our ONCA-compliant templates and customizing them to the specific governance needs of the Club.

### **Step 4 – Other Post-Continuance Matters**

After receiving the certificate of continuance, the Club will have to update its corporate records and inform relevant parties of the governance changes, including the bank and accountants. All contracts and agreements going forward would need to be signed using the new corporate name.



## VI. OTHER MATTERS CONSIDERED

### **Tax Implication for the Membership**

We do not see any tax implications for the shareholders on the cancellation of their shares, particularly if the shareholders are issued memberships in the corporation of equal value.

### **Continued Exemption from Income Tax as a Non-Profit**

The benefit of having non-profit status under the *Income Tax Act* (Canada) (the “ITA”) is that non-profit organizations do not generally pay income tax on revenue generated. This is a significant advantage. However, a social club subject to 149(5) of the ITA does pay income tax on certain income generated by property used exclusively for and directly in the course of providing the dining, recreational or sporting facilities provided by it to its members. The Club should ensure that its accountant is live to this issue.

Additionally, non-profit organizations may not operate for a for-profit purpose. While the CRA has not provided a lot of guidance on what would constitute “for profit”, consistently have revenues exceeding expenditures year after year may be an indication that the Club is not operating at an at cost basis. While the 2023 financial statements showed a deficit of \$4,554, in 2022 there was a \$35,833 excess of revenues over expenditures. Excess revenue may be able to be attributed to a future capital project, but undesignated revenues over expenses year over year may trigger a concern with the CRA and could result in the redesignation of the Club as a taxable entity. We note that this issue has been already brought to the attention of the Club in 2006 by your then accountants.

The Club received an audit letter on March 28, 2012 in which the CRA indicated that the by-laws of the Club should be changed so that on dissolution, the assets of the Club would not be distributed to its members. The CRA said that this was because the Club’s tax-exempt status as a non-profit organization under 149(1)(l) was at risk since under that provision, members are not allowed to have part of the income of the organization payable to them.

It is our view that while the ITA does restrict members of non-profit organizations from receiving income, the members could still be entitled to the assets of the Club upon dissolution if (a) the Club gave up its status as a non-profit organization prior to dissolution (though this might result in a tax liability for the Club), or if (b) the Club distributed capital (e.g. the Club’s assets) to its members, instead of the income (e.g. interest income earned from the assets). In our opinion, your current by-laws do not contravene the ITA in respect of permitting the distribution of assets to members on dissolution.





### Appendix Comparison Chart

	<b>OCA (current)</b>	<b>ONCA</b>	<b>OBCA</b>	<b>Co-op Act</b>
<b>Type of corporation</b>	Social company	Not-for-profit corporation	Business corporation	Co-operative corporation
<b>Share capital</b>	Company with share capital	Corporation without share capital	Corporation with share capital	Corporation with or without share capital
<b>Control</b>	Shareholders with flexible voting rights (member contractual rights only)	Members with flexible voting rights Could duplicate current governance structure by creating a voting membership class combining the current Class C shareholder rights with the current member rights	Shareholders with flexible voting rights (member contractual rights only) Could duplicate current governance structure	Members with voting rights (voluntary membership open to all persons able to use services, one vote per member, no votes by proxy) More complicated to duplicate current governance structure
<b>Rights of shareholders or members</b>	The OCA permits aggrieved shareholders to apply to the court for an order directing the company, director, officer or employee to perform a duty imposed by the Act and the court can make any order it sees fit. The OCA also permits compliance orders in specific circumstances (a shareholder may apply to court to direct a person to	The ONCA provides for enhanced member rights and member remedies to enforce those rights, including: <ul style="list-style-type: none"> <li>• derivative actions (a member may apply to the court to bring an action in the name of or on behalf of the corporation);</li> <li>• a compliance or restraining order (a member may</li> </ul>	The OBCA provides similar rights and remedies to shareholders, and includes the additional right to bring an oppression remedy, which means a shareholder can apply to the court for an order to rectify: <ul style="list-style-type: none"> <li>• any act or omission of the corporation or any of its affiliates effects or</li> </ul>	The Co-op Act provides for similar rights and remedies to members as the ONCA, including: <ul style="list-style-type: none"> <li>• derivative actions;</li> <li>• compliance orders;</li> <li>• court ordered liquidation and dissolution on application of a member; and</li> <li>• a dissenting member right, with a dissenting preference shareholder</li> </ul>



	<b>OCA (current)</b>	<b>ONCA</b>	<b>OBCA</b>	<b>Co-op Act</b>
	comply with the OCA provisions regarding proxy solicitation and the information circular).	<p>apply to court to direct a person to comply with the ONCA or restrain a person from acting in breach of the ONCA);</p> <ul style="list-style-type: none"> <li>• court ordered liquidation and dissolution on application of a member; or</li> <li>• a dissenting member right to be paid the fair value of the member's membership interest in certain limited circumstances.</li> </ul> <p>Note that while the ONCA does not include an oppression remedy, there is a court ordered wind up provision can be used by members in a similar manner if they feel they have been treated unfairly.</p>	<p>threatens to effect a result;</p> <ul style="list-style-type: none"> <li>• the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or</li> <li>• the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder of the corporation.</li> </ul>	right in some limited circumstances.
<b>Limited liability</b>	Shareholders have limited liability under the OCA	Members have limited liability under the ONCA	Shareholders have limited liability under the OBCA	Members have limited liability under the Co-op Act
<b>Distribution of profit</b>	Profit can be distributed to shareholders as	Generally speaking, the ONCA provides	Profit can be distributed to shareholders as	Profit can be distributed to members as



	<b>OCA (current)</b>	<b>ONCA</b>	<b>OBCA</b>	<b>Co-op Act</b>
	<p>dividends, but constating documents must prohibit dividends to qualify for income tax exemption.</p>	<p>that no part of a corporation's profits or of its property or accretions to the value of the property may be distributed, directly or indirectly, to a member of the corporation except in furtherance of its activities or as otherwise permitted by the ONCA.</p> <p>A corporation that is not a "public benefit corporation" may distribute the fair value of a membership to a member upon termination of that member's membership.</p> <p>To qualify for tax exempt status, distributions of income must be prohibited in constating documents.</p>	<p>dividends, but constating documents must prohibit dividends to qualify for income tax exemption.</p>	<p>crediting interest on loan capital or dividends on share capital. After this distribution and providing for reasonable reserves, co-ops operate as nearly as possible at cost. However, any profit that remains can be distributed among its members, in whole or in part, in proportion to the volume of business the members have done with or through the co-op, unless it is used to maintain or improve services for its members or donated for community welfare or the propagation of co-operative principles. Further, the co-op may, by by-law, provide that part of the surplus may be allocated, credited or paid to non-members (such as non-member shareholders) at the same or at lesser rates than to members.</p>



	<b>OCA (current)</b>	<b>ONCA</b>	<b>OBCA</b>	<b>Co-op Act</b>
				To qualify for tax exempt status, distributions of income must be prohibited in constating documents.
<b>Distribution on dissolution</b>	Shareholders receive net assets after payment of liabilities on dissolution	The distribution of net assets after payment of liabilities depends on whether the corporation qualifies as a “public benefit corporation” (discussed below)	Shareholders receive net assets after payment of liabilities on dissolution	Members receive net assets after payment of liabilities on dissolution
<b>Transferability</b>	Shares are transferrable, but transfers can be restricted.	Default is that membership is not transferable, but articles or by-laws can provide otherwise.	Shares are transferrable, but transfers can be restricted.	Membership shares/ memberships are transferrable provided certain conditions are met, but transfers can be restricted. Preference (non-membership) shares are transferrable.
<b>Director removal</b>	By 2/3 vote of the shareholders	By majority vote of the members	By majority vote of the shareholders	By majority vote of the members
<b>Income tax status</b>	NPO income tax exemption may apply	NPO income tax exemption may apply	NPO income tax exemption may not apply	NPO income tax exemption may apply
<b>Securities law</b>	Not applicable in connection with membership (other securities that non-profits could issue may be subject to securities law)	Not applicable as there are no shareholders	Possible securities law compliance required	Possible securities law compliance required