

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ABU TAHER NOORI, MOHAMMAD H. KABIR, KHALED A. MAMUN, SYED A. RAHMAN, ZAHIRUDDIN AKM, AKM JOINAL ABEDIN (BAHAR), MD. ZAHIDUR RAHIM (BOBY), MD. SHAHJAHAN UDDIN, AKIL AHMED v. JOINAL ABDIN

BEFORE: Michael G. Quigley J.

**COUNSEL: Jason Squire, for the Applicants
Mauro Carabetta, for the Respondent**

HEARD: November 1, 2011

AMENDED ENDORSEMENT

[1] Today the court is again confronted for the *fifth* time since September 12, 2011 with the continuing governance dispute that plagues the Danforth Community Center. The DCC was established in 2008 as a Muslim community center in order to establish a mosque for worship by some of the members of the Bengali speaking Sunni Islamic community of Toronto.

[2] There were and are many issues in dispute between two groups of discordant members, but when they appeared before me on September 12, both groups were resolved to go forward to hold new directors elections on October 30, 2011. Both parties proclaimed their willingness to resolve the affairs of the Danforth Community Center on this basis to permit it to move forward and to start to function again.

[3] Only one fundamental issue remained to be determined. That issue was who would be eligible to vote in that upcoming election of directors, and what rules would apply to govern that election. Following an all-day hearing on September 12, I advised all parties of my decision. I issued an endorsement that answered that question several days later.

[4] First, on the most important question, I ruled that all 54 Founder Members as defined in section 4.4 of the DCC Constitution would be entitled to vote on October 30,

2011. I reached that conclusion without regard to whether those members made their membership contributions in cash or by contributions of services. The validity of such in-kind payments for membership going forward was left to be determined by the new board after the election had been held.

[5] I would specifically note that while the DCC Constitution contemplates so-called Life Members in section 4.5, there was *no indication* before the court on September 12 that there were any Life Members who could be eligible to vote in the October 30 election.

[6] It was of particular importance to me on September 12 that in the case of all 54 Founder Members, I was assured by Mr. Abdin that *all 54 of them*, whether they paid in cash or in kind for their membership, had been fully paid up members for at least one year prior to that time. Thus, I was assured that all of them also complied with section 4.6 of the Constitution of the Danforth Community Center. That provision is the most important constitutional qualifier on the ability of members of the mosque to vote in directors' elections, and the most important provision in issue today. It provides as follows:

4.6 Right of Member: Founder member and Life member shall have full right to vote *after one year of membership dues paid in full*. (my emphasis)

[7] As a result, the September 12 Order settled before me on September 29 with Mr. Squire in attendance and also Mr. Carabetta, new counsel for Mr. Abdin, stipulated in paragraph 1(c) that without limiting the right of any other member *properly entitled to vote pursuant to the DCC Constitution*, all 54 of the Founder members named on the attached Schedule "A" to that Order would be entitled to vote in the Election. (my emphasis).

[8] The Order went on to provide for the appointment of an Election Committee as stipulated in clause 11.5 of the DCC Constitution. In paragraph 1(e), I appointed Stern Cohen LLP as Monitor to supervise the election. Mr. Lorne Lebow, a senior chartered accountant and partner of that firm took on that role. Paragraph 1(e) provides as follows:

Stern Cohen LLP is appointed as Monitor to supervise the Election, to provide assistance to the election committee as to the conduct of the Election, and to report to the membership of the DCC on the conduct and results of the election. Any person with notice of this Order shall assist and

cooperate with the monitor. It is the intendment of this order that the Monitor shall also stand in the place of any or all of the members of the Election Committee should any or all of them resign prior to the completion of the election, and for the discharge of the duties of the Election Committee under the DCC Constitution.

[9] In the context of the responsibilities of the Election Committee as stipulated in the Constitution, section 11.5 is relevant. It provides as follows:

11.5 Procedure: An election committee shall form for holding the election by the existing Board, consisting of one convener and other two members, at least two months ahead of the date of elections. The election committee shall count the ballots in the presence of representatives of the candidates. Upon receiving a written complaint from a member about any electoral irregularity, the president shall take appropriate action after consulting of Board.[sic]

[10] It was at about the same time that I thought the terms of the order had been settled that suspicious circumstances started to arise and that the issue arose related to Life Members. Life Members were not part of the application brought on September 12. The issue of Life Members only arose subsequently. Although there had been no discussion with respect to Life Members at the September 12 hearing, Mr. Abdin wrote to me on September 30, 2011. In that letter, Mr. Abdin for the first time raised issues relating to Life Members. He indicated that there are "several life members" of the DCC, but indicated that I had provided no direction to them with respect to the election and their ability to vote. He stated that they are also valid voters. In addition, Mr. Abdin attached a copy of a Notice of Appeal of my September 12 decision to the Court of Appeal. That Notice of Appeal was filed with the registrar of the Court of Appeal on September 27, 2011. A number of other unusual and suspicious documents relative to source were attached to Mr. Abdin's letter. Notwithstanding his appeal, and whether or not to the correct court, I advised counsel I would settle my order and remain involved until one week after the election to see that the election was conducted according to that order.

[11] The suspicious circumstances of that letter increased when I received a letter on October 5 from an unnamed member of the mosque who claimed to be an articling student and who claimed to have been put up to preparing a fraudulent letter to send to me about the existence of Life Members when in fact he said there were none. However, quite alarmingly to me, that unnamed member indicated that it was he who wrote Mr.

Abdin's letter of September 30. He stated that the list of Life Members that was included with that letter was a false list, because the DCC has no Life Members, and never has had. The unnamed articling student stated in his email correspondence to me that there are no paid Life Members of the DCC, and that he was becoming concerned that he was involved in a criminal offense that could involve "obstruction of justice, perjury and forgery."

[12] Having received this correspondence and being very concerned by it, I commenced an investigation. I asked counsel, Mr. Squire and Mr. Carabetta, to make inquiries into the unnamed articling student and to determine if there was any substance to any of the statements that he made in the e-mail letter sent to me. I was told today by Mr. Squire that they have made those inquiries and that he will be in a position to report to me on that matter soon, but that there may be issues of concern arising out of what he has been able to discover.

[13] The next installment happened later in October, last week prior to the scheduled October 30 election, when I again had Messrs. Squire, Carabetta and Lebow appear in court before me. Mr. Lebow advised that he had met with Mr. Abdin and that Mr. Abdin provided him with documentation with respect to the 20 Life Members allegedly on the membership list that Mr. Abdin was now claiming to be correct. Mr. Lebow advised the court that the evidence he had seen indicated that all of those Life Members had only paid part of the \$10,000 contribution to membership at the time that they were allegedly admitted to membership and approved as Life Members by the board.

[14] While Mr. Lebow acknowledged that the Constitution appears to permit this, a proposition with which I agree, he noted that section 4.6 of the DCC Constitution states that a member is *only* entitled to vote after the passage of one year after their payment has been received in full, and that it did not appear to him that *any* of the Life Members had completed their required membership contributions by October 30, 2010. As such, based on Mr. Lebow's advice, it appeared that none of the Life Members who claimed to be Life Members were actually entitled to vote, regardless of their membership status.

[15] Mr. Lebow's e-mail indicates, however, that Mr. Abdin pointed out that many of the Founder Members were in the same situation and yet I had ruled that they could vote. That is either an incorrect assertion, or based on a misrepresentation made to the court in September because it was agreed by all persons and confirmed by Mr. Abdin on September 12, 2011 that *all* of the Founder Members listed on Schedule A that was

attached to the September 12 order, all 54 of them, had been fully paid members, in cash or in kind of the DCC *since at least August 24, 2010*.

[16] This information is what led to that final appearance before me last week on October 25. It was based upon Mr. Lebow's advice as Monitor that the information and documentation provided to him by Mr. Abdin made it apparent that none of the proposed Life Members whose names are on the list supplied by Mr. Abdin had completed making their respective membership contributions by October 30, 2010. As a result, because of the fact that the Constitution provides that a member is only entitled to vote one year after payment has been received in full, Mr. Lebow communicated his interpretation as Monitor to counsel and to the court on October 25 to the effect that *none* of the proposed Life Members should be regarded as entitled to vote in the election that was scheduled for and that was conducted on October 30, 2011, two days ago.

[17] As a result of their appearance before me on October 25, an appearance that was also attended by Mr. Abdin, I issued a number of directions on the record on that day. Those directions were made to facilitate the conduct of the election held two days ago. The directions were as follows:

- (i) Life Members would only be entitled to vote at the election on October 30, 2011 if they completed their respective contributions (in cash or in-kind) on or before October 30, 2010, owing to the stipulations of clause 4.6 of the DCC Constitution;
- (ii) any Life Member purporting to be entitled to vote would be permitted to vote by way of a ballot that would be marked distinctly from those used by Founder Members. The Life Member's ballots would be numbered and the ballot number would be recorded with the voting Life Members name;
- (iii) Signage would be posted at the site of the election conveying that
 - (a) individuals were only entitled to vote if they were (i) a Founder Member; or (ii) a Life Member entitled to vote by operation of the DCC Constitution; and
 - (b) that in the case of individuals who were voting as Life Members, their names would be associated with a particular ballot number.

- (iv) After the election, the Monitor would review the voting of the Life Members, and report on whether their votes would have any or a partial impact on the results of the Election;
- (v) if there are directors elected whose election is beyond dispute, whether the Life Member ballots are counted or not, that group would be considered to form an operating board of the DCC; and finally
- (vi) that the parties and the court would be entitled to consider evidence of any voting irregularities at a later date.

[18] I was advised by counsel and Mr. Lebow in court today that the election proceeded on Sunday, October 30 without altercation, but that the results of the election were completely inconclusive because of the votes cast by the 20 Life Members. Unfortunately, the election result differs depending on whether the votes of the Life Members are taken into account. As a result, there were no “interim” board members elected.

[19] This result appears to have occurred as a result of the fact that all 20 of the Life Members voted even though most of them had provided no evidence prior to October 30 that their membership dues had been paid in full in cash or in kind on or before October 30, 2010, as required by section 4.6 of the DCC Constitution. Further, based on the materials that have now been provided to Mr. Lebow by Mr. Abdin, it has confirmed to the Monitor that 18 of the Life Members had not made their contributions prior to October 30, 2010, but two of them had. This means only two of the Life Members ought to have voted.

[20] I will say that there have been many suspicious and troubling circumstances that I have seen arise in the course of the last eight weeks as this matter has progressed. Initially, there was no question of Life Members voting because I was told there were no Life Members. There was no question initially that all 54 of the Founder Members would be entitled to vote in the election, because all of the parties agreed that all of them had made their cash or in-kind membership contributions on or before August 24, 2010. My initial endorsement and order contemplated that all 54 of the Founder Members listed on Schedule "A" to the September 12 Order would be entitled to vote on the basis that all were fully paid up members of the DCC whose memberships had been paid in cash or in kind at least one year prior to the election in question as required by clause 4.6 of the DCC Constitution. However, the initial order also contemplated and recognized that

other members entitled under the terms of the DCC Constitution to vote in an election of directors would be entitled to do so.

[21] The problem is that even if the Life Members have been accepted as Life Members by the old board, they have not demonstrated by any evidence that is reliable or proffered to the court or to the opposing parties on a timely basis that any more than two of their number shown on the list produced by Mr. Abdin are in fact entitled to vote in accordance with the requirements of the DCC Constitution. This results in an unacceptable effect on the election result. That gives rise to an unconstitutional result under the DCC constitution that all claim ought to govern the legality of this election process.

[22] Two alternatives were proposed to remedy this situation. Mr. Carabetta waived a pile of papers in the air in front of me in court this morning, saying that those papers were copies of documentation that would support the entitlement of the other 18 Life Members to exercise their franchise in compliance with the terms of the DCC Constitution. The suggestion, effectively, was that either Mr. Lebow or the court should audit that documentation. This is totally impractical, and has the additional problem that I regard that documentation with extreme suspicion, given that the court was assured there were no Life Members only eight weeks ago, given the suspicious circumstances of the correspondence from Mr. Abdin and the articulated student at the beginning of October, and given the failure of Mr. Abdin to provide Mr. Lebow with supportive documentation in the weeks leading up to the election as he was requested to do and as he was provided the opportunity to do. It is not a solution that commends itself to me or that will give rise to the certainty of result that is now required.

[23] I wish to again remind all parties to this dispute that this court does have the power under sections 297, 309 and 332 of the *Corporations Act* 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 that it finds to be necessary. Thus, the court can give direction on the interpretation of the Danforth Community Center Constitution, on the proper composition of the voters list, on interpretive questions that may be in dispute, and on the manner in which the election will be held and the governance of the Danforth Community Center regularized. That is what the court sought to do in my endorsement of September 12, and the order I issued as subsequently settled before me which contained as a schedule the list of founder members of the Danforth Community Center as of August 24, 2010, all of whose

contributions in cash or in kind had been made on or before August 24, 2011. That is what I sought to do on the several appearances that arose after the initial application was argued as the parties refused to adhere to the intention of the orders and directions issued.

[24] Let me also remind the parties that this court is empowered to provide such direction as part of its broad remedial discretionary powers as a superior court of record under section 96 of the *Constitution Act, 1982* as amended, and under the *Courts of Justice Act* of this province. The court can exercise those powers for the protection of the membership of the DCC as a whole and to permit the DCC and its community of worshipers to move forward from the impasse they have faced now for well over a year: see *Rexdale Singh Sabha Religious Centre v. Chattha*;¹ *Chu v. Scarborough Hospital Corp.*²

[25] Notwithstanding the efforts that have been made to provide procedure and mechanisms and directions that would permit an election for a new board of the DCC to take place in a manner consistent with its Constitution, at the end of the election process, nothing has changed. Nothing has changed because some members of the Danforth Community Center mosque appear to have cared more about ensuring that they could control the results of the directors' election than complying with the Constitution that is intended to govern the mosque's affairs, and the orders and directions issued by this court.

[26] The evidence presented to me by the Monitor in court this morning shows that only two of the 20 alleged Life Members met the requirements of section 4.6 of the Constitution on Sunday, October 30 when the election was held. As such, I rule that only those two votes from the list of the Life members will count for the purposes of the election of the board that took place on that day since the balance of the alleged Life Members of the mosque failed to provide evidence prior to that election of their entitlement to vote under the terms of the Constitution.

[27] As such, having regard to the report of Mr. Lebow, the Monitor, on the election results as set out in his e-mail to Messrs. Street, Squire and Carabetta on October 31, it is evident that the board that will be considered to be legally elected as a result of that election is the List B members, who were voted for **only** by the 54 Founder members. The two additional votes of the two qualifying Life members would not have affected

¹ [2006] O.J. No. 328 (S.C.J.) at para 20 and cases cited there.

² [2006] O.J. No. 5417 (S.C.J.).

that result. That board is hereby considered to have been elected in accordance with the DCC Constitution as of October 31, 2011. The current board is now *functus* apart from its obligation to deliver transitional materials to the new board.

[28] In accordance with my order of September 12, the existing board of the DCC shall have seven days from the date of the election, plus one day's grace until November 8, 2011, to comply with paragraph 2 of that Order. Compliance with that paragraph requires that the existing board deliver assets, keys, books and records of the DCC to the newly elected board on or before that date.

[29] In accordance with paragraph 2.1 of the September 12 order, final disposition of the suspensions of any members made prior to the election, and indeed to the determination of the membership status of any members going forward shall be determined by the new board or by the general membership in accordance with the Constitution of the DCC as it may or may not be amended, but as was recommended in my endorsement of September 16, 2011. It will also remain the responsibility of the new board to determine going forward whether in-kind payments may continue to be made for memberships in the mosque, or whether only cash contributions will be permitted in future. These duties of the new board are set out in paragraphs 3(a) and (b) of the September 12 Order. If there are complaints by any members about the electoral process, they can be made to the new board and the president in accordance with section 11.5 of the constitution.

[30] Should the current board fail to comply with these orders, the newly elected board members will be at liberty to bring a new motion for enforcement, but as the election is now completed, I am now *functus* as well in this matter, apart from the issue of costs arising between September 12 and November 8, and the investigation into the articling student matter, so any further proceedings shall be brought before another judge of this court.

[31] As noted, with respect to costs, the parties may schedule a date to return before me, in consultation with me and the trial coordinator, to argue on issues of costs if they are unable to resolve the costs issues themselves.

[32] I wish to receive the results of the investigation into the articling student matter that I ordered was to take place when these parties were before me at the end of September, as soon as convenient.

Michael G. Quigley J.

Released: November 1, 2011