

SAVE JAZZ.FM91

JAZZ.FM91 ADMONISHED FOR BREACHING COURT ORDER TO PROVIDE EMAIL ADDRESSES

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Divisional Court Refuses to Issue Stay Order Sought by JAZZ.FM91 After Breaching Order

TORONTO, December 22, 2018 – On December 21, the Divisional Court admonished Toronto jazz station JAZZ.FM91 for breaching the Superior Court of Justice Order (“Email Order”) handed down on Friday, December 14.

The Email Order required JAZZ.FM91 to provide the email addresses of donor members to Brian Hemming by Thursday, December 20 (see [news release](#) on Email Order). The Board caused JAZZ.FM91’s failure to comply with the Email Order and instead issued a statement on the evening of December 20 stating it would appeal the Email Order. As noted below, the Board’s statement to members was misleading. JAZZ.FM91 breached the Email Order by not seeking a stay of the Email Order or filing an appeal before the December 20 deadline.

In an unethical manoeuvre that backfired, two employees of JAZZ.FM91 -- Sharda Prashad, VP Finance & Operations and Suzanne Belanger, Assistant Director of Finance & Operations – attended the Divisional Court without notice to Mr. Hemming’s counsel. These employees also represented themselves as “officers” of JAZZ.FM91. Tellingly, JAZZ.FM91 was not represented by legal counsel or any Board member.

Justice Myers of the Divisional Court heard JAZZ.FM91’s request for a stay of the Email Order without Mr. Hemming’s counsel being present. In his endorsement denying the stay, His Honour noted: ([Click](#) to see Unofficial Transcript)

- JAZZ.FM91’s breach of the Email Order was of its “own making”.
- “Non-compliance with a Court Order can be a serious matter.”
- Justice Dunphy (who issued the December 14 Email Order) “specifically advised the parties that they could reduce acrimony and let democracy play out so that members can fairly decide the issues.” The Board of JAZZ.FM91 “plainly ignored this admonition by moving aggressively and improperly without notice today.”
- There was no prejudice to the station from comments on social media since “the answer in a democracy is more and better information”, and “[l]evelling the playing field for dissidents enhances member democracy. It is not harm”.
- The Board of JAZZ.FM91 was “making efforts to “frustrate” [Mr. Hemming’s] ability to communicate effectively”.
- The Board of JAZZ.FM91 could have and should have provided notice to Mr. Hemming about its intention to seek a stay and attend Court on December 21.
- Ms. Prashad was directed to call Mr. Hemming’s counsel. In breach of this direction, Ms. Prashad emailed Mr. Hemming’s counsel and then failed to call him. In fact, despite several attempts to contact Ms. Prashad (and the station’s assumed legal counsel), the courtesy of a response was not forthcoming from Ms. Prashad or David McGown. ([Click](#) to see emails).

Late on December 21, JAZZ.FM91 abandoned its misguided proposed appeal and provided Mr. Hemming with the email addresses ordered by the Email Order. (It has still not paid Mr. Hemming's costs). In its statement to members, the Board of JAZZ.FM91 desperately tried to re-argue a position that has been resoundingly rejected by two levels of Courts in Ontario.

The most disturbing comment in JAZZ.FM91's email to members is the statement from the Chair of JAZZ.FM91 that "JAZZ.FM91 regrets that the Court has chosen to place less importance on privacy than we do." This is highly inflammatory language and disrespectful of the Courts and to the judicial process. It also contradicts a factual finding by the Superior Court that the Board was not motivated by members' privacy concerns.

Why is the Board misleading members about the December 14 hearing?

JAZZ.FM91 has continued to mislead members about the outcome of the hearing on December 14 and the bases for its appeal. For instance:

- The Board asserts that "[t]he judge found for Mr. Hemming on only one of his four claims".
 - The main relief sought by Mr. Hemming was members' email addresses. He withdrew his request for telephone numbers at the hearing (i.e., this issue was not decided).
 - The Court did not grant two declarations sought by Mr. Hemming because although the facts supported the declarations, they had no practical import. These declarations were (a) the Board had not given Mr. Hemming members' email addresses within 10 days, as required by the *Corporations Act* (which is demonstrably true); and (b) the Board did not call the 2018 AGM and present financial statements within six months of JAZZ.FM91's fiscal year-end (which the Board admitted at the 2018 AGM). The fact that these declarations were not granted is not a "win" for the Board. To suggest otherwise is misleading.
- The Board asserts that Mr. Hemming was awarded "costs ... less than normal". Again, this is misleading. Mr. Hemming sought just over \$30,000 in costs. The Board argued that Mr. Hemming should get \$0. The Court awarded Mr. Hemming \$20,000 after commenting on the Board's improper tactics and motives.
- The Board asserts that "[t]he interpretation of the Ontario *Corporations Act* as requiring provision of member emails was unprecedented." This, too, is highly misleading. The Divisional Court rejected the Board's position that the Email Order was "unprecedented" since it flies in the face of "an obvious interpretation".
- The Board asserts that "[t]he judge was very swift in his handling of the case, and did not hear full oral submissions from either side but had reviewed the written material". If anything, this fact demonstrates how devoid of merit the Board's position truly was.
- The Board asserts that "[t]he station is concerned about issues related to the privacy of donors and giving private information to people with no fiduciary responsibility". Again, this is misleading and disrespectful of the judicial process since Justice Dunphy expressly found as a fact that the Board was not motivated by member's privacy concerns.

Why is the Board misleading members about its legal advice?

The Board's emails to members on December 20 and 21 are misleading for another key reason. The Board intentionally left members with the impression that the Board's decision to appeal was informed by legal considerations raised by its lawyer or "in-house resources". In its December 20 email:

1. The Board did not produce the entire email/letter from its counsel. Members should demand that the Board acknowledge this fact or produce the entire letter. The Board cannot assert privilege over the letter since it has waived privilege.
2. The Board failed to disclose that its counsel did not recommend an appeal of the Email Order. This is pretty obvious from the context of the (incomplete) letter and the fact that counsel did not represent the Board of JAZZ.FM91 in its misadventure at the Divisional Court on December 21. Members should demand that the Board acknowledge this fact.
3. The Board referenced the use of "in-house resources" to mean the use of a Board member who is a lawyer, Reagan Ruslim. Mr. Ruslim -- who was only appointed to the Board in November -- resigned on December 21. Members can draw their own conclusions about the timing of this resignation in light of the Board's tactical and unethical legal maneuvers to prevent member democracy.

The Board should promptly address these misrepresentations to members.

Mr. Hemming intends to exercise his democratic right by seeking support from donor members to requisition a meeting of members to replace the current Board with more qualified candidates proposed by Save JAZZ.FM91.

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