

**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

**FACTUM OF THE APPLICANT
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PART I—OVERVIEW

1. This application is primarily about whether Mr. Hemming, a member of JAZZ.FM 91 Inc. (“**JAZZ.FM**”), is entitled under the *Corporations Act*¹ to a complete copy of the members’ register, including the email addresses and phone numbers therein. Mr. Hemming needs this information to efficiently communicate with his fellow members for valid corporate purposes. Specifically, he wishes to seek feedback from members about ongoing issues at JAZZ.FM and to solicit their proxies for his nominees for the Board of Directors of JAZZ.FM at the next Annual General Meeting (“**AGM**”).

2. JAZZ.FM’s Board takes the untenable position that Mr. Hemming is entitled to his fellow members’ mailing addresses, but not their email addresses and phone numbers. In other words, according to JAZZ.FM, Mr. Hemming is somehow entitled to know where members live but cannot be trusted with their email addresses and phone numbers. This is a self-serving attempt by an entrenched Board to prevent Mr. Hemming from efficiently communicating with his fellow members. Tellingly, the Board of JAZZ.FM had no hesitation using members’ email addresses to solicit proxies for the last AGM, and have continued emailing members to cast aspersions over Mr. Hemming’s motives. This pattern will only escalate before the next AGM.

3. Mr. Hemming is entitled to members’ email addresses and phone numbers under the *Corporations Act*. There is no dispute that Mr. Hemming (a) has complied with the *Act*’s requirements by submitting an affidavit undertaking that he will use the members’ information for valid purposes only, (b) has *bona fide* intentions, and (c) has not misused the member information he has already received from JAZZ.FM. Mr. Hemming is even

¹ *Corporations Act*, R.S.O. 1990, c. C.38. (“*Corporations Act*”)

prepared to provide a further affidavit or undertaking with reasonable terms and conditions on his use of members' email addresses and phone numbers if that is necessary to address JAZZ.FM's purported privacy concerns.

4. Without the contact information Mr. Hemming is seeking, his only way of communicating with members is through mail or visiting their homes. The cost for sending a single letter to the 2,000-plus members of JAZZ.FM is not insignificant.² Costs aside, Mr. Hemming's letters would arrive more slowly and less instantaneously than emails from the Board. The legislature would never have intended this imbalance because it is contrary to the principles of member democracy.

5. Apart from disenfranchising Mr. Hemming, JAZZ.FM has also disregarded its obligations under the *Corporations Act* and the JAZZ.FM By-Law No. 1 (the "**By-Law**"). Mr. Hemming therefore also seeks declarations with respect to two distinct breaches of the *Act*: (a) s. 307(1) of the *Act* (requiring the corporation to provide a member with a copy of the members' register within ten days of the date of the request); and (b) s. 97(1) of the *Act* (requiring the corporation to provide members with a financial statement ended not more than six months before the annual meeting).

PART II—FACTS

A. The Parties

6. Mr. Hemming is a member in good standing of JAZZ.FM.³

² Cross-Examination Transcript of Brian Hemming dated November 2, 2018 ("Hemming Transcript") at p. 41-43, Transcript Brief of the Applicant, Brian Hemming ("Transcript Brief"), Tab 1.

³ Hemming Affidavit at para. 1, Hemming AR Tab 2.

7. JAZZ.FM is a not-for-profit corporation under the *Corporations Act*. It operates the 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. Mr. Hemming believes this legacy is at risk due to the mismanagement of the incumbent Board.⁴

B. Corporate Governance at JAZZ.FM

8. JAZZ.FM was incorporated by letters patent as a non-profit corporation under the *Corporations Act*.⁵ JAZZ.FM's fiscal year end is August 31.⁶

9. For a non-profit corporation like JAZZ.FM, "members" are the persons entitled to vote at meetings of members, including for the election of directors to the board (they are analogous to shareholders in many respects).⁷

10. The Supplementary Letters Patent of JAZZ.FM define a "Donor Member" (i.e. member) of JAZZ.FM as any individual who donates a stipulated amount during the previous fiscal year.⁸ In other words, for example, a person must be a member as of August 31, 2018 to exercise voting and other rights at the subsequent AGM.

11. 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 By-Law No. 1, which requires the Executive Assistant to the Board to record the "name,

⁴ Affidavit of Brian Hemming sworn October 1, 2018 ("Hemming Affidavit") at paras. 3-4, Application Record of the Applicant, Brian Hemming ("Hemming AR"), Tab 2.

⁵ Mobile phone images of By-Law No. 1 at p. 1, Exhibit H to Hemming Affidavit, Hemming AR Tab 2-H.

⁶ Mobile phone images of Financial Statement ended August 31, 2017, Exhibit I to Hemming Affidavit, Hemming AR Tab 2-I.

⁷ *Corporations Act*, R.S.O. 1990, c. C. 38, s. 300.

⁸ Mobile phone images of By-Law No. 1 at p. 22, section 86, Exhibit H to Hemming Affidavit, Hemming AR Tab 2-H.

mailing address, telephone number and, where possible, the email address, of each Member”.⁹

12. Section 100 of the By-Law requires that members receive notice of the time and place of every AGM at least ten days before the AGM.¹⁰ Significantly, section 103 of the By-Law allows notice to be effected by sending it to the last postal or email address of the member.¹¹ JAZZ.FM provided 1,936 members (out of 2,032 members) with notice of the 2018 AGM by email.¹² JAZZ.FM also received 131 proxies electronically.¹³

C. Mr. Hemming’s initial efforts to obtain corporate documents

13. On August 20, 2018, Mr. Hemming received email notice of the AGM for the period from September 1, 2017 to August 31, 2018 (the “**2018 AGM**”) to be held on August 31, 2018 – i.e. ten days later.¹⁴

14. 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*, affirming that he would only use the member information provided to him for purposes connected with JAZZ.FM.¹⁵

⁹ Mobile phone images of By-Law No. 1 at p. 22, section 89, Exhibit H to Hemming Affidavit, Hemming AR Tab 2-H [*emphasis added*].

¹⁰ Mobile phone images of By-Law No. 1, Exhibit H to Hemming Affidavit, Hemming AR Tab 2-H at p. 25.

¹¹ Mobile phone images of By-Law No. 1, Exhibit H to Hemming Affidavit, Hemming AR Tab 2-U at p. 25.

¹² Affidavit of Charles Cutts sworn October 31, 2018 (“Cutts Affidavit”) at para. 20, Application Record of the Responding Party, JAZZ.FM91 Inc. (“JAZZ.FM AR”), Tab 1.

¹³ Cutts Affidavit at para. 23, JAZZ.FM AR, Tab 1.

¹⁴ Email notice of Annual General Meeting dated August 20, 2018, Exhibit E to Hemming Affidavit, Hemming AR Tab 2-E.

¹⁵ Letter from Shane D’Souza to the Board of JAZZ.FM dated August 21, 2018 and enclosed

15. On August 27, 2018, with no credible explanation for the delay and despite numerous requests for earlier disclosure, JAZZ.FM permitted Mr. Hemming to attend its offices to review and copy the By-Law, special resolutions and financial statements ended August 31, 2017 (i.e. over a year stale).¹⁶ Mr. Hemming was refused access to a photocopier even though he offered to pay a reasonable expense for photocopying.¹⁷ JAZZ.FM's interim CEO suggested that Mr. Hemming could copy the corporate documents by hand on paper.¹⁸ In the circumstances, Mr. Hemming took low-quality pictures of each page of each document with his cellphone.¹⁹

16. Contrary to his requests and his rights under the *Corporations Act*, Mr. Hemming was provided with an edited version of the members' register that included names and postal addresses but not phone numbers or email addresses,²⁰ even though JAZZ.FM maintains the additional information as required by its By-Law.

D. The controversy at the 2018 AGM

17. On August 31, 2018, JAZZ.FM held its 2018 AGM.²¹ It was scheduled on the morning of August 31, 2018—exactly ten days after notice was sent, 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 candidates for the Board. In any event, for Mr. Hemming to act on his

affidavit of Brian Hemming sworn August 21, 2018, Exhibit F to Hemming Affidavit, Hemming AR Tab 2-F.

¹⁶ Hemming Affidavit at para. 15, Hemming AR Tab 2.

¹⁷ Hemming Affidavit at para. 15, Hemming AR Tab 2.

¹⁸ Hemming Affidavit at para. 15, Hemming AR Tab 2.

¹⁹ Hemming Affidavit at para. 16, Hemming AR Tab 2.

²⁰ Hemming Affidavit at para. 17, Hemming AR Tab 2.

²¹ Hemming Affidavit at para. 19, Hemming AR Tab 2. See also Agenda for 2018 AGM of JAZZ.FM, Exhibit K to Hemming Affidavit, Hemming AR Tab 2-F.

right, he would have needed to submit a nomination on the very same day that he received email notice of the AGM. The 2018 AGM was attended by around 70 members, a record as admitted by JAZZ.FM.²²

18. Several 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.²³ Members in attendance objected to approving the draft minutes from the 2017 AGM.²⁴ By an overwhelming majority, 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”.²⁵ In other words, ***most members in attendance signalled that they had not received notice of the 2017 AGM.***

19. In response to a question from Mr. Hemming, JAZZ.FM’s interim CEO, Charles Cutts, conceded that JAZZ.FM had not abided by 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).²⁶

20. The Board’s nominees for directors were elected because there were no challengers and because the Board had, including through email, solicited proxies.²⁷

²² Hemming Affidavit at paras. 25 and 28, Hemming AR Tab 2.

²³ Hemming Affidavit at para. 20, Hemming AR Tab 2.

²⁴ The prior AGM, for the period from September 1, 2015 to August 31, 2016 (i.e. fiscal year ending August 31, 2016), had been held on July 20, 2017 (the “**2017 AGM**”).

²⁵ Hemming Affidavit at para. 21, Hemming AR Tab 2. See also Minutes of the Tenth (42nd) Annual Meeting of Members of JAZZ.FM91 INC., Exhibit L to Hemming Affidavit, Hemming AR Tab 2-L.

²⁶ Hemming Affidavit at para. 28, Hemming AR Tab 2.

²⁷ Hemming Affidavit at paras. 22-26, Hemming AR Tab 2.

21. Mr. Hemming and other members in attendance left the 2018 AGM feeling that the Board and JAZZ.FM representatives did not provide them with the opportunity to express all their concerns and did not address the concerns that were expressed in any meaningful manner.²⁸

22. The 2018 AGM was attended by and reported on by several news outlets.²⁹ The coverage was overwhelmingly unflattering.³⁰ In contrast, JAZZ.FM issued a misleading news release describing the 2018 AGM in favourable terms.³¹

E. JAZZ.FM’s delayed and inadequate response to Mr. Hemming’s request

23. On September 7, 2018, Mr. Hemming requested a copy of the current members’ register, which would identify members eligible to vote at the next AGM (the “**2019 AGM**”). A sworn affidavit from Mr. Hemming was enclosed in compliance with s. 307(1) of the *Corporations Act*.³²

24. After attending the 2018 AGM, Mr. Hemming’s desire to nominate new individuals for the Board increased substantially. Mr. Hemming also felt disenfranchised

²⁸ Hemming Affidavit at para. 29, Hemming AR Tab 2.

²⁹ Toronto Star article published August 31, 2018, Exhibit N to Hemming Affidavit, Hemming AR Tab 2-N; The Globe and Mail article published August 31, 2018, Exhibit O to Hemming Affidavit, Hemming AR Tab 2-O; National Post article published August 31, 2018, Exhibit P to Hemming Affidavit, Hemming AR Tab 2-P. See also The Globe and Mail article published August 31, 2018, Exhibit B to Affidavit of Suzanne Firth sworn October 1, 2018 (“Firth Affidavit”), Hemming AR Tab 3-B; Toronto Star article published August 31, 2018, Exhibit B to Affidavit of Jim Grant sworn October 1, 2018 (“Grant Affidavit”), Hemming AR Tab 4-B; The Globe and Mail article published August 31, 2018, Exhibit C to Grant Affidavit, Hemming AR Tab 4-C; National Post article published August 31, 2018, Exhibit D to Grant Affidavit, Hemming AR Tab 4-D.

³⁰ Hemming Affidavit at para. 29, Hemming AR Tab 2; Firth Affidavit at para. 4, Hemming AR Tab 3; Grant Affidavit at para. 4, Tab 4.

³¹ Copy of post titled “JAZZ.FM91’s Donor Members Offer Unprecedented Support”, Exhibit Q to Hemming Affidavit, Hemming AR Tab 2-Q; Press release published by JAZZ.FM dated August 31, 2018, Exhibit A to Grant Affidavit, Hemming AR Tab 4-A; Press release published by JAZZ.FM dated August 31, 2018, Exhibit A to Firth Affidavit, Hemming AR Tab 3-A.

³² Letter from Shane D’Souza to the Board of JAZZ.FM dated September 7, 2018 and enclosed affidavit of Brian Hemming sworn September 6, 2018, Exhibit T to Hemming Affidavit, Hemming AR Tab 2-T.

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.³³

25. 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. 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.³⁴ JAZZ.FM has failed to cite any applicable “privacy laws”. None exist. Nor has JAZZ.FM provided a credible explanation for why it did not provide Mr. Hemming with the members' list within 10 days of Mr. Hemming's request, as required by s. 307(5) of the *Corporations Act*.

PART III—ISSUES

26. There are three issues on this application:

Issue 1: Does the *Corporations Act* require JAZZ.FM to provide Mr. Hemming with members' phone numbers and email addresses for members listed in the members' register? *Yes.*

Issue 2: Did JAZZ.FM breach s. 307(5) of the *Corporations Act* by not providing Mr. Hemming with a members list on or before September 7, 2018? *Yes. The facts underlying this issue are undisputed.*

Issue 3: Did 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? *Yes. The facts underlying this issue are undisputed.*

³³ Hemming Affidavit at para. 33, Hemming AR Tab 2.

³⁴ Letter from John McKellar to Shane D'Souza dated September 21, 2018, Exhibit U to Hemming Affidavit, Hemming AR Tab 2-U.

PART IV—LAW AND ARGUMENT

ISSUE 1: MR. HEMMING IS ENTITLED TO HIS FELLOW MEMBERS’ EMAIL ADDRESSES

- i. A purposive interpretation of the *Corporations Act* supports Mr. Hemming’s right to obtain members’ email addresses

27. The *Corporations Act* requires JAZZ.FM to keep a record of, and to provide a requesting member, each member’s contact information as maintained by JAZZ.FM.

28. JAZZ.FM maintains an electronic copy of its register containing members’ contact information,³⁵ as required by section 300(1).3 of the *Corporations Act*:

300 (1) A corporation *shall* cause the following documents and registers to be kept:

...

3. A *register of* shareholders or *members* in which are set out the names alphabetically arranged of all persons who are shareholders or members or have been within ten years shareholders or members of the corporation and *the address of every such person* while a shareholder or member and, in the case of a company, in which are set out also the number and class of shares held by each shareholder and the amounts paid up and remaining unpaid on their respective shares.³⁶

29. Section 305 of the *Act* requires JAZZ.FM to make available for inspection and copying, among other things, the register of members so long as the inspecting member first makes an affidavit that the information in the register will be used only for purposes connected with the corporation.³⁷ Section 305 specifically directs that the register as it is kept by JAZZ.FM —i.e., containing all of the information that the corporation maintains in the register—be made available to a requesting member:

305 (1) The minutes of proceedings at meetings of shareholders or members mentioned in section 299 and the documents and *registers mentioned in* section 41 and *subsection*

³⁵ Cross-Examination Transcript of Charles Cutts dated November 2, 2018 (“Cutts Transcript”) at p. 44, q. 141, Transcript Brief, Tab 2.

³⁶ *Corporations Act*, R.S.O. 1990, c. C.38, s. 300(1).3 [*emphasis* added].

³⁷ *Corporations Act*, R.S.O. 1990, c. C.38, s. 306.

300 (1), during the normal business hours of the corporation, *shall*, at the place or places where they are kept, *be open to inspection by* the shareholders or *members* and creditors of the corporation or their agents or legal representatives, *and any of them may make extracts therefrom*.

(2) Every person who refuses to permit a person entitled thereto to inspect such minutes, documents or registers, or to make extracts therefrom, is guilty of an offence and on conviction is liable to a fine of not more than \$200.³⁸

30. Similarly, s. 307 of the *Corporations Act* requires JAZZ.FM to provide a list of its members and their addresses to any member who pays a reasonable charge and submits an affidavit affirming that the information provided will only be used for purposes connected with the corporation:

307 (1) *Any person*, upon payment of a reasonable charge therefor and upon filing with the corporation or its agent the affidavit referred to in subsection (2), *may require a corporation*, other than a private company, or its transfer agent *to furnish within ten days* from the filing of such affidavit *a list setting out* the names alphabetically arranged of all persons who are shareholders or members of the corporation, the number of shares owned by each such person *and the address of each such person as shown on the books of the corporation* made up to a date not more than ten days prior to the date of filing the affidavit.

...

(5) Every corporation or transfer agent that fails to furnish a list in accordance with subsection (1) when so required is guilty of an offence and on conviction is liable to a fine of not more than \$1,000, and every director or officer of such corporation or transfer agent who authorized, permitted or acquiesced in such offence is also guilty of an offence and on conviction is liable to a like fine.³⁹

31. The clear purpose of the foregoing sections of the *Corporations Act* is to permit members to obtain other members' contact information – *as maintained by JAZZ.FM* – for valid corporate purposes. Collectively, these sections oblige JAZZ.FM to provide Mr. Hemming with access to, or a copy of, the members' register *as it is maintained*.

32. JAZZ.FM is not entitled to pick and choose which of its members' contact information it provides to Mr. Hemming when he has otherwise fulfilled the

³⁸ *Corporations Act*, R.S.O. 1990, c. C.38, s. 305 [*emphasis added*].

³⁹ *Corporations Act*, R.S.O. 1990, c. C.38, s. 307(1) and (5) [*emphasis added*].

requirements of the *Act*. The *Act* instructs JAZZ.FM to provide a copy of the register or the members' addresses maintained by JAZZ.FM. Mr. Hemming has the right to inspect and make excerpts from the electronic register. JAZZ.FM has denied him both rights.

33. There is no language in the *Corporations Act* supporting JAZZ.FM's position that it may edit or alter the information it maintains about any member in the electronic register before providing that information to Mr. Hemming. If the legislature had intended to provide JAZZ.FM with such a right, it would have expressly done so and the unusual policy behind such selective disclosure would presumably have been clear.

34. It is unnecessary for the *Corporations Act* to expressly include the terms "email" before the word "address" for the same reason as it is unnecessary to include the word "postal" before the word "address". The best interpretation of the legislation, in keeping with its purpose and member democracy, is that however JAZZ.FM maintains the address of its members (whether postal or electronic), the means to contact members must be provided to a requesting member who otherwise meets the statutory requirements for obtaining that information.

35. Section 89 of the By-Law supports the purposive interpretation being urged by Mr. Hemming. It requires JAZZ.FM to maintain a register "in which shall be recorded the name, mailing address, *telephone number and, where possible, the e-mail address*" of each member.⁴⁰ 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.

⁴⁰ Mobile phone images of By-Law No. 1, Exhibit H to Hemming Affidavit, Hemming AR Tab 2-H at p. 22.

36. JAZZ.FM may seek to justify its narrow interpretation of “address” based on certain proposed amendments to the *Corporations Act* effected through the *Cutting Unnecessary Red Tape Act, 2017* which refer to “telephonic or electronic means”. These proposed amendments, even if enacted, do not change the purposive interpretation of the legislation urged above. **First**, none of the amendments are yet in force.⁴¹ **Second**, section 56 of the *Legislation Act, 2006* specifies that the amendment of an Act “does not imply anything about the previous state of the law,”⁴² nor does it imply “that the previous state of the law was different”.⁴³ **Third**, the proposed amendments concern providing notice to members. They do not concern the content of the members’ register and a member’s rights to inspect the register and obtain a copy of the contact information for fellow members.

37. Mr. Hemming’s interpretation of the *Corporations Act* is consistent with the policy behind the *Electronic Commerce Act, 2000*,⁴⁴ which provides that a legal requirement for something to be “in writing” is satisfied by the provision of information, a document, or a signature in electronic form. Ontario laws should be interpreted in line with technological developments, including email. In an age where communication is more frequently and inexpensively sent to email addresses rather than physical mail addresses, it is logical and necessary to interpret the word “address” broadly as including electronic mailing addresses.

38. In at least one prior case—*Jacobs v. Ontario Medical Association*—the

⁴¹ *Cutting Unnecessary Red Tape Act, 2017*, SO 2017, c. 20 - Bill 154, Sched 7, s 85.

⁴² *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 56(1).

⁴³ *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 56(2).

⁴⁴ *Electronic Commerce Act, 2000*, S.O. 2000, c. 17.

corporation *voluntarily provided* a requesting member with a membership list that included the names, addresses, and *email addresses* of members.⁴⁵ This case demonstrates that other corporations—even when engaged in proxy contests—have purposively interpreted “address” to include both postal *and* email addresses.

ii. Principles of shareholder democracy support Mr. Hemming’s right to communicate effectively with other members

39. Members and shareholders have a broad democratic right to inspect the books and obtain a shareholder/members’ lists of a corporation under s. 307.

40. In *Lawrence v. Toronto Humane Society*, a member of the Toronto Humane Society applied to the Court for a list of members of the Society pursuant to s. 307(1) of the *Corporations Act* after his request to the corporation list was denied.⁴⁶ The Court of Appeal allowed the applicant’s appeal of the application judge’s decision denying the request, noting that s. 307(1) affords “a *broad right of access* to a shareholder or membership list.”⁴⁷

41. In interpreting the scope of s. 307, the Court of Appeal linked a member’s statutory right of access to the members’ register and corporate information as a fundamental principle of shareholder democracy:

More generally, *recognition of the fundamental importance of access to corporate information to the exercise of investors’ and creditors’ rights is a cornerstone of corporate law in Canada*. The policy rationales for such access have been described by F. Iacobucci, M.L. Pilkington & J.R.S. Pritchard,

⁴⁵ *Jacobs v. Ontario Medical Association*, 2016 ONSC 4977 (S.C.J.) at para. 44, Brief of Authorities of the Applicant, Brian Hemming (“Hemming BOA”) at Tab 1.

⁴⁶ *Lawrence v. Toronto Humane Society*, 2006 CanLII 20224 (Ont. C.A.) at para. 4, Hemming BOA, Tab 2.

⁴⁷ *Lawrence v. Toronto Humane Society*, 2006 CanLII 20224 (Ont. C.A.) at para. 45, Hemming BOA, Tab 2.

Canadian Business Corporations: An Analysis of Recent Legislative Developments (Agincourt: Canada Law Book, 1977) at 178-79 as follows:

Information is important for at least two basic reasons. First, it allows the shareholders and the securities market as a whole to evaluate the relative strengths and weaknesses of the enterprise so that they can make informed decisions as to whether or not to invest or continue to invest in the company. Second, ***only with adequate information are the shareholders able to evaluate effectively the performance of the corporation's directors and officers and to exercise their rights to have the directors and officers accountable for their misdeeds. In a dispute between a dissenting shareholder and those in control, the accessibility of information becomes a key factor*** as management's ready access to the records of the company and other inside information gives it a distinct advantage over the individual shareholder who may be unable to substantiate his suspicions of wrongdoing with documentary proof.⁴⁸

42. The Court of Appeal also concluded that the very purpose of s. 307 was to facilitate access to the shareholder or membership lists:

In my view, *s. 307 of the Act creates a broad right of access to the shareholder or membership list of a corporation governed by the Act, consistent with the objective of ensuring the timely disclosure of corporate information, but tempered by constraints on the purpose for which such information is sought and the actual use to which the information contained in such lists may be put.* Section 307(1), in my opinion, is ***intended to facilitate access to the shareholder or membership lists*** of companies governed by the Act, subject to the formal requirements of an access request set out in ss. 307(1) and (2) and the statutory safeguards against abuse of the information so obtained as provided by ss. 307(2) and (4) of the Act.⁴⁹

43. While *Lawrence* did not determine the exact issue on this application—whether a member is entitled to all the member contact information maintained by the corporation—the Court of Appeal's application of general principles of shareholder democracy is instructive for this case.

44. Another critical principle alluded to in *Lawrence* is the right of shareholders to

⁴⁸ *Lawrence v. Toronto Humane Society*, 2006 CanLII 22224 (Ont. C.A.) at para. 51, Hemming BOA, Tab 2.

⁴⁹ *Lawrence v. Toronto Humane Society*, 2006 CanLII 22224 (Ont. C.A.) at para. 56, Hemming BOA, Tab 2.

vote on the board of directors who will oversee management.⁵⁰ The Supreme Court of Canada described this simple, yet critical, principle in *Re: BCE Inc.* as follows:

A share “is not an isolated piece of property...[but] a ‘bundle of inter-related rights and liabilities’”. These rights include the right to a proportionate part of the assets of the corporation upon winding-up and ***the right to oversee the management of the corporation by its board of directors by way of votes at shareholder meetings.***⁵¹

45. The Court of Appeal in *Lawrence* recognized that shareholders (or members in this case) must have adequate information in order to exercise their right to vote on new directors.⁵² This principle played a key role in the Court’s decision in *Ewart v. Higson-Smith*, where the board adjourned a meeting of shareholders to provide them with additional time to consider their vote.⁵³ Justice Cummings held:

The adjournment of the shareholders’ meeting does not prejudice the dissident group except to the extent that the dissident group may have lost the tactical advantage of moving against management by surprise and not circulating a dissident circular. ***A fully informed body of shareholders on a matter as important as the choice of directors to elect is a preferred course of action. It is essential to the principle of ‘shareholders democracy’ that shareholders have sufficient information to form a reasoned judgment before they vote.*** A corollary is that they should also properly have sufficient information before them in making a decision not to file the requisite proxy and thereby not exercise the right to vote by absentee ballot.⁵⁴

46. Principles of member democracy are especially important to members of JAZZ.FM because of the way that voting rights are allocated by the corporation’s constating documents. Each member has one vote.⁵⁵ Thus, unlike other types of corporations, no single member of JAZZ.FM may direct the outcome of a members’

⁵⁰ *BCE Inc., Re*, 2008 SCC 69, at para. 35, Hemming BOA, Tab 3.

⁵¹ *BCE Inc., Re*, 2008 SCC 69, at para. 35, Hemming BOA, Tab 3 [***emphasis*** added].

⁵² *Lawrence v. Toronto Humane Society*, 2006 CanLII 20224 (Ont. C.A.) at para. 51, Hemming BOA, Tab 2.

⁵³ *Ewart v. Higson-Smith*, 2009 CanLII 38517 (Ont. S.C.J.) at para. 9, Hemming BOA, Tab 4.

⁵⁴ *Ewart v. Higson-Smith*, 2009 CanLII 38517 (Ont. S.C.J.) at para. 17, Hemming BOA, Tab 4, [***emphasis*** added].

⁵⁵ Mobile phone images of By-Law No. 1, Exhibit H to Hemming Affidavit, Hemming AR Tab 2-H at s. 15, p. 5.

meeting. All members play a key role in the voting process. It is therefore imperative that each member is sufficiently informed to form a reasoned judgment before voting.

47. The practical reality is that members of JAZZ.FM will not have equal or sufficient information from Mr. Hemming about his proposed slate of nominees compared to the slate proposed by the Board if he does not obtain access to members' email addresses and phone numbers. They will also not receive any timely responses from Mr. Hemming to the Board's emails.

48. Mr. Hemming has been forced to use postal addresses to send a letter to all members of JAZZ.FM about his proposed vision for the corporation and the Board. He faced administrative challenges and incurred not insignificant costs.⁵⁶ Members of JAZZ.FM would not be "fully informed" or have "sufficient information to form a reasoned judgment" if they received one or two belated letters from Mr. Hemming, yet dozens of emails from JAZZ.FM promoting its own slate of candidates for the Board.

49. Mr. Hemming is not looking for an advantage. He seeks a level playing field. For the 2018 AGM – which was not contested – JAZZ.FM's Board directed that emails soliciting proxies be sent to members *on behalf of nominees* recommended by the Board.⁵⁷ The Board allowed emails soliciting proxies to be sent to select members (i.e., not everyone).⁵⁸ There is no credible justification for the selective use of member information. In one case, the Board allowed an email to be sent *on behalf of a member*

⁵⁶ Hemming Transcript at pp. 41-42, qq. 93-99, Transcript Brief, Tab 1.

⁵⁷ Cutts Transcript at p. 75, q. 249 and pp. 78-9, qq. 262-70, Transcript Brief, Tab 2.

⁵⁸ Cutts Transcript at p. 75, q. 252, Transcript Brief, Tab 2.

endorsing the Board's nominees.⁵⁹ Board nominees were even given access to members' phone numbers so they could call members to solicit their proxies.⁶⁰

50. At his cross-examination, Mr. Cutts, the interim CEO of JAZZ.FM, explained why the Board does not use mail to communicate with all members: "It's more time consuming and costly."⁶¹ Despite this, Mr. Cutts refused to agree that JAZZ.FM's Board would allow the sending of similar emails on behalf of board nominees not supported by the Board.⁶² He attempted to justify the selective use of the members' register to support nominees endorsed by the Board,⁶³ as if there is a statutory basis for the Board to use member information to play favourites in a contested election. None exists.

51. Mr. Hemming has a legitimate concern that JAZZ.FM's Board will distort facts in the upcoming proxy contest, and he will be unable to respond in a timely manner. *First*, the Board had no hesitation issuing a misleading press release after the August 31, 2018 AGM, which was contradicted by three articles from independent media outlets. *Second*, the following exchange from Mr. Cutts' cross-examination reveals the lengths to which he will distort the truth:⁶⁴

Q. Okay. Would you say it was the majority of the room?

A. No.

Q. It was the minority of the room is your position and your recollection?

A. There was some hands raised.

...

Q. Okay. There was certainly more than enough to cause an amendment to be made to the minutes, right, because an amendment was made to the minutes to remove the ---

A. Correct.

⁵⁹ Cutts Transcript at p. 86, q. 291-3, Transcript Brief, Tab 2.

⁶⁰ Cutts Transcript at p. 90, q. 302, Transcript Brief, Tab 2.

⁶¹ Cutts Transcript at p. 72, q. 240, Transcript Brief, Tab 2.

⁶² Cutts Transcript at p. 79; q. 272, Transcript Brief, Tab 2.

⁶³ Cutts Transcript at p. 79, q. 271, Transcript Brief, Tab 2.

⁶⁴ Cutts Transcript at pp. 100-1, Transcript Brief, Tab 2.

...

Q. And for an amendment to be made, just help me understand, that requires a majority vote, correct?

A. Correct.

iii. The By-Law supports Mr. Hemming’s interpretation

52. As noted above, s. 89 of the 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.⁶⁵

53. Similarly, s. 103 of the By-Law states that any notices to members, including notices of annual general meetings, may be sent via email:

103. For the purpose of sending notice to any Member, Director or officer for any meeting or otherwise, *the address* of any Member, Director or officer *shall be his last postal or e-mail address* recorded on the books of the Corporation.⁶⁶

54. These provisions in the By-Law confirm that (a) the “address” of each member as shown on the books of JAZZ.FM includes, in many instances, both a physical (postal) and electronic (email) address, and (b) “postal address” and “e-mail address” have the same status under the By-Law – both are considered an “address”.

iv. Privacy laws do not prevent disclosure sought

55. JAZZ.FM has repeatedly declined Mr. Hemming’s request for members’ telephone numbers and email addresses on the basis that “privacy laws” prevent disclosure, without specifying any applicable privacy laws. At Mr. Cutts’ cross-examination, counsel for JAZZ.FM eventually conceded that she did not believe “there

⁶⁵ Mobile phone images of By-Law No. 1, Exhibit H to Hemming Affidavit, Hemming AR Tab 2-H at p. 22.

⁶⁶ Mobile phone images of By-Law No. 1, Exhibit H to Hemming Affidavit, Hemming AR Tab 2-H, s. 103, p. 98.

are any [privacy laws] that relate” to this application.⁶⁷ No contrary information has been provided by JAZZ.FM to date.

56. In *Rodgers v. Calvert*, Justice MacKenzie rejected the corporation’s argument that giving a requesting member a copy of the membership list would in and of itself violate the privacy of its members. The Court held that any privacy concern is addressed by the provisions of s. 307(4): “the *Act* restricts the purposes for which the membership [list] can be used and makes it an offence to use the list for any restricted objective.”⁶⁸ Justice MacKenzie then proceeded to consider whether the requesting member’s right to production of the membership list engaged any other privacy legislation. In that case, the Court ruled that the not-for-profit corporation did not engage in “commercial activity” and therefore Canada’s federal privacy legislation, the *Personal Information Protection and Electronic Documents Act*,⁶⁹ did not apply.⁷⁰

57. *PIPEDA* does not apply to JAZZ.FM because JAZZ.FM is a registered charity and not engaging in commercial activities. The one exception is “the selling, bartering or leasing of donor, membership or other fundraising lists.”⁷¹ Since Mr. Hemming’s request has nothing to do with selling, bartering or leasing of the members list, this provision does not apply and *PIPEDA* is not engaged.

58. There is also no restriction to providing Mr. Hemming with members’ email

⁶⁷ Cutts Transcript at p. 68, Transcript Brief, Tab 2.

⁶⁸ *Rodgers v. Calvert*, 2004 CanLII 22082 (Ont. S.C.J.) at para. 25, Hemming BOA, Tab 5.

⁶⁹ *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 2(1) (“*PIPEDA*”).

⁷⁰ *Rodgers v. Calvert*, 2004 CanLII 22082 (Ont. S.C.J.) at para. 56, Hemming BOA, Tab 5.

⁷¹ *PIPEDA*, s. 2(1).

addresses and phone numbers under the *Canadian Anti-Spam Legislation*.⁷² The threshold question for whether *CASL* applies is whether what is proposed to be sent electronically is a “commercial electronic message”. In order to qualify as a “commercial electronic message”, the message must involve commercial activity.⁷³ Pure advocacy does not engage the definition. Mr. Hemming has stated in multiple affidavits that he intends to use the contact information of members of JAZZ.FM for valid corporate purposes only.⁷⁴

v. JAZZ.FM’s position is driven by an entrenched Board’s animus against Mr. Hemming

59. JAZZ.FM’s position that Mr. Hemming is not entitled to members’ contact information beyond their mailing address is not principled. JAZZ.FM is hiding behind a purported commitment to members that their personal information will not be shared with third parties.

60. As a threshold matter, JAZZ.FM’s so-called privacy commitment is overstated because it cannot contradict JAZZ.FM’s obligations under the *Corporations Act*. Even on JAZZ.FM’s narrow interpretation, Mr. Hemming (a “third party” according to Mr. Cutts⁷⁵) is entitled to know a member’s name and address, which flies in the face of

⁷² *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 (“*CASL*”).

⁷³ *CASL*, s. 1(2).

⁷⁴ Hemming Affidavit at para. 46, Hemming AR Tab 2; Letter from Shane D’Souza to the Board of JAZZ.FM dated August 21, 2018 and enclosed affidavit of Brian Hemming sworn August 21, 2018, Exhibit F to Hemming Affidavit, Hemming AR Tab 2-F; Letter from Shane D’Souza to the Board of JAZZ.FM dated September 7, 2018 and enclosed affidavit of Brian Hemming sworn September 6, 2018, Exhibit T to Hemming Affidavit, Hemming AR Tab 2-T.

⁷⁵ Cutts Transcript at p. 55, qq. 178-9, Transcript Brief, Tab 2.

the purported privacy commitment.⁷⁶

61. Significantly, there are no contemporaneous documents evidencing JAZZ.FM's so-called commitment to privacy. An adverse inference should be drawn in the circumstances where JAZZ.FM has been asked to produce talking scripts/notes from "donor drives" when listeners/members are asked to donate,⁷⁷ and any training material provided to JAZZ.FM employees or volunteers who interact with members to discuss the so-called privacy commitment.⁷⁸

62. JAZZ.FM's so-called privacy commitment cannot be supported by their own conduct. JAZZ.FM's privacy policy allows the sharing of members' "personal data" with "trusted third parties".⁷⁹ Even Mr. Cutts was not comfortable with the reliability of many of the trusted third parties who are provided members' personal data.⁸⁰ He nevertheless acknowledged that these third parties are "trusted" because they have agreed to not misuse members' personal data.⁸¹ Similarly, JAZZ.FM volunteers who handle members' personal information apparently sign non-disclosure agreements where, as acknowledged by Mr. Cutts, the gist of the agreement is that the members' information will not be misused.⁸² ***This is precisely what the Corporations Act requires from Mr. Hemming and what he has provided to JAZZ.FM.***

63. Ultimately, in the following telling exchange in his cross-examination, Mr. Cutts

⁷⁶ Cutts Transcript p. 57, qq. 187-8, Transcript Brief, Tab 2.

⁷⁷ Cutts Transcript at p. 50, q. 160, Transcript Brief, Tab 2.

⁷⁸ Cutts Transcript at q. 164, p. 52, Transcript Brief, Tab 2.

⁷⁹ Privacy Policy, Exhibit B to Cutts Affidavit, JAZZ.FM AR Tab 1-B; Cutts Transcript at pp. 58-60, qq. 189-94, Transcript Brief, Tab 2.

⁸⁰ Cutts Transcript at p. 61, qq. 196-200, Transcript Brief, Tab 2.

⁸¹ Cutts Transcript at p. 63, qq. 204-6, Transcript Brief, Tab 2.

⁸² Cutts Transcript at pp. 65-6, q. 212, Transcript Brief, Tab 2.

came clean on why Mr. Hemming was not being provided with members' contact information beyond their mailing address:⁸³

Q. If a member satisfies the Act and provides an affidavit that says that the information will not be misused, why does that not satisfy your concerns about, you know, privacy or advertising or misuse of the information?

A. In this particular case, Mr. Hemming said, yes, you are under attack.

Q. Okay. And by "attack," you mean he takes issue with the Board's leadership, and so that's the reason why even when an affidavit is provided -- sorry, you said -- you nodded, but you didn't say yes to ---

A. Yes.

Q. --- my previous question.

A. Yes.

Q. And so that's the reason why an affidavit by itself is not enough from your perspective?

A. Yes.

ISSUE 2: JAZZ.FM DID NOT PROVIDE THE MEMBERS' REGISTER TO MR. HEMMING IN A TIMELY FASHION

64. Section 307(1) of the *Corporations Act* requires a corporation to provide a member with a copy of the members' register *within ten days* of the date of the request, provided the requesting member provides an affidavit in compliance with s. 307(2). Section 307(5) makes it an offence for a corporation to fail to furnish a members' list in accordance with s. 307(1) when it is so required.

65. Mr. Hemming requested a copy of the members' register on September 7, 2018.⁸⁴ Mr. Hemming and his counsel did not hear from JAZZ.FM about when a copy of the members' list would be available to pick up until September 21, 2018⁸⁵—fourteen days after the date of his request.

⁸³ Cutts Transcript at p. 70, q. 224-7, Transcript Brief, Tab 2.

⁸⁴ Letter from Shane D'Souza to the Board of JAZZ.FM dated September 7, 2018 and enclosed affidavit of Brian Hemming sworn September 6, 2018, Exhibit T to Hemming Affidavit, Hemming AR Tab 2-T.

⁸⁵ Letter from John McKellar to Shane D'Souza dated September 21, 2018, Exhibit U to Hemming Affidavit, Hemming AR Tab 2-U.

66. JAZZ.FM's conduct in failing to provide Mr. Hemming with a timely copy of the updated members' register constitutes a clear breach of s. 307(1) pursuant to s. 307(5) of the *Corporations Act*. Not only that, it provided Mr. Hemming no explanation for the delay until Mr. Cutts speculated at cross-examination that Mr. Hemming's request came "immediately following [JAZZ.FM's] year end and people were unavailable to compile the list properly."⁸⁶

67. ***The declaration sought is appropriate.*** Ever since Mr. Hemming decided to take an initiative as a member, his rights have been repeatedly ignored by JAZZ.FM's Board. ***First***, he was not provided with a members list when he asked for one on August 21, even though it was readily producible from the electronic database. ***Second***, he was forced to attend the JAZZ.FM office even though there is no requirement under the *Corporations Act* or the By-Law for him to attend the office to receive the members' list.⁸⁷ The same "rule" was imposed when Mr. Hemming requested a members' list again. If accepted, JAZZ.FM's "rule" would mean that a member residing outside Toronto -- JAZZ.FM has members outside Ontario and outside Canada⁸⁸—must attend the JAZZ.FM office to obtain corporation information. ***Third***, when Mr. Hemming attended the JAZZ.FM office, he was urged by Mr. Cutts to copy the 31 page By-Law, a special resolution and the financial statements by hand.⁸⁹ The *Corporations Act* requires the corporation to provide the information sought to the requesting member for

⁸⁶ Cutts Transcript at p. 111, q. 388, Transcript Brief, Tab 2.

⁸⁷ Cutts Transcript at p. 27, q. 79 and p. 29, q. 91, Transcript Brief, Tab 2.

⁸⁸ Cutts Transcript at p. 32, q. 103-4, Transcript Brief, Tab 2.

⁸⁹ Cutts Transcript at p. 38, q. 123, Transcript Brief, Tab 2.

reasonable charges, which Mr. Hemming offered.⁹⁰ *JAZZ.FM's pattern of wilful disregard for Mr. Hemming's rights is deserving of sanction by this Court.*

ISSUE 3: JAZZ.FM FAILED TO PROVIDE MEMBERS WITH TIMELY FINANCIAL STATEMENTS PRIOR TO THE 2018 AGM

68. Section 97(1) of the *Corporations Act* requires companies to “lay before each annual meeting of shareholders” a financial statement ended not more than six months before that annual meeting. In other words, the annual meeting of shareholders must be held within six months of the financial statement in order to comply with s. 97(1).

69. The financial statements provided to members who attended the 2018 AGM were a year old—six months out of date according to the timeline in s. 97(1). The 2018 AGM should have been held within six months of August 31, 2017, the last fiscal year end, in order to comply with s. 97(1) of the *Corporations Act*. At the 2018 AGM, Mr. McGown admitted that the corporation was technically not compliant with the *Corporations Act* in this respect and in the future, AGMs would be held within six months of August 31.⁹¹

70. Mr. Cutts believes that the usefulness of providing stale financial statements to members is “open to debate”.⁹² *It is not, according to the Corporations Act, which is why a declaration that JAZZ.FM breached its statutory obligation is appropriate.*

⁹⁰ Cutts Transcript at p. 38, q. 124 and p. 38, q. 126, Transcript Brief, Tab 2.

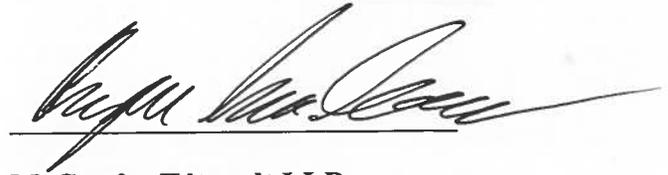
⁹¹ Hemming Affidavit at para. 28, Hemming AR Tab 2.

⁹² Cutts Transcript at p. 12-3, q. 28, Transcript Brief, Tab 2.

PART V—ORDER REQUESTED

71. Mr. Hemming respectfully requests:
- (a) An Order directing that JAZZ.FM provide him with a full and complete copy of the corporation's members' register, including the postal address, email address, and telephone number of each member;
 - (b) A Declaration that JAZZ.FM committed offence under s. 307(5) of the *Corporations Act* by failing to provide Mr. Hemming with a list of all members of JAZZ.FM on or by September 17, 2018; and
 - (c) A Declaration that JAZZ.FM breached s. 97(1) of the *Corporations Act* by failing to provide members with timely financial statements when it held the 2018 AGM.
72. Mr. Hemming also respectfully requests his costs of this application.

November 26, 2018



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Schedule “A” – List of Authorities

Tab	Authority
1.	<i>Jacobs v. Ontario Medical Association</i> , 2016 ONSC 4977 (S.C.J.).
2.	<i>Lawrence v. Toronto Humane Society</i> , 2006 CanLII 20224 (Ont. C.A.).
3.	<i>BCE Inc., Re</i> , 2008 SCC 69.
4.	<i>Ewart v. Higson-Smith</i> , 2009 CanLII 38517 (Ont. S.C.J.).
5.	<i>Rodgers v. Calvert</i> , 2004 CanLII 22082 (Ont. S.C.J.).

Schedule “B” – Relevant Statutes

1. *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.

Definitions

1 (1) The following definitions apply in this Act.

Meaning of commercial electronic message

(2) For the purposes of this Act, a commercial electronic message is an electronic message that, having regard to the content of the message, the hyperlinks in the message to content on a website or other database, or the contact information contained in the message, it would be reasonable to conclude has as its purpose, or one of its purposes, to encourage participation in a commercial activity, including an electronic message that

- (a) offers to purchase, sell, barter or lease a product, goods, a service, land or an interest or right in land;
- (b) offers to provide a business, investment or gaming opportunity;\
- (c) advertises or promotes anything referred to in paragraph (a) or (b); or
- (d) promotes a person, including the public image of a person, as being a person who does anything referred to in any of paragraphs (a) to (c), or who intends to do so.

2. *Corporations Act*, R.S.O. 1990, c. C.38

Documents and registers

300 (1) A corporation shall cause the following documents and registers to be kept:

1. A copy of the letters patent and of any supplementary letters patent issued to the corporation and of the memorandum of agreement, if any, or, if incorporated by special Act, a copy of the Act.
2. All by-laws and special resolutions of the corporation.
3. A register of shareholders or members in which are set out the names alphabetically arranged of all persons who are shareholders or members or have been within ten years shareholders or members of the corporation and the address of every such person while a shareholder or member and, in the case of a company, in which are set out also the number and class of shares held by each shareholder and the amounts paid up and remaining unpaid on their respective shares.
4. A register of directors in which are set out the names and addresses of all persons who are or have been directors of the corporation with the several dates on which each became or ceased to be a director.
5. A register of ownership interests in land complying with section 300.1. R.S.O. 1990, c. C.38, s. 300; 2004, c. 19, s. 10 (5); 2015, c. 38, Sched. 7, s. 47 (1).

Records to be open for inspection

305 (1) The minutes of proceedings at meetings of shareholders or members mentioned in section 299 and the documents and registers mentioned in section 41 and subsection

300 (1), during the normal business hours of the corporation, shall, at the place or places where they are kept, be open to inspection by the shareholders or members and creditors of the corporation or their agents or legal representatives, and any of them may make extracts therefrom. R.S.O. 1990, c. C.38, s. 305 (1); 2015, c. 38, Sched. 7, s. 47 (8).

List of shareholders

306 (1) No shareholder or member or creditor or the agent or legal representative of any of them shall make or cause to be made a list of all or any of the shareholders or members of the corporation, unless the person has filed with the corporation or its agent an affidavit of such shareholder, member or creditor in the following form in English or French, and, where the shareholder, member or creditor is a corporation, the affidavit shall be made by the president or other officer authorized by resolution of the board of directors of such corporation:

Form of Affidavit

Province of Ontario In the matter of
County of *(Insert name of corporation)*

I, of the of in the of
.....

make oath and say (*or affirm*):

1. I am a shareholder (*or member or creditor*) of the above-named corporation.
(Where the shareholder, member or creditor is a corporation, indicate office and authority of deponent in paragraph 1.)
2. I am applying to make a list of the shareholders (*or members*) of the above-named corporation.
3. I require the list of shareholders (*or members*) only for purposes connected with the above-named corporation.
4. The list of shareholders (*or members*) and the information contained therein will be used only for purposes connected with the above-named corporation.

SWORN, etc.

Where list of shareholders to be furnished

307 (1) Any person, upon payment of a reasonable charge therefor and upon filing with the corporation or its agent the affidavit referred to in subsection (2), may require a corporation, other than a private company, or its transfer agent to furnish within ten days from the filing of such affidavit a list setting out the names alphabetically arranged of all persons who are shareholders or members of the corporation, the number of shares owned by each such person and the address of each such person as shown on the books of the corporation made up to a date not more than ten days prior to the date of filing the affidavit.

Offence

(5) Every corporation or transfer agent that fails to furnish a list in accordance with subsection (1) when so required is guilty of an offence and on conviction is liable to a fine of not more than \$1,000, and every director or officer of such corporation or transfer agent who authorized, permitted or acquiesced in such offence is also guilty of an offence and on conviction is liable to a like fine.

3. *Cutting Unnecessary Red Tape Act, 2017*, SO 2017, c. 20 - Bill 154, Sched 7.

Commencement

85 (1) Subject to subsections (2) to (6), this Schedule comes into force on a day to be named by proclamation of the Lieutenant Governor.

(2) Subsections 3 (2), 4 (2), 64 (3) and 68 (6) come into force on the 25th anniversary of the day subsection 3 (1) comes into force.

(3) Sections 13 and 23, subsections 28 (1), 31 (1), 35 (1) and 37 (1), section 47, subsections 58 (1) and 59 (1), section 60, subsections 64 (1) and 68 (2), sections 74 and 75, subsections 76 (1), 82 (1) and 84 (1) come into force on the day the *Cutting Unnecessary Red Tape Act, 2017* receives Royal Assent.

(4) Subsections 33 (1), 34 (1), 36 (1), 38 (1), 64 (4) and 72 (1) and (2), sections 77 to 81 and 83 come into force on the 60th day after the day the *Cutting Unnecessary Red Tape Act, 2017* receives Royal Assent.

(5) Subsections 28 (2), 31 (2), 33 (2), 34 (2), 35 (2), 36 (2), 37 (2), 38 (2), 59 (2), 64 (5), 72 (3) and (4), 76 (2), 82 (2) and 84 (2) come into force on the day subsection 4 (1) of the *Not-for-Profit Corporations Act, 2010* comes into force.

(6) Subsection 72 (6) comes into force on the third anniversary of the day the *Cutting Unnecessary Red Tape Act, 2017* receives Royal Assent.

4. *Electronic Commerce Act, 2000*, S.O. 2000, c. 17.

Legal recognition of electronic information and documents

4. Information or a document to which this Act applies is not invalid or unenforceable by reason only of being in electronic form. 2000, c. 17, s. 4.

Legal requirement that information or document be in writing

5. A legal requirement that information or a document be in writing is satisfied by information or a document that is in electronic form if it is accessible so as to be usable for subsequent reference. 2000, c. 17, s. 5.

Legal requirement to provide information or document in writing

6. (1) A legal requirement that a person provide information or a document in writing to another person is satisfied by the provision of the information or document in an electronic form that is,
- (a) accessible by the other person so as to be usable for subsequent reference; and
 - (b) capable of being retained by the other person. 2000, c. 17, s. 6 (1).

6. *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F.

Effect of repeal and revocation

51 (1) The repeal of an Act or the revocation of a regulation does not,

- (a) affect the previous operation of the repealed or revoked Act or regulation;
- (b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;

- (c) affect an offence committed against the repealed or revoked Act or regulation, or any penalty, forfeiture or punishment incurred in connection with the offence;
- (d) affect an investigation, proceeding or remedy in respect of,
 - (i) a right, privilege, obligation or liability described in clause (b), or
 - (ii) a penalty, forfeiture or punishment described in clause (c). 2006, c. 21, Sched. F, s. 51 (1).

Same

(2) An investigation, proceeding or remedy described in clause (1) (d) may be commenced, continued and enforced as if the Act or regulation had not been repealed or revoked. 2006, c. 21, Sched. F, s. 51 (2).

7. *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

Definitions

2 (1) The definitions in this subsection apply in this Part.

commercial activity means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

BRIAN HEMMING JAZZ.FM 91
Applicant and Respondent

Court File No.: CV-18-00606192-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

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