

**ONTARIO
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF THE LIQUIDATION AND WINDING-UP OF
OXFORD GOLF AND COUNTRY CLUB, LIMITED

APPLICATION UNDER SECTION 244 OF THE
CORPORATIONS ACT, R.S.O. 1990, c. C.38

BOOK OF AUTHORITIES OF THE APPLICANT

LERNERS LLP
130 Adelaide Street West, Suite 2400
Toronto, ON M5H 3P5

Domenico Magisano LS#: 45725E
dmagisano@lerners.ca
Tel: 416.601.4121
Fax: 416.601.4123

Alan Melamud LS#: 58370F
amelamud@lerners.ca
Tel: 416.601.4128
Fax: 416.601.2748

Lawyers for the Applicant

INDEX

TAB	DOCUMENT
-----	----------

- | | |
|----|--|
| 1. | <i>Sobrinho v. Oakville Portuguese Canadian Club</i> , 1982 CarswellOnt 936 (S.C.) |
|----|--|

1982 CarswellOnt 936
Ontario Supreme Court

Sobrinho v. Oakville Portuguese Canadian Club

1982 CarswellOnt 936, 14 A.C.W.S. (2d) 405, 37 O.R. (2d) 581

**In the Matter of Section 273 of the Corporations
Act, Revised Statutes of Ontario. 1970, c. 89, and**

In the Matter of the Oakville Portuguese Canadian Club

Manuel Sobrinho, Plaintiff v. Oakville Portuguese Canadian Club, Defendant

Cromarty J.

Judgment: June 10, 1982

Counsel: *O.A.J. Fonseca* , for plaintiff.

J. Warren Caldwell , for defendant.

Subject: Corporate and Commercial

Headnote

Corporations --- Winding-up — Under provincial acts — By order of court — Where "just and equitable" — Grounds

Winding-up — Under provincial acts — By order of court — Where "just and equitable" — Grounds — Corporations Act, R.S.O. 1980, c. 95, s. 243(d).

Portuguese club formed for social and recreational purposes -- Two rival factions of club members having heated dispute about election of officers and enlargement of membership -- Some members wrongly deprived of membership benefits -- Factions unable to resolve differences -- Application to wind-up non-share capital corporation allowed -- Just and equitable to wind-up club under Act.

Cromarty J.:

1 On November 8, 1979 it was ordered "that there be a trial of an issue, the issue to be whether the Defendant Club ought to be wound up pursuant to the Provisions of the Corporations Act". The issue finally came on for trial in November, 1981. The applicable statutory provision is R.S.O. 1970, c. 89, s. 273(d) which is carried forward in the same wording to R.S.O. 1980, c.95, s. 243(d) which reads -

243. A corporation may be wound up by order of the court,

.

(d) where in the opinion of the court it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up.

2 The members of this Club are religious, hard-working people of Portuguese descent who came to Canada in the nineteen fifties and sixties and banded together for social and recreational purposes. Through much effort they have acquired a valuable piece of land in Oakville to be used, in time, for a clubhouse, and they have substantial money on hand towards its construction.

3 There is no suggestion that the Club is bankrupt or insolvent so in order to decide if it should be wound up, it is necessary to examine its history, its activities and the litigious proceedings prior to this trial. Because of language difficulties much of the evidence was hard to follow and many of the translations of documents were barely adequate.

4 An unincorporated Club was formed in 1963. Shortly afterwards, one of the members got a set of by-laws from a musical club in the Azores which have been used ever since as the basis upon which the Club operates although they were never adopted formally by the original Club or its incorporated successor. The original by-laws were in Portuguese. They were roughly translated into English only in 1978 and very few copies were available in either language. They provide for a General Assembly which is ordinarily to meet once a year between October 15th and November 15th, and extraordinarily on request. Its duty is to elect "the table of the General Assembly", consisting of the president, the vice president and its secretary. It also elects the board of directors of the Club and a committee for the examination of the accounts.

5 The General Assembly is also given authority: (1) to confirm and alter the "internal regulations" proposed by the board of directors; (2) to vote and expel at the request of the board of directors or of ten members any members who become unworthy of membership; (3) to approve the acts of the directors with respect to the social funds; (4) to hear appeals from any acts of the directors which offend against the rules, and (5) to amend the rules at a meeting specially requested for that purpose.

6 Its president is empowered (1) to call meetings, (2) to direct the work of the Session, (3) to number and sign all books of the Club, and its secretary is to (1) verify the meetings by "calling" the number of members present, (2) read the minutes and correspondence, (3) send notices of ordinary and extraordinary meetings of the General Assembly, (4) keep the records of the General Assembly.

7 The board of directors is to be composed of seven "efective" members and an equal number of substitutes, to be known as the president, vice president, secretary, treasurer, fiscal [scrutineer] and two voters. Its duties are (1) to direct the society and administer its funds, (2) to admit members and to propose to the General Assembly their expulsion, (3) make internal regulations and (4) to give an accounting of its administration to the General Assembly. The president, secretary and treasurer have the usual duties of their offices.

8 The Club was incorporated without share capital and with ten directors on the 4th July, 1974. None of the by-laws referred to were enacted or adopted by the corporation, but the Club's business continued to be conducted more or less in accordance with them rather than the Act. No minutes seem to have been kept before November, 1978, other than a short memo of a meeting of the General Assembly and the board of directors on January 16, 1973 authorizing the sale of a piece of land owned by the Club and signed by only one person whose office is not shown, and an undated memo signed by the same person apparently some time after May 31, 1973. Those started in November were made because of this litigation and were kept for only a short time. No other minutes were produced.

9 A register of members was kept in which the earliest entry is April 6, 1963. This complies with s. 300(3). It was referred to as the secretary's book or the "blue book". Its last entry is dated November 5, 1977. There was also the treasurer's book, a red-covered register of members for 1977 in which the payment of dues is shown by a series of check marks and a binder containing a number of applications for membership, all dated in November, 1977, the year in which the Club started to use written application forms.

10 In 1977 the members had agreed that there should be a drive for new members to raise funds for the building. However, by November 6, 1977 when the elections of officers for 1978 were to be held, stresses were developing between a group of members led by Sobrinho who thought the membership should be greatly enlarged and the activities of the Club broadened, and another group led by Jose V. Garcia who seemed more content with existing conditions. One manifestation of stress was the arrangement whereby two competing slates of officers would be put up; one the Garcia slate, and the other the Pereira slate. Members would cast only one vote each for a complete slate. This procedure is not provided for in the by-laws and there was no evidence of how the elections had been run in the past, but both sides obviously agreed to this method in 1977. Serious problems arose because of the way in which membership applications were handled.

11 The secretary's book shows the following additions to membership:

1971	-	15
1972	-	24
1973	-	11

1974	-	8
1975	-	4
1976	-	11
1977	-	87

In November, 1977, after taking account of deaths and resignations, there appeared to be about 200 members if all of the 87 were properly admitted. This book was kept by Eduardo Viana who was secretary in 1977 under Garcia and in 1978 under Pereira. The red or treasurer's book shows only 167 persons as members at the date of the election in 1977 and the difference is one of the roots of the trouble.

12 Four witnesses were called on each side as to how members were admitted and as to what happened at that meeting. The first for the defence was A. da Rosa, the 1979 president of the Club. He didn't remember 1977 very well as he was just a member not an officer.

13 The next was Jose V. Garcia, who joined the Club in 1965, was treasurer for 2 years, vice president for one, and was president in 1973. He was an incorporator, first director and president in 1974, and was elected president again in late 1976 for the year 1977 but lost the election on November 6th for the 1978 board. He said there was a lot of confusion at the meeting and that Manuel Vargas (the scrutineer) was "mad" because there were a lot of new members there who had not been approved by the board. The incumbent board of directors sat together at a table as, Garcia said, there were a lot of new members to be approved, they had come to become members and to vote. There was no evidence as to what Garcia and his board did about accepting or rejecting these people. Someone asked where the money was for the new members initiation fee. Viana (to whom Garcia referred as "my secretary") said he had it all at home. He left the meeting and returned later with the money.

14 He said several other members complained to him and to Cruz, the president of the General Assembly. Garcia took the position that while he was the president of the board, Cruz was the president of the General Assembly and it was up to him to run the meeting. After Viana came back with the money, Cruz put a motion to the meeting asking if the list of members was all settled and if the meeting should continue and *everybody* (my emphasis) put their hands up indicating yes and the meeting went on "for the election and everything".

15 Garcia had signed proposals for the admission of Manuel L. Gonçalves on November 1st and for Tomas J. Andrade at the hall where the meeting was being held. The proposals had been signed by Cruz and Viana but had not been passed on by the board. The men were at the meeting and were seen by Garcia to vote. There was no evidence that he complained or tried to stop them. He said that the ballots were given out to the voters by Jose Goulart. He was cross-examined on his affidavit sworn on the application for an interim injunction

in which he said, "I verily believe that the then secretary of the Club, the defendant Eduardo Viana gave the ballots to the approximately forty people". He acknowledged that this was an error, and that the ballots had been given out by Goulart and another. He later said that there were two on each side who gave out the ballots.

16 When the vote was counted Cruz declared the Pereira slate elected. Garcia made no objection and indeed went over to Pereira, shook hands and congratulated him. He then made an odd comment saying, "If I had won I would have declared it invalid". He had no power to do this since, as he had said earlier, it was up to Cruz to run the meeting and article 4(1) of the by-laws provides: "It is the competence of the General Assembly to elect the directors".

17 The next witness was Manuel Vargas, the fiscal (scrutineer) who said that he used the red book to go by when letting people in to the meeting so he would know if their dues were paid. When he entered the hall he had never seen such a large meeting and there were a great many strange faces but all of these people had cards and some other "guys" came after and Viana gave them cards. Later Cruz called a roll of names — not by the red book — and asked the meeting if he could "go by this list" (for the voting). This was approved by a majority vote. Vargas did not put his hand up nor did any of the board, he could not say how many voted in favour. da Rosa was not asked about this vote.

18 Jose de Faria was a founder of the Club and very active in it, having held office almost continuously since 1963. At first the Club was like a family, there was no problem accepting members, they got a card and a number without any board meeting and their names were put in both books and if there was any slip of paper about them it was thrown away and there was almost nothing in writing, "We just agreed". He then contradicted himself and said that when he was secretary of the board of directors (1963-4-5-6-9-70-4-5-) the members were always approved by the board. He was shown the application by Andrade, proposed by Jose Garcia, stamped with the words "President" and "Secretary" and signed by Cruz and Viana, the secretary of the board of directors, and said this meant approval but he complained that approval had not been given before the day of the election. Garcia had said that he proposed two people on November 6 and gave the forms to Viana, that the men were present at the meeting and that they voted. de Faria stated that he did not know of these applications being given to Viana by Garcia but "If it was done in honesty this is how it has been done since 1963: it is no surprise to me that Garcia gave it to Viana but Viana doesn't get rights at all to approve the application before he can show it to the rest of the board of directors. Our statute never said Cruz could approve. If approved by the board of directors it doesn't need to go to the General Assembly. I don't know what happened about approvals in 1977 before the elections". His antipathy to the members of the Pereira slate and to persons friendly to Pereira showed through his evidence. He said he spoke to Pereira but "he doesn't listen to anybody". He charged that Cruz called out the names of members not in the book (referring to the red

book not to the book required to be kept by the Act), but he does concede that Cruz put a motion to the meeting about continuing but complains that he asked for only favourable votes and not for those opposed, although he did not know how many were opposed. He said he then sat down and shut up. On cross-examination he said he objected that all the money was not at the meeting and said that the elections could not go ahead. When Viana brought the money to the meeting, he asked de Faria if he was satisfied to which he replied "Why didn't you bring this before or take it to the board of directors or keep it until tomorrow, what's the rush - when we have accepted the new members, what's the difference?" Later he refused to shake hands with Sobrinho, an important member of the Pereira faction, saying "I wouldn't shake hands after a matter like this". He then went to see the Club's lawyer MacMillan. He admitted that he wanted to win the election and that all these new members were a potential threat to him. He conceded that he had no objection personally to any of the people proposed becoming members, it was just that they had not been approved, as approval must be made by the directors and not by the General Assembly.

19 Sobrinho who is the applicant was a founding director, an incorporator in 1974 and one of the first directors of the incorporated Club and in November, 1977 was vice president of the General Assembly. He was of the opinion that all members at the meeting were in good standing. In the past, 70 per cent of the dues owing for the current year were collected on the day of voting in November and he remembered no one being expelled for non-payment.

20 Viana appears to have been secretary of the Club in 1967-8 and in some later years including 1977. In that year he was asked to run as secretary for the Garcia slate for 1978 but refused and switched his allegiance to Pereira because of some difficulties with Garcia. He was at the meeting of the 6th but was not much questioned about it.

21 During the meeting da Rosa and Viana went to his house to get the money paid by new members as entrance fees. It was brought back to and accepted by the meeting. Vargas then seemed satisfied that the persons at the meeting were proper legal members. Viana could recall no one of full age being turned down for membership by the board.

22 Pereira joined the Club about 1967 and was present at the November 6th meeting. He recalled no objections to the election and stated that Cruz inquired of Vargas and was told that all members had paid and that the election could proceed. His slate was elected and there were no objections from the floor. After the announcement Garcia congratulated him and Pereira asked for his support to which Garcia replied he would be with him. After the election de Faria was upset and told Garcia to hold all the ballots saying, "We're going to take all this into the courts. I'm not in accord with the election." Pereira asked why he had not objected earlier and only got the reply, "One of these days we'll go to the courts".

23 Cruz is a very recent member of the Club but became president of the General Assembly for the year 1977 and conducted the meeting of November 6th. Vargas, the fiscal, was assisted by Goulart, the treasurer, and E.F. Andrade, the vice secretary, in checking the identity of persons coming into the hall and ensuring that they were in good standing. Vargas reported to Cruz that they were. The secretary of the General Assembly then called the roll provided by the secretary of the board of directors. There were no objections to the names called.

24 Earlier in the meeting Garcia had given him an application from one Tomas Andrade. He also received, but cannot recall when, an application from Manuel Gonçalves dated November 1. Both were proposed by Garcia and were entered in the secretary's (blue) book in their proper places.

25 There was a 15 minute recess before the voting while the ballots were being distributed. The vote then took place, the ballots were counted and the Pereira slate was declared elected. There were no objections to the method of balloting or to the result other than a question about the Club's money which was raised earlier in the meeting and to which I have referred. After the meeting adjourned it became obvious that some members were not pleased with what had gone on.

26 On November 10th, four days after the election, Viana received a letter signed by the members of the Garcia slate in part as follows: "The executive of the Club expels you from holding office because of the failures and abuses below mentioned that you perpetrated from January 1977 until November 7th; (1) a serious failure in respect of the contract with the 'Mash' orchestra; (2) organization of a function without authority of the executive and making 'propoganda' for the function; (3) you were entrusted to deliver a letter to the directorate of the General Assembly to Mr. de Melo, unregistered, but you registered it causing problems between the two bodies and causing Mr. de Melo to lose hours of work; (4) you refused the Club's correspondence and notices; (5) getting in members at the last hour without informing the executive and without submitting accounts to the treasurer; (6) making photocopies of applications without informing the executive." As far as I can tell the alleged offences, except the last two, were old, were not raised earlier and seem to be of little moment. I can only assume that he was "expelled" by Garcia for switching sides in the election.

27 There were difficulties in renting halls and other areas for large functions so these were always booked at least a year ahead. In the past the outgoing executive had always turned over to their successors all of the correspondence about bookings for parties, all of the Club's books, flags and religious objects shortly after the election. On that day Garcia agreed to hand them over to Pereira the following week. When Pereira asked for them a week later Garcia said he had changed his mind and his board wanted new elections because all the new members were not legal and he would be writing to Cruz about it. There were

some visits back and forth to members houses about money, lists and the Club's possessions and at one time the police were called but the Garcia slate retained the Club's possessions. There were also discussions about Viana's expulsion and the calling of a General Assembly meeting. It seems that Cruz suggested November 27 as the date for such a meeting since on November 14th, 1977 Garcia wrote to the "director" of the General Assembly raising the following points: (1) the board of directors does not authorize the meeting to be held on November 27th as the case is not urgent enough; (2) it then refers, I assume, to the letter expelling Viana saying that it did not expel him but only suspended him as an employee. (A secretary is an officer and is not an employee of the board. However, by virtue of the board's right to appoint a secretary, it presumably has a right to dismiss him from that office.) (3) the directors of the Club advised the directors of the Assembly to convene a meeting for the 11th December to hold new elections, "as you are aware those of the 6th November were invalid as 44 persons were voted who were not members of the Club". On December 3rd Garcia wrote again referring to his request for a meeting on the 11th December complaining that he has had no reply to his request and asking for a meeting to be convened on the 18th.

28 This criticism is unjustified since Cruz, the president of the General Assembly, wrote on December 10th saying that Garcia and Vargas were present at the General Assembly Executive meeting at which Garcia's letter of November 14th was discussed and that later he was telephoned about a further meeting with Pereira and the General Assembly Executive to discuss how his objections might be met. He replied that he had been in touch with a solicitor who had advised him not to attend any such meeting. Cruz then suggested that he and Garcia might meet with the Club's solicitor and this suggestion was also rejected. Cruz then points out that he has no authority to hold new elections but that he will call a General Assembly meeting on December 18th to consider (1) a possible violation by the secretary in keeping the records, and (2) to consider the purported dismissal of the secretary of the board, and (3) to discuss the need for new elections.

29 On December 20th, Mr. McCormick issued a writ on behalf of the Club against the Pereira slate for (1) an injunction restraining it from taking their respective offices until after a new, duly constituted meeting can be held at which new elections will take place, (2) restraining the defendants from any financial dealings with respect to the club, (3) for a declaration that the election on November 6th is null and void, (4) for a mandatory injunction requiring the defendants to deliver all of the Club's books and records to the plaintiff and directing Cruz to call a duly constituted meeting of the members for the purpose of electing a new board of directors.

30 Garcia said he gave instructions to issue this writ after canvassing the board of directors except for Viana. He was excluded because he had been expelled at this time. As I said above the board can relieve the secretary of his office but that does not give them the right to expel him as a director. Garcia also said that he did not ask approval of the action from Cruz

because he (Cruz) doesn't want to agree with the by-laws and that if he did agree with them, "We wouldn't be here. He didn't agree with me." He then said that he brought the action in the interests of the by-laws and the Club and that he had to go by the by-laws. His cross-examination on this statement was revealing:

Q. And it was nearly to decide...you did this in the interest of the club, not in your personal?

A. Interest of the club, yes. My interest too.

Q. Not you interest?

A. My interest too.

Q. What are your interests?

A. When I'm president.

Q. You want to become president again?

A. Yes.

Q. You want to become president again?

A. To build our club, also...

Q. And you think that you are the only man to do it?

A. Well, with my partners and the members too.

Q. So that is why you did it..for the interest of the Club and being your interest really?

MR. W. MCCREA: No, he didn't say that.

A. No my interest because I work there free and never charge a penny to the club.

Q. But you think that you are the best man for the interest of the club?

A. Yes.

Q. Nobody else is as good as you?

A. Well, in all my years till now I can say that I was the best.

Q. And you were very surprised that you lost the election were you?

A. Well, yes, because of all the new applications, yes.

31 On December 29th an eight day ex parte interim injunction was granted by the Local Judge, S.C.O. at Milton granting part of the relief sought. It was not extended.

32 Space problems had made it impossible to hold the meeting on December 18th but on January 4th Cruz sent out to all members a notice of a meeting of the General Assembly on the 15th in the Pine Room at the Oakville Arena, where the meeting of November 6th had been held. Despite having had the time and place confirmed in advance, there was a bazaar going on in the Pine Room on that day so the meeting was moved to St. James Portuguese School. Some 6 or 7 members were left behind to tell people where to go. The agenda in the notice was as follows:

1. To submit to the General Assembly the violation of article 12 on the part of the secretary 'to keep the books of records and writing of the society';
2. To submit the expulsion of the secretary to the General Assembly.
3. Make all members aware of the actual situation of the Club (which I consider very grave).
4. To ask if the president, Henry Cruz, collaborated with the 1978 executive with the intention of destroying the Club.
5. To bring to the General Assembly the court action in the name of the Club against the board members elected for 1978.

33 Rough minutes of the meeting were kept and 53 of the people present signed a memorandum as follows:

34 1. That the elections of November 6 were conducted validly without any shadow of doubt.

35 2. That the court action launched by Garcia in the name of the Club be immediately withdrawn.

36 3. To fire Mr. McCormick and retain in his place Mr. Fonseca to represent the Club.

37 Because of the poor turnout a memorandum to the same effect was mailed to all the other members and 55 of these were returned duly signed. None of the Garcia board came to the meeting or signed this memorandum. Garcia said "I didn't go because Cruz is not one to follow the rules of the Club so there is no sense to go".

38 The injunction proceedings were adjourned to be heard by Maloney J. on April 12th, 1978 and were further adjourned for settlement negotiations. Some progress was made but it came before Saunders J. on June 14th when he endorsed the notice of motion (no formal order was produced before me) as follows:

a) The parties agree that the voting membership of The Club consists of the 201 names filed less the names opposite # 162, 177, 178, 185, 189, 190, 191, 193, 194 and 196 on the left hand side of such filed list.

b) Henry Cruz (The President of The General Assembly of the 1978 officers being the Pereira group) shall convene a meeting of The Club at a place chosen by him on Saturday July 1st, 1978 at 2:30 p.m. where the voting membership personally present shall vote on the single question of whether the election held on November 6th, 1977 should be confirmed.

If such meeting confirms the election the 1978 Assembly Directors and Officers shall be the Assembly Directors and Officers of The Club for the balance of the year or until their successors are elected.

c) If such meeting does not confirm the election then:

1. A meeting shall be convened by Henry Cruz at a place chosen by him on Saturday August 12th, 1978 at 2:00 p.m.

2. The business of such meeting shall be:

i) The approval or rejection for membership individually of each of the persons whose names are opposite numbers 177, 185, 190, 191, 193, 194 and 196 on the list filed. Upon approval any such person shall become part of the voting membership.

ii) Election of Assembly Directors and Officers for period ending December 31st, 1978 or so soon thereafter as their successors are elected.

3. Any new member not on the list filed may not vote at the meetings of July 1st or August 12th.

4. No order as to costs.

39 At the meeting held on July 1st, 1978 the election of November 6th was not confirmed. It was therefore necessary to hold a further meeting on August 12th. This was done but the meeting dissolved into violence, chairs were thrown during the discussion of the approval

for membership of the seven individuals and the police had to be called. Cruz adjourned the meeting to the 29th October to further consider the seven members and to elect officers and directors for 1978. At this meeting, to avoid any further violence, members were allowed into the hall only one at a time in order to vote and two police officers were present to maintain order. 162 members voted in secret on both questions. None of the seven members were approved and the Pereira slate lost the election 82 to 80.

40 The seven members not approved applied for membership in November, 1978, and were all rejected by the Garcia executive apparently on the ground that the general meeting had rejected them as members.

41 On November 4th, 1978, da Rosa wrote to all members advising them of the names of the new board, the General Assembly and the trustees and said:

We also wish to advise you of the rules of the club that have to be complied with in the future:

Every member has to pay his monthly dues with a tolerance of six months. Every member at the end of this period that has not paid his membership fees to the Treasurer or the Secretary of this club will have his name struck off as a member in the register of the club. Further we are giving you an opportunity up to the 30th day of November, 1979.

42 Sobrinho sent a letter to Leonel Andrade, the president of the General Assembly on November 13 signed by himself and 24 others asking for a general meeting to present the accounts for 1977, to hand over the fees and other items in the possession of the secretary for 1977-8, to question Garcia about instituting action without authority, to ask if the meeting is willing to suffer the expenses or take action against Garcia for payment, to ask for an explanation as to why the seven possible members were rejected, to explain the cancellation of some bookings for events, to change the by-laws so that no one can bring an action in the name of the Club without approval and to hold elections for the new governing body for 1979.

43 Andrade replied on December 18th saying (without naming them) that ten of the persons who signed the letter were not in good standing and that no member in arrears may request anything from the Club, that if Sobrinho has not received a letter confirming that he is in good standing he will be excluded as a member "because there is no latitude given on this point for anybody. There is no law that can get me to call a general meeting. And your lawyer." Sobrinho's fees had been paid in full on March 15th, 1978 for that year. Article 6 of the by-laws provides that the General Assembly will meet once annually between the 15th October and the 15th November and Article 4 provides that the General Assembly shall elect its "table", the directors and the accounts committee. By custom this was done in

November of each year and if the by-laws were to be followed, should have been done in 1978 notwithstanding the elections held pursuant to the order of Saunders J.

44 In December, 1978, membership cards were sent out to all members considered by the board to be in good standing. No card was sent to Sobrinho (despite his fees having been paid in full) nor to a majority of the members who supported him, although, as I will discuss later, many of them had paid their fees or were not required to pay fees.

45 After the settlement in June, 1978, there was a verbal agreement by both sides to account to a general meeting for the moneys each had on hand. This was not done, so on December 8th, Mr. Fonseca wrote a letter to da Rosa containing a brief accounting, enclosing a list of the members who had paid their fees in 1978, showing the amount paid by each, and enclosing five cheques for \$25 each payable to the Club from five members. He noted that in accordance with the by-laws, the directors elected on November 6th, 1977 had paid no dues for 1978. They remained the directors of the Club until their successors were elected on October 29th, 1978. The Club's solicitor returned the five cheques to Fonseca with instructions that they be forwarded directly by the member to the Club secretary and saying that Garcia would account for the fees collected by him to the "duly constituted directors" — in effect himself.

46 The executive of the General Assembly, part of the Garcia group, called no annual meeting for the election of officers between October 15th and November 15th so on January 8th, 1979 the Sobrinho group issued a writ of summons in the name of the Club naming the Garcia group as defendants. On November 19th the plaintiff in that action moved for the following interim relief:

47 1. An injunction restraining the defendants from acting as officers or dealing with the Club's assets and requiring them to deliver up the books.

48 2. Directing an extraordinary meeting of the Assembly to ascertain (a) if the members want the Club wound up and the assets distributed, and (b) whether the Club's "current conflicts could be best resolved by a judicial review of the Club".

49 The application was heard by Anderson J. on February 8th, 1979. I set out his reasons in full since they are brief and informative:

There were before me a motion on behalf of the plaintiff for an injunction restraining the defendants from exercising their respective office on the board of directors, general assembly and the trustees of The Oakville Portuguese Canadian Club and for other relief and a cross motion on behalf of the defendant for an order that the action be stayed or dismissed and for other relief.

The history of this matter, including the previous action in which the dispute underlying this application gave rise to court appearances and two apparent settlements, leaves one with little confidence that any order of the court, or any other legal sanction short of a winding-up order, will cure the disease which affects this corporation. The affairs of the company must be managed by its members. If they are unable or unwilling to do so, then winding up is the only appropriate remedy.

Viewing the matters before me strictly, it is doubtful that the action was properly instituted. It is apparent that the corporation, acting through its directors, gave no authority to institute it, nor would the directors have done so if asked. Control of a company is in its duly elected board of directors until their successors are elected.

An order will go that this action be stayed until further order.

An order will also go that the present board of directors proceed forthwith to hold a duly constituted meeting of members to elect directors, to do such other things as are called for at a general meeting, and to transact in an orderly manner such other business as may properly come before it, such meeting to be held not later than the 18th day of May 1979. All members are directed to cooperate in all necessary respects as may be necessary to the due convening and conducting of such a meeting.

Save as aforesaid, the motion and cross motion are both dismissed. There will be no order as to costs.

I am firmly of the view that no further intervention of the court in the affairs of this corporation should be sought, unless by way of an application to wind up.

Unfortunately no formal order based on these reasons was taken out. I interpret his order "to hold a duly constituted meeting of members" to refer to the list of members used in the election of October 29, 1978 and not on some other list that was not before the court.

50 A meeting was held on May 12th, 1979 without any notice being given to Sobrinho who had made a long and detailed affidavit for use on the motion which was extensively referred to at the trial, or to any other persons sympathetic to him who were almost 50 per cent of the persons in the agreed voting list used by the Club as late as October 29th, 1978. On April 18th, Sobrinho spoke to Andrade, president of the General Assembly, who told him that he would not be given notice of any meeting as he and his sympathizers were not considered members of the Club. In his affidavit of September 6th, 1979, Garcia puts it this way:

9. On April 11th, 1979 I caused a notice of a general meeting to be held on May 6, 1979 to be sent to all members of The Club, a copy of which notice in both English and

Portuguese languages is attached hereto as Exhibit 'A' to this my affidavit. This notice was sent to 124 members of The Club being all the paid-up club members at the date of notice. This notice was sent in accordance with The Club By-laws and the Order of Mr. Justice Anderson dated the 30th day of March, 1979.

10. At the meeting held on May 6th, 1979 eighty-eight members attended. A ballot was given to each member in attendance asking whether or not they wished to have the Oakville Portuguese Canadian Club continue in operation, a copy of which ballot is attached hereto and marked Exhibit 'B' to this my affidavit. By secret vote, the members present voted unanimously to continue the Club operation.

51 A vote on the continuation of the Club was not referred to in his reasons by Anderson J. although it was requested in the notice of motion but he did order an election of officers, which was not requested in the notice of motion.

52 In evidence Garcia said that elections had been held in his house on February 11th, 1979, but he did not mention this in his affidavit of September 6th and Andrade did not tell Sobrinho of it in his conversation of April 18th. He also conceded that the by-laws require the president of the General Assembly to call such a meeting and that this one was not called by Andrade, the president, but by the secretary. No minutes and no copy of the notice were produced. No material which may have been filed in answer to Sobrinho's affidavit of January 16th was produced before me and it seems obvious that if Anderson J. had been told that a meeting to elect officers had been called for February 11th, he would not, on February 8th, have ordered an election to be held no later than the 18th of May.

53 The question of who was a member at any given time is not an easy one, in great part because of the lack of any proper records. However, in the settlement discussions held prior to Saunders J.'s order of June 14th, Garcia approved 36 new members from the persons who appeared on the list made by Viana, without referring them to a board of directors although it appears he consulted some of the 1977 board. That list was used in the voting of July 1st, August 12th and October 29th, 1978. The first ten sheets show 155 names which are not in dispute. As to the remaining 46, there was some dispute. Three were minors and seven others were finally struck out for the first voting as agreed upon. The list of funds prepared by Viana and dated November 28th, 1978 relates to the payment of 1978 fees. Of the 36 names about which there was some question on the voters list, 18 had paid their fees of \$24 in full for 1978, 9 had paid more than \$12 and 4 less than \$12. It was common ground that the directors were not required to pay fees for the year in which they held office. The Pereira slate came into office on January 2nd, 1978. On July 1st, 1978 the General Assembly held that the vote of November 6th, 1977 should not be confirmed but successor directors were not elected until October 29th so that the Pereira slate held office until then and at most would owe two months' dues in that year. Article 25 of the by-laws provides:

The member who ceases to pay his monthly fixed fee, for more than six months will be by the board of directors excluded from the number of members.

The 18 members therefore who had paid in full remained members until June 30th, 1979 and the Pereira slate until April 30th and it seems to me they would all continue as members until the board of directors excluded them from membership. There was no evidence of this being done other than da Rosa's letter of November 4th earlier referred to which does not deal with the defaulting members individually as seems to be contemplated by Article 25.

54 In his reasons delivered on March 30th, 1979 Anderson J. said an order would go that the present board (i.e. the Garcia slate) hold a duly constituted meeting of members...not later than May 18." Clearly almost all of the 191 persons above referred to were still members of this Club and notice sent to 124 members was not what was proper or contemplated by Anderson J. It is obvious that Garcia was giving notice to his supporters and ignoring the other persons who, in my opinion, were still members and entitled to notice.

55 There is no doubt that none of the members of the Club (in the broadest sense) want the Club wound up. There is, however, much frustration on the part of Pereira and Sobrinho and their supporters resulting from the conviction that they were improperly treated by the Garcia group in various ways and especially in having their memberships terminated and not being given notice of any meetings after October 29th and in not being allowed to vote.

56 Membership fees were collected by both groups in 1977 and 1978 and both were withheld from the proper officers of the Club although the money, with some deductions, collected by the Pereira group was accounted for by Mr. Fonseca's letter of December 8, 1978 to da Rosa which provides that they will be accounted for at a general meeting of the Club, while Garcia refused to make any accounting except to the board of directors as I have already set out above.

57 The attitude of the 8 persons called as witnesses on the subject of admitting or re-admitting the so-called: "illegal" members is of some assistance in forming an opinion. They said:

Sobrinho : "I know the result of a winding-up order. I don't want one. I want everyone to work together. I want us to be reinstated as members - there are about 80 of us."

Viana : "I want to make the Club go. I agree 101 per cent with a winding-up order as it is the only means available. We'd like all members to be reinstated. The only thing that will bring peace is for all to be members."

Pereira : "I don't agree the Club should be wound up but there is no other choice - we have been expelled for two years, they sent me no correspondence, they gave me no card."

Cruz : "I don't want the Club broken up. This has been going on a long time. The Club can no longer be successful for the good of the community."

da Rosa : "I don't want the Club broken up. All 80 except one are no longer members, for them to come back everything would have to go by the by-laws - they are more important than the members. They must fill up applications, send it back, pay dues back to 1977 and after that we'll call a meeting of the General Assembly to see if they are accepted, of the 126 members who are in my book now must decide if the applications are acceptable. I would accept 5 to 10 'outside' Portuguese as members and I want the Club to have a lot more members. Sobrinho will have to pay his dues back to 1977 to get back in."

Garcia : "I don't want the Club broken up. I don't object to Sobrinho being a member again. He only has to go by the by-laws, fill up an application and pay a penalty. The penalty under Article 21(4) double the initial fee in force now, all Sobrinho's friends can come back if they apply and pay a penalty."

Article 21(4) provides:

Any member who ceases to be a member of this organization and thinks to return again has to pay the initial fee double of the present time.

(There is a translated memorandum in what is labelled "Book of Meetings of the directors of the General Assembly and Directors" (my translation) dated 14th January, 1979 which is exceedingly sparse. It says, amongst some other matters, "Alter the initial membership fee from \$20 to \$50.")

Vargas : "I don't want the Club broken up. I want Sobrinho to be a member but by the by-laws. I want him to pay a double penalty. The penalty is now \$50. I want double. That is all. No arrears up to the application. Anyone is welcome to be a member by the by-laws."

de Faria : "I had no objection to anyone on the list just that they had not been approved. There is no right. I was in court and I approved the list."

58 The by-laws clearly require that applicants for membership be admitted by the board of directors as does s. 124 of the Corporations Act. There is nothing in writing to show that this requirement was followed and the evidence of past practice is at least mixed. I am satisfied that there was no general challenge made at the meeting of November 6th to the right of

about 40 people to vote. Garcia and the members of his slate who gave evidence had no objection to the persons who voted becoming members other than the seven persons struck off the voters list as first proposed but demanded that they be properly admitted. I do not think I need to decide whether or not the 40 persons who were allowed to vote were in fact regularly admitted members at that time since Garcia and the members of his slate who were available and who had been directors in 1977 together with both counsel agreed to a list of members on June 14th, 1978 containing 191 names and this list was used at the three meetings in 1978. Those 191 persons therefore are agreed to as members as of that date and all but a few remained members at least until six months beyond the end of 1978. Notwithstanding this the Garcia slate treated them as no longer being members because of non-payment of fees when in fact they were in good standing, were entitled to notice of meetings and to vote at them until mid-1979.

59 Counsel referred me to no cases dealing with the winding-up of a club or other non-share capital corporation and I have not been able to find any. However, the general principles that have been laid down for corporations with share capital are of considerable assistance. The first one usually referred to is *Ebrahimi v. Westbourne Galleries Ltd.*, [1972] 2 All E.R. 492 at p. 499 in the speech by Lord Wilberfoce:

My lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies, and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The just and equitable provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

60 Henry J. considered the principles in *Re Pre-Delco Machine & Tool Ltd.*, [1973] 3 O.R. 115 at p. 120. Apparently *Ebrahimi* was not brought to his attention but he said at p.120:

Bearing in mind that, as I have found, this is a private company which is essentially a partnership of two persons, the decision of the Court of Appeal of Ontario in *Re R.C. Young Ins. Ltd. supra*, is pertinent. There Laidlaw, J.A. identified five principles emerging from the jurisprudence as follows [at p. 602 O.R., p. 573 D.L.R.]:

1. It is right to consider what is the precise position of a private company such as this, and in what respects it may be fairly called a partnership in the guise of a private company.
2. The same principles ought to be applied where there is, in substance, a partnership in the form or guise of a private company. The circumstances which would justify the winding-up of a partnership are circumstances which should induce the Court to exercise its jurisdiction under the 'just and equitable' clause and to wind up the company.
3. As the foundation of applications for winding-up on the 'just and equitable' rule there must be a justifiable lack of confidence in the conduct and management of the company's affairs.
4. That lack of confidence must be grounded on the conduct of the directors in regard to the company's business. It may rest on lack of probity, good faith or other improper conduct on the part of a majority of directors.
5. It must not spring from dissatisfaction at being outvoted in the business affairs or what is called the 'domestic policy' of the company.

61 In *Re Rogers and Agincourt Holdings Ltd. et al.*, 14 O.R. (2d) 489, Lacourciere J.A., speaking for the Court of Appeal, said at p. 493:

In interpreting this subsection there are two points that appear especially important. Firstly, Courts from time to time have commented that the words 'just and equitable' are words 'of the widest significance', and must be given a broad interpretation:...It is quite proper, of course, to draw upon previous cases for general guidance but counsel and the Court must be careful not to construe the authorities as setting out a series of restrictive principles which would confine the phrase 'just and equitable' to rigid categories, for each case depends to a large extent on its own facts. It is in this light that we must consider the principles and propositions set out by Laidlaw J.A., in *Re R.C. Young Ins. Ltd.*, [1955] O.R. 598 at pp.601-2, [1955] 3 D.L.R. 571 at pp. 572-3, C.B.R. 72; Laidlaw, J.A. himself stated at p. 607 O.R. p. 578 D.L.R., that the decision rested 'primarily on findings of fact'.

Secondly, in cases such as the present, some general guidance can be obtained from an analogy to partnership law. Section 35 of the *Partnerships Act*, R.S.O. 1970, c. 339, provides that:

35. On application by a partner, the court may order a dissolution of partnership,

.....

(f) when in any case circumstances have arisen that in the opinion of the court render it just and equitable that the partnership be dissolved.

To paraphrase Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd. et al.*, *supra*, commenting on the corresponding sections of English statutes, the common use of the words 'just and equitable' provides a bridge between the cases under s. 217(d) of the *Business Corporations Act* and the principles of equity developed in relation to partnerships. The partnership analogy has been used extensively, in Ontario as well as in England, ever since Lord Cozens-Hardy, M.R., described a private company which 'can fairly be called a partnership in the clothes or under the guise of a private company'.

and in *Re Grimm's Foods Limited*, 25 O.R. (2d) 42, in which Montgomery J. quoted the above passage from *Ebrahimi* and went on to find as a fact that Grimms cannot fairly be called a partnership in the guise of a private company, and at p. 50:

On the facts before me I see no mismanagement of the company's affairs. Grimm's is a profitable well-managed company with 70 employees. The complaint of the minority ultimately relates to control.

.....

In my view, the dispute was an internal corporate matter with which the Court should not interfere.

I find support for this conclusion in the words of Masten J.A., in *Re Shipway Iron Bell & Wire Manufacturing Co. Ltd.* (1926), 58 O.L.R. 585 at p. 588, [1926] 2 D.L.R. 887 at p. 889 [quoting from *Buckley on Companies*, 10th ed. p. 316]:

A company may also be wound up where there is a complete deadlock in its management. But a mere domestic quarrel between two sets of shareholders will not be sufficient, the company itself being the proper forum for the settlement of domestic differences according to the powers of the majority under the constitution of the company.

Mere apprehension by the minority about contemplated future acts of the majority is insufficient reason for the Court to exercise equitable relief.

62 It was the agreed policy of the Club to increase the membership and hence the funds available for the construction of a clubhouse, but between November, 1977 and May, 1979 when the meeting was held in accordance with the reasons given by Anderson J., the number of paid-up members has dropped from 191 to 124 members.

63 I am not dealing with a private company which is really a partnership nor with a situation comparable to that in *Grimm* .

64 Lacking agreement one partner cannot readily get rid of another or himself get out of a partnership. A shareholder cannot be expelled although he can sell his shares in the market if the company is public but only subject to the restrictions if the company is private. In this Club a member can resign, be expelled by the General Assembly for cause if the cause is proposed by the directors and under Article 28 "The member who ceases to pay his monthly fixed fee, for more than six months, will be by the board of directors excluded from membership." This in my opinion requires the directors to consider each defaulting member and make a decision about him, strictly speaking at a meeting duly called and at which a quorum was present. The evidence shows that no one had been so "excluded" in the past. It follows that the decision which gave rise to the decision referred to in da Rosa's letter of November 4, 1978 was improper with regard to most of the Pereira supporters who have thus been deprived of their membership and of all benefits of the Club.

65 In my opinion, it is clearly evident that it is just and equitable that the Club be wound up under the provisions of the Corporations Act. The members among whom the assets should be distributed are those 191 persons whose names were agreed to before Saunders J. on June 14th, 1978. It is ordered that upon the filing of its consent, Dunwoody & Company be appointed interim and permanent liquidator of the Club. It is further ordered that the liquidator get in all of the assets of the Club, realize upon them and pay all of the Club's proper indebtednesses and its proper fees and distribute the balance among those persons.

66 Counsel asked that the matter of costs be left for further argument. I will be glad to see them when convenient.

67 While I am satisfied that the only proper outcome to this litigation is the order which I have made, I am very concerned that the Portuguese community in Oakville should lose all that they have worked for for so long and I intend not to endorse the record until September 1st or such other date as may be agreed upon by counsel in order to permit the factions in the Club to attempt to reconcile their differences.

68 To that end I strongly recommend to the present board of directors that they reinstate as members all of those 191 persons named in the list agreed to on June 14th, 1978 whom earlier boards purported to exclude from membership and that the demand for any penalty -

double or otherwise, be dropped and that no new applications for membership be demanded from them.

69 I have already said that in my opinion they were, in the main, members in good standing, part until the 30th of April, 1979 and part until the 30th of June, 1979. The amount of money involved is not large but humiliation will not help to mend the rift which has occurred.

70 Since none of these persons nor their families have been able to enjoy the amenities of the Club all during this very protracted litigation no monthly dues should be demanded from them until the first day of the month commencing at least 21 days after they are reinstated and are so advised by individual letter sent to them at their most recent address by pre-paid ordinary mail.

71 I also recommend that new by-laws be prepared which will be more apt for the Club's purpose and will comply with the Corporations Act.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at **LONDON**

**BOOK OF AUTHORITIES OF THE APPLICANT
(returnable February 20, 2018)**

LERNERS LLP
130 Adelaide Street West, Suite 2400
Toronto, ON M5H 3P5

Domenico Magisano LS#: 45725E
dmagisano@lerners.ca
Tel: 416.601.4121
Fax: 416.601.4123

Alan Melamud LS#: 58370F
amelamud@lerners.ca
Tel: 416.601.4128
Fax: 416.601.2748

Lawyers for the Applicant