

**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

RESPONDING PARTY'S FACTUM

December 6, 2018

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PART I - OVERVIEW

1. The Applicant has been on a mission to “save” Jazz.FM91 Inc. (“Jazz.FM”) which, in his view, involves a replacement of some or all of the current Board of Directors with individuals selected by him (and others from his group). In order to achieve his end result, he requested a list of members including their email addresses and telephone numbers. Jazz.FM consulted with its corporate legal counsel and was advised that the *Corporations Act*, R.S.O. 1990, c. C 38 (“*Corporations Act*”) does not stipulate or require the release of email addresses or telephone numbers. As such, Jazz.FM complied with the *Corporations Act* and provided membership lists with names and addresses to the Applicant. The Applicant commenced this Application on an urgent basis and Jazz.FM has unequivocally complied with the purported urgency of this Application. Jazz.FM simply takes the position that there is no legal authority for it to provide the requested email and telephone number information that it has in its computer database for some of its members. It further takes the position that the balance of relief requested by the Applicant is unnecessary and redundant.

PART II - FACTS

2. Jazz.FM is a not-for-profit arts charitable organization that is governed by a Board of Directors consisting of 10 elected Directors and one President and Chief Executive Officer of the corporation. According to By-Law No. 1, the Directors serve on the Board without remuneration except for the President and Chief Executive Officer.

3. Brian Hemming has donated to Jazz.FM since December 2014 and has been a Donor Member since 2016 or 2017. He became an active listener of Jazz.FM when he met his now wife, jazz artist June Garber, in June 2014.

Transcript from Cross-Examination of Brian Hemming held on November 2, 2018 (“Hemming Transcript”), Q. 3-7 p. 4-5, Q. 148 p. 61, Tab 1 of Transcript Brief

4. The only Jazz.FM Annual General Meeting that Mr. Hemming has attended was the one held on August 31, 2018.

Hemming Transcript, Q. 15 p. 7, Tab 1 of Transcript Brief

5. Mr. Hemming has never been involved with an arts organization. He has a business background in investor relations that includes corporate communications for companies who have disclosure requirements and was involved in corporate communications for situations such as mergers and acquisitions.

Hemming Transcript, Q. 38 p14, Q.44 p. 20, Q. 47 p. 22, Tab 1 of Transcript Brief

6. Donor Members of Jazz.FM are those individuals or entities that donate an annual amount of \$240.00 between September 1 to August 31 of any given year. As some donors contribute on a monthly basis which commence at different points of any given year, it can be difficult to determine the exact list of members for any particular fiscal year.

Affidavit of Charles Cutts sworn October 31, 2018 (“Cutts Affidavit”), par. 4-8, Tab 1 of Responding Application Record

7. Information about Donor Members is kept in an electronic database. A list of members derives from the database through a query.

Cutts Affidavit, par. 8, Tab 1 of Responding Application Record

8. Jazz.FM communicates to its Donor Members that it protects their private information including email addresses.

Cutts Affidavit, par. 9-13, Tab 1 of Responding Application Record

9. At the time this Application was brought, Brian Hemming was the first and only Donor Member to request a list of members and provide the required Affidavit with his request.

Hemming Affidavit, par. 12, Tab 2 of Application Record

Hemming Transcript, Q. 65-68 p. 29-30, Tab 1 of Transcript Brief

Transcript from Cross-Examination of Charles Cutts held on November 2, 2018 ("Cutts Transcript"), Q. 105 p. 32, Tab 2 of Transcript Brief

Cutts Transcript, Q. 92 p. 29, Tab 2 of Transcript Brief

10. When the request came in from Mr. Hemming, Mr. Cutts reviewed with corporate counsel and was advised as to what should be provided and in what manner. He was told to provide the members list with names and addresses, no further information.

Cutts Transcript, Q. 133 p. 41-42, Tab 2 of Transcript Brief

11. The Annual General Meeting (AGM) for Jazz.FM for the fiscal 2017 year was scheduled for August 31, 2018. Notice of the AGM was sent to 1936 Donor Members who had provided their email addresses. Jazz.FM received undeliverable messages or bounce backs for 138 of those email addresses. Jazz.FM sent notice of the AGM by regular mail to those 138 members and to 97 members who had not provided an email address at all.

Cutts Affidavit, par. 20, Tab 1 of Responding Application Record

12. Proper notice of the August 2018 AGM was given.

Cutts Affidavit, par. 22, Tab 1 of Responding Application Record

13. For the August 2018 AGM, Jazz.FM received 470 proxies with the vast majority (347) being received by regular mail.

Cutts Affidavit, par. 23, Tab 1 of Responding Application Record

14. At the August 2018 AGM, several members did state that they felt they had not received notice of the July 2017 AGM. In order to have the substance of the Minutes approved efficiently, a motion was carried to amend the Minutes so that the Minutes did not include a specific reference to all appropriate notices for that AGM having been sent.

Cutts Affidavit, par. 26-27, Tab 1 of Responding Application Record

15. Jazz.FM provided a complete list of current members and their addresses to Mr. Hemming on August 27, 2018 and again on September 25, 2018.

Cutts Affidavit, par. 31 and 39, Tab 1 of Responding Application Record

16. Mr. Hemming eventually used the member lists and addresses provided to write to members at a cost of approximately \$3,500.00.

Hemming Transcript, Q. 93-107, p. 41-44, Tab 1 of Transcript Brief

17. Mr. Hemming has been the leader of a group ("Save Jazz FM") that has been vocal about the view that Jazz.FM requires saving through various newspaper articles and a website, www.savejazzfm.com

Hemming Affidavit, par 31-32, Tab 2 of Application Record

Hemming Affidavit, Exhibit P, Tab 2 P of Application Record

Cutts Affidavit, Exhibit E, Tab 1 E of Responding Application Record

Cutts Affidavit, Exhibit F, Tab 1 F of Responding Application Record

18. Although Mr. Hemming's Affidavit and website suggests that Jazz.FM is in need of "saving" as a result of loss of financial donations and advertisers, Mr. Hemming has only given evidence with respect to two members who have ceased or reduced donations. He has further given evidence about one advertiser who ceased advertising through Jazz.FM and indicated that he has anecdotally heard of a couple of other advertisers changing their relationships with the station but conceded that he did not verify this anecdotal information. He has given evidence of nine other members of Jazz.FM who are members of an Executive Committee of Save Jazz FM with him.

Hemming Transcript, Q. 26-37 p. 10-14, Q. 39-41 p. 15-19, Q. 149 p. 61-62, Tab 1 of Transcript Brief

Hemming Affidavit, par. 31-32, Tab 2 of Application Record

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

ISSUES:

- 1. Does the *Corporations Act* require the Respondent to provide the Applicant with members' telephone numbers and email addresses?**
- 2. Should the court interfere with decisions made by a not-for-profit arts organization?**
- 3. Is the relief sought by the Applicant necessary at this stage?**

Issue I – Does the *Corporations Act* require the Respondent to provide Mr. Hemming with members’ telephone numbers and email addresses?

19. The Respondent has taken the position that with respect to the request for a list of members, it must comply with the *Corporations Act*. The *Corporations Act* sets out the following:

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).

[emphasis added]

20. The *Corporations Act* makes no reference whatsoever to an email address or telephone number forming part of the register or being a record open for inspection.

21. The *Cutting Unnecessary Red Tape Act*, 2017, S.O. 2017, c. 20. - Bill 154 provided amendments to the *Corporations Act* among other statutes. Section 1 is amended to add a definition as follows:

““Telephonic or electronic means” means any means that uses the telephone or any other electronic or other technological means to transmit information or data, including telephone calls, voice mail, fax, email, automated touch-tone telephone system, computer or computer networks. (moyen de communication téléphonique ou électronique)”

22. The amendments to the Act allowed for communication using technologies which included the ability for notice of members’ meetings to be given electronically and for meetings to be held electronically or by telephone if a corporation’s by-laws so permit. Of note, there is no amendment to the wording of s. 300 of the *Corporations Act*.

23. There have been no Ontario decisions that have dealt with the issue of whether s. 300 of the *Corporations Act* requires a membership list to be provided at the request of another member to include email addresses with the list.

24. The decision of *Jacobs v. Ontario Medical Association* dealt with, in part, the Applicant’s request for telephone numbers from the member register. In that case, the Ontario Medical Association had voluntarily included in its membership list email addresses. The court did not comment on whether that was appropriate or not. However, the court noted that the Applicant’s request for a membership list was moot as the Ontario Medical Association did provide a membership list to the Applicant. The court stated “there never was an obligation on the OMA to provide a membership list including the phone numbers of its members. The OMA complied with its statutory obligations, and I see no reason for the court to intervene to require it to do more”. The Applicant’s request for a membership list was dismissed in that case.

***Jacobs v. Ontario Medical Assn.*, 2016 CarswellOnt 12548 (SCJ) at par 54-57, Tab 1 of the Applicant's Book of Authorities**

25. A review of the Australian *Corporations Act 2001*, No. 50, 2001, reveals similar provisions to the Ontario *Corporations Act*. The relevant similar sections are as follows:

169 Register of members

General requirements

- (1) The register of members must contain the following information about each member:
 - (a) the member's name and address;
 - (b) the date on which the entry of the member's name in the register is made.

173 Right to inspect and get copies

Right to get copies

- (3) The company or scheme must give a person a copy of the register (or a part of the register) within 7 days if the person:
 - (a) makes an application to the company or registered scheme in accordance with subsection (3A); and
 - (b) pays any fee (up to the prescribed amount) required by the company or scheme.

ASIC may allow a longer period to comply with the request. If the register is kept on a computer, the company or registered scheme must give the copy to the person in the prescribed form.

- (3A) An application is in accordance with this subsection if:
 - (a) the application states each purpose for which the person is accessing the copy; and
 - (b) none of those purposes is a prescribed purpose; and
 - (c) the application is in the prescribed form.

26. Australia has proposed a Bill to amend s. 169 of its Corporations Act through the *Corporations Amendment (Modernisation of Members Registration) Bill 2017*. It has

received a first and second reading only. The sole purpose of the Bill is to add “email address” to the list of required information in the register. It is set out here:

Schedule 1—Amendments

Corporations Act 2001

1 Subsection 169(1)(a)

After “name”, insert “, email address”.

27. It is clear that email addresses are treated differently in the statutes referenced above than regular addresses. That is not surprising given the propensity for abuse of email addresses and anti-spam and privacy laws that set the tone for the current electronic communication environment. Not-For-Profit corporations ought to be very concerned about providing donor members’ email addresses without direct consent and/or proper legal authority to do so. If a corporation were required by statute to provide email addresses, that would have been set out in the *Corporations Act* or in the *Cutting Unnecessary Red Tape Act* which provided amendments specifically related to electronic communications including emails.

ISSUE II -Should the court interfere with decisions made by a not-for-profit arts organization?

28. Courts should be reluctant to interfere with the internal affairs of non-profit organizations unless there has been clear evidence that the wishes of the majority are not being observed or there has been an obvious violation of the electoral process.

***Lee v. Lee’s Benevolent Assn of Ontario*, 2004 CarswellOnt 8790 (SCJ) at par. 12, Tab 1 of the Respondent’s Book of Authorities**

***Scharafanowicz v. Hamilton Regional Indian Centre*, 2011 CarswellOnt 12915 (SCJ) at par.18 and 19, Tab 2 of the Respondent’s Book of Authorities**

29. The Board of Directors of Jazz.FM has interpreted the requirements under the *Corporations Act* with input from its legal counsel. It determined that the email addresses and telephone numbers of its members ought not to be disclosed without legal authority to do so. Fairness to this one member, Brian Hemming, has been observed; there is no need for the court to interfere in the decision of the Board of Directors in this minor issue.

ISSUE III - Is the relief sought by the Applicant necessary at this stage?

30. Mr. Hemming is making “much ado about nothing”. He utilized counsel to make a first enquiry for a membership list. He received that membership list. He then made a second enquiry for an updated membership list and received that list. He has had the members’ names and addresses of all members for almost 3 months. He has now sent a letter to the members. Mr. Hemming has an online presence through website www.savejazzfm.com and has been contacted by at least two members through that website. Numerous newspaper articles have been written about Jazz.FM and about Mr. Hemming’s leadership in seeking change. Surely Mr. Hemming has drawn more attention to his position than he would be able to by sending emails to individuals that could be sent to outdated email addresses or lost in spam folders.

31. The other relief sought by Mr. Hemming is redundant and of no practical purpose. Surely proportionality dictates against retaining three lawyers at a large law firm to obtain the declarations he seeks that would have no import or effect on the operation of the corporation. Jazz.FM, governed for the most part by volunteers, readily admitted that it was previously unaware of its obligation to hold an AGM within 6 months of its financial

year end and has expressed its commitment to now comply with this requirement. Mr. Hemming is attempting to create much negative buzz around a charitable arts organization reliant upon donors and advertisers and cause the station to incur unnecessary legal costs so that he can enforce his unsubstantiated position that the station requires “saving”.

PART IV - ORDER REQUESTED

32. The Respondent requests that the Application be dismissed with costs payable to the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of December, 2018.

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SCHEDULE “A”
LIST OF AUTHORITIES

1. *Jacobs v. Ontario Medical Assn.*, 2016 CarswellOnt 12548 (SCJ)
2. *Lee v. Lee’s Benevolent Assn of Ontario*, 2004 CarsewellOnt 8790 (SCJ)
3. *Scharafanowicz v. Hamilton Regional Indian Centre*, 2011 CarswellOnt 12915 (SCJ)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

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2. ***Cutting Unnecessary Red Tape Act, 2017, S.O. 2017, c. 20. - Bill 154***

“Telephonic or electronic means” means any means that uses the telephone or any other electronic or other technological means to transmit information or data, including telephone calls,

voice mail, fax, email, automated touch-tone telephone system, computer or computer networks.
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3. *Corporations Act 2001, No. 50, 2001 (Australia)*

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BRIAN HEMMING
Applicant

-and- JAZZ FM91. INC.
Respondent

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

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PROCEEDING COMMENCED AT
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