

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N :

BRIAN HEMMING

Applicant

- and -

JAZZ.FM 91 INC.

Respondent

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

**REPLY FACTUM OF THE APPLICANT
BRIAN HEMMING**

December 10, 2018

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank
Tower
Toronto ON M5K 1E6

Shane D'Souza LS#: 58241G
sdsouza@mccarthy.ca
Tel: 416-601-8196

Ryan MacIsaac LS#: 69514A
rmacisaac@mccarthy.ca
Tel: 416-601-8135

Meghan S. Bridges LS#: 68360S
mbridges@mccarthy.ca
Tel: 416-601-7537
Fax: 416-868-0673

Lawyers for the Applicant, Brian
Hemming

TO: **FORBES CHOCHLA LLP**
Barristers and Solicitors
439 University Avenue
Suite 2300
Toronto ON M5G 1Y8

Natalie M. Leon LS#: 37890K
nleon@forbeschochla.com
Tel: (416) 596-7724
Fax: (416) 596-7562

Lawyers for the Respondent, JAZZ.FM 91 Inc.

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REPLY FACTUM¹

A. JAZZ.FM’s concern about privacy rights is disingenuous

1. JAZZ.FM argues that “the propensity for abuse of email addresses and anti-spam and privacy laws... set the tone for the current electronic communication environment.”²

This is all rhetoric.

- (a) JAZZ.FM has cited no privacy laws.³
- (b) JAZZ.FM’s own privacy policy allows sharing members’ confidential information with “trusted” third parties.⁴
- (c) JAZZ.FM has failed to answer undertaking requests (including those given to Mr. Hemming) about:
 - (i) its purported communications to its members about protecting their privacy;⁵
 - (ii) its purported privacy-related training materials and on-air scripts;⁶
 - (iii) exceptions to JAZZ.FM’s privacy policy;⁷
 - (iv) who constitutes a “trusted third party” under that policy;⁸ and
 - (v) a copy of *The Jazz Messenger* newsletter which—according to

¹ All capitalized terms in this Reply Factum bear the same meaning as in Mr. Hemming’s initial factum of November 26, 2018 (“Hemming Initial Factum”), unless otherwise noted.

² Responding Factum of JAZZ.FM dated December 6, 2018 (“JAZZ.FM Factum”) at para 27.

³ Letter from John McKellar to Shane D’Souza dated September 21, 2018, Exhibit U to Hemming Affidavit, Hemming AR Tab 2-U; Cutts Transcript at p. 68, Transcript Brief, Tab 2.

⁴ 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.

⁵ Cutts Transcript at pp. 50–51, undertakings no. 2–3, Transcript Brief, Tab 2.

⁶ Cutts Transcript at pp. 50–51, undertakings no. 2–3, Transcript Brief, Tab 2.

⁷ Cutts Transcript at pp. 53–54, 60–63, undertakings no. 4–7, Transcript Brief, Tab 2.

⁸ Cutts Transcript at pp. 53–54, undertaking no. 4, Transcript Brief, Tab 2.

Mr. Cutts' affidavit—includes a privacy disclaimer.⁹

The reasonable inference from JAZZ.FM's failure to provide any undertaking responses is that Mr. Cutts' bald statements about privacy-related promises to members are not supported by contemporaneous documents.¹⁰

- (d) JAZZ.FM has provided no evidence that Mr. Hemming lacks *bona fides* and has or will misuse member information.
- (e) JAZZ.FM has not explained why Mr. Hemming's affidavit undertaking under the *Corporations Act* is not sufficient to address JAZZ.FM's purported concern about abuse.

2. As a matter of common sense, the Court can take judicial notice of the fact that email and phone providers offer means to block unwanted communications. If any JAZZ.FM member believes Mr. Hemming's emails or calls to them will be abusive, they can block him out. That is entirely a member's choice.

3. In any event, the *Corporations Act* provides built-in protections against misuse of member information. Subsection 307(4) states:

Offence

307 (4) Every person who uses a list of shareholders or members of a corporation obtained under this section,

- (a) for the purpose of delivering or sending to all or any of such shareholders or members advertising or other printed matter relating to shares or securities other than the shares or securities of the corporation;
- or

- (b) for any purpose not connected with the corporation,

is guilty of an offence and on conviction is liable to a fine of not more than \$1,000.

⁹ Cutts Transcript at pp. 63–65, undertakings no. 8–9, Transcript Brief, Tab 2.

¹⁰ See Cutts Affidavit at paras 9–13; JAZZ.FM Factum at para 8.

4. Section 308 states:

308 Every person who offers for sale or sells or purchases or otherwise traffics in a list or a copy of a list of all or any of the shareholders or members of a corporation is guilty of an offence and on conviction is liable to a fine of not more than \$1,000, and, where such person is a corporation, every director or officer of such corporation who authorized, permitted or acquiesced in such offence is also guilty of an offence and on conviction is liable to a like fine.

B. Legislation proposed in Ontario and Australia has no bearing here

5. JAZZ.FM relies on the *Cutting Unnecessary Red Tape Act, 2017* to argue that Mr. Hemming is not entitled to email addresses.¹¹ This argument is flawed for several reasons. As noted in Mr. Hemming’s initial factum:

- (a) None of the relevant proposed amendments to the *Corporations Act* have been proclaimed into force nor are they scheduled to come into force;¹²
- (b) The *Legislation Act, 2006* specifies that the amendment of an Act “does not imply anything about the previous state of the law,”¹³ nor does it imply “that the previous state of the law was different”;¹⁴ and
- (c) 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.

6. Similarly, JAZZ.FM’s reliance on the law of Australia is unpersuasive.¹⁵ There is no expert evidence on whether or how the Australia courts have interpreted that country’s corporations statute. In any event, the fact that the Parliament of Australia may, in the future, require Australian corporations to maintain email addresses in their

¹¹ JAZZ.FM Factum at para 21.

¹² *Cutting Unnecessary Red Tape Act, 2017*, SO 2017, c. 20 - Bill 154, Sched 7, s 85.

¹³ *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 56(1).

¹⁴ *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 56(2).

¹⁵ JAZZ.FM Factum at paras 25–26.

members' register has no bearing here. JAZZ.FM, by virtue of section 89 of its By-Law, is *already* required to maintain email addresses in its members' register.¹⁶ Australia's law is simply catching up to the state of affairs at JAZZ.FM.

C. Email addresses have been disclosed in a proxy contest

7. JAZZ.FM cites *Jacobs v. Ontario Medical Association* to argue that the Court did not order email addresses be disclosed.¹⁷ This is technically accurate but it misses the point. In *Jacobs*, the non-profit corporation was *embroiled in a proxy contest*. With the benefit of legal advice, the corporation *voluntarily provided* a requesting member with a membership list that included the names, addresses, and *email addresses* of members.¹⁸ This case demonstrates that email addresses have been provided by a corporation engaged in a proxy contest, even though there were (as here) tactical reasons to refuse doing so.

8. In *Jacobs*, the Court declined to order phone numbers to be disclosed. That outcome is distinguishable from the current circumstances because there is no reference in *Jacobs* to the corporation's by-laws requiring it to maintain members' phone numbers in the members' registry. In the present case, JAZZ.FM is required to keep each member's phone number (and email address) in the register.¹⁹ JAZZ.FM's register has the information Mr. Hemming is seeking because it is mandated to collect and maintain this information.

¹⁶ Mobile phone images of By-Law No. 1, Exhibit H to Hemming Affidavit, Hemming AR Tab 2-H at p. 22; see Hemming Initial Factum at paras 52–54.

¹⁷ JAZZ.FM Factum at para 24.

¹⁸ *Jacobs v. Ontario Medical Association*, 2016 ONSC 4977 (S.C.J.) at para. 44, Initial Brief of Authorities of the Applicant, Brian Hemming (“Hemming BOA”) at Tab 1.

¹⁹ Mobile phone images of By-Law No. 1, Exhibit H to Hemming Affidavit, Hemming AR Tab 2-H at p. 22, s. 89.

D. JAZZ.FM’s Board is not entitled to deference for its statutory interpretation

9. JAZZ.FM argues that the Court should not interfere with its “internal affairs” and in particular, its interpretation of the *Corporations Act*.²⁰ This is a thinly veiled business judgment argument—JAZZ.FM is arguing that the statutory interpretation by its directors is entitled to deference from the Court. This is wrong at law. In *Kerr v. Danier Leather Inc.*, the Supreme Court of Canada definitely held that legal obligations are not subject to the business judgment rule.²¹ The same principle applies here. JAZZ.FM and its directors have no particular expertise in statutory interpretation.

10. Even the authorities cited by JAZZ.FM for this “discretion” point are easily distinguishable. *Lee v. Lee’s Benevolent Assn of Ontario* involved a complaint that the non-profit corporation had not technically complied with its internal by-laws for the conduct of an election of directors.²² The Court declined to enforce strict compliance with the corporation’s by-laws where it did not go to the heart of the electoral process. That is different than the present case, which involves interpretation of a provincial statute.

11. The other case, *Scharafanowicz v. Hamilton Regional Indian Centre*, involved an incomprehensible request by a self-represented applicant who alleged all manner of violations of the *Corporations Act* and the non-profit corporation’s by-laws.²³ The Court

²⁰ JAZZ.FM Factum at paras. 28, 29.

²¹ *Kerr v. Danier Leather Inc.*, 2007 SCC 44 at paras. 54-57, [2007] 3 SCR 331, Hemming Reply BOA Tab 2.

²² *Lee v. Lee’s Benevolent Assn of Ontario*, 2004 CarswellOnt 8790 (S.C.J.), JAZZ.FM BOA Tab 1. Note that the Divisional Court held that the first sentence of para 12 of the lower decision was *obiter dicta*, although it affirmed the last sentence of para 12: 2005 CarswellOnt 180 (Div. Ct.), Hemming Reply BOA Tab 1.

²³ *Scharafanowicz v. Hamilton Regional Indian Centre*, 2011 CarswellOnt 12915 (S.C.J.), JAZZ.FM BOA Tab 2.

declined to intervene in the internal workings of the corporation regarding *the enactment* of certain by-laws, the keeping of board minutes, and similar grievances. *Scharafanowicz* has no bearing on this litigation.

12. If JAZZ.FM is right that its directors' statutory interpretation is entitled to discretion—it is not—then the Court of Appeal in *Lawrence v. Toronto Humane Society* would not have ordered a charitable organization to disclose a list of its members to a union official who wanted to use it in relation to the management and labour relations policies and practices of the organization.²⁴

13. Similarly, in *Rodgers v. Calvert*, the Superior Court of Justice would not have ordered hunting and fishing association to provide a members' list to a member who had concerns about the association's management.²⁵ But it did.

E. The declaratory remedies sought are appropriate

14. JAZZ.FM argues that the relief sought by Mr. Hemming stemming from its uncontested breaches of the *Corporations Act* is “much ado about nothing”.²⁶ It is precisely this dismissive attitude towards compliance with the *Corporations Act* and good governance that had spurred Mr. Hemming into taking on the Board. Of course, the relief sought is necessary. Otherwise, the Board will continue breaching the *Corporations Act* without consequence.

15. This Honourable Court clearly has the jurisdiction to grant declaratory relief,

²⁴ *Lawrence v. Toronto Humane Society*, 2006 CanLII 20224 (Ont. C.A.), Hemming BOA Tab 2.

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

²⁶ JAZZ.FM Factum at para. 30.

“whether or not any consequential relief is or could be claimed.”²⁷ The purpose of the declaratory relief sought by Mr. Hemming is:

- (a) To establish that Mr. Hemming (and by implication, his fellow JAZZ.FM members) has a right to access complete members’ lists within 10 days of filing an affidavit per s. 307 of the *Corporations Act*, and that JAZZ.FM denied that right without good reason; and
- (b) To establish that Mr. Hemming (and by implication, his fellow JAZZ.FM members) has a right to access financial statements that are not more than 6 months old at each AGM per s. 97(1) of the *Corporations Act*, and that JAZZ.FM denied that right.

16. The issues raised by Mr. Hemming for declaratory relief are real and not theoretical. Mr. Hemming has a genuine interest in their resolution.

17. The declarations sought will also inform the parties’ conduct going forward. As noted in Mr. Hemming’s initial factum (para. 67), JAZZ.FM’s pattern of wilful disregard for Mr. Hemming’s rights is deserving of sanction by this Court. Mr. Cutts’ own evidence suggests he is influenced by his perception that Mr. Hemming is attacking him.²⁸ This should not be acceptable, as noted by the Court of Appeal in the context of a non-profit corporation that refused to provide a members’ list:

Ill feelings and a desire to change respondent’s management and policies do not render petitioners’ request improper, nor do efforts to communicate with the members and to investigate the conduct of management. ...²⁹

²⁷ *Courts of Justice Act*, RSO 1990, c C.43, s. 97.

²⁸ Cutts Transcript at p. 70, q. 224-7, Transcript Brief, Tab 2.

²⁹ *Lawrence v. Toronto Humane Society*, 2006 CanLII 20224 at para 98 (Ont. C.A.), Hemming BOA Tab 2, quoting with approval *Mayer v. National Arts Club* (1993), 596 N.Y.S. 2d 537 at p. 539 (S.C. App. Div.).

F. JAZZ.FM’s attack on Mr. Hemming is unsupported by evidence

18. JAZZ.FM suggests that Mr. Hemming’s concerns about its financial circumstances are unwarranted.³⁰ The merits of Mr. Hemming’s concerns are not relevant to the issues before this Court. In any event, JAZZ.FM has failed to provide any affirmative evidence that Mr. Hemming’s concerns are unfounded. Mr. Cutts could have, but did not, testify that JAZZ.FM was not experiencing a loss of financial donations and advertisers. Having insulated itself from scrutiny on this issue, JAZZ.FM should not attack Mr. Hemming’s genuine concerns.

G. Mr. Hemming’s rights are not qualified by his “online presence”

19. JAZZ.FM argues that Mr. Hemming “has had the members’ names and addresses of all members for almost 3 months.”³¹ This is misleading to the extent it suggests that Mr. Hemming has had three months to contact members. Mr. Hemming received a members’ list for members who could vote at the 2019 AGM in late September. It was incomplete because it did not provide members’ email addresses and phone numbers. Litigation commenced days later for a complete list.

20. JAZZ.FM argues that Mr. Hemming has an “online presence” and has been covered by “numerous newspaper articles”,³² implying that this somehow qualifies Mr. Hemming’s rights under the *Corporations Act*. It does not. Mr. Hemming’s efforts to contact members, while commendable, are no match for the Board’s ability to send emails to 2000+ members, cost-free, at its discretion. Common sense dictates that Mr. Hemming does not control newspaper stories, and in any event would be unable to

³⁰ JAZZ.FM Factum at para. 18.

³¹ JAZZ.FM Factum at para. 30.

³² JAZZ.FM Factum at para. 30.

respond via post in a timely manner to email missives from the Board to members.

21. JAZZ.FM's suggestion that Mr. Hemming is better off on his own rather than "sending emails to individuals that could be sent to outdated email addresses or lost in spam folders"³³ is not grounded in any evidence. In any event, this rationale flies in the face of the Board's almost exclusive reliance on emails to provide its members with notice of the 2018 AGM and to solicit proxies for its nominees.

December 10, 2018



McCarthy Tétrault LLP
 Suite 5300, Toronto Dominion Bank
 Tower
 Toronto ON M5K 1E6

Shane D'Souza LS#: 58241G

sdsouza@mccarthy.ca

Ryan MacIsaac LS#: 69514A

rmacisaac@mccarthy.ca

Meghan S. Bridges LS#: 68360S

mbridges@mccarthy.ca

Tel: 416-601-7537

Fax: 416-868-0673

Lawyers for the Applicant, Brian
 Hemming

³³ JAZZ.FM Factum at para. 30.

SCHEDULE “A” – LIST OF AUTHORITIES

Authority	Location
<i>Jacobs v. Ontario Medical Association</i> , 2016 ONSC 4977	Hemming BOA Tab 1
<i>Lee v. Lee’s Benevolent Assn of Ontario</i> , 2004 CarswellOnt 8790 (S.C.J.)	JAZZ.FM BOA Tab 1
<i>Lee v. Lee’s Benevolent Assn of Ontario</i> , 2005 CarswellOnt 180 (Div. Ct.)	Hemming Reply BOA Tab 1
<i>Scharafanowicz v. Hamilton Regional Indian Centre</i> , 2011 CarswellOnt 12915 (S.C.J.)	JAZZ.FM BOA Tab 2
<i>Kerr v. Danier Leather Inc.</i> , [2007] 3 SCR 331	Hemming Reply BOA Tab 2
<i>Lawrence v. Toronto Humane Society</i> , 2006 CanLII 20224 (Ont CA)	Hemming BOA Tab 2
<i>Rodgers v. Calvert</i> , 2004 CanLII 22082 (Ont. S.C.J.)	Hemming BOA Tab 5

SCHEDULE “B” – RELEVANT STATUTES

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.

Transition

(2) If a corporation is incorporated or continued under this Act or a predecessor of it before the day section 2 of the *Forfeited Corporate Property Act, 2015* comes into force, paragraph 5 of subsection (1) applies to the corporation on and after the second anniversary of the coming into force of that section, in respect of its ownership interests in land on and after that second anniversary.

Same

(3) If a corporation is incorporated or continued under this Act on or after the day section 2 of the *Forfeited Corporate Property Act, 2015* comes into force, paragraph 5 of subsection (1) applies to the corporation on and after the day it is incorporated or continued, in respect of its ownership interests in land on and after the day it is incorporated or continued.

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.

Affidavit

(2) The affidavit referred to in subsection (1) shall be made by the applicant and shall be in the following form in English or French:

Form of Affidavit

Province of Ontario
County of

In the matter of
(*Insert name of corporation*)

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

make oath and say (*or affirm*):

(*Where the applicant is a corporation, indicate office and authority of deponent.*)

1. I hereby apply for a list of the shareholders (*or members*) of the above-named corporation.

2. I require the list of shareholders (*or members*) only for purposes connected with the above-named corporation.

3. 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.

Idem, where applicant a corporation

(3) Where the applicant 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.

Offence

(4) Every person who uses a list of shareholders or members of a corporation obtained under this section,

(a) for the purpose of delivering or sending to all or any of such shareholders or members advertising or other printed matter relating to shares or securities other than the shares or securities of the corporation; or

(b) for any purpose not connected with the corporation,

is guilty of an offence and on conviction is liable to a fine of not more than \$1,000.

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.

Interpretation

(6) Purposes connected with the corporation include any effort to influence the voting of shareholders or members at any meeting of the corporation, any offer to acquire shares

in the corporation or any effort to effect an amalgamation or reorganization and any other purpose approved by the Minister. R.S.O. 1990, c. C.38, s. 307.

Courts of Justice Act, RSO 1990, c C.43

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

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

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.

Legislation Act, 2006, SO 2006, c 21, Sched F

No implication

56 (1) The repeal, revocation or amendment of an Act or regulation does not imply anything about the previous state of the law or that the Act or regulation was previously in force.

Same

(2) The amendment of an Act or regulation does not imply that the previous state of the law was different.

BRIAN HEMMING JAZZ.FM 91
Applicant and Respondent

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

**ONTARIO
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COMMERCIAL LIST**

Proceeding commenced at TORONTO

**REPLY FACTUM OF THE APPLICANT,
BRIAN HEMMING**

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Shane D'Souza LS#: 58241G
sdsouza@mccarthy.ca
Tel: 416-601-8196

Ryan MacIsaac LS#: 69514A
rmacisaac@mccarthy.ca
Tel: 416-601-8135

Meghan S. Bridges LS#: 68360S
mbridges@mccarthy.ca
Tel: 416-601-7537
Fax: 416-868-0673

Lawyers for the Applicant, Brian Hemming