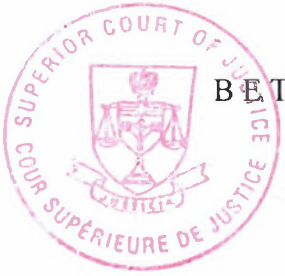


CV-18-00606192-00CL

Court File No.:

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**



BETWEEN:

BRIAN HEMMING

Applicant

- and -

JAZZ.FM 91 INC.

Respondent

APPLICATION UNDER section 332 of the *Corporations Act*, R.S.O. 1990, c. C.38

**NOTICE OF APPLICATION**

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION shall be made to a judge presiding over the Commercial List on a date to be fixed by the Commercial List office, at 330 University Avenue, Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF

YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY  
LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A  
LOCAL LEGAL AID OFFICE.

*mb*  
Date: October <sup>2</sup>~~1~~, 2018

Issued by

*May Nikolaidis*  
Local registrar **May Nikolaidis**

Address of court office Superior Court of Justice –  
Commercial List Office  
7<sup>th</sup> Floor, 330 University Ave  
Toronto, ON M5G 1R7  
Fax: (416) 327-6228

TO: JAZZ.FM 91 INC.  
4 Pardee Avenue, Unit 100,  
Toronto, ON M6K 3H5

## APPLICATION

### THE APPLICANT MAKES APPLICATION FOR:

1. An order compelling the Respondent, JAZZ.FM 91 Inc. (“**JAZZ.FM**”), to forthwith provide the Applicant, Brian Hemming, with all current information in the members register of JAZZ.FM, including the email addresses and phone numbers of members, as maintained by JAZZ.FM;
2. A declaration that JAZZ.FM committed an offence under s. 307(5) of the *Corporations Act*, R.S.O. 1990 (the “*Corporations Act*”) by failing to provide on Mr. Hemming, with a list of all members of JAZZ.FM, on or by September 17, 2018;
3. A declaration that JAZZ.FM did not provide all members with notice of the JAZZ.FM annual general meeting (“**AGM**”) held on August 31, 2018 (the “**2018 AGM**”) and the AGM held on July 20, 2017 (the “**2017 AGM**”) in breach of section 21 of By-Law No. 1 of JAZZ.FM enacted and passed by the Board of Directors of JAZZ.FM on June 7, 2007 (the “**JAZZ.FM By-Law**”);
4. A declaration that JAZZ.FM breached s. 97(1)(a) of the *Corporations Act* by failing to provide members with timely financial statements when it held the 2018 AGM;
5. An Order for directions on:
  - (a) a timetable for any steps necessary to hear this Application on an expedited basis; and
  - (b) any other relief necessary for the proper and timely determination of this Application;

6. If necessary, an abridgment of time required under the *Rules of Civil Procedure* for the delivery of material or other procedural requirements to permit this Application to be heard on an expedited basis;
7. Costs of this Application, including applicable taxes; and
8. Such further and other relief as counsel may advise and this Honourable Court may permit.

**THE GROUNDS FOR THE APPLICATION ARE:**

**Overview**

- (a) JAZZ.FM has been in turmoil for months. JAZZ.FM and its Board of Directors (the “**Board**”) have been on the receiving end of intense criticism, negative media publicity and serious allegations ranging from sexual harassment by its former CEO, workplace bullying, mismanagement and corporate governance issues;
- (b) The corporate governance issues at JAZZ.FM are real. At the 2018 AGM, JAZZ.FM’s interim CEO admitted that JAZZ.FM had breached s. 97(1) of the *Corporations Act* by not holding AGMs with timely financial statements, and members in attendance passed a resolution affirming that not all members were given notice of the 2017 AGM. Several members had also not received notice of the 2018 AGM;
- (c) Now, JAZZ.FM is at a cross-roads. Mr. Hemming wishes to nominate directors for the next AGM of JAZZ.FM, which must be held on or before February 28, 2019 (the “**2019 AGM**”). This Application arises out of the unreasonable, inappropriate and illegal refusal of JAZZ.FM to adequately respond to a duly delivered request from Mr. Hemming for the

members registry of JAZZ.FM. After the statutory timeline provided for in the *Corporations Act* expired, Mr. Hemming received a list but with incomplete member contact information;

- (d) JAZZ.FM provided Mr. Hemming with members' mailing addresses but refused to provide telephone numbers and email addresses. Mr. Hemming is entitled to this information under the *Corporations Act* and the JAZZ.FM By-Laws. The missing information is maintained in the members registry and is routinely used by JAZZ.FM and the Board to contact members and solicit proxies for AGMs. The missing information is crucial for Mr. Hemming to efficiently reach out to fellow members in today's environment. Despite asserting that "privacy laws" prevent JAZZ.FM from sharing the missing information, no "privacy laws" have been cited despite numerous requests to do so, thereby leaving bare the Board's desire to disenfranchise Mr. Hemming from mounting an equal-footing challenge to their entrenched positions at the 2019 AGM;

### **The Parties**

- (e) JAZZ.FM is a not-for-profit corporation under the *Corporations Act*. Since about 1974, JAZZ.FM has promoted knowledge and appreciation of jazz music, including by operating the popular Toronto radio station 91.1 FM. This radio station is a cultural gem and a holdout in a landscape of increasingly commercialized, homogenized broadcast radio. That legacy is now at risk due to the corporate mismanagement of the incumbent Board;
- (f) Mr. Hemming is a member in good standing of JAZZ.FM and has been for the past two years;

### **About JAZZ.FM Corporate Governance**

- (g) JAZZ.FM was incorporated on December 18, 1974 as a non-profit

corporation under the *Corporations Act*. Pursuant to the Letters Patent, JAZZ.FM is to operate exclusively as a charitable organization by operating an FM radio broadcasting undertaking on a non-profit, non-commercial basis;

- (h) For a non-profit corporation under the *Corporations Act*, the persons entitled to vote for the board of directors are “members” (for all intents and purposes, analogous to shareholders). Additional members’ rights under the *Corporations Act* include the right to submit a requisition for a special meeting of members and call one if the board does not do so;
- (i) Section 300 of the *Corporations Act* requires JAZZ.FM to maintain a register of its members, including their addresses. This requirement is reflected in s. 89 of the JAZZ.FM By-Law No. 1, which requires the Executive Assistant to the Board to record the “name, mailing address, ***telephone number and, where possible, the email address, of each Member***”;
- (j) JAZZ.FM’s fiscal year end is August 31;
- (k) The Supplementary Letters Patent and By-Laws of JAZZ.FM define a “Donor Member” (member) of JAZZ.FM as any individual who donates a stipulated amount during the previous fiscal year. In other words, for example, a member must be one as of August 31, 2018 for the purposes of voting and other rights relating to the 2019 AGM;
- (l) Section 21 of the JAZZ.FM By-Law requires that members receive notice of the time and place of every AGM at least ten days before the AGM;
- (m) Section 103 of the JAZZ.FM By-Law allows notice to be effected by sending it to the last postal or email address of the member. For the 2018 AGM, JAZZ.FM provided certain members with notice of the AGM by email;

- (n) Section 83 of the JAZZ.FM By-Law allows members to submit a director nomination for the Board “prior to or at the [AGM]” provided, among other things, that such a nomination must be received by JAZZ.FM “no less than ten (10) clear days prior to the [AGM]”. Despite the ambiguity of section 83, JAZZ.FM has taken the position that members must submit director nominations 10 days before an AGM;

**The 2017 AGM: not all members received notice**

- (o) At the 2018 AGM, members in attendance objected to approving the draft minutes from the 2017 AGM. Specifically, by an overwhelming majority after some discussion, the members in attendance passed a resolution to modify and approve the draft 2017 AGM minutes after removing the reference to “notice of this [2017 AGM] meeting had been mailed and/or emailed to all Members of the Corporation more than ten days ago”;
- (p) Almost all members in attendance signalled by voting that they had not received notice of the 2017 AGM (and several prior AGMs);

**The 2018 AGM: minimal notice provided to those who received it**

- (q) Mr. Hemming received notice of the 2018 AGM on August 20, 2018 by email. The AGM was scheduled on the morning of August 31, 2018—exactly ten days later, on the Friday before the Labour Day long weekend. The notice that Mr. Hemming received presented Board nominees for director positions, and did not advise him of his ability as a member to nominate any candidate(s) for the Board. In any event, for Mr. Hemming to act on his right, he would need to have submitted a nomination on the very same day that he received notice of the AGM;
- (r) Some members at the 2018 AGM claimed they did not receive notice of the 2018 AGM from JAZZ.FM. They found out about the meeting through social media or other media outlets;

### **Mr. Hemming's efforts to obtain Corporate Documents prior to the 2018 AGM**

- (s) On August 21, 2018, Mr. Hemming requested copies of the JAZZ.FM By-Laws, special resolutions, and the member's register, including members' addresses, phone numbers and email addresses. He provided an affidavit in accordance with s. 307 of the *Corporations Act*, guaranteeing that he would only use the member information for purposes connected with JAZZ.FM. JAZZ.FM was obligated by s. 305 of the *Corporations Act* to keep these records open for inspection by members during normal business hours, and to allow members to make extracts;
- (t) On August 27, 2018, with no explanation for the delay and despite numerous requests for an earlier opportunity, JAZZ.FM permitted Mr. Hemming to attend at its offices to review and copy the JAZZ.FM By-Laws, special resolutions and financial statements ended August 31, 2017 (over a year stale). Mr. Hemming was refused access to a photocopier even though he offered to pay a reasonable expense for photocopying. JAZZ.FM's interim CEO suggested that Mr. Hemming could copy the corporate documents by hand on paper. In the circumstances, Mr. Hemming took low-quality pictures of each page of each document with his phone;
- (u) Contrary to his requests and his rights under the *Corporations Act*, Mr. Hemming was provided with a truncated version of the members register that included members' names and postal addresses but not phone numbers or email addresses;

### **The 2018 AGM**

- (v) Mr. Hemming attended the 2018 AGM. It was also attended by around 70 members, a record as admitted by JAZZ.FM representatives. He also submitted questions in advance of the meeting;



- (w) As noted, at the start of the meeting, members voted to confirm that they had not received notice of the 2017 AGM and the 2018 AGM;
- (x) Mr. Hemming and other members in attendance left the 2018 AGM feeling that the Board and JAZZ.FM representatives did not provide members in attendance with the opportunity to express all their concerns and did not address the concerns that were expressed in any meaningful manner. For instance, JAZZ.FM refused to directly (or at all) answer many questions that were asked by members in attendance;
- (y) JAZZ.FM's interim CEO eventually agreed that JAZZ.FM had breached s. 97(1)(a) of the *Corporations Act* by failing to provide members with timely financial statements when it held the 2018 AGM (and in previous meetings);
- (z) The Board's nominees for directors were elected because there were no challengers and because the Board had, through email, solicited proxies in advance of the AGM;
- (aa) The 2018 AGM was attended by and reported on by at least three news outlets. The coverage was unflattering;
- (bb) Ignoring the tone of the meeting and the negative coverage by independent media attendees, JAZZ.FM issued a misleading news release describing the AGM;

**JAZZ.FM's delayed and inadequate response to Mr. Hemming's request for an updated members register**

- (cc) On September 7, 2018, Mr. Hemming requested a copy of the current members register and members' addresses, including email addresses, which would identify donors eligible to vote at the 2019 AGM. A sworn affidavit from Mr. Hemming was enclosed in compliance with s. 307(1) of the *Corporations Act*;

- (dd) After attending the 2018 AGM, Mr. Hemming's desire to nominate new individuals for the Board increased substantially. Mr. Hemming also understandably felt disenfranchised by the way his request for corporate documents and the members register was handled by JAZZ.FM prior to the 2018 AGM, and wanted to ensure he obtained an updated members register as far in advance of the next AGM as possible. These experiences motivated his renewed request for an updated members register;
- (ee) There is no dispute that Mr. Hemming's request and accompanying affidavit are valid. Similarly, there has been no suggestion that Mr. Hemming was requesting the list for an improper purpose. Rather, it is plain that he wishes to obtain the list for purposes connected with the corporate governance of JAZZ.FM;
- (ff) On September 21, 2018—fourteen days after the initial request—Mr. Hemming was advised that a current list of members was available to be picked up;
- (gg) The members list provided to Mr. Hemming did not contain phone numbers and email addresses because, allegedly, “privacy laws” prevented JAZZ.FM from disclosing that information;
- (hh) Mr. Hemming has repeatedly asked JAZZ.FM to identify which “privacy laws” prevent the disclosure of members' phone numbers and email addresses. No laws have been cited in response;

**Mr. Hemming should be provided with members' phone numbers and email addresses**

- (ii) Mr. Hemming wishes to nominate directors for the 2019 AGM which must be held on or before February 28, 2019. Therefore, time is of the essence so that Mr. Hemming can reach his fellow members to discuss JAZZ.FM matters and after submitting nominations, solicit their proxies;
- (jj) A fair and purposive reading of the *Corporations Act* in the context of

JAZZ.FM's governing corporate documentation and past practices requires JAZZ.FM to provide Mr. Hemming with members' phone numbers and email addresses for members listed in the members' register;

- (kk) Section 300(1).3 of the *Corporations Act* requires JAZZ.FM to keep a members' list including their "address". Section 305(1) of the *Corporations Act* allows a member to inspect the members' register. Section 307(1) of the *Corporations Act* requires a corporation to provide a requesting individual with a list of Donor-Member names and "the address of each such person as shown on the books of the corporation." (emphasis added) The clear purpose of these sections is to allow members to communicate with each other for valid corporate purposes;
- (ll) JAZZ.FM cannot unilaterally determine which "address" it will provide to a valid request from a member. The lack of distinction in the *Corporations Act* between a postal and any other address should not be read as including postal addresses only. Had the legislature wished to specify that postal addresses only were included, it could and would have said so;
- (mm) Moreover, section 89 of the JAZZ.FM By-Law requires JAZZ.FM to maintain an annual register "in which shall be recorded the name, mailing address, telephone number and, where possible, the e-mail address" of each member. The "address" component of a member's entry on the register therefore necessarily contains the postal address, telephone number and email address of the member, where available;
- (nn) Section 103 of the JAZZ.FM By-Law allows JAZZ.FM to send members notice via email. The Board has taken advantage of this means of communication in the past, including most recently to solicit proxies for the 2018 AGM;

- (oo) JAZZ.FM has cited no privacy laws that preclude JAZZ.FM from providing member's telephone numbers or email addresses to Mr. Hemming. That is because none exist;
- (pp) The Applicant will rely on the following legislative provisions:
  - (i) The *Corporations Act*, R.S.O. 1990, c. C.38;
  - (ii) *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c. 23;
  - (iii) *Electronic Commerce Act*, 2000, SO 2000, c 17;
  - (iv) *Legislation Act, 2006*, SO 2006, c 21, Sch F; and
  - (v) Rules 1.04, 2.03, 14.05(2), 14.05(3)(d), 14.05(3)(h) and 38 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
- (qq) The Applicant will rely on such other grounds as counsel may advise and this Honourable Court permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:**

- 9. Affidavit of Brian Hemming, sworn October 1, 2018 and the exhibits thereto;
- 10. Affidavits of other members of JAZZ.FM and the exhibits thereto, if any; and
- 11. Such further and other evidence as counsel to Mr. Hemming may advise and this

Honourable Court permit.

 October <sup>2</sup> 1, 2018

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BRIAN HEMMING      JAZZ.FM 91  
Applicant      and      Respondent

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Court File No.:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**NOTICE OF APPLICATION**

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