CV-18-596938-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Applicant

- and -

APARTMENTS FOR LIVING FOR PHYSICALLY HANDICAPPED ASSOCIATION

Respondent

BOOK OF AUTHORITIES OF THE APPLICANT, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

July 3, 2018

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TO: **APARTMENTS FOR LIVING FOR PHYSICALLY HANDICAPPED ASSOCIATION**
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I N D E X

Authorities

Case Name:

Singh v. Sandhu

RE: Major Singh, Natha Singh Bhullar, Jujhar Singh Dhillon, Tarlochan Singh Manj, Jaideep Singh Sidhu, Kuldip Singh, Ranjit Singh, Harpinder Singh Toor, Ranjit Singh Chahal, Amritpal Singh Dhami, Maghar Singh Natt, Sukhdev Singh Randhawa, Malkit Singh and Narinder Singh, Plaintiffs, and Sukhwinde Singh Sandhu, Gian Singh Kang, Parminder Singh Lakhi, Rajinder Singh Sahota, Kultar Singh Sodhi, Sadhu Singh Brar, Charnjit Singh Nijjar, Avtar Singh Thandi, Kharak Singh Hayre, Pulvinder Singh, Iqbaljit Singh Mann, Harvinder Singh Rakkar, Baljinder Singh, Karnajot Singh Chauhan, Gurmail Singh Dhillon, Jugtar Singh Kainth, Kulvir Singh Mandair, Daljit Singh DHami, Lakhvir Singh Rai, Kundan Singh Nahal, Jodh Singh, Baljinder Singh Wander, Arshdeep Singh Khaira, Gurbachan Singh Bhangu, Bakhshish Singh Kang, Prabhjot Singh Sekhon, Charan Kamal Atwal, Charanjit Singh, Satpal Singh, Gurpreet Singh Mangat and The Sikh Spiritual Centre Toronto, Defendants

[2013] O.J. No. 2507

2013 ONSC 3230

229 A.C.W.S. (3d) 22

16 B.L.R. (5th) 194

2013 CarswellOnt 7398

Court File No. CV-12-9860-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: April 15-17, May 14 and 15, 2013.
Judgment: June 3, 2013.

(130 paras.)

Corporations, partnerships and associations law -- Corporations -- Directors and officers -- Board composition -- Election of directors -- Validity of acts of directors and officers -- Irregularity in election or appointment -- Meetings of directors -- Notice -- Action for declarations that admission of 23 defendants as new members at board meeting was invalid and that election of director defendants at special members' meeting was null and void allowed in part -- Parties were members and directors of Sikh Spiritual Centre -- Admission of defendants as new members and directors set aside -- Notice regarding admission of new members at board meeting was defective and misleading -- Deception was used to have defendants admitted as new members -- Defendants could thus not vote at special members' meeting and elections of defendant directors at meeting were null and void.

Action for declarations that the admission of the 23 defendants as new members at a 2012 Board meeting was invalid and that the election of the seven director defendants at the 2012 special members' meeting was null and void, for related declaratory relief identifying the officers of the Sikh Spiritual Centre and financial-related relief. The plaintiffs were members of the Centre. Seven plaintiffs were directors whose terms did not expire until 2013 or 2014. The other plaintiffs argued that they were properly elected as directors at the competing membership meeting held in August 2012. Seven of the defendants were elected at the August 2012 special members' meeting. The remaining 23 individual defendants were the new members purportedly admitted at the July 24 directors' meeting. The Center serviced a congregation of 10,000. Its corporate membership demonstrated an inability to govern its affairs. Factionalism was endemic in its membership body and on its board of directors which had resulted in members coming to court on two previous occasions to determine the members of the corporation and the directors. The present dispute arose out of a series of directors and members meetings in 2012. At the time of trial the Centre was purported to be run by contending boards of directors.

HELD: Action allowed in part. The admission of the 23 new member defendants as new members of the Centre at the board meeting held on July 24 was null and void. Since none of the 23 defendants were eligible to attend or vote at the August special members' meeting, no quorum was reached for that meeting, and the actions taken at that members' meeting, including the election of the seven defendant directors, were null and void. After the July 8 board meeting, several members actively solicited applications for new membership without disclosing their efforts to the plaintiff directors. The corporate conduct of the board should be subject to the strictest of scrutiny. The notice of meeting failed to give proper notice of what business actually was intended in respect of the issue of new membership and, in that respect, the notice was defective and misleading in the extreme. It was well within the power of the members Deol and Hargan to give notice of an amended agenda which removed the issue of new membership. Instead, they proceeded with their plan to add a significant number of new members in the face of contrary advice from corporate counsel. Deol and his faction, through the instrumentalities of a defective, misleading notice of the business to be conducted at the July 24 directors' meeting and the misrepresentations made by the defendant Khehra to the other faction regarding the cancella-

tion of the directors' meetings, used deception to hold the July 24 directors' meeting and, at that meeting, to admit 23 of their supporters as new members without prior disclosure of that intention. The conduct of all three members in respect of that meeting was done in bad faith, so the results of that meeting in respect of the admission of the 23 new members had to be set aside. The members of the Centre and the directors were those persons who were members or directors immediately following the July 8 board meeting. There was no point in directing a members' meeting to deal with the election of replacement directors given the Centre's present state of corporate governance chaos. In order for a court-ordered members' meeting to achieve the goal of regularizing the corporate governance of the Centre and maximizing the chance of the Centre managing its affairs in accordance with the principles of Ontario corporate law, the accounting practices of the Centre must be regularized, an auditor must prepare the 2012 and 2013 reports, all current members of the Board must attend a training session on basic corporate governance, and the board of directors must develop an amendment to the process the directors were to follow when considering applications for new membership.

Statutes, Regulations and Rules Cited:

Corporations Act, R.S.O. 1990, c. C.38, s. 94, s. 129(1)(i), s. 295, s. 295(4), s. 297, s. 332

Counsel:

L. O'Connor, for the Plaintiffs.

E. Upenieks and K. Gill, for the Defendants, Sukhwinde Singh Sandhu, Gian Singh Kang, Parminder Singh Lakhi, Rajinder Singh Sahota, Kultar Singh Sodhi, Sadhu Singh Brar, Charnjit Singh Nijjar.

A. Dhillon and B. Nagra, for the remaining defendants.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Governance dispute in a Sikh *Corporations Act* temple

1 The Sikh Spiritual Centre Toronto is no stranger to this Court. Although servicing a congregation of up to 10,000 faithful, the Centre's corporate membership of less than 100 people has demonstrated a singular inability to govern its affairs. Factionalism is endemic in its membership body and on its board of directors, which has resulted in members coming before this court on two previous occasions in 2005[1] and 2008[2] for the adjudication of the simple questions: Who are the members of the corporation? Who are its directors?[3] Notwithstanding the detailed directions given by Pattillo J. in his 2008 trial decision, the

members of the Centre have returned and again placed the same two questions before this court.

2 The fundamental policy underlying the Ontario *Corporations Act*, R.S.O. 1990, c. C.38, under which the Centre was incorporated on May 9, 2001, is that those who come together to form the corporation will be capable of self-governance. Although the *Corporations Act* enables resort to the courts to call meetings of members or to wind-up the corporation, judicial intervention in the affairs of a corporation without share capital should be rare. It is not the policy of the *Corporations Act* that courts should baby-sit the affairs of such corporations; self-governance by the members is the operating norm. If members, such as those of the Centre, are incapable of governing the corporation, they should take a hard look in their collective mirrors and do one of three things: (i) reform their ways, which the current members seem incapable of doing; (ii) step aside and let new members who are unencumbered with the baggage of past factionalism take over the running of the corporation; or, (iii) wind-up the corporation, with the different factions parting company and setting up their own temples.

3 Continued supervision by this Court of the affairs of the Centre through more litigation in the future is not an option. In the last paragraph of his 2008 decision Pattillo J. wrote:

> [G]iven the history of the dispute which has occurred between the parties, it is necessary in my view that the Sikh Centre and its members and directors adhere strictly to the provisions of the Act and the By-Law in respect the governance of the Sikh Centre. Failure to do so will only result in strong sanctions by the court not only against the participants but also against the Sikh Centre.[4]

The two factions did not listen to Pattillo J. Instead, they ignored his advice and directions, causing everyone to tumble back into Court in this action.

4 In these Reasons I set aside the admission of 23 new members which occurred at a July 24, 2012 board meeting, the election of directors at an August 5, 2012 special members' meeting and the appointment of officers made at an August 5, 2012 board meeting. As well, I specify the conditions which must be satisfied by the Centre before I set the date for a special members' meeting under section 297 of the *Corporations Act*.

II. The Corporation

5 The corporate history of the Centre was described by Pattillo J. in his reasons of almost five years ago:

> [3] The Sikh Centre is a charitable non-share capital corporation, incorporated pursuant to the *Corporations Act,* R.S.O. c. C.38 (the "Act") by letters patent issued May 9, 2001 on the application of 17 persons. The objects of the Sikh Centre, as set forth in its letters patent, are, among other things, to establish, maintain and support a house of worship with services conducted in accordance with the tenants and doctrines of the Sikh faith.

> [4] The Sikh Centre owns premises at 9 Carrier Drive, Etobicoke which houses a Sikh Temple (Gurdwara) (the "Temple"). It was founded to serve as a successor to the Rexdale Singh Sabha Religious Center, also a non-share capital corporation, which was founded in 1993. Following the purchase of the Temple, and the relocation from the Rexdale Singh Sabha premises, the later premises were renovated and converted to a funeral home to cater to the Sikh community. A third non-share capital corporation, Akal Funeral Home, was incorporated to run the funeral home.

III. The history of repeated, similar corporate governance disputes at the Centre

6 In order to understand the context in which the present dispute at the Centre arose, as well as the context which will inform the approach I will take in adjudicating the dispute, it is necessary to recount the history of the two prior proceedings which involved essentially the same questions as raised in this action. Again, let me quote from the decision of Pattillo J. who summarized the 2005 proceedings which took place before this Court and the Court of Appeal:

> [5] In 2005, a disagreement arose between the members of the three corporations concerning the management of their affairs. *Matters escalated to the point that some of the members commenced an application pursuant to the Act seeking a declaration that certain individuals were members and directors of the corporations. The responding members also sought a declaration fixing the membership for the corporations and requiring the directors to call a meeting of members to elect the boards of directors. Some of the plaintiffs and defendants in this action were also parties in the earlier litigation.*
>
> [6] The application came on before Madam Justice Van Melle on January 17, 2006. In reasons released January 24, 2006, (reported: [2006] O.J. No. 328 (S.C.J.)), Van Melle J. sided with the respondents. The learned judge exercised the courts remedial power to confirm the board of directors' admission of new members notwithstanding procedural irregularities; fixed the membership of each of the corporations as requested by the respondents and required a meeting of the three corporations including the Sikh Centre, to be held within 30 days.
>
> [7] The order of Van Melle J. was appealed to the Court of Appeal. On November 23, 2006 the Court of Appeal allowed the appeal and in a brief endorsement (reported: [2006] O.J. No. 4698 (C.A.)), the *Court noted that in admitting the members in issue, there was a complete failure to comply*

> *with the Act.* In the result, the Court held that the proper directors and members of the corporations, including the Sikh Centre, were the original applicants for the letters patent of each corporation. The Court ordered that meetings to organize the corporations should be held within 30 days.
>
> [8] The meetings of the directors and members of the Sikh Centre ordered by the Court of Appeal were held on December 17, 2006. (emphasis added)

7 As Pattillo J. noted in his reasons, at meetings of the directors and members on December 17, 2006, By-Law No. 1 was approved and ratified and 21 directors were elected for staggered two-year terms. That Board structure has continued to the present. For the next six months - December, 2006 until June, 2007 - the directors were able to hold meetings in a proper fashion. Then, on June 3, 2007, the wheels fell off the governance wagon, yet again.

8 The events of June 3, 2007, have a familiar ring given the present dispute. On that day a directors' meeting was held. Only 13 of the 21 directors were present. Ten of those directors belonged to one faction, the plaintiffs in that particular case. Amarjit Singh Deol, who was one of the plaintiffs in the 2008 Action and now is the primary affiant for the defendants in this action, at that time moved that a new president and cashier, or treasurer, be elected. He proposed that Mr. Gurinder Singh Khehra, one of the individuals who acted as a facilitator in the present dispute, be elected president. The incumbent cashier, Major Singh Kler, and the incumbent president, Majit Singh, were not present at the meeting. One sensible director suggested that no vote should be held in the absence of the incumbent president and cashier. His most sensible advice was ignored. A quorum was present, a vote held, and a new president and cashier were elected by the vote of 10 directors.

9 The opposing faction of directors submitted before Pattillo J. that on the same day a competing directors' meeting was held by five other directors. Pattillo J. rejected that contention in very strong terms:

> [27] As a result, I find that the defendants' alleged meeting of June 3, 2007 was fabricated by them, after the fact, most likely as a result of what transpired at the regular monthly directors meeting of June 3, 2007 and in an attempt to respond to it.

10 A pattern of conduct then emerged which is echoed in the present proceeding: efforts were made to mediate; an alleged agreement was reached; then a break-down of the agreement, with allegations about one party having reneged on the deal. Let me return to the narrative of Pattillo J., somewhat edited:

> [28] As a result of what transpired on June 3, 2008 and in particular the attempt by the plaintiffs to replace certain of the defendant officers of the Sikh Centre, representatives of both the plaintiffs and defendants met on June 8, 2007 at the home of the plaintiff Avtar Singh Rai and again, prior to June 24, 2007 at the home of the defendant Malkiat Singh Grewal. The meetings were to resolve the differences which had arisen. The agree-

ment reached by the parties at the first meeting was that two members of the plaintiffs group would become president and cashier of the Sikh Centre and two members of the defendant group would remain as chairman and secretary. The result of the agreement would be to better balance the number of plaintiffs and defendants who were the officers of the Sikh Centre...In particular, no agreement was reached as to which of the plaintiffs would become president and cashier until the second meeting. At that meeting it was agreed that, from the plaintiffs, Mr. Khehra would become the president in 60 days and Mr. Dhillon would become cashier or treasurer immediately. Mr. Gill and Mr. Kler from the defendants would remain as chairman and secretary. Mr. Kler did not attend the second meeting.

[29] Following the two meetings, the board of directors met at the Temple on June 24, 2007. There were 19 directors present, 10 of the defendants and nine plaintiffs. The minutes indicate that the only item discussed was a reshuffling of the executive committee to appoint Mr. Dhillon as cashier. Manjit Singh was confirmed as president and Mr. Kler as secretary. The minutes further noted that Mr. Dhillon would take charge of his duties as cashier on July 1, 2007.

[30] Mr. Khehra testified that notwithstanding there is no mention in the minutes that it had been agreed he was to take over as president in 60 days, the agreement was announced to all the directors at the meeting by Mr. Grewal who had acted as mediator to resolve the dispute. In addition, the president, Manjiit Singh announced that he would hand over his duties to Mr. Khehra in 59 days.

[31] While Mr. Kler and the defendants acknowledge that the June meetings took place, they deny that there was any such agreement...

[32] In my view, the evidence of Mr. Khehra, Mr. Dhillon and Mr. Sidhu concerning the meetings and the absence of any response from the individuals who were primarily involved particularly Mr. Grewal who acted as a mediator for the parties at the meetings and the president Majit Singh is significant. Further, I accept Mr. Khehra's evidence that the fact that he was to become president of the Sikh Centre in 60 days was not noted in the minutes of the meeting of June 24, 2007 does not mean that it did not occur or was not discussed at the meeting.

[33] In my view, based on the evidence of both parties, it is clear that the minutes of the directors meetings are brief and at times selective and do not contain a record of all of the discussions that took place. However, Mr. Khehra, Mr. Dhillon and Mr. Sidhu did sign the minutes at the conclusion of the meeting indicating their concurrence with them. As a result, I am not prepared to hold that the agreement was other than appears in the minutes of the June 24 meeting. While I find on the evidence that the

> parties had reached an agreement as outlined in the evidence of the plaintiffs, in the absence of a board resolution adopting it, it was not implemented. That said the defendants failure to honour the agreement further added to the distrust which already existed between the two parties.

11 I wish to pause to comment on one aspect of this narrative, in particular the objective of the agreement between the contending parties to "balance" the representation of each faction on the Centre's executive. Balanced representation may have some practical place where both "sides" can work together. More often than not it is a recipe for disaster, simply setting the stage for a governance deadlock. More importantly, by trying to balance factional representation, a board completely ignores the fundamental duty of each and every director - to act in the best interests of the corporation, not the best interests of a faction. As my review below of the evidence in this case will reveal, most of the Centre's present directors have lost sight of their basic fiduciary duty under corporate law - to act at all times in the best interests of the corporation.

12 But, back to the narrative set out in the reasons of Pattillo J. In July, 2007, a dispute erupted between the two factions on the Board about whether a July 1 directors meeting had been adjourned to July 15. Pattillo J. found that not all directors had been given proper notice of the July 15 meeting at which one director was removed and another resigned in protest. Pattillo J. found that some directors were not given notice of an August 12, 2007, board meeting.

13 Pattillo J. found that in regards to a September 2, 2007, board meeting, the then "defendant" faction excluded the then "plaintiff" faction from the meeting, and in the absence of those plaintiffs proceeded to admit 29 new members:

> [52] The minutes indicate four agenda items were discussed at the September 2 meeting, the most important of which is the introduction and election of 29 new members. *The minutes contain no indication of any discussion with respect to the qualifications of each of the individual members.* The resolution merely states: "The Chairman suggests that in order to improve the efficiency of Temple Business more members be included so the names of following members are approved unanimously." (emphasis added)

14 In late August, 2007, some of the "plaintiff" faction requisitioned the "defendant" directors to hold a special meeting of members. The directors did nothing. So, one of the then plaintiffs called a special members meeting pursuant to s. 295(4) of the *Corporations Act*. That meeting took place on October 5, 2007, but only 13 members attended; none of the "defendant members" attended. Certain directors were elected and confirmed.

15 A directors' meeting was then held on October 14, 2007. Of a board consisting of 21 directors, 23 purported to attend, the difference resulting from the disputed results of previous board meetings. Each faction claimed to have elected new officers at the meeting. The incumbent faction, the defendants, refused to hand over the books and records to the "in-coming" plaintiff faction and, as put by Pattillo J., "each side refused to recognize each other's authority". Déjà vu.

16 The final chapter in that saga involved a November 4, 2007 board meeting, attended only by "defendant directors" who, even though lacking a quorum, purported to admit nine new members to the Centre.

17 Pattillo J. set aside the election of two of the directors, set aside the purported admission of the 43 additional new members, and directed that the Centre hold a special meeting of its members to elect seven directors.

IV. The present dispute

18 The Centre duly held the meeting directed by Pattillo J. and the affairs of the Centre were managed without incident until June, 2012. The present dispute arose out of a series of directors and members meetings which took place from late June, 2012 through to early August, 2012. The sequence of meetings was as follows:

Date 2012	**Corporate event**
June 24	Annual General Meeting held
July 8	Directors' meeting held
July 15	Some members requisition Directors to call a meeting of the membership
July 18	Notice given for a July 24 Directors' meeting
July 20	Plaintiffs' group issues notice of a July 23 Directors' meeting
July 23	Directors' meeting not held
July 23 and 24	Mediation between two factions of members and directors held

July 24	Facilitator presents his mediation proposal at 2 p.m. at the temple
July 24	A Directors' meeting was held, but many directors did not attend, contending that the meeting had been cancelled due to the mediation. 23 new members were admitted at the meeting.
August 5	Special members' meeting held at which new directors elected
	A competing members' meeting is held at the same time
August 5	"Defendants' Board" meets
August 10	"Plaintiffs' Board" meets

19 The plaintiffs are members of the Centre. Seven plaintiffs are directors whose terms do not expire until this year or next.[5] The other seven plaintiffs contend they were properly elected as directors at the competing membership meeting held on August 5, 2012.[6]

20 The first seven defendants were elected at the other August 5, 2012 special members' meeting (the "Director Defendants"). The remaining 23 individual defendants (Messrs. Thandi through to Mangat) were the new members purportedly admitted at the July 24 directors' meeting (the "New Member Defendants").

21 The dispute between the parties in this action resembles that seen in the 2005 and 2008 proceedings. Here, the plaintiffs seek declarations that the admission of 23 new members at the July 24, 2012 Board meeting was invalid and, as a result, the election of the seven Director Defendants at the August 5 special members' meeting was null and void. The plaintiffs seek related declaratory relief identifying the officers of the Centre, together with some financial-related relief.

22 The Director Defendants have counterclaimed for declarations affirming the admission of the New Member Defendants on July 24 and their election as directors on August 5. They also seek a declaration that the election of the plaintiff directors at the other August 5 meeting was invalid. They too seek relief as to who should serve as officers of the Centre, as well as some financial-related relief.

23 The New Member Directors assert no counter-claim, but take the simple position that they were properly admitted as members of the Centre on July 24, 2012.

24 As I say, déjà vu.

25 This hybrid trial was scheduled to take three days; it ended up taking five. That resulted from the efforts of both factions to expose the warts and flaws of the other faction during the various cross-examinations which were witnessed by a number of members of both factions. Given that the purpose of the Centre is to provide a place for spiritual reflection, worship and fulfilment, the fight between the two factions in open court was most unseemly.

V. The principles which will govern the assessment of the evidence

26 In these reasons I intend to review each corporate event in chronological order. As to the degree of scrutiny to be brought to bear on each event, there is some suggestion in the case law that non-profit organizations should not be required to adhere rigorously to all of the technical requirements of corporate procedure for their meetings as long as the basic process is fair.[7] While such an approach might have merit in certain circumstances, it does not in the present. In his 2008 Reasons Pattillo J. gave fair notice to the Centre, its board and its members about the approach this Court would take to any further governance disputes:

> [G]iven the history of the dispute which has occurred between the parties, it is necessary in my view that the Sikh Centre and its members and directors adhere strictly to the provisions of the Act and the By-Law in respect the governance of the Sikh Centre. Failure to do so will only result in strong sanctions by the court not only against the participants but also against the Sikh Centre.[8]

Since the Centre now appears for a third time before this Court, I intend to review the evidence to ascertain whether the Centre, its board and its members have adhered strictly to the requirements of the Act and the By-Law. In light of the continued factionalism which precipitated this action, I see no need to cut those involved in the governance of the Centre any slack. To the contrary, the challenge in this case is how to impress upon the members and directors of the Centre to comply with the corporate law which governs their corporation.

VI. Analysis: who are members and who are directors?

A. The June 24, 2012 AGM

27 At the time of the Centre's June 24, 2012 Annual General Meeting there were 62 members of the Centre. The parties agreed that the June 24 AGM was properly called and conducted. Two governance issues, however, surround that AGM: (i) the status of seven, or one-third, of the directors whose terms were coming to an end, and (ii) whether the AGM concluded that day or was adjourned so as to continue on a later date.

A.1 The status of seven directors

28 Pursuant to section 12 of the Schedule to By-Law 1, the three-year terms of the Centre's directors are staggered so that each year the positions for one-third of the 21 directors come up for election. Section 12 concludes by stating:

> At the second and each subsequent annual meeting of the members a number of directors equal to the number of directors retiring in such year shall be elected for a term of three years or until the third annual meeting after their election, whichever shall first occur.

29 As recorded in the minutes of the June 24 AGM, confusion existed about which directors were reaching the end of their terms. A proposal to nominate and hold the election for replacement directors was not approved, and the list of directors whose terms were expiring was not agreed upon. The minutes evidently were finalized well after the AGM because they contained the notation: "The List has as of July 8th, 2012 been corrected and the directors' whose terms are expiring in 2012 are", and the list of names followed.

30 The minutes recorded the following motion by the plaintiff, Natha Singh Bhullar:

> Natha Singh Bhullar brought a Motion to postpone the termination of the directors whose terms have expired and the election of new directors as agreed to. Seconded by Amarjit Singh Deol. Motion Carried.

Mr. Deol filed the main affidavit in support of the position of the Director Defendants. Accordingly, the plaintiff group and defendant group appeared to agree to defer the election of replacement directors and to postpone the retirement of the seven directors nearing the end of their term.

31 The motion passed at the AGM was consistent with section 287(4) of the Act which provides that "if an election of directors is not held at the proper time, the directors continue in office until their successors are elected". Accordingly, following the June 24 AGM the seven directors whose terms expired in 2012 remained in office.

A.2 The basis upon which the AGM concluded

32 The plaintiffs took the position at trial that the June 24 AGM was adjourned to be continued at a later date, one consequence of which was that in the interim no new members could be admitted to the Centre.

33 As to the basis upon which the AGM ended, the minutes of the June 24 AGM contained the following record:

> Raj Jhajj: Motion to adjourn this meeting.
>
> Amarjit Singh Deol. Seconded by Natha Singh
>
> Motion carried, meeting adjourned.

34 The minutes also recorded that earlier in the meeting three things had happened:

(i) the members had approved a motion to conduct the election of new directors by way of secret ballot, but the chair of the meeting announced that a secret ballot could not be held at that time because "we are not prepared to accommodate this request at this time";
(ii) certain members disputed the accuracy of proposed amendments to the By-Law, which led to the adoption of a motion to "further amend and re-circulate the By-Law by August 24th, 2012 - 60 days to the day - with consideration to any new amendments proposed by the Members by July 24th, 2012". From a comment attributed to Mr. Ranjeet Chahal, one objection to the draft By-Law was that it did not include an increase in the total number of members as had been proposed; and,
(iii) the minutes recorded that no date had been specified for "the next Annual General Meeting".

35 While the authors of *Corporate Meetings Law and Practice* observe that often the terms "termination" and "adjournment" are used interchangeably to describe the conclusion of a meeting, the terms refer to conceptually different effects on the business of a meeting: a termination brings proceedings at the meeting to an end when the business for which it was called has been completed, whereas an adjournment signifies the continuation of some of the business of the meeting at a later date.[9]

36 In the present case, the minutes of the AGM indicated that two important matters of business - the election of new directors and the consideration of an amended By-Law - could not be dealt with at the meeting. In those circumstances, I conclude that the reference in the minutes to the "adjournment" of the meeting meant the business of the AGM had not been completed and the business of the meeting was adjourned to be continued at a later date. As the minutes noted, no new date for the continuation of the AGM was specified. In such a circumstance a new notice for the continuation of the meeting would be required.[10]

37 I should note that notwithstanding the entry in the minutes of the AGM that revised amendments to the By-Law would be circulated within 60 days, at trial Mr. Deol contended that the revision process would take at least six months. To my mind that evidence raised concerns about whether the issue of the revision of the By-Law was being used by some members as a means by which to stall the election of new directors.

38 Did the adjournment of the June 24 meeting mean that no new members could be admitted prior to the continuation of the meeting? On the evidence filed in this case, I conclude that it did not, provided that the admission of new members was done in a fair manner. The most cogent evidence on this point was the conduct of the plaintiffs immediately following the June 24 AGM. Seven of the plaintiffs attended the July 8, 2012 directors' meeting. At that meeting one plaintiff, Major Singh, proposed the admission of a new member (who was rejected), and all plaintiffs supported motions to admit two other new members. In light of that conduct, it is not now open to the plaintiffs to argue that, as a matter of principle, the membership list was "closed" as of June 24 until the continuation of the AGM.

39 That said, the minutes of the AGM recorded the chair, Mr. Jhajj, as stating: "The status quo is to be maintained with respect to the Directors and Officers until the next Annual General Meeting". Although no resolution was made to formalize that position, I find it significant that the defendants' main affiant, Mr. Deol, in his January 15, 2013 affidavit deposed:

> It was agreed that the status quo was to be maintained with respect to the Directors and Officers until the next AGM. For those reasons, the AGM was adjourned to a date and time to be decided.

Yet, having deposed to such an agreement, on cross-examination Mr. Deol contended that the view attributed to Mr. Jhajj in the minutes was simply his personal view and no motion or resolution had been passed to support that view. That internal contradiction in Mr. Deol's own evidence weakened his credibility in my eyes.

40 I should note that the Centre had retained Ms. Marni Whitaker, of the McMillan LLP firm, as corporate counsel. Amazingly, the Board did not inform Ms. Whitaker of the June 24 AGM nor seek her advice in respect of it, again indicative of the abysmally low level of corporate governance employed by the members of the Board.

B. The July 8, 2012 Directors' meeting

41 A directors' meeting was held on July 8, 2012. The parties agreed that proper notice was given of the meeting and it was properly conducted. One item on the agenda for which notice was given was "change of officers". The President (Mr. Deol) and Chairman (Mr. Bhullar) were re-appointed on an un-opposed basis, as was the secretary (Mr. Hargan).

42 Two directors were nominated for treasurer: Sadhu Singh Brar and Narinder Singh. The latter did not consent to his nomination, so Mr. Brar was acclaimed as treasurer. Although appointed treasurer, Mr. Brar's term as a director was to expire in 2012. Two new vice-presidents were appointed. The Board also identified the years in which the terms of the current directors would expire.

43 As noted, at the meeting the Board admitted two new members, notwithstanding that the notice for the meeting made no mention about the admission of new members as an item of business. No party questioned the validity of the admission of the two new members by the directors at their July 8 meeting, but at this point it is worth setting out the principles which govern the content for a notice of a meeting of directors of a *Corporations Act* corporation.

44 Section 294 of the Act requires a notice calling a directors' meeting to specify "the general nature" of the business to be transacted at the meeting. Section 15 of the Centre's By-Law requires such a notice to "specify the general nature of affairs to be transacted". The notice calling the July 8 meeting particularized four items of business, as well as "other business". Given the requirement in the By-Law that a notice specify the general nature of affairs to be transacted, I find that a notice of a meeting of the Centre's board of directors must specify what business is proposed to be transacted at the meeting to enable a director to decide whether or not to attend the meeting.[11]

45 The failure of the Centre's President and Secretary to specify in the July 2, 2012 notice calling the July 8 board meeting that one item of business would involve the consideration of the admission of new members typified the Centre's lax approach to proper corporate governance. Under the By-Law, an application for new membership in the Centre must receive recommendations from two members and two directors "before the Board of Directors gives a final approval" to the application. In his 2008 Reasons Pattillo J. stressed the need for the Centre to follow proper governance practices on the fundamental corporate issue of the admission of new members so that directors were fully informed about the qualifications of any proposed member. His reasons emphasized the need to provide directors with an opportunity to learn about and consider the qualifications of any proposed new member:

> [96] Given the lack of evidence, I cannot determine whether each of the new members met the Sikh Centre's qualifications for membership. This is appropriate because, in my view, the proper place for the determination of whether a person is qualified to be a member of the Sikh Centre is by the board of directors of the Sikh Centre and not by a court... However, given the evidence of how the board proceeded in admitting the new members, in my view, it is necessary to comment on the process which the board followed.
>
> [97] As noted, pursuant to Article Six of the By-Law, in order for a person to be admitted to membership to the Sikh Centre, the person must apply and the board of directors must determine that the person has met the qualifications as set out in Article Six. Given that the By-Law sets forth specific qualifications for membership, the board must be satisfied that each applicant meets the qualifications.
>
> [98] Based on the evidence I have heard and the minutes of the meetings of the board meetings in respect of the admission of new members, I am not satisfied that at each of the meetings in question, the board members present sufficiently considered the application of each applicant to enable them to determine that each applicant met the Sikh Centre's criteria for membership.
>
> [99] I have no doubt, from the evidence that some of the new members met the qualification. There is no question that Ms. Rachhpal Gill, with her many years of devoted volunteer service to not only the Sikh Centre but also the Rexdale Singh Sabba Religious Centre easily meets the qualifications for membership. What is missing from the evidence and in particular the minutes is the presentation of her qualifications to the board and those of every other applicant and the consideration of them for each applicant prior to acceptance. Such a presentation can easily be given to the board for each applicant for membership by one of the two recommending directors.

> [100] The Sikh Centre is a large place and getting bigger all the time. The evidence indicates that there are many people involved in its activities on a daily basis. It is not likely that every board member will know every applicant for membership personally. This makes it all the more important that the membership admission process at the board be done properly and in a way that ensures that each board member is clearly satisfied in his or her mind before voting on the admission of a new member that the person meets the Sikh Centre's qualifications for membership as set out in the By-Law.

46 The informed consideration of applications for new memberships required by Pattillo J. cannot occur if directors are not told, in the notice calling a board meeting, that it is proposed to consider the admission of new members. Given the history of improper corporate governance by the Centre on the process to admit new members, as discussed at length in the reasons of Pattillo J., I find that when the Centre's board proposes to consider the admission of new members, notice of the board meeting at which that will occur must specifically identify that item of business in order to constitute proper notice. In the case of the July 8 board meeting, proper notice of the intention to consider the admission of new members was not given. Since no party objected to that defective procedure or sought any relief in respect of it, I need do nothing. However, the notice given for the hotly disputed July 24 board meeting raises similar issues, which I will address shortly.

47 One item of business specified in the notice for the July 8 meeting was the "date of next members meeting". The minutes of the July 8 meeting recorded that the "special membership meeting date and time announcement postponed".

48 Finally, the minutes of the July 8 board meeting contained no hint that at the next board meeting the directors would be asked to consider the admission of a very large number of new members. However, Mr. Deol deposed that at the meeting Mr. Brar indicated he had received two other applications for membership. Mr. Deol contended that he told the other directors that any other applications for membership should be considered at the next Board meeting. Mr. Major Singh denied that any such statement was made at the July 8 board meeting.

49 I have strong reservations about the credibility of both Mr. Deol and Mr. Major Singh. Both were evasive during important portions of their cross-examinations. Although minutes of meetings are not infallible or necessarily comprehensive, the minutes of both the June 24 AGM and July 8 board meetings were written in a narrative form and included much information beyond the specific motions moved and voted on. The minutes of the July 8 Board meeting made no reference to the subject of the future admission of new members. Accordingly, I reject Mr. Deol's testimony that he told other directors that applications for new members would be considered at the next board meeting.

C. Events from July 8 to July 15, 2012: applications for new membership

50 On July 15, 2012, eight members of the Centre, constituting not less than 10% of the members of the Centre, submitted a requisition to the directors, pursuant to section 295 of the Act, to call a special meeting of members "for the purposes of removing directors of the corporation, whose term has already expired as of last annual general meeting election held on 24th of June 2012 and appointing directors to fill the vacancies thereby created". No party questioned the validity of that requisition.

51 Before turning to how certain members of the Board responded to that requisition, I wish to review the evidence adduced about the applications for new memberships which took place between the July 8 board meeting and the submission of the July 15 requisition.

52 The applications for membership used by the Centre at that time were simple, single sheet applications. After filling in basic personal and contact information, the applicant declared that he had "worked as a volunteer or have been associated with the Sikh Spiritual Centre Toronto for the last two years", language which tracked the qualifications requirement contained in the By-Law. The form then specified that the membership of the applicant was recommended by two members and two directors, with signature lines for each. Below that was the date on which the application was submitted to the Board, followed by simple boxes indicating whether the application had been approved or not approved.

53 According to Mr. Deol, following the July 8 board meeting he and other directors started receiving applications "slowly". He received two, and he testified that Mr. Hargan received others. He deposed that the two of them received all 23 applications in advance of the July 24 meeting and they reviewed each one to ensure they met all membership criteria. They put the applications together and then presented them at the July 24 board meeting. Mr. Deol contended that he did not approach individuals to ask them to apply for membership

54 All 23 applications considered by the Board on July 24, including the two received by Mr. Deol, were marked as submitted to the board on the date of that meeting. Mr. Deol confirmed that neither he nor Mr. Hargan recorded the date on which they had received the applications. Mr. Deol testified that copies of the applications were not circulated amongst the directors in advance of the board meeting because that had never been done by the Centre.

55 Mr. Hargan did not submit evidence at the trial, but I heard from several of the New Member Defendants, including on how they came to apply for membership. Their evidence was as follows:

(i) ***Kulvir Singh Mandair***: A congregant since 2002, Mr. Mandair deposed that he decided to pursue membership in the Centre in July, 2012, and provided a completed application form to Mr. Brar, the director who had become Treasurer at the July 8 board meeting. At trial Mr. Mandair testified that he went to the Centre's office in July, obtained an application from Mr. Hargan, filled it out and handed it back over at the same time. Mr. Mandair did not explain how he secured the recommendations from two members and two directors given that he handed the form back to Mr. Hargan just after receiv-

ing it. Nor did Mr. Mandair explain why in his affidavit he deposed he handed the application to Mr. Brar, while at trial he said he gave it to Mr. Hargan;

(ii) ***Arshdeep Singh Khaira***: A congregant since 2006, Mr. Khaira deposed that he decided to pursue membership in the Centre in July, 2012, completed an application form and submitted it to Mr. Brar. Mr. Kaira testified that his desire to become a member was prompted by his May, 2012 trip to various Sikh religious sites in the Punjab. Around July 14 or 15, 2012 he asked Mr. Brar for an application. Mr. Brar brought one to Mr. Khaira's house, he signed it and gave it to Mr. Brar. Mr. Khaira did not attend the August 5 members' meeting, but gave his proxy to Mr. Brar;

(iii) ***Baljinder Singh***: Mr. Singh testified that he had been going to the Centre for a "very long time". On Saturday, July 14, 2012 he asked Mr. Deol for an application form, filled it out that day and gave it to Mr. Deol;

(iv) ***Dalji Singh Dhami***: Although he had attended the Centre for a number of years, Mr. Dhami did not think about becoming a member until July, 2012. He went to the temple around July 12 or 14 and asked Mr. Hargan if new members were being made. Mr. Hargan told him they were and gave him an application form, which he completed and handed in. Mr. Dhami did not attend the August 5 members' meeting. He provided his proxy to someone, but the minutes of the August 5 meeting show that his proxy was disallowed;

(v) ***Avtar Singh Thandi***: A congregant since about 2008, in July, 2012 he asked Mr. Hargan if new members were being admitted, was given an application form and filled it out. Mr. Thandi testified that when he signed the application form, it did not contain the signatures of any of the four people supporting his membership ;

(vi) ***Kharak Singh Hayre***: A congregant since 2004, Mr. Hayre testified that periodically he would inquire about the admission of new members, but was told none were being admitted. However, on July 14 or 15 when he inquired, Mr. Deol told him they were accepting new members and he filled out an application. Mr. Hayre testified that when he signed the application form, it did not contain the signatures of any of the four people supporting his membership;

56 The defendants ask this Court to accept that neither Mr. Deol nor Mr. Hargan actively solicited new members following the July 8 board meeting. Instead, they ask the Court to accept that at least the six new members who gave evidence at trial coincidentally had expressed an interest in becoming members at the same time. In sum, the defendants ask the Court to accept that the application by 23 new members simply constituted a happy coincidence of events.

57 I do not accept that submission. It strains credulity. First, several the New Members who testified contended that for several years they had been inquiring about new mem-

berships, but were told the doors to membership were closed. Yet, filed in evidence were the minutes of the July 18, 2010 board meeting which admitted 21 new members and the minutes of the May 18, 2011 board meeting recording the admission of 17 new members. The doors to new membership seemed to be open at that point of time. Second, three of the New Members were firm in their recollection that they received their application forms on the weekend of July 14 and 15, 2012 from Messrs. Brar, Deol or Hargan. That does not suggest mere coincidence; it suggests a co-ordinated effort by those three individuals to solicit new members. Finally, several of the New Members testified that when they signed and handed back their forms, no signatures of supporters of their applications were yet on the forms. Again, that strongly suggests a campaign of solicitation of memberships, with those soliciting later securing the signatures from members or directors. In sum, I find that following the July 8 board meeting Messrs. Brar, Deol and Hargan actively solicited applications for new membership without disclosing their efforts to the plaintiff directors.

D. The calling of the July 23 and July 24 board meetings

58 On July 17, 2012, Messrs. Deol, Brar, Hargan and Mann met with the Centre's corporate counsel, Ms. Marni Whitaker. In her July 19 reporting letter of that meeting Ms. Whitaker stated that she had not been aware the Centre had held an AGM on June 24. Ms. Whitaker reported that she had met with Messrs. Major Singh, Randhawa and Bhullar on July 18. She then gave both sides some very wise advice:

> I have now heard from two different groups of directors within the [Centre] and have been given conflicting reports as to how the officers of [the Centre] are to be determined. I am very concerned that a dispute is beginning to develop which will again lead to lengthy and very costly litigation. I would like to remind everyone that Mr. Justice Pattillo indicated in his judgment that if there is further litigation among the directors and members of the [Centre], there is a good chance that the court will simply order the [Centre] to be dissolved and its assets distributed to other Sikh gurdwaras.
>
> Accordingly, despite my earlier letter to Mr. Singh, I am now asking the two of you to work together in a co-operative manner until the next annual meeting of members is held. The meeting will be held within the next month and accordingly it should be possible for you to work together for that short period of time. As I have already notified the two banks that Mr. Brar is the treasurer, his signature will have to appear on all cheques rather than that of Mr. Singh but I would suggest that Mr. Singh prepare the cheques for Mr. Brar's signature as a way of ensuring that both of you are aware of what is being paid. There should be no difficulty in meeting together to review invoices, bank statements, etc.

> At the same time, I think it is important for the directors to meet as soon as possible to call the annual meeting of members. *No additional member should be admitted before the next meeting of members as this may also be a contentious matter and it is very important to have an accurate list of members that everyone agrees on before the annual meeting of members is called.*
>
> I think it is important that outside legal counsel be present at the annual meeting of members. I hope that the directors will be able to decide on the appropriate outside legal counsel but in no event should there be two outside lawyers present. (emphasis added)

59 As matters transpired, both factions on the board - that led by Mr. Deol and the one led by Mr. Major Singh - ignored that wise advice. On July 18, 2012, the President (Deol) and the Secretary (Hargan) issued a notice that a meeting of the Board would be held on July 24, 2012 at 4 p.m. There was no dispute that the members of the board received the notice. The two main items of business listed on the agenda in the notice were:

> 3. Special members meeting as requested by members to elect/replace directors.
> 4. Approval of new membership.

Under section 295(4) of the Act a board, upon receipt of a requisition, has 21 days in which to call and hold a meeting of members, thus the inclusion of agenda Item 3 in light of the July 15 requisition.

60 Agenda Item 4 in the Notice - "approval of new membership" - did not give proper notice of that subject-matter of business. As written, the notice signalled to directors that the consideration of one new membership would take place at the board meeting. The notice gave no hint of what the President and Secretary actually intended - to place the names of 23 new members before the board. For reasons set out above, in the circumstances of this case the corporate conduct of the board should be subject to the strictest of scrutiny. The July 18 notice failed to give proper notice of what business actually was intended in respect of the issue of new membership and, in that respect, the notice was defective. Indeed, it was misleading in the extreme.

61 In his 2008 Reasons Pattillo J. stressed the need for advance notice to be given to directors of "important non-routine business to be transacted at a directors' meeting" in order that the notice be a fair one.[12] Pattillo J. specifically ordered that "going forward...notice of the general nature of affairs to be transacted at every board meeting must be provided to each board member not less than 48 hours in advance of each board meeting..."[13] Mr. Deol was a plaintiff in that proceeding. At trial in this action Mr. Deol was asked why he had issued a notice which included new membership as an item of business when the Centre's corporate counsel had advised against such a course of action. Mr. Deol explained that the notice had gone out before he had received Ms. Whitaker's letter and that no change could be made. I do not accept such an explanation. It was well within the power of Mr. Deol and Mr. Hargan to give notice of an amended agenda which removed the issue of new membership. Instead, they proceeded with their plan to add a significant

number of new members in the face of contrary advice from corporate counsel. In the circumstances, by turning their back on the sound advice of their corporate counsel, Mr. Deol and Mr. Hargan crossed the boundary into the realm of bad faith misconduct.

62 On July 19 Mr. Hargan asked to meet with Ms. Whitaker. In her email of that date she indicated she could not meet with him on July 20 and continued:

> As I said during our telephone conversation, I have nothing to add to what I said in my letter today. The board has authorized Major Singh to be the contact person with my firm and I am reluctant to increase the fees to the [Centre] with unnecessary meetings.

63 The Major Singh faction issued a contending notice on July 20, 2012 which called for an emergency meeting of the board on July 23, 2012 "for the sole purpose of fixing the date of next membership meeting based on the requisition by members dated July 15, 2012." Major Singh deposed that since nothing had been heard from the other directors following the receipt of the requisition, his group decided to call a directors' meeting. He stated that their July 20 notice went out before they had received the July 18 notice.

64 The July 20 Notice was signed by the Chair of the Board, Mr. Bhullar, and one of the Vice-Presidents, Mr. Toor. Although section 15 of the By-Law states that any two directors may authorize or direct a board meeting, the section requires the secretary to call the meeting. The July 20 Notice was not signed by the secretary. It therefore did not comply with the By-Law and was invalid. As will be seen, however, nothing turns on that finding.

E. The mediation and the July 24 board meeting

E.1 The proposal

65 Around this time two directors, Mr. Lajwant Singh Ghuman and Mr. Gurinder Singh Khehra (or Khaira), offered to mediate the emerging dispute between the two factions on the board. According to Mr. Khehra, Messrs. Major Singh and Brar contacted him while he was in India requesting his assistance in resolving the conflict. In any event, there is no dispute that Mr. Khehra came back to Toronto on July 20 and, with the assistance of Mr. Ghuman, put together a resolution proposal.

66 There is no dispute that on July 24, at 2:00 p.m., at the Centre, Mr. Khehra presented representatives of both factions with a proposal, written in English, which contained the following key features:

(i) The composition of the Board would remain unchanged until November 30, 2012;
(ii) The seven "existing" directors would have their terms renewed at a members' meeting;
(iii) "Membership will be equal #"; and,
(iv) A new board would be set up on November 30, 2012 after an AGM. The proposal then identified who would service as officers of the Centre. It continued: "This Board term will be two years". The pro-

> posal then allocated certain other responsibilities to certain members.

E.2 The dispute

67 Two main disputes existed on the evidence about the events surrounding the presentation of this proposal. First, the plaintiffs contended that Mr. Khehra initially represented that the proposal would be presented on July 23, but that date slipped to July 24. Mr. Khehra disputed that assertion. Second, the plaintiffs contended that Mr. Khehra had told them that both of the called board meetings - July 23 and July 24 - were cancelled pending the outcome of the mediation. Mr. Khehra denied that assertion. Let me first review the evidence, and then make my findings of fact.

Evidence of Major Singh

68 Major Singh deposed that Mr. Khehra told him, in a phone call, that while they were trying to mediate the dispute, both board meetings would be cancelled and would not go ahead. On that basis he cancelled the July 23 board meeting. There is no dispute that that meeting was not held.

69 Under some pressure during cross-examination Mr. Khehra acknowledged that he had spoken to Major Singh, but he denied telling Major Singh that the board meetings would be cancelled.

70 Major Singh also testified that he had understood Mr. Khehra would present his proposal late in the evening of July 23, but was then told it would be presented at 2 p.m. on July 24. Mr. Singh understood the July 24 board meeting would not proceed. Mr. Singh did not attend at the presentation of the proposal on July 24.

Evidence of Ranjit Singh Toor

71 Mr. Toor filed an affidavit (Ex. 5), but plaintiff's counsel advised during trial that he was not calling Mr. Toor, so his affidavit should be ignored. Accordingly, I have not taken Mr. Toor's evidence into account.

Evidence of Amritpal Singh Dhami

72 Mr. Dhami deposed that on July 22 Mr. Khehra told him that he was planning to bring a proposal and that both board meetings were cancelled. Mr. Dhami's cell phone records, produced at trial, showed a close to 10 minute call to Mr. Khehra's number at 18:53. Mr. Khehra did not deny receiving such a call, but he could not recall its contents. Mr. Dhami testified that he also called the other mediator, Mr. Ghuman, that day; his cell phone records show an eight minute call to Mr. Ghuman at 18:43 that day.

73 Mr. Dhami attended the Centre on July 24 to hear the proposal. He did not agree with it because he thought "the Deol group were trying to take over four of the five top executive positions...I felt this was playing games..." Mr. Dhami also deposed:

> They also wanted to add several members to even up the sides at 32 each, I felt, so as to buy themselves a year or two of peace.

74 According to Mr. Dhami, he continued to discuss the proposal with Mr. Khehra, and they both decided to visit Mr. Bhullar, the then chair of the board. Mr. Dhami drove Mr.

Khehra in his van, but they were not able to find Mr. Bhullar, either at his home or at that of Mr. Randhawa. Mr. Dhami's cell phone records showed an attempt to call Mr. Bhullar's number at 15:48 on July 24. Mr. Dhami stated that call was made very close to Mr. Bhullar's house. Mr. Dhami testified that Mr. Khehra suggested they try to find Mr. Toor at his factory, but on the way there Mr. Khehra decided it would be best to return to the temple. Mr. Dhami testified that he returned Mr. Khehra to the Centre at around 4:30 to 4:45 p.m. and he understood Mr. Khehra planned to pick up his truck from a nearby repair shop. Mr. Dhami did not believe that the called July 24 board meeting was proceeding.

75 According to Mr. Dhami, when he dropped Mr. Khehra at the temple, the latter asked him to call in a few minutes. Mr. Dhami's cell phone records showed that he placed a 7 minute to call to Mr. Khehra's number at 16:31.

76 Mr. Dhami testified that at no time during his drive with Mr. Khehra did the latter mention that he had to get back for a 4 p.m. board meeting at the Centre, nor did Mr. Khehra mention during the 16:31 call that he was at or going into a Board meeting.

Evidence of Gurinder Singh Khehra

77 Mr. Khehra deposed that at no time did he tell any of the parties that the July 23 and July 24 board meetings should be cancelled, and he had always informed them the resolution proposal would be presented at 2 p.m. on July 24. He contended that when he presented the proposal Mr. Dhami agreed with it (an assertion denied by Mr. Dhami) and Messrs. Toor, Chahal and Malkit Singh walked out after about 15 minutes.

78 Mr. Khehra deposed that he did drive with Mr. Dhami to Mr. Bhullar's house. In his initial affidavit (Ex. 13) he deposed that they left the temple around 2:30 p.m., returning by 2:45 p.m. Mr. Khehra revised his affidavit (Ex. 21) to state that they left the temple around 3:30 p.m. and five minutes later Mr. Dhami called Mr. Bhullar's house. As a result of learning from that call that Mr. Bhullar was not home, Mr. Khehra said they returned to the temple, arriving at about 3:45 p.m.

79 Mr. Khehra deposed that when they returned to the temple "I told Mr. Dhami that I was going inside for the scheduled director's meeting", and he signed in at the board meeting at around 4 p.m., at the start of the meeting. Under cross-examination Mr. Khehra testified that during the car ride he told Dhami about the board meeting at 4 p.m. and advised him "let's go to the meeting". He also stated that when they arrived back at the temple Mr. Dhami said he would talk to the others in his group and would bring them to the board meeting.

80 Mr. Khehra conceded that when they came back to the temple he might have asked Mr. Dhami to give him a call. He acknowledged that at 16:31 Mr. Dhami called him, but he contended that during the call he asked Dhami to come to the board meeting.

81 Mr. Khehra disputed that he told Mr. Dhami he was going to pick up his truck from a repair shop. Some evidence at trial indicated that Mr. Khehra's truck had been serviced at a repair shop less than a kilometre from the temple the following day, July 25, but Mr. Khehra contended that his son must have arranged for that work.

82 According to Mr. Khehra, at around 7 or 8 p.m. that night Major Singh phoned him to inquire what had happened at the mediation meeting. Mr. Khehra relayed the proposal and contended that Major Singh told him it was reasonable.

Evidence of Amarjit Singh Deol

83 Mr. Deol deposed that he was present when Mr. Khehra presented the proposal at 2 p.m. on July 24. In his first affidavit Mr. Deol deposed, in respect of that presentation:

> Mr. Khehra advised Mr. Chahal in the presence of the other directors that were in attendance that the meeting would proceed.

Mr. Khehra did not give such evidence during the trial, either in his affidavit or during his cross-examination.

84 Mr. Deol deposed that four directors from the plaintiffs' group attended the 2 p.m. presentation: Messrs. Dhami, Malkit Singh, Chahal and Toor. He stated that Messrs. Chahal, Toor and Singh walked out at 2:15 p.m., and that all four had left before the directors' meeting started at 4 p.m. On cross-examination Mr. Deol acknowledged that when he saw those directors leaving the building he did not mention the 4 p.m. meeting to them; in his view since they had received the notice of the meeting, nothing more needed to be said.

E.3 The July 24 Board meeting

85 Minutes of the July 24 Board meeting were filed in evidence. Twelve of the Centre's 21 directors attended, just making quorum. The minutes stated:

> A.S. Dhami, R. Toor, R. Chahal, Malkial Singh showed up before the meeting and left before the commencement of the meeting.

That entry was misleading. On Mr. Deol's evidence Messrs. Toor, Chahal and Singh had left by 2:15, hardly an attendance "before the meeting", and Mr. Dhami had gone off with Mr. Khehar around 3:30 p.m., not an indication of any intention to attend the meeting. In the result, none of the plaintiff directors attended the meeting.

86 Two decisions of relevance to this proceeding were made. First, the directors set August 5 as the date for a members' meeting. Second, applications for new members were considered. On that issue the minutes stated:

> Directors were presented opportunity to forward the name of new members. Requirement according to By Law #6 was explained for new membership i.e. age and residence. Secretary [Hargan] was presented 23 new membership forms duly completed and signed. Names were read to Directors and suggestions and objections were requested.
>
> [23 names then listed]
>
> Motion to approved membership was presented by S.S. Brar and 2nd by H.S. Dhanoa. Motion carried.

87 This portion of the Board's minutes merits several comments. First, the entry that "secretary was presented 23 new membership forms duly completed and signed" was misleading. According to Mr. Deol, in advance of the meeting both he and Mr. Hargan had received all of the application forms - i.e. Mr. Hargan already had the forms before the meeting; nothing was "presented" to him. Second, as written the minutes do not disclose any discussion by the individual directors about the qualifications of each applicant - names were presented, a motion made and the motion was approved. Mr. Deol, in his affidavit, stated that the directors at the meeting "reviewed the applications one by one. The names were read out a second time and directors were given the opportunity to raise any objections. No objections were raised..." The minutes did not reflect a name-by-name review of the applications by the directors and, in any event, the description of events given by Mr. Deol hardly constituted the considered review of applications for new membership directed by Pattillo J. in the portion of his 2008 Reasons which I reproduced above at paragraph 45. Finally, Mr. Khehra, who immediately before the meeting was acting to mediate the dispute between the two factions, attended the board meeting and voted in favour of the admission of the new members.

88 A notice of special members meeting dated July 24, 2012, signed by Mr. Hargan, was sent out the following day calling for a special meeting to be held on August 5, 2012. It specified that one item of business would be "election/replacing directors whose terms expires or vacancy exists".

E.4 The plaintiffs' protest: July 25

89 Late on the morning of July 25, nine of the plaintiff directors sent an email to Mr. Hargan, as secretary of the Centre. The email read:

> Director's meeting of July 23rd requested by chairman Mr. Natha singh Bhullar and vice president Mr. Ranjit S Toor was adjourned at the request of Mr. Gurinder Singh Khera with the promise that no meeting will be held while Mr. Khera and Mr. Lajwant Singh Ghuman are acting as mediator in resolving the difference between parties. We waited on 23rd until 10 pm, on 24th morning Mr. Khera intimated that they will announce their decision in the afternoon of 24th July at approximately 2 pm, he also reiterated again that no meeting will take place while this negotiation was going on both mediators attended the meeting on 24th July 2012 while advising otherwise. We have been misled by the mediators.
>
> Now we are being the current directors of [Centre] demand to show us the minute book as we are kept in dark of this meeting. Mr. Khera told me today i.e. July 25th 2012 that he attended the meeting of 24th July and they added new members. While it was decided in last annual general body meeting that status quo of [Centre] will remain same until special general body meeting is held to replace the directors whose term is expiring. We are still waiting for the date and time of the general body meeting and minutes of the meetings.

> We also request you to give us the copy of membership list entitled to vote as a date of requisition by members dated July 15th 2012.
>
> This appears you are not acting in good faith, in the interest of Sikh Spiritual Centre. You are hereby warned that you will be personally responsible for any harm suffered by the center due to your inappropriate action.

90 On July 26 Mr. Hargan responded to Major Singh, stating:

> As per the request of membership, board of directors met on July 24, 2012 to decide the date of Special members meeting for honouring the wish of members.
>
> The notice regarding membership meeting was mailed to all the members on the same day and probably received by now.

Mr. Hargan then went on to inform Major Singh that he had been removed as the Centre's contact person with outside legal counsel, and proceeded to level allegations of wrongful conduct against Major Singh, Narinder Singh and Malkit Singh. Mr. Hargan did not address Major Singh's assertion that the mediators had told them no board meetings would take place during the mediation.

E.5 Advice from external corporate counsel

91 On July 27, 2012, Ms. Whitaker emailed Mr. Hargan writing, in part:

> I have heard that additional members may have been admitted at [the July 24] meeting. *If this occurred, it would have been contrary to the advice I gave in my letter that no additional members should be admitted before the next meeting of members. Such individuals have no right to vote at the August 5 meeting and adding them may be seen as acting in bad faith*. (emphasis added)

92 On August 3, 2012, Mr. Hargan sent an email to Ms. Whitaker firing McMillans as the Centre's corporate counsel.

E.5 Events surrounding the August 5 and 10 member and board meetings

93 Before making findings of fact in respect of the July 24 board meeting, it is necessary to briefly review the evidence concerning the members' meetings which took place on August 5 and the duelling board meetings which occurred on August 5 and 10, 2012.

94 On August 5, 2012 competing members' meetings were held. From a corporate governance perspective, chaos reigned. The special members' meeting called by the July 24 notice was supposed to start at 4 p.m. at the temple. It did not. Mr. Deol requested the presence of members of the Toronto Police Services to provide security at the temple. Competing teams of lawyers showed up - two from McMillan's, the Centre's former corporate lawyers whom Mr. Hargan had fired on August 3, a Mr. Malhi from Paul Mand Lawyers, and Mr. Amandeep Dhillon, counsel to the New Member Defendants in this proceeding. Mr. Dhillon ended up acting as the recording secretary for the meeting run by the Deol

faction. Negotiations amongst the factions and the lawyers failed to resolve the split in the Centre's governing body.

95 In the result, the meeting did not start until 6:01 p.m., according to Mr. Dhillon's minutes. Mr. Deol chaired the meeting. Most of the new members who had been admitted on July 24 either attended in person or provided proxies. The minutes recorded the presence of 41 members in person and the presence, by proxy, of 9 members. Thirty-four (34) members were recorded as not present; most of them ended up in another room in the temple running a parallel members' meeting. Three (3) proxies were disallowed.

96 Of the 50 members either present in person or by proxy, 21 were New Members: 18 in person, 3 by proxy, with one not attending (Satpal Singh) and one proxy disallowed (Daljit Singh Dhami). Put another way, of the 64 individuals who were members prior to July 24, 2012, 29 were present in person (23) or by proxy (6), whereas 34 were not present and two had had their proxies disallowed.

97 As the Centre's by-laws did not contain any provision setting the quorum at meetings of members,[14] the common law quorum requirement of the presence of a majority of members, either in person or by proxy, governed the August 5 meeting. If the number of members of the Centre included the New Member Defendants, then of the total of 87 members, 50 were present in person or by proxy and quorum was met. If the number of members excluded the New Member Defendants, then of the total of 64 members, only 29 (45%) were present in person or by proxy and quorum was not met.

98 Once started at 6:01 p.m., the Deol-chaired August 5 members' meeting last eight minutes, according to the minutes. At that meeting the seven Director Defendants were acclaimed to replace those whose terms were ending in 2012.

99 The seven new Director Defendants, together with six incumbent directors,[15] then convened a directors' meeting in which they made allegations of "unethical and illegal activities" against members of the Major Singh faction, appointed new officers, and authorized bank and immigration signatories.

100 When Major Singh and other directors in his group learned that the Deol faction intended to allow the 23 New Members to vote at the August 5 members' meeting, they proceeded to hold their own members' meeting in another part of the temple. No separate notice of that members' meeting had been given; the meeting therefore was not a valid meeting of members. At that meeting the members who attended purported to elect seven other persons as directors to replace those whose term was ending. Minutes of that meeting, if taken, were not filed in evidence. Following that members' meeting, the Major Singh-group directors and the seven "new directors" (13 "directors" in total) held their own board meeting on August 10 at which they purported to appoint a set of officers. Since their August 5 members' meeting was not valid, their August 10 directors' meeting was not valid.

101 And that is where matters remained at the time of trial - the Centre was purported to be run by contending boards of directors.

F. Assessment of the evidence, findings of fact and declaratory relief

102 To decide the key issues in this case, unfortunately I must make findings of credibility regarding these two disputed issues about the July 24 board meeting. I say unfortunately because in a case involving a spiritual and religious institution, a court is reluctant to find that some individuals are not telling the truth. Disputes such as those raised in this case are best resolved by the members of the religious institution. However, this Court has given the parties several chances to solve their own internal problems, but they refused to do so. A week before this trial started C. Campbell J. devoted a full day in an attempt to mediate a settlement of the dispute; the parties would not settle. In the early stages of the trial, and when we had to break for a few weeks, I exhorted the parties to settle their dispute. They refused to do so. Necessity dictates, therefore, that credibility findings be made in order to make the findings of fact required to determine a dispute which the parties refused to resolve themselves.

103 Making credibility findings in respect of the events of July 23 and July 24, 2012 has not been an easy task. No independent witness testified about those events: Messrs. Major Singh, Dhami and Deol were each affiliated with one of the two factions, and Mr. Khehra's credibility was very much in issue. The other mediator, Mr. Ghuman, did not file or give any evidence in this proceeding. Also, contemporaneous documentary evidence is slim - Mr. Dhami's cell phone records and Mr. Singh's letter of July 25 to Mr. Hargan. Moreover, having observed Messrs. Major Singh, Dhami, Deol and Khehra give evidence at some length, I formed reservations about the credibility of each of them, largely based on their repeated unwillingness to respond directly to pointed, but very important, questions during their cross-examinations. However, after considering the evidence as a whole, I am able to make findings of fact, on the balance of probabilities, and reach conclusions about the relative credibility of those four key witnesses.

104 In my view, the evidence supports, on the balance of probabilities, the following findings of fact:

(i) Mr. Khehra told members of the Major Singh faction, including Major Singh and Mr. Dhami, that conducting a mediation of the dispute between the Singh and Deol factions would require both sides to cancel the directors' meetings they had called for July 23 and 24, 2012;
(ii) Mr. Khehra initially told members of the Major Singh faction, including Mr. Dhami, that a resolution proposal would be delivered on the evening of July 23, but he then postponed the time for delivery to July 24 at 2 p.m.;
(iii) Major Singh and the director members of his faction cancelled their July 23 directors' meeting on the understanding, coming from Mr. Khehra, that both directors' meetings would be cancelled;
(iv) Major Singh and the director members of his faction did not attend the July 24 directors' meeting because they thought, with very good

reason, that the meeting would not take place in light of the on-going mediation; and,

(v) The Deol faction knew that directors who were members of the Major Singh faction would not show up at the July 24 directors' meeting because the Deol faction was acting in concert with Mr. Khehra.

Let me explain how I have arrived at these findings of fact.

105 First, in respect of the events of July 22, 23 and 24, I prefer the evidence of Mr. Dhami over that of Mr. Khehra:

(i) Mr. Khehra filed a revised affidavit in which he bumped back the times of his departure and return to the temple with Mr. Dhami on July 24 by one hour, so that in the end some of his times came closer to those given by Mr. Dhami and reflected in his cell phone records. While the times in the first affidavit may have resulted from mistaken recollection, the fact of revision points to frailties in Mr. Khehra's recollection of key events;

(ii) The overall thrust of Mr. Khehra's evidence was that he intended to attend the 4 p.m. directors' meeting (which he did and voted in support of the Deol faction's new members). Yet, defence counsel established that it was over 7 kilometres from the temple to Mr. Bhullar's house, or a round trip of more than 14 kilometres. To leave the temple in Rexdale at 3:30 p.m., and to expect to be able to drive through urban traffic to Brampton and return to the temple in time for the start of the meeting at 4 p.m. makes no sense, thereby undermining Mr. Khehra's credibility;

(iii) Mr. Khehra tried to explain away the times by contending that Mr. Dhami called Mr. Bhullar about 5 minutes after they had left the temple, found he was not home and turned around before they had even reached Steeles Avenue. Yet, Mr. Dhami's phone records showed that he called Mr. Bhullar's number at 15:48. That timing is much more consistent with Mr. Dhami's testimony that they drove to Mr. Bhullar's home, he called when they were close to that location, and then they made their way back. I do not accept Mr. Khehra's suggestion that the call to Mr. Bhullar was made shortly after their departure from the temple and they then turned back to the temple;

(iv) It follows that I find more reasonable the chronology given by Mr. Dhami which placed their return to the temple well after 4 p.m., and that a few minutes after he had dropped off Mr. Khehra, he placed a call to him at 16:31;

(v) I need not get into the evidence about whether the truck was in the repair shop that day or the next. Instead, it is sufficient to find, as I do on the evidence, that Mr. Khehra arrived back at the temple after the directors' meeting had started. I would note that his name was the last to appear on the list of attendees contained in the minutes.

In sum, I find Mr. Dhami to be a more credible witness regarding the chronology and timing of events concerning the drive he made together with Mr. Khehra on July 24.

106 Of course, just because a court accepts the evidence of a witness on one matter does not mean that a court must accept other parts of a witness's evidence. But, I also prefer the evidence of Mr. Dhami and Mr. Major Singh over that of Mr. Khehar on the issues of when the resolution proposal would be delivered and the cancellation of both directors' meetings for two reasons, both of which rest on the overall reasonableness of their evidence.

107 First, immediately after learning that the July 24 directors' meeting had been held and new members admitted, the Major Singh faction wrote a protest email to Mr. Hargan asserting that they had been misled, both with regards to the timing of the delivery of the proposal and the cancellation of both meetings. In his July 26 response Mr. Hargan avoided dealing with either issue, instead levelling accusations of misconduct against the Singh faction. Mr. Hargan's failure to explain why the July 24 meeting went ahead in the face of the mediation speaks volumes, to my mind, about the lack of good faith in the conduct of the Deol faction.

108 Second, the evidence showed that the Major Singh faction did not shrink from asserting what it perceived to be its "rights" in the face of conduct by the Deol faction. When the Deol faction refused to exclude the votes of the New Member Defendants from the August 5 members' meeting, the Singh faction held a parallel members' meeting. When the Deol faction appointed new officers at its August 5 directors' meeting following the members' meeting, the Singh faction made its own appointments at its August 10 directors' meeting. To accept the assertion of the Deol faction that the Singh-faction directors knowingly refrained from attending the July 24 directors' meeting defies belief in light of the evidence placed before me. Messrs. Toor, Chahal and Malkit Singh left the temple by about 2:30 p.m. on July 24, upset over the terms of the proposal, and Mr. Dhami proceeded to drive around with Mr. Khehra in a vain attempt to find other directors with whom to continue the mediation discussions. There is absolutely no doubt in my mind that if any of those four individuals had thought the July 24 directors' meeting would proceed at 4 p.m., they would have been there, and they would have moved heaven and earth to get their fellow faction members to the temple in time for the meeting. The only reason they did not do so, I find, is that they were led to believe by Mr. Khehra that both directors' meetings had been cancelled to give the mediators a chance to find a resolution to the dispute.

109 How, then, is the conduct of Mr. Khehra linked to that of Mr. Deol and his faction, who called the July 24 directors' meeting? First, both mediators, Messrs. Khehra and Ghuman, showed up at the July 24 meeting. Indeed, without their attendance, a quorum would not have been reached. Both voted in favour of the admission of the New Members. No wonder the plaintiffs thought they had been misled by both mediators; they had good reason for so thinking. Second, neither Deol nor Hargan had disclosed to the directors in the Singh faction that they intended to put forward the names of 23 new members at the July 24 meeting - of whom 22 voted, or tried to vote, in favour of the Deol faction slate of directors at the August 5 meeting. The notice calling the meeting contained no hint that such a number of new members would be put forward. Ms. Whitaker's July 19 letter advising that no new members should be admitted until a further members' meeting was held

had been sent to directors in both factions. It is a reasonable inference to draw, and I do, that Deol and Hargan knew that if all directors had shown up at the July 24 meeting, vigorous opposition would be made to the admission of the proposed 23 new members. To avoid that problem, they were content to allow the Singh faction directors to believe that both directors' meetings had been cancelled. Without the insistence by Mr. Khehra that both meetings had to be cancelled, the Deol faction's plan to stack the membership with a large number of members of their faction would not work.

110 In sum, I find that Mr. Deol and his faction, through the instrumentalities of a defective, misleading notice of the business to be conducted at the July 24 directors' meeting and the misrepresentations made by Mr. Khehra to the other faction regarding the cancellation of the directors' meetings, used deception to hold the July 24 directors' meeting and, at that meeting, to admit 23 of their supporters as new members without prior disclosure of that intention. Messrs. Deol, Hargan and Khehra, arranged and conducted the July 24 directors' meeting in what was the corporate governance equivalent to a trial by ambush. I find that the conduct of all three in respect of that meeting was done in bad faith, so the results of that meeting in respect of the admission of the 23 new members cannot stand.

111 As a result, I grant the declaration sought by the plaintiffs in paragraph 1(a) of their Amended Statement of Claim that the admission of the 23 New Member Defendants as new members of the Centre at the board meeting held on July 24, 2012 is null and void.

112 It follows from that conclusion that none of the 23 New Member Defendants were eligible to attend, let alone to vote, at the August 5, 2012 special members' meeting. As I set out in paragraph 97 above, without the presence of the New Member Defendants, no quorum was reached for the August 5, 2012 members' meeting. Given the lack of quorum, I find that the actions taken at that members' meeting, including the election of the seven Defendant Directors, were null and void, and a declaration shall issue to that effect.

113 It follows from that conclusion that the board meeting held immediately following the August 5 directors' meeting was invalid, and I declare as invalid the appointment of officers made at that meeting.

114 As a result, I declare that the members of the Centre are those persons who were members as of July 9, 2012 - i.e. immediately following the July 8, 2012 board meeting. I declare that the directors of the Centre are those persons who were directors as of July 8, 2012. I further declare that the officers of the Centre are those persons who were appointed officers at the July 8, 2012 board meeting, as recorded on pages 21 through 23 of the Centre's minute book, reproduced in Ex. 10, Tab G.

VII. Request for a new meeting of members

A. Section 297 of the *Corporations Act*

115 The plaintiffs have requested an order, pursuant to section 297 of the *Corporations Act*, that the court direct the holding of a members' meeting within 60 days to elect replacement directors and at which only those persons who were members on June 24, 2012 can vote. Section 297 of the Act states:

> 297. If for any reason it is impracticable to call a meeting of shareholders or members of the corporation in any manner in which meetings of shareholders or members may be called or to conduct the meeting in the manner prescribed by this Act, the letters patent, supplementary letters patent or by-laws, the court may, on the application of a director or a shareholder or member who would be entitled to vote at the meeting, order a meeting to be called, held and conducted in such manner as the court thinks fit, and any meeting called, held and conducted in accordance with such an order shall for all purposes be deemed to be a meeting of shareholders or members of the corporation duly called, held and conducted.

116 The plaintiffs also have sought a declaration that the actions of the defendants in taking over the business and affairs of the Centre have been unduly oppressive and unduly prejudicial to and in disregard of the plaintiffs' interests. Although the *Corporations Act* does not contain an oppression provision similar to section 248 of the *Business Corporations Act*, section 332 of the *Corporations Act* provides:

> 332. Where a shareholder or member or creditor of a corporation is aggrieved by the failure of the corporation or a director, officer or employee of the corporation to perform any duty imposed by this Act, the shareholder, member or creditor, despite the imposition of any penalty and in addition to any other rights that he, she or it may have, may apply to the court for an order directing the corporation, director, officer or employee, as the case may be, to perform such duty, and upon such application the court may make such order or such other order as the court thinks fit.

As M. G. Quigley J. stated in *Noori v. Abdin*, the combination of the powers contained in sections 297 and 332 of the Act authorizes the court "to provide direction in governance cases such as this by exercising its remedial power to make such orders. It is entitled to make orders that it finds to be just in the circumstances, and that it finds to be necessary."[16]

B. Financial affairs of the Centre

117 Before considering the plaintiffs' request for relief under section 297 of the Act, I wish to mention briefly some of the evidence on the issue of the financial affairs of the Centre. The parties agreed that they understood C. Campbell J. had directed a trial only of the governance issues raised by the pleadings. I accept that understanding, although when I reviewed the pleadings with the parties at trial, most of the relief sought by them related to the governance issues.

118 The financial issues raised in the evidence, however, are relevant, in my view, to a consideration of the request that the court call a special meeting of members. Specifically, I consider the following evidence to be relevant:

> (i) Although sections 96 and 133(1) of the Act require the Center to secure from an auditor an annual report on the financial statements dealing with the matters specified in section 96(2) of the Act, I understand that no such reports have been given or statements have been prepared since 2003, notwithstanding that the parties agreed

that in recent years the Centre's gross revenues were in the neighbourhood of $1 million;

(ii) Congregants donate substantial sums of cash to the Centre on a weekly basis by placing the cash in golaks, or donation boxes, located on the first and second floors of the temple. At the end of a weekend, up to $10,000.00 might be contained in the golaks. The evidence revealed that the Centre did not consistently deposit all cash receipts into its bank account, but used some of the donated cash to pay on-going expenses, such as weekly grocery expenses, communal eating being a feature of Sikh temple culture. Not surprisingly, one flash point between the two factions involved whether the other had misused some of this cash, although I should add that no allegations of personal misappropriation were levelled;

(iii) Moreover, the evidence revealed that some of the cash was given to the principal of the Centre's school to pay teachers in cash. The income tax implications of such a practice speak for themselves, as do the implications of such a practice on the Centre's status as a registered charitable organization;

(iv) The dispute between the two factions on the board led the Centre's lender, the TD Bank, to call the outstanding loan of approximately $650,000 and to freeze the Centre's bank accounts. At trial counsel advised that the Bank has agreed to forbear until the end of this August; I am not clear about the status of the Centre's bank accounts;

(v) Although last Fall the two factions put in place a mechanism under which representatives of each side would co-sign all cheques, disputes have arisen over which cheques should be signed. Some significant payables remain outstanding.

C. Analysis

119 In her letter to both factions of the board dated July 19, 2012, Ms. Whitaker wrote:

> I would like to remind everyone that Mr. Justice Pattillo indicated in his judgment that if there is further litigation among the directors and members of the [Centre], there is a good chance that the court will simply order the [Centre] to be dissolved and its assets distributed to other Sikh gurdwaras.

I was not able to find such a statement in the 2008 Reasons of Pattillo J., but based on the evidence I have heard, if I possessed the power, I would order the winding-up of the Centre. The membership and board of the Centre is poisoned by factionalism. The directors have demonstrated that they have no practical understanding of their over-riding fiduciary duty to act in the best interests of the corporation; their loyalties appear to lie with their faction. Notwithstanding two previous proceedings before this court on the same issue - who are the members and who are the directors - the members and directors of the Centre have not changed their ways. I have significant doubts whether proper corporate govern-

ance can ever take root in the Centre given the current composition of its membership and board.

120 That said, as the *Corporations Act* now stands, I have concluded that in the absence of a request by a member or the corporation, a court does not possess the power under the Act to wind-up a Part III corporation.[17] No party has asked for such relief. In my view, in the circumstances of the present case, the powers of the court are limited to granting declaratory relief regarding compliance with the Act, articles or by-laws, to directing the corporation, director or officer to perform a duty imposed by the Act, and to ordering a meeting of members under section 297 of the Act, subject to any necessary conditions. Whether the court will enjoy enhanced powers upon the coming into force of the *Not-for-Profit Corporations Act, 2010*, S.O. 2012, c. 15, is not a question I need address.

121 Section 297 of the Act authorizes the court to "order a meeting to be called, held and conducted in such manner as the court thinks fit". Such a members' meeting needs to be called in the present circumstances. The June 24, 2012, annual general meeting did not deal with two items of business: electing seven directors to replace those whose terms ended in 2012 and to deal with proposed amendments to the By-Law. Part of that business must be completed, but in a manner which is fair and lawful, which was not the case with the August 5, 2012 special members' meeting conducted by the Deol faction. Also, the terms of seven directors expired last year and those of seven more expire this year; their replacements must be elected. Since the members and directors have demonstrated that they are unable to call, hold and conduct such a meeting in a fair fashion under their own direction, an order must go under section 297.

122 However, I see absolutely no point in directing a members' meeting to deal with the election of replacement directors given the Centre's present state of corporate governance chaos. No productive purpose would be served. In order for a court-ordered members' meeting to achieve the goal of regularizing the corporate governance of the Centre and maximizing the chance (as slim as it might be) of the Centre managing its affairs in accordance with the principles of Ontario corporate law, in my view it is necessary that certain threshold conditions be met. Specifically, the following four threshold conditions must be satisfied before I will set a date for a court-ordered general members' meeting:

(i) The accounting practices of the Centre must be regularized. The working arrangement put in place over the past 9 months or so under which members of each faction co-signed cheques has not worked and, more importantly, represents an departure from the principles of proper corporate governance. The financial administration of a corporation should not be the product of co-operative factionalism; it must be the product of an independent allegiance only to the best interests of the corporation. Proper books and records must be put in place. As well, a proper system for accounting for all receipts and disbursements, especially cash receipts, must be implemented. To that end, I shall appoint a monitor over some of the affairs of the Centre, with powers similar to those which I ordered in paragraph 52(i) and Schedule "A" to my Reasons in *Ontario Korean*

Businessmen's Assoc. v. Seung Jin Oh, 2011 ONSC 6991, and which I have reproduced as Schedule "A" to these reasons. Schedule "A" shall be modified to reflect the appointment of the monitor pursuant to section 297 of the *Corporations Act* in preparation for the court-ordered members' meeting, as well as the actual fees required by the monitor following discussions with the candidates for the position. The monitor must be a licensed trustee under the *Bankruptcy and Insolvency Act* and must be independent of the Centre - i.e. must not be a congregant at the Centre or related to any person who is a congregant or member of the Centre. Within 90 days of the date of this order the monitor shall report to me whether, with the assistance of the monitor, the Centre has put in place proper accounting books, records and procedures;

(ii) Within 90 days of the date of this order an auditor must prepare the reports described in section 96(2) of the Act for the 2012 financial year and the first six months of the 2013 financial year. The auditor must be independent of the Centre - i.e. must not be a congregant at the Centre or related to any person who is a congregant or member of the Centre;

(iii) Within 90 days of the date of this order all current members of the Board must attend, together, at the same time and in the same room, a one-day training session on basic corporate governance conducted by a recognized corporate governance organization. If this order interferes with the travel plans of any director, he must change his travel plans; and,

(iv) Within 90 days of the date of this order the board of directors must develop an amendment to the By-Law, for consideration by the members at the special meeting, which details the process the directors are to follow when considering applications for new membership. The amendment must address the following matters: (i) the circulation to all directors, in advance of the board meeting, of the applications for new membership, including details describing how the applicant "has worked as a volunteer or associated with the" Centre over the preceding two years; and (ii) the discussion and consideration by the board of each individual application on its merits. The Centre's board did not listen to the directions given by Pattillo J. in his 2008 Reasons; the board must now redress its failure on this most important matter.

123 Once the Centre and monitor report to me that all four conditions have been satisfied, I will then direct the holding of a special meeting of members within 60 days. The preparation for and holding of such a meeting shall be supervised and chaired by an independent person, experienced in organizing and chairing corporate meetings, who is acceptable to 17 (80%) of the current directors and approved by this Court. In the absence of such agreement by the board, I shall appoint the chairperson. The chairperson shall arrange for a further independent person to take the minutes of the meeting. The business for that meeting shall be three-fold: (i) to receive the reports of the auditor prepared pur-

suant to section 96(2) of the Act; (ii) to elect directors to replace those whose terms have expired; and, (iii) to consider the amendment to the By-Law developed in accordance with paragraph 122(iv) of these Reasons. I have not included as an agenda item the consideration of the By-Law amendments discussed at the June 24, 2012 AGM. Those draft amendments were not filed in evidence, and I do not know whether their inclusion in the agenda simply would inflame the present dispute.

124 In light of the pending replacement of up to 14 directors and the findings of misconduct which I have made against certain current directors, I further order that until the court-directed special members' meeting is held:

(i) the Board may not admit any persons as new members of the Centre; the persons entitled to vote at the special meeting shall be those persons who were members of the Centre as of July 9, 2012; and,

(ii) the Board may not approve or enter into any transaction out of the ordinary course of business, including the refinancing of any debt, or propose or approve any fundamental change in the corporate governance structure of the Centre without the approval of this Court.

125 At the July 8, 2012 board meeting the directors clarified the remaining terms of all current directors. The terms of seven of those directors expired in 2012, but have continued by operation of law and these Reasons, and the terms of an additional seven directors expire this year. Unfortunately the minutes of that meeting did not fix a date in each year for the expiration of the terms. I do not want that issue to become a bone of contention. Since the June 24, 2012 AGM was intended to replace those directors whose terms were expiring in 2012, I think it reasonable to fix the expiration date for the terms of all three sets of seven directors at June 30 of each year - i.e. 2012, 2013 and 2014. Accordingly, the members' meeting which I shall call under section 297 of the Act will elect 7 directors to replace those whose terms expired in 2012 and seven whose terms will expire shortly. In order to maintain the system of staggered rotating terms of three-years, those directors elected to replace the retiring 2012 directors will serve for a two year term, while those elected to replace the retiring 2013 directors will serve for three years.

126 If the parties work co-operatively, there is every prospect that the special members' meeting can be held by Thanksgiving.

127 I intend to give the directors of the Centre an opportunity to demonstrate that they are capable of working together in the best interests of the Centre. Accordingly, I order the plaintiffs and the other current directors of the Centre to consult and to attempt to agree on the selection of the monitor and the auditor. The parties shall arrange a one-hour case conference before me during the week of June 17, 2013. If the parties have agreed on the selection, I will consider approving their agreement and issuing the appropriate order. If the parties cannot agree on the selection, they shall file with me, in advance of the case conference, the names and qualifications of those whom they propose to act as monitor and auditor and I shall select a person for each role, either from their lists or otherwise. Of course, the Centre will have to pay the costs of the monitor and auditor. While I have no doubt that none of the directors are eager for the Centre to incur such expenses, their ina-

bility to discharge their duties properly has made such expenses necessary. At the case conference the parties must also report on their progress in arranging the full-day corporate governance training course for the directors of the Centre.

128 I regard these orders as containing the steps which necessarily must be undertaken to remedy the past defects in the appointment of directors and members and to create the conditions for holding a proper, fair and productive meeting of members.

129 Finally, the Centre operates a website: www.sikhspiritualcentrerexdale.com. Transparency is a hall-mark of good corporate governance. To that end, I order the Centre to post a copy of these Reasons on the "Home" page of the Centre's website no later than 5 p.m. on Wednesday, June 5, 2013, such posting to remain in place until after the holding of the special members' meeting. Perhaps if all members and congregants become aware of what the Centre must do to right its corporate governance keel, appropriate pressure will be brought to bear on the directors to discharge their duties in a proper manner.

130 After the appointment of the monitor and auditor, I will call for submissions on costs.

D.M. BROWN J.

* * * * *

Schedule "A", based on Schedule "A" to the Reasons in*Ontario Korean Businessmen's Assoc. v. Seung Jin Oh*, 2011 ONSC 6991

Terms of the Monitor's Appointment

[1] THIS COURT ORDERS that [name of monitor] is hereby appointed pursuant to section 207 of the *Corporations Act* as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Centre with the powers and obligations set forth herein and that the Centre and its members, officers, directors, and employees shall advise the Monitor of all material steps taken by the Centre pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

[2] THIS COURT ORDERS that the Monitor is hereby directed and empowered to:

(a) monitor the Centre's receipts and disbursements;
(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the property of the Centre (the "Property"), its Business, and such other matters as may be relevant to the proceedings herein;
(c) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Centre, to the extent that is necessary to adequately assess the Centre's business and financial affairs or to perform its duties arising under this Order;

(d) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order; and

(e) perform such other duties as are required by this Order or by this Court from time to time.

[3] THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any environmental legislation, unless it is actually in possession.

[4] THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by any applicable legislation.

[5] THIS COURT ORDERS that the Monitor and counsel to the Monitor shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Centre as part of the costs of these proceedings. The Centre is hereby authorized and directed to pay the accounts of the Monitor and counsel for the Monitor on a monthly basis and, in addition, the Centre is hereby authorized to pay to the Monitor and counsel to the Monitor, retainers in the amounts of $[amount] and $[amount], respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

[6] THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

[7] THIS COURT ORDERS that the Monitor and counsel to the Monitor, if any, shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of $[amount], as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings.

1 *Rexdale Singh Sabha Religious Centre v. Chattha*, [2006] O.J. No. 328 (S.C.J.); reversed on appeal [2006] O.J. No. 4698 (C.A.).

2 *Deol v. Grewal*, [2008] O.J. No. 3355 (S.C.J.) ("Pattillo Decision").

3 Although Amarjit Singh Deol, the primary affiant for the defendants, denied, at trial, the existence of any factions and professed his person distaste for "groupism", his words rung hollow. The Director Defendants, in the Statement of Defence and Counterclaim, repeatedly referred to "factions". That term accurately described the reality on the ground as it emerged in the evidence at trial.

4 Pattillo Decision, para. 119.

5 Major Singh and the plaintiffs Chahal through to Narinder Singh.

6 The plaintiffs Bhullar through to Toor.

7 *Lee v. Lee's Benevolent Assn. of Ontario*, [2004] O.J. No. 6232 (S.C.J.), para. 12. While an appeal from that decision was dismissed, the Divisional Court regarded the comments as *obiter dicta*: [2005] O.J. No. 194 (Div. Ct.), para. 5.

8 Pattillo Decision, supra., para. 119.

9 Hartley R. Nathan, Q.C., Mihkel Voore and Kathleen Skerrett, *Corporate Meetings Law and Practice* (Toronto : Carswell, 1995, updated), 22-1 and 22-3.

10 Nathan, Voore and Skerret, *supra*., p. 22-12.

11 See the discussion in Nathan, Voore and Skerrett, *supra*., at pp. 9-6 to 9-8.

12 Pattillo Decision, para. 74.

13 Pattillo Decision, para. 118.

14 *Corporations Act*, s. 129(1)(i).

15 Messrs. Mohan Singh, Dhuga, Mann, Deol, Ghuman (one of the mediators) and Dhanoa.

16 [2011] O.J. No. 6316, 2011 CanLII 91855 (ON SC), para. 23.

17 *Corporations Act*, ss. 243 and 244.

Case Name:

Bank of Montreal v. Owen Sound Golf and Country Club, Ltd.

RE: Bank of Montreal, Applicant, and Owen Sound Golf and Country Club, Limited and Kenneth W. Rowe Limited, Respondents

[2012] O.J. No. 246

2012 ONSC 557

98 C.B.R. (5th) 161

213 A.C.W.S. (3d) 543

2012 CarswellOnt 911

Court File No. CV-11-9306-00CL

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: January 23, 2012.
Judgment: January 23, 2012.

(9 paras.)

Counsel:

J. Simpson, for the Receiver, BDO Canada Limited.

Keith Hagedorn, claimant creditor in person.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Receiver's motion to liquidate debtor corporations

1 Last July BDO Canada Limited was appointed receiver of the Owen Sound Golf and Country Club, Limited ("OSGCC") and Kenneth W. Rowe Limited, a wholly-owned subsidiary of the Golf Club which owned property on which a practice facility was located (the "Debtors").

2 Pursuant to orders of this Court the Receiver sold the Golf Club and ran a claims process for creditors. As a result, last October this Court authorized the Receiver to pay out the secured creditor, BMO, as well as the Canada Revenue Agency. The claims process for the other creditors has been completed, and the Receiver seeks approval to disburse funds to those claimants.

3 On the return of the motion Mr. Keith Hagedorn, the former chef at the Golf Club, sought leave for an extension of time in respect of the claim which he had filed with the Receiver. Mr. Hagedorn had mailed in his claim before the claims bar date, but his letter was returned due to insufficient postage. By the time he had re-sent his claim he was 10 days past the claims bar date. The Receiver did not oppose the requested extension of time, and during a break in the proceedings the Receiver and Mr. Hagedorn settled his claim for $5,000.00. Accordingly, I formally grant Mr. Hagedorn an extension of time in which to file his claim, declare that his claim as filed was received by the Receiver within the permitted extension, and approve the Receiver paying out the agreed upon $5,000 settlement.

4 Upon payment of the unsecured creditors the Receiver will hold surplus funds of slightly under $1 million. The Receiver moves for authorization to place both Debtors into liquidation. The Receiver gave proper notice of this motion. Although no one has appeared to oppose the relief sought, one Club member contacted the Receiver to query its jurisdiction to put the companies into liquidation.

II. Analysis

5 Kenneth W. Rowe Limited is incorporated under the *Ontario Business Corporations Act*.[1] OSGCC owns all of the shares of that company. Section 208(1) of the *OBCA* provides that a shareholder may apply to court for a winding-up order. Paragraph 4(r) of the Appointment Order made July 15, 2011 authorized the Receiver "to exercise any shareholder ... rights which the Debtors may have". Therein lies the power of the Receiver to apply to wind-up OSGCC's subsidiary, Kenneth W. Rowe Limited.

6 OSGCC is incorporated under the *Corporations Act*.[2] A few days before the appointment of the Receiver the entire Board of Directors of OSGCC resigned. Paragraph 3(c) of the Appointment Order authorized the Receiver to "manage, operate and carry on the business of the Debtors". As Cumming J. observed in *Ravelston Corp. (Re)*: "When a court-appointed receiver is appointed in the normal course, 'the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced' ... The essence of a receiver's power is to settle liabilities and liquidate assets."[3]

7 The Receiver has sold OSGCC's assets, satisfied the secured creditors, and administered a claims process for unsecured claims. Once the unsecured claims are paid,

the Receiver will be left holding surplus proceeds. The shareholders are the next group entitled to claim against those funds, and the Receiver seeks to address that stage in the corporate life of OSGCC by seeking an order to wind-up that company. Section 244(1) of the *Corporations Act* authorizes a corporation to apply to court for a winding-up order. It is well settled that a court possesses the power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order.[4] In my view the same logic applies to the power of the court to authorize a court-appointed receiver to apply to wind-up a company.

8 In its Supplement to the Second Report the Receiver described the work which must be done in order to identify the current shareholders of OSGCC and proposed a notice and claims bar-like process to deal with claims by shareholders. The process proposed is a reasonable one.

9 Accordingly, I grant the Receiver's motion for orders to wind up the Debtors and to appoint the Receiver as liquidator. I approve the winding-up process it proposes. I grant an order in the form submitted by the Receiver, which I have signed.

D.M. BROWN J.

cp/e/qlrxg/qljxr/qlcas/qljac

1 R.S.O. 1990, c. B. 16.

2 R.S.O. 1990, c. C. 38.

3 *Ravelston Corp. (Re)*, [2007] O.J. No. 414 (S.C.J.), para. 61; affirmed 2007 ONCA 135.

4 *Royal Bank of Canada v. Sun Squeeze Juices Inc.*, [1994] O.J. No. 567 (Gen. Div.), paras. 6 to 10.

Case Name:

Liptay v. Liptay-Burghardt

RE: John Joseph Liptay, Jr. and 1584131 Ontario Ltd., Applicants, and Paula Anne Liptay-Burghardt, Pamela Marie Hvasta, Laurie Anne Liptay-Morar, David Stephen Liptay, Leslie Marie Liptay, Luanne Marie Liptay, 1280584 Ontario Inc. and The Office of the Children's Lawyer, Respondents

[2016] O.J. No. 2962

2016 ONSC 3638

Court File No.: CV-15-11005-00CL

Ontario Superior Court of Justice

M.A. Penny J.

Heard: May 27, 2016.
Judgment: June 2, 2016.

(36 paras.)

Corporations, partnerships and associations law -- Corporations -- Liquidation and dissolution -- Motion by Jay for production of financial records for estate freeze vehicle or, alternatively, appointment of inspector allowed -- Court ordered liquidation of estate freeze vehicle -- Jay and Pam were beneficiaries of estate freeze and Pam was responsible for accounting, but refused to produce financial records -- Situation cried out for independent third party to review financial records and submit report to court -- Pam was not independent, her accounting was questioned and questions were confirmed by forensic accounting expert.

Statutes, Regulations and Rules Cited:

Business Corporations Act, s. 207, s. 208, s. 209, s. 215(2)

Counsel:

Michael Kerr and Andrea Farkouh for the Applicants.

Robert Watson for the Respondents.

ENDORSEMENT

1 M.A. PENNY J.:-- This proceeding involves the allocation of assets within an estate freeze structure between the seven children of Anne Teresa Liptay and John Joseph Liptay, both deceased. Many issues raised in the initial application have been overtaken by events.

2 It is common ground that each child is to receive an equal share of their parents' accumulated assets. The assets were either in their parents' estate or in an estate freeze vehicle, 1280584 Ontario Inc. It is also common ground that any *inter vivos* transfers of assets to individual children are to be included as part of that child's overall 1/7 share. The litigation has really boiled down to an accounting exercise.

3 The respondent, Pam Hvasta, was given initial responsibility for looking after the parents' financial affairs and, following their death, the accounting for the assets and who had already received, or was to receive, what, in order to achieve the equal division that the parents intended.

4 This litigation arose from disagreements over how various transactions had and should be accounted for and whether the accounting done by Pam achieved the objective of equal division of all of the assets.

5 Jay believes mistakes have been made and that the accounting prepared by Pam is not accurate or reliable in certain respects. Pam, Paula, Luanne, Laurie and David are opposed to Jay in this litigation. They say Pam's current accounting (it has been amended several times in response to a number of Jay's concerns) is correct. Leslie has not participated and has taken no position in the litigation.

6 At a pretrial conference held November 2, 2015, Mr. Justice Hainey concluded that the matter was not ready for trial and vacated the pending trial date. There were two significant issues standing in the way of a trial:

(1) the issues for trial were not specifically defined for the trial judge; and

(2) there was a pending motion by Jay for production of additional financial records or, in the alternative, for the appointment of an inspector under s. 209 of the Ontario *Business Corporations Act.*

7 Hainey J. ordered that the motion proceed on the date previously reserved for the commencement of the trial, November 30, 2015. I adjourned that motion at the request of the respondents, who had not filed responding material or a factum. The motion came back on for hearing Friday, May 27, 2016.

8 Mr. Justice Morgan on January 31, 2013 ordered the immediate liquidation of 128 (subject to the obligation to realize proper values) under s. 208 of the OBCA. At that time, he declined to appoint an inspector but ordered that "relevant information respecting the conduct of the liquidation shall be disclosed to all parties."

9 3 1/2 years later, most of the assets have been sold but the parties are still at war over many of the transactions that have taken place, how they are to be accounted for and whether Pam's accounting will result in an equal distribution of the assets to all seven children.

10 Jay retained his own accountant to review the reports prepared by Pam. In a preliminary report of August 21, 2015, Ms. Loomer of Froese Forensic Partners Inc. concluded, among other things, that with respect to disbursements from 128 and loans payable to the Liptay childrens' numbered companies, Froese could not confirm the amounts paid, or the amount payable to, the childrens' numbered companies "because insufficient information has been provided to allow us to do so." These disbursements, loans and payments are at the heart of the dispute between the parties.

11 Exhibit L to the Loomer affidavit filed in support of this motion sets out, comprehensively, the documents requested with respect to disbursements from father's account and disbursements and loans from 128. Production of these documents has been refused.

12 Some indication of the respondents' approach to the accounting dispute can be derived from the respondents' response to the applicant' request to admit. The respondents were asked to admit the authenticity of their father's, and 128's, financial records. They refused to do so.

13 To the parties' credit, they have managed to narrow the issues and largely, to liquidate their father's asset portfolio. There is deep distrust, however, between Jay and the respondents.

14 Pam's accounting has been shown to have contained errors, which she has purported to address once confronted with them. Now, she says all issues have been addressed that there is no need for any further accounting information or accounting analysis. Jay, on the other hand, is not satisfied that the accounting has been done properly and has been thwarted in his efforts to conduct a full examination of the originating financial records in order to test Pam's assertion that her reporting has been done correctly.

15 The financial dealings between 128 and the childrens' numbered companies are complex, but not that complex. In light of Morgan J.'s clear order and the substantial amount of time that has passed since that order was made, it is surprising, and disturbing, that the parties are still locked in this highly acrimonious struggle. The respondents' response to this motion has been to attack Jay's motives and his prior actions or positions taken in these proceedings; in general, to raise every possible obstacle to Jay's attempt to challenge and test Pam's accounting. The only thing they have not done in their response to this motion is to answer the simple question, 'why should Jay not have access to the original financial records to examine them for himself?'

16 Essentially, the respondents take the position that:

(a) Jay, having set the matter down for trial, is foreclosed from bringing this motion;

(b) Jay has been given all the information he has previously asked for; and

(c) All Jay's concerns have been addressed in subsequent iterations of Pam's several revised reports.

They oppose any further production of backup financial documentations or the appointment of an inspector to review the records to ascertain whether Pam's accounting is comprehensive and accurate.

17 This is, in my view, a situation that cries out for an independent third-party to review the financial records and accounts and submit a report to the court. That is what Jay seeks on this motion.

18 I do not agree that this motion has been foreclosed by virtue of the applicant having set the matter down. Hainey J. clearly identified this case as a straightforward accounting case that was not ready for trial. Pam, as a beneficiary of the estate freeze, is not independent. Her accounting has been questioned. Those questions have been confirmed by a forensic accounting expert. This case could not proceed at all without the ability of the applicant to have someone with accounting expertise who is independent review the underlying financial records. It is for the benefit of all parties that this exercise be done as quickly and efficiently as possible.

19 The court enjoys broad inherent powers to regulate and control its own process and proceedings. This is necessary in order to fulfill the court's core functions in the administration of justice. These core functions include securing the just, most expeditious and least expensive determination of every civil proceeding on its merits, see *Abrams v. Abrams* (2010), 102 O.R. (3d) 645 (S.C.J.). If leave to bring this motion were necessary, as part of the inherent jurisdiction of the court to ensure the just, most expeditious and least expensive determination of this proceeding on its merits, I would grant that leave.

20 On the present record before me, there remains uncertainty about the reliability of Pam's accounting on a number of issues. For example, there remain questions about the accounting treatment of the money she borrowed to buy the Doulton property. Has Pam accounted for interest on the funds borrowed to purchase the Lionheart property? There remain unanswered questions about interest on the Grand Olympic mortgage which was paid to Laurie, although the mortgage was owned by 128. Similar questions remain about the Plouffe, Kuppa and Shakespeare mortgages. There is a lack of detailed information about how much money has been withdrawn from 128 on behalf of the children. The amounts owed by 128 to individual children appear to fluctuate from year to year without explanation. Although there are now apparently only four mortgages left in the asset portfolio, they are material, representing over $6.5 million in uncollected debt owed to 128. There are apparently legal proceedings regarding at least three of them.

21 These are all issues which have been identified by Ms. Loomer. Her requests for information to enable her to answer these questions have been refused. Other than the

fact that the respondents say they are tired of this litigation and Jay's constant requests for more information, no factual explanation has been offered for why Ms. Loomer's request is unreasonable, unwarranted or inappropriate.

22 I find the respondents' position particularly odd in light of Pam's acknowledgment in her factum that she was the family member entrusted for years with handling the family's financial affairs. She was the one appointed by their mother as estate trustee. She was the one appointed by their father to be attorney and estate trustee. It was Pam who the siblings agreed initially should conduct the winding up and be entrusted with the accounting of who was entitled to what. Pam took on fiduciary obligations. She has a responsibility to account for her management of and accounting for other people's money. If there are questions about that accounting, she ought to be cooperating and seeking answers, not throwing up every possible obstruction.

23 The words of MacKinnon J. in *King City Holdings Limited v. Preston Springs Gardens Inc*., 2001 CarswellOnt 1364 (S.C.J.) at para. 12 are entirely apposite here:

> the significant quarreling and the state of animosity as is here demonstrated precludes all reasonable hope of reconciliation and friendly cooperation. In itself, that significant animosity and the resulting complete loss of confidence is sufficient to justify relief and to meet the test of "just and equitable." It is clear that the parties have reached an impasse, are deadlocked, and that the court must intervene in this shareholder's dispute.

24 MacKinnon J. went on to say in the *King City* case that the court may make whatever order it deems just and equitable. This gives the court power to grant a wide range of discretionary remedies. No finding of oppression need be made by the court under s. 207. Where the parties no longer trust one another, have lost confidence in each other's ability to deal fairly and can no longer act properly and in a businesslike manner, there is a deadlock which warrants the exercise of the court's authority under s. 209 of the OBCA to appoint an inspector.

25 It is clear that the "just and equitable" jurisdiction conferred by s. 207 of the OBCA (which was invoked by Morgan J. when he ordered 128 to be wound up) informs the authority of the court under s. 209.

26 Section 209 provides:

> The court may make the order applied for, may dismiss the application with or without costs, may adjourn the hearing conditionally or unconditionally or may make any interim or other order as is considered just, and upon the making of the order may, according to its practice and procedure, *refer the proceedings for the winding up to an officer of the court for inquiry and report and may authorize the officer to exercise such powers of the court as are necessary for the reference*. [Emphasis added]

27 I have come to the conclusion that the normal remedy for the problem posed by Ms. Loomer - an order for production of documents - would not suffice in the circumstanc-

es of this case. I say this because, based on conduct to date, it would likely lead to more squabbling and more antagonism and cost without necessarily achieving what is clearly needed - an independent assessment of Pam's accounting. I therefore exercise my discretion under s. 209 of the OBCA and appoint an inspector as an officer of the court to make enquiry and report on the sufficiency of Pam's accounting.

28 No exception was taken to the qualifications of the individual proposed to be appointed as an inspector under s. 209. This is Jerry Henechowicz of MNP Ltd. I therefore appoint Mr. Henechowicz as the inspector.

29 In connection with his duties as a court appointed inspector, I authorize Mr. Henechowicz to make inspection of all necessary documents and records and, for this purpose, order the respondents to deliver such documents and records to Mr. Henechowicz forthwith upon demand.

30 Mr. Henechowicz shall also have the authority to interview and, if necessary, examine any party in connection with the exercise of his responsibilities as inspector.

31 I am not satisfied that further orders under s. 215(2) of the OBCA or for the appointment of a liquidator are warranted at this time.

32 The inspector has provided an estimate of costs. The inspector's costs up to the limit of that estimate shall be paid at first instance by 128. If additional fees are necessary there shall be a motion on proper material seeking, and explaining the reason for, this relief. How the inspector's costs should be finally allocated as between the applicant and the respondents is an issue that will be resolved as part of the final disposition on the merits.

33 Mr. Kerr seeks to tidy up the pleadings to reflect developments (of which there have been many) since the application was first initiated. He therefore seeks leave to amend. The motion is opposed on the basis that it is unnecessary and for various technical reasons. Mr. Watson conceded that the amendments do not raise any issues which are "prejudicial" to the respondents within the meaning of that term as it is used in connection with amendment motions.

34 Leave to amend is granted.

35 It is my intention to fix the costs of this motion but make them payable in the cause. I urge the parties to agree on an appropriate number. In the absence of agreement, each party shall submit a Bill of Costs within seven days of the release of these reasons.

36 Certainly no later than the completion of the inspector's inquiry and report, the parties shall book a case conference before the case management judge, Justice Hainey, in order to resolve any remaining outstanding issues concerning the conduct of the trial.

M.A. PENNY J.

Case Name:

Royal Bank of Canada v. CFNDRS Inc.

Between
Royal Bank of Canada, Applicant, and
CFNDRS Inc., formerly known as Design Cofounders Inc., formerly known as Tailored UX Inc., Respondent

[2017] O.J. No. 6688

2017 ONSC 7661

Court File No.: CV-17-587341-00CL

Ontario Superior Court of Justice

F.L. Myers J.

Heard: December 20, 2017.
Judgment: December 20, 2017.

(18 paras.)

Counsel:

James Satin, counsel for Royal Bank of Canada.

Mustafa Redha in person.

ENDORSEMENT

1 F.L. MYERS J.:-- On November 28, 2017, the bank commenced a summary application seeking the appointment of a receiver over the property, assets, and undertaking of the respondent. The relief claimed in the notice of application does not include the appointment of a manager of the business. Neither does it include a claim for judgment on the respondent's indebtedness. The appointment of a receiver alone is the sole substantive relief sought in this application.

2 The grounds relied upon in the application and the bank's evidence are that: the bank holds security under a general security agreement and a lease; the terms of the security documents provide for the appointment of a receiver on default; the respondent is indebted to the bank; it defaulted; and the bank has made demand.

3 The bank relies upon s. 101 of the *Courts of Justice Act*, RSO 1990, c. C-43 and s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B.3.

4 Section 101 of the *Courts of Justice Act* does not apply in this application. The section involves only interlocutory orders. Here, the appointment is sought on a final basis. This is allowed under s. 243 of the *BIA* and therefore under Rule 14.05 (2) of the *Rules of Civil Procedure*, RRO 1990, Reg. 194. However, nothing in that statute describes what happens after the receiver is appointed by way of application. An application is made and the court issues a final order appointing the receiver -- presumably defining the goals of the process in that final order.

5 By contrast, when an action is commenced to enforce a debt and the plaintiff seeks the interim appointment of a receiver and manager under s. 101 of the CJA and Rule 41, the appointment is interlocutory. The receiver preserves and protects the assets pending proof of the debt. If the plaintiff obtains judgment on its debt, the receiver and manager then will enforce the plaintiff's judgment by way of equitable execution akin to an appointment under Rule 60.02 (1)(d). The receiver and manager will liquidate assets or engage in other processes to realize cash to pay to the plaintiff who is then a judgment creditor. Before the receiver and manager can pay a judgment creditor however, the receiver and manager, of necessity, will have to consider whether there are other claims that must, by law, be paid in priority to the claim of the judgment creditor. In that process an orderly liquidation and payment scheme is mandated and carried out.

6 While there is much similarity between the provincial and federal regimes, it should be borne in mind that s. 243 (7) of the BIA prohibits the court from providing a super-priority charge to the receiver to indemnify it for disbursements it incurs in the operation of a business of the insolvent person. I am unaware of any case law that provides for the appointment of a receiver under s. 243 of the BIA by way of originating application in which the receiver has been ruled to be entitled to a super-priority charge to protect its right to indemnity for business disbursements.

7 Although the notice of application in this case sought only the appointment of a receiver, the draft order submitted by the bank followed the Commercial List model form of order. It provided for the appointment of a receiver and manager under both s. 101 of the *CJA* and s. 243 of the *BIA*. It provided a super-priority charge for all fees and disbursement of the receiver and manager and its counsel on all disbursements although that is available only under the former statute and not under the latter. Where both statutes apply, that is permissible. But here, since s. 101 is not engaged in an interlocutory appointment process, the receiver would not be entitled to indemnity for business disbursements in a s. 243 receivership.

8 The test for the appointment of an interlocutory receiver is well understood. In para. 10 of *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC) Blair J. (as he then was) set out several propositions that remain applicable today:

a. The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so;

b. In deciding whether or not to do so, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto;

c. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently;

d. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed.

9 Justice Blair also noted that while the appointment of a receiver may be seen to be extraordinary, it is much less extraordinary when the plaintiff has a contractual right to appoint a receiver on its own. The question of whether a court appointment then is just and convenient when there is a contractual power of appointment will turn on an assessment of, "the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager." *Freure Village* at para. [12].

10 In my view, the issue that usually tips the balance is whether there is a reason to incur the expense and procedural formality of appointing a third party to exercise neutral, transparent, accountable stewardship of the assets of the debtor while interested parties jostle on the merits of whatever their dispute may be. If the parties' dispute puts the business assets at risk or where realization options may be impaired by leaving the business in the debtor's hands or requiring the secured creditor to bear the risk of indemnifying a privately appointed receiver, the court will usually intervene. Often, simple default on secured debt will be sufficient to attract a receivership where the risk to the business is implicit in the nature of the business or the dispute between the creditor(s) and the debtor(s). However, as with all equitable remedies, context is everything and each case turns on its own facts.

11 In this case, there is absolutely no evidence before the court as to why a court appointed receiver is just or convenient. All that follows was told to me on an unsworn basis by counsel and Mr. Redha personally.

12 As best as I can tell, the respondent runs a high tech startup that is in an early development stage. It is creating software that will help lead a business through the steps of a problem solving exercise. Like many startups, the business operates through its principal, Mr. Redha, and a number of independent contractor/consultants. There are no other employees. There is no bricks and mortar. There is Mr. Redha, his computer, and perhaps

some IP. I did not ask if the business has an office or if the bank proposed to take possession of Mr. Redha's residence under the order as drafted.

13 The bank says that it is interested in collecting the respondent's accounts receivable and its entitlement to Scientific Research and Experimental Development Tax Incentive payments. Mr. Redha estimates conservatively that the business has approximately $75,000 in outstanding receivables. It may have entitlement to SR&ED payments for 2016 and 2017 that may be significant. The applications for these payments are complex and require Mr. Redha's involvement with a professional consultant who charges a 7% fee. Mr. Redha is bullish on his prospects to obtain new receivables, i.e. new revenue, in the New Year. I doubt he would have been so bullish had he understood that a receivership would have seen him working for a salary to be negotiated with the receiver while the receiver obtains the receivables generated by his efforts.

14 Mr. Redha submits that the IP of the business has value that exceeds the amount of his debt. I have no way to assess the correctness of this statement. Moreover, the bank is not required to keep funding the respondent through a sales process of its own making. However, this much is clear to me (based on experience and common sense absent any evidence one way or the other) -- if a receiver is appointed, it has no wherewithal to run the business without Mr. Redha's voluntary and ongoing commitment. Trying to sell partially developed software disembodied from an operating business and without Mr. Redha's ongoing support seems unlikely to be value-maximizing and probably is impossible. In fact, there really is no business for a third party to manage. There is just Mr. Redha and his computer and incomplete software.

15 Mr. Satin submits that the bank is entitled to a receiver under its loan and security documents. The proposed receiver, he says, is not willing to undertake the appointment without the protection of the court. There is no indication of why that may be so.

16 The total debt of about $450,000 is very small for a court ordered receivership process. There is no indication as to how a court-based process can be expected to be value-maximizing or why it is more desirable than a private appointment in this case. There is nothing inherent in the relationship between these parties that makes the mere existence of a default on a debt require a neutral third party to assume stewardship of the business such as it may be. The bank has delivered a notice under s. 63 (4) of the PPSA that it intends to realize on collateral of the respondent. Collecting $75,000 in outstanding receivables is not made more convenient by a court appointed receiver. Putting in place a trust or lockbox process for receipt of SR&ED payments may require some negotiation or, perhaps, appointment of a very limited true receiver empowered simply to receive this specific property of the debtor and perhaps to oversee completion of SR&ED applications. With some negotiation, a sale process for the respondent's IP might be agreed upon. It will take evidence however to establish that a professional accountant/trustee can come in and sell the IP in a value-maximizing process without Mr. Redha's voluntary, active engagement.

17 The respondent should not take from this that it is at all freed from its legal obligations to pay its debt. The bank has many paths open to it to seize and sell the respondent's assets, take its loss, and bring a swift end to the business. That strikes me as a lose-lose proposition, but that is not my decision to make. As usual, if there is to be a win-win, there

will need to be a discussion in which each party tries to accommodate the other's interests to some degree at least.

18 In view of the procedural issues, the complete lack of evidence, and the inapt order sought, I am not prepared to appoint a receiver as sought in this case at this time. If the bank wishes, it may arrange a case conference before me, on notice to the respondent, at which I can assist the parties work towards a consensual outcome or restructured court proceedings. Alternatively, the applicant may file a draft order dismissing this application for signing. Mr. Redha's approval of the form and content of the draft order is not required. Nothing in this outcome precludes the applicant from commencing an action against the respondent to sue on its debt.

F.L. MYERS J.

CV-18-596938-00CL

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	**- v -**	**APARTMENTS FOR LIVING FOR PHYSICALLY HANDICAPPED ASSOCIATION**
Applicant		Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

APPLICANT'S BOOK OF AUTHORITIES

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