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# **The 2018 Ottawa Region Charity & Not-for-Profit Law Seminar**

**Ottawa – February 15, 2018**

## **GOVERNANCE DISPUTES INVOLVING CHARITIES AND NOT- FOR-PROFITS: A VIEW FROM THE BENCH**

**By The Honourable Justice David M. Brown**  
Court of Appeal of Ontario

## GOVERNANCE DISPUTES INVOLVING CHARITIES AND NOT-FOR-PROFITS: A VIEW FROM THE BENCH

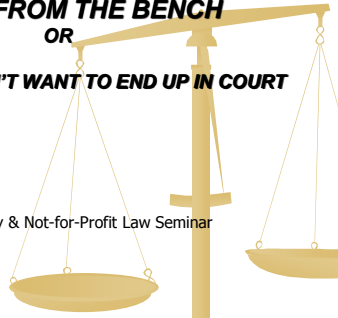
OR

**YOU REALLY DON'T WANT TO END UP IN COURT**

Justice David Brown  
Court of Appeal for Ontario

2018 Ottawa Region Charity & Not-for-Profit Law Seminar  
Ottawa, Ontario

February 15, 2018



## DISCLAIMER/CAUTION

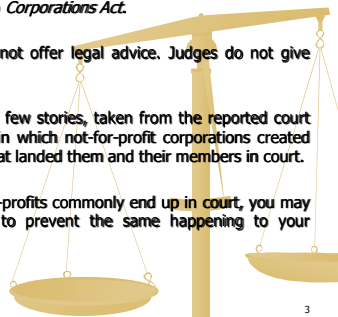
- Our court typically considers cases involving not-for-profit corporations incorporated under the *Corporations Act*, R.S.O. 1990, c. C.38 or by special act.
- The Ontario Legislature has passed legislation to establish a corporate regulatory regime specifically for not-for-profit corporations: *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15. This act has not yet come into force.
- To make matters more complicated, the Ontario government has introduced legislation that would amend the *Corporations Act* to import some of the anticipated provisions in the *Not-for-Profits Act*: see Bill 154 introduced September 14, 2017.



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## DISCLAIMER/CAUTION

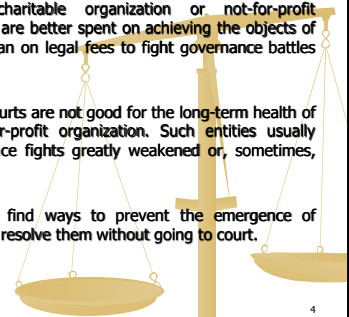
- The discussion in this presentation is based only on the existing provisions of the Ontario *Corporations Act*.
- This presentation does not offer legal advice. Judges do not give legal advice.
- This presentation tells a few stories, taken from the reported court cases, about instances in which not-for-profit corporations created governance problems that landed them and their members in court.
- By knowing why not-for-profits commonly end up in court, you may be able to find ways to prevent the same happening to your organization.



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## MY KEY ASSUMPTIONS

- The funds of a charitable organization or not-for-profit corporation/association are better spent on achieving the objects of those organizations, than on legal fees to fight governance battles in court.
- Governance fights in courts are not good for the long-term health of a charitable or not-for-profit organization. Such entities usually emerge from governance fights greatly weakened or, sometimes, destroyed.
- Effective organizations find ways to prevent the emergence of governance disputes or resolve them without going to court.



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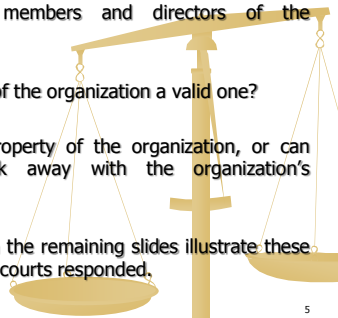
## THREE COMMON GOVERNANCE PROBLEMS FOUND IN THE COURT CASES

[1] Who are the members and directors of the organization?

[2] Was that meeting of the organization a valid one?

[3] Who owns the property of the organization, or can some members walk away with the organization's property?

The cases discussed in the remaining slides illustrate these problems and how the courts responded.



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## COMMON PROBLEM NO. 1

**WHO IS A MEMBER?**

**WHO IS A DIRECTOR?**



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## WHO IS A MEMBER? WHO IS A DIRECTOR?

### *Corporations Act*, Part III: Corporations without Share Capital (selected sections)

120. The letters patent, supplementary letters patent or by-laws of a corporation may provide for more than one class of membership and in that case shall set forth the designation of and the terms and conditions attaching to each class.
123. Unless the letters patent, supplementary letters patent or by-laws of a corporation otherwise provide, there is no limit on the number of members of the corporation.
125. Each member of each class of members of a corporation has one vote, unless the letters patent, supplementary letters patent or by-laws of the corporation provide that each such member has more than one vote or has no vote.
129. (1) The directors of a corporation may pass by-laws not contrary to this Act or to the letters patent or supplementary letters patent to regulate,
- (a) the admission of persons and unincorporated associations as members and as members by virtue of their office and the qualification of and the conditions of memberships;
  - (b) the fees and dues of members;
  - (c) the issue of membership cards and certificates;
  - (d) the suspension and termination of memberships by the corporation and by the member;
  - (e) the transfer of memberships.

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## WHO IS A MEMBER? WHO IS A DIRECTOR?

### *Corporations Act*, Part III:

129 (1) The directors of a corporation may pass by-laws not contrary to this Act or to the letters patent or supplementary letters patent to regulate,

- ... (f) the qualification of and the remuneration of the directors and the directors by virtue of their office, if any;
- (g) the time for and the manner of election of directors;
- ... (i) the time and place and the notice to be given for the holding of meetings of the members and of the board of directors, the quorum at meetings of members, the requirement as to proxies, and the procedure in all things at members' meetings and at meetings of the board of directors...
- (j) the conduct in all other particulars of the affairs of the corporation...

(2) A by-law passed under subsection (1) and a repeal, amendment or re-enactment thereof, unless in the meantime confirmed at a general meeting of the members duly called for that purpose, is effective only until the next annual meeting of the members unless confirmed thereat, and, in default of confirmation thereat, ceases to have effect at and from that time, and in that case no new by-law of the same or like substance has any effect until confirmed at a general meeting of the members.

(3) The members may at the general meeting or the annual meeting mentioned in subsection (2) confirm, reject, amend or otherwise deal with any by-law passed by the directors and submitted to the meeting for confirmation, but no act done or right acquired under any such by-law is prejudicially affected by any such rejection, amendment or other dealing.

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## WHO IS A MEMBER? DIRECTOR?

### Case study: *Rexdale Singh Sabha Religious Centre*

ROUND 1: *Rexdale Singh Sabha Religious Centre v. Chattha*, 2006 CanLII 2189 (ON SC); reversed: 2006 CanLII 39456 (Ont. C.A.)

What lay behind the court litigation:

- Disagreement over the management of a large capital project (the construction of a funeral home), including the failure to internally share accounting information.
- Unilateral creation of a membership list by an officer, which resulted in most congregants obtaining "membership". However, the process did not comply with the membership requirements of the *Corporations Act*.

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## WHO IS A MEMBER? DIRECTOR?

- In the first round, the 2006 Application judge held:

[20] Although the Directors did not call meetings of members and did not properly pass by-laws, I agree with the submission of the Respondents that the congregants warrant protection. I agree with the submission that at least four of the five directors of Rexdale can be taken to have approved the creation of the list of the members. As such the Court can exercise its remedial power to make such order as is just.

- The Court of Appeal disagreed and reversed:

[4] No proper procedure was ever taken to change the members of these corporations in accordance with the Act. There was a total failure to comply with the Act. We cannot agree with the application judge's conclusion that four of the five directors of Rexdale can be taken to have approved the creation of the list of the members.

- The Court of Appeal held the members of the corporation were the original applicants on the incorporation.

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## WHO IS A MEMBER? DIRECTOR?

ROUND 2: *Deol v. Grewal*, 2008 CanLII 44699 (ON SC)

- After the 2006 Court of Appeal decision, proper governance conduct prevailed for a time. However, problems emerged at later directors meetings, including:

- The expanded Board turned out to be a divided Board.
- Groups or factions of directors met in the absence of the other directors.
- A resolution removing certain officers was passed in their absence.
- Minutes of meetings were cryptic and omitted material information.
- Proper notice of the time and place of meetings was not given to all directors.
- Notices did not fully describe the business to be considered at a meeting.
- The Board refused to call a members' meeting requested by a proper requisition.

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## WHO IS A MEMBER? DIRECTOR?

- The 2008 Application judge stated:

[74] I recognize that the Sikh Centre is a volunteer organization, run by volunteers. I also agree with the comments ... in *Lee v. Lee's Benevolent Assn. of Ontario*, 2004 CarswellOnt 8790 (S.C.J.) at para.12 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 process is fair. In my view, however, the lack of advance notice to the directors of important non-routine business to be transacted at a directors meeting is not fair to the directors.

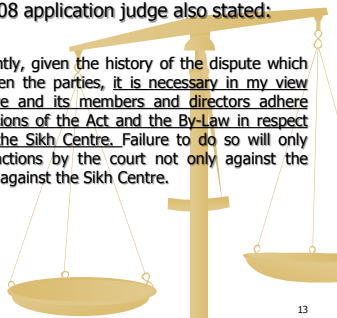
- It is questionable whether the proposition about relaxed compliance with governance requirements is consistent with the Court of Appeal's 2006 decision (see Slide 10). See also the reservations about the proposition expressed by the Divisional Court in the *Lee* case, 2005 CanLII 1072.

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### WHO IS A MEMBER? DIRECTOR?

- In any event, the 2008 application judge also stated:

[119] More importantly, given 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 of 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.

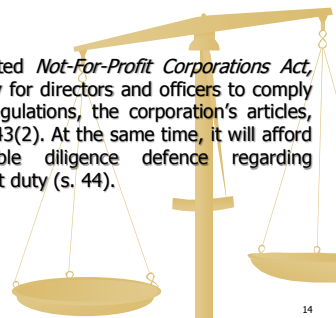


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### WHO IS A MEMBER? DIRECTOR?

#### NOTE:

- The yet-to-be-enacted *Not-For-Profit Corporations Act, 2010* creates a duty for directors and officers to comply with the Act, its regulations, the corporation's articles, and its by-laws (s. 43(2)). At the same time, it will afford them a reasonable diligence defence regarding compliance with that duty (s. 44).

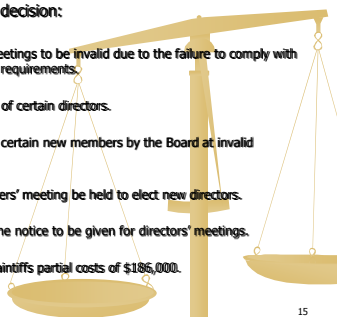


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### WHO IS A MEMBER? DIRECTOR?

#### 2008 Application judge's decision:

- Found certain directors' meetings to be invalid due to the failure to comply with by-law notice and quorum requirements.
- Set aside the appointment of certain directors.
- Set aside the admission of certain new members by the Board at invalid meetings.
- Ordered that a new members' meeting be held to elect new directors.
- Stipulated the content of the notice to be given for directors' meetings.
- Awarded the successful plaintiffs partial costs of \$185,000.

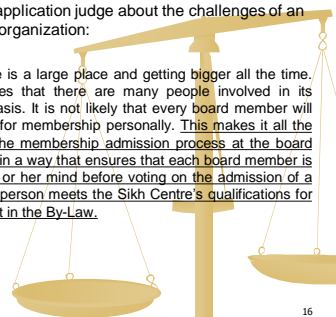


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### WHO IS A MEMBER? DIRECTOR?

- Comments of the 2008 application judge about the challenges of an expanding not-for-profit organization:

[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.

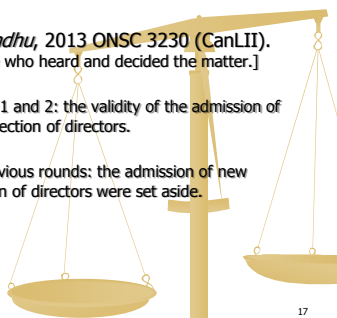


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### WHO IS A MEMBER? DIRECTOR?

ROUND 3: *Singh v. Sandhu*, 2013 ONSC 3230 (CanLII).  
[I was the application judge who heard and decided the matter.]

- Similar issues to Rounds 1 and 2: the validity of the admission of new members and the election of directors.
- Similar results to the previous rounds: the admission of new members and the election of directors were set aside.

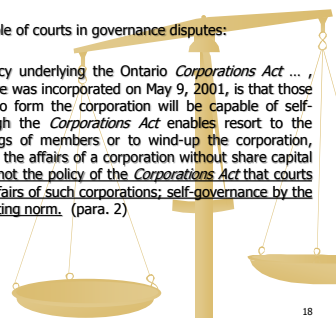


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### WHO IS A MEMBER? DIRECTOR?

- Three "take-aways" from the 2013 decision in *Singh v. Sandhu*.
- Take-away No. 1:** The role of courts in governance disputes:

The fundamental policy underlying the Ontario *Corporations Act* ... 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. (para. 2)



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## WHO IS A MEMBER? DIRECTOR?

- **Take-away No. 2:** The danger of trying to “balance” boards of directors with members drawn from different factions:

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... (para. 11)

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## WHO IS A MEMBER? DIRECTOR?

- **Take-away No. 3:** Taking a governance dispute to court can risk attracting highly intrusive intervention by a court in the affairs of the corporation. In the *Singh* case, the litigants came to court asking for the approval of different groups as members and directors. However, the corporation ended up being subject to the following orders:

- [1] The appointment of a monitor over some of the corporation’s affairs;
- [2] The preparation of audited financial statements by a fixed date;
- [3] Mandatory corporate governance training for all directors;
- [4] The preparation of a by-law amendment for consideration by members at a special meeting. (paras. 122-124)

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## COMMON PROBLEM NO. 2

### WAS THAT MEETING VALID?

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## WAS THAT MEETING VALID?

- There are three sources for the rules that govern calling and holding a meeting of directors or members:

- The corporation’s articles and by-laws;
- Statutes, such as *The Corporations Act*;
- The common law.

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## WAS THAT MEETING VALID?

### Source No. 1: The articles and by-laws:

**The Corporations Act, s. 129 (1):** The directors of a corporation may pass by-laws not contrary to this Act or to the letters patent or supplementary letters patent to regulate,

...

- (i) the time and place and the notice to be given for the holding of meetings of the members and of the board of directors, the quorum at meetings of members, the requirement as to proxies, and the procedure in all things at members’ meetings and at meetings of the board of directors...

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## WAS THAT MEETING VALID?

### Source No. 2: Statute

**The Corporations Act, s. 93(1)** Subject to subsection (2) and in the absence of other provisions in that behalf in the by-laws of the company,

(a) notice of the time and place for holding a meeting of the shareholders shall, unless all the shareholders entitled to notice of the meeting have waived in writing the notice, be given by sending it to each shareholder entitled to notice of the meeting by prepaid mail ten days or more before the date of the meeting to the shareholder’s last address as shown on the books of the company;

...

(c) all questions proposed for the consideration of the shareholders at a meeting of shareholders shall be determined by the majority of the votes cast and the chair presiding at the meeting has a second or casting vote in case of an equality of votes.

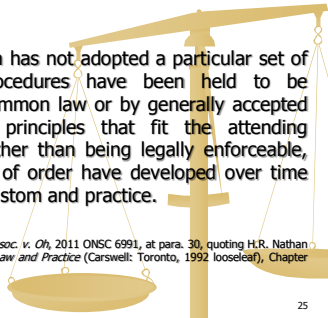
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### WAS THAT MEETING VALID?

#### Source No. 3: The common law (i.e. judge-made law):

Where a corporation has not adopted a particular set of rules, meeting procedures have been held to be governed by the common law or by generally accepted parliamentary law principles that fit the attending circumstances. Rather than being legally enforceable, parliamentary rules of order have developed over time and are based on custom and practice.

[from *Ontario Korean Businessmen's Assoc. v. Oh*, 2011 ONSC 6991, at para. 30, quoting H.R. Nathan and R.E. Voore, *Corporate Meetings: Law and Practice* (Carswell: Toronto, 1992 looseleaf), Chapter 19, §3(b), p. 3(b).]



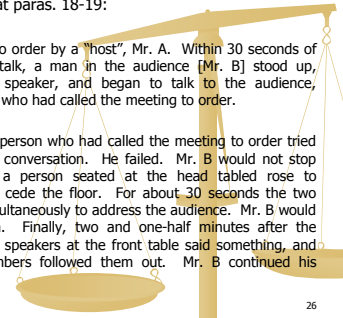
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### WAS THAT MEETING VALID?

An example of an annual general meeting of members that went badly off the rails : *Ontario Korean Businessmen's Assoc. v. Oh*, 2011 ONSC 6991 (hereafter "*OKBA*"), at paras. 18-19:

The meeting was called to order by a "host", Mr. A. Within 30 seconds of the speaker starting to talk, a man in the audience [Mr. B] stood up, turned his back to the speaker, and began to talk to the audience, speaking over the person who had called the meeting to order.

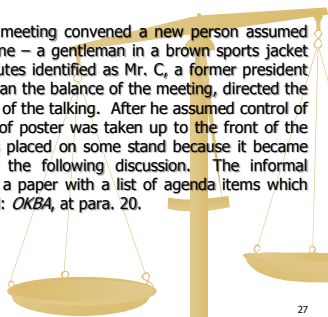
About a minute later the person who had called the meeting to order tried to resume control of the conversation. He failed. Mr. B would not stop talking. At that point a person seated at the head table rose to speak. Mr. B would not cede the floor. For about 30 seconds the two individuals attempted simultaneously to address the audience. Mr. B would not stop his interruption. Finally, two and one-half minutes after the meeting had started, the speakers at the front table said something, and left. A number of members followed them out. Mr. B continued his monologue.



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### WAS THAT MEETING VALID?

Four minutes after the meeting convened a new person assumed control of the microphone – a gentleman in a brown sports jacket whom the informal minutes identified as Mr. C, a former president of the Association. He ran the balance of the meeting, directed the discussion and did most of the talking. After he assumed control of the meeting some sort of poster was taken up to the front of the room. I assume it was placed on some stand because it became the focus of much of the following discussion. The informal minutes described it as a paper with a list of agenda items which was attached to the wall: *OKBA*, at para. 20.



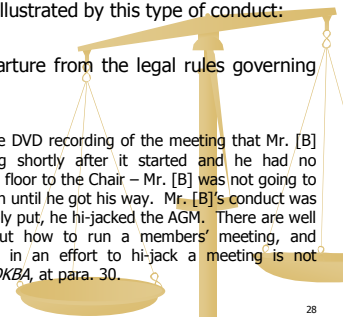
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### WAS THAT MEETING VALID?

Three legal problems illustrated by this type of conduct:

[1] The unlawful departure from the legal rules governing meetings:

It is apparent from the DVD recording of the meeting that Mr. [B] disrupted the meeting shortly after it started and he had no intention of ceding the floor to the Chair – Mr. [B] was not going to stop talking or sit down until he got his way. Mr. [B]'s conduct was highly improper. Simply put, he hi-jacked the AGM. There are well established rules about how to run a members' meeting, and interrupting the chair in an effort to hi-jack a meeting is not permissible conduct: *OKBA*, at para. 30.

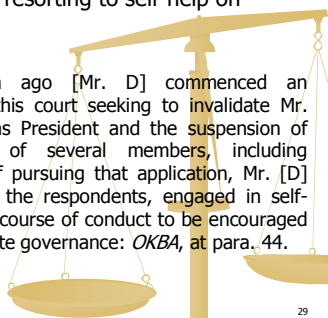


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### WAS THAT MEETING VALID?

[2] Courts frown on resorting to self-help on governance issues:

About one month ago [Mr. D] commenced an application before this court seeking to invalidate Mr. [E's] confirmation as President and the suspension of the memberships of several members, including himself. Instead of pursuing that application, Mr. [D] and his associates, the respondents, engaged in self-help. That is not a course of conduct to be encouraged on issues of corporate governance: *OKBA*, at para. 44.

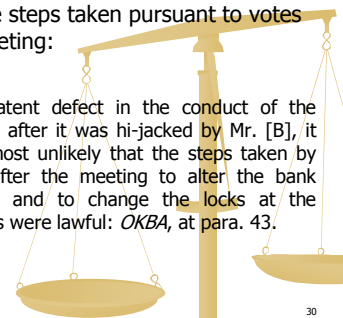


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### WAS THAT MEETING VALID?

[3] Invalidating the steps taken pursuant to votes at the unlawful meeting:

In view of the patent defect in the conduct of the November 15 AGM after it was hi-jacked by Mr. [B], it follows that it is most unlikely that the steps taken by the respondents after the meeting to alter the bank signing authorities and to change the locks at the Association's offices were lawful: *OKBA*, at para. 43.



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### WAS THAT MEETING VALID?

What were the results of the unlawful “hi-jacking” of the AGM in the *OKBA* case? The court:

- [1] Directed a special meeting of members be held within 60 days to conduct elections of directors and officers;
- [2] Directed the parties select a corporate lawyer or former judge to supervise all aspects of the election process;

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### WAS THAT MEETING VALID?

[3] Appointed a monitor of the affairs of the OKBA until the elections were held:

In the meantime, management of the day-to-day operations of the Association should be placed in the hands of an independent third party. Both factions have failed to comply with provisions of the *Corporations Act*, the By-laws and Election Rules. Both factions accuse the other of misconduct in the affairs of the Association. Neither faction should be left in control of the management of the Association – that would only inflame the dispute. The temperature must be brought down on this dispute, the management of the Association monitored by a third party on a temporary basis so the members are not prejudiced by this factional dispute, and steps then taken to hold proper elections: *OKBA*, at para. 49.

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### COMMON PROBLEM NO. 3

#### CAN DEPARTING MEMBERS TAKE AN ORGANIZATION'S PROPERTY WITH THEM?

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### MEMBERS DEPARTING WITH PROPERTY

- A complicated issue, the determination of which depends upon the specifics of the legal relationship between the umbrella organization and the small unit/branch/parish.
- An example of a not-for-profit incorporated umbrella organization and an unincorporated branch that held valuable real estate through a corporation and trustees where branch members ultimately successfully withdrew and took the branch's property with them:

*Polish Alliance Association of Toronto Limited v. The Polish Alliance of Canada*: 2014 ONSC 3216, reversed in part 2016 ONCA 445; 2017 ONCA 574, affirming 2016 ONSC 7230.

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### MEMBERS DEPARTING WITH PROPERTY

- A case with a different result. The membership of a Windsor parish voted to leave the Anglican Diocese of Huron. The courts held that when the parish members left the Diocese, they also left the parish's property behind. The analysis by the courts focused on the interpretation of the Diocese' by-laws, or canons, and trust law:

*Incorporated Synod of the Diocese of Huron v. Delicata*, 2013 ONCA 540

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### BIG PICTURE “TAKE-AWAYS” FROM THESE STORIES

- [1] Set clear and lawful governance rules about who is a member, who is a director, and how meetings are to be called and conducted.
- [2] Follow carefully and fairly the rules you set.
- [3] Act in the best interests of the organization as a whole, not in the interests of a faction.
- [4] Recognize that a court fight can weaken an organization's long-term ability to pursue its objects and inevitably will result in very significant legal fees.
- [5] Also recognize that by going to court, an organization may lose the ability to govern its own affairs. A court may place temporary control of the organization in the hands of an outside third party, such as a monitor, who reports to the court, not to the organization's members.

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