FINANCIAL INSTITUTIONS COMMISSION

BETWEEN

KHALSA CREDIT UNION

APPLICANT

AND

SUPERINTENDENT OF FINANCIAL INSTITUTIONS

RESPONDENT

DECISION

BEFORE

J. Stewart M. Cunningham
William G. Hopkins
Janet Pau

Commissioner
Commissioner
Commissioner

DATE

November 21, 2005 to November 25, 2005;
November 28, 2005 to December 2, 2005;
January 16, 2006 to January 18, 2006

Supplementary written submissions were received
during the Hearing and also dated January 20, 2005
January 25, 2005 and January 26, 2005

PLACE

Vancouver, British Columbia

APPEARING

Andrew G. Sandilands
Greg S. Lilles
Ravi R. Hira Q.C.
Jason B. Mann

Counsel for the Applicant
Counsel for the Respondent
INTRODUCTION

1. This decision concerns whether, pursuant to s. 276 of the Financial Institutions Act, R.S.B.C. 1996, c. 141 (FIA), the Financial Institutions Commission (the Commission or FICOM) should release Khalsa Credit Union (KCU) from supervision.

2. KCU initiated the present request to be released from supervision by letter dated March 17, 2005. A meeting was held on April 26, 2005 between KCU and the Commissioners of the Commission at which KCU presented their case. Following this meeting the Commission gave notice to KCU on May 5, 2005 under s. 237(2)(f) of the FIA of its intention to deny KCU's application. The May 5, 2005 letter states in part:

   The Commission has decided that it intends to deny Khalsa's request for release from supervision at this time as there is not a clear understanding of board governance by the directors. The Commission is of the opinion that there is not a satisfactory working relationship between management and the board. Corporate governance is ineffective, in particular with respect to the roles of the board and management, and this was one of the main reasons for placing Khalsa under supervision. In addition, although your written presentation stated that the board and management worked well together, from the comments and demeanor of board members and the CEO during the oral presentation the board's assurances of good relations were not, in our opinion, credible.

3. On May 16, 2005, the KCU Board Chair wrote to the Commission stating that KCU wished to "appeal". The Commission took this to be the exercise by KCU of its statutory right under s. 237(3) of the FIA to require that the Commission conduct a full hearing on the matter.

4. On November 8, 2005, a Pre-hearing Conference was held. As a result of that Conference, Mr. Hira, acting for the Superintendent, particularized in a letter the basis for the Superintendent's opposition to the credit union's release from supervision:

   The Superintendent opposes the release of the KCU from Supervision due to the corporate governance practices and inappropriate decision-making of the Board of Directors, particulars of which include:
1. The inappropriate hiring of Ms. Sundeep K. Dhliwal as counsel for KCU;

2. The inappropriate process followed by the Board of Directors to fill the vacant Director's position created by the resignation of Jaspreet S. Malik;

3. The Board of Director's interference in Mr. Dalbir S. Sohi's (the "CEO") efforts in hiring a Senior Manager of Operations;

4. The Board of Directors interference with the CEO's budget and marketing plan with respect to advertising;

5. The Board of Directors interference with the CEO's efforts to terminate a manager; and

6. The Board of Directors appointment of Ripudamin S. Malik as a director when the Board knew or reasonably ought to have known, of his unsuitability for that position.

5. During the Hearing, we allowed the Superintendent to add a further particular. Mr. Hira describes this further particular in his opening statement as follows:

7. The directors' undermining of the CEO by encouraging complaints about the CEO from employees.

ISSUE

6. The question before the Hearing is whether the Commission ought to exercise its statutory discretion to release KCU from supervision. That discretion is to be exercised in accordance with the purposes and objects of the FIA. The principal matter of concern before the Hearing is the ability of the KCU Board to satisfactorily administer the credit union's affairs in accordance with proper corporate governance and in the absence of supervision. This ability is necessary so that depositors and investors are protected in a fashion commensurate with the serious responsibilities of a financial institution.

BACKGROUND

7. KCU was established in 1986. It is a requirement of the Credit Union Incorporation Act, R.S.B.C. 1996, c. 82, that a credit union have a "common bond of
membership”. Various categories of common bond are specified. One is “religious interest”, which applies to KCU. All members of KCU must be members of the Sikh Faith.

8. The Mission Statement of KCU encapsulates the principles upon which it was established and continues to operate:

   *The mission of Khalsa Credit Union is to provide a range of quality financial services to our Sikh members; promote Sikh educational, cultural, economic and religious upliftment of our members in the Khalsa spirit. As a closed bond member controlled association, we will:

   * maintain a financially sound organization:
   * be responsive to the needs of our members:
   * be environmentally conscious; and
   * be a community spirited organization.

9. KCU presently has about 11,000 active accounts and about $120 million in assets. Its head office is in Surrey. It has five branch offices in the Lower Mainland of British Columbia and in Victoria. By any standard KCU has established itself firmly in the Sikh community of British Columbia.

10. Under s 277, s 278 and s 279 of the FICOM two remedies are given to FICOM with regard to credit unions that FICOM decides are acting in a manner that might place their depositors at risk. In summary, the lesser remedy known as “supervision”, provides for the board of directors of the credit union to continue to control the credit union but subject to direction from FICOM or its delegate. Under supervision, FICOM or its delegate is directly involved with a credit union’s operations to the extent that FICOM or its delegate may give orders on any matter concerning these operations. The stronger remedy, known as “administration”, means that a credit union is placed under supervision and, in addition, allows an administrator appointed by FICOM to exercise all of the powers of the credit union, its officers and staff. Although a credit union’s board of directors may continue to operate when a credit union is under administration, the
administrator has the power to direct this board in any manner that the administrator
deems appropriate in the circumstances.

11. KCU has been under supervision for nearly half of its existence. KCU was under
supervision (including the appointment of an administrator) from May 1989 to September
1992 because its internal controls and business practices were considered inadequate to
safeguard the interests of depositors and creditors and posed a risk of claims against the
deposit insurance fund. In August 1999, pursuant to KCU’s written request made on the
recommendation of Stabilization Central Credit Union of British Columbia (SCCU), the
Commission again ordered that KCU be placed under supervision as a result of serious
irregularities in KCU’s financial controls and concerns about the effective operation of
the KCU Board. In February 2000, the supervision order was amended when the
Commission ordered that KCU be placed under administration. KCU appealed the
administration order to the former Commercial Appeals Commission (CAC). The CAC’s
October 23, 2000 decision allowed the appeal respecting the appointment of an
administrator, but maintained supervision according to various terms set out in its
decision: Khalsa Credit Union v. British Columbia (Superintendent of Financial
Institutions), [2000] B.C.C.O. No. 12 (Q.L.). The CAC’s decision thoroughly described
the circumstances and concerns leading to the orders of 1999 and 2000, which will not be
repeated here. In 2004, KCU applied to be released from supervision, but this request
was denied. KCU has thus remained subject to supervision from 1999 to the present.
The present terms of supervision are as described in detail in a January 18, 2001 letter
from SCCU to KCU.

HEARING PROCESS AND EVIDENCE

12. At the outset of the Hearing, the Hearing Chair advised the parties as follows:

_We accept the legal advice we have received that a request for a hearing must be
meaningful. This means we must be open and prepared to revisit the matters set
out in our May the 5th letter. The panel is therefore approaching this hearing
process with an open mind that is prepared to fairly and impartially consider all
the evidence tendered. Thus, while our May the 5th letter has given Khalsa notice
of the Commission’s concerns about its request to be released from supervision,
we are prepared to come to conclusions different from those set out in our earlier letter if that is where the evidence takes us.

13. Consistent with this statement, the Hearing Panel undertook a full and fresh hearing regarding this matter. The Hearing itself occupied 13 days. Excellent and experienced legal counsel represented both parties. Witnesses testified under oath, and were subject to detailed examination and cross-examination. The following witnesses testified:

- Mr. William Samler, a consultant to Khalsa Credit Union;
- Mr. Dalbir Singh Sohi, Chief Executive Officer of Khalsa Credit Union;
- Mr. Balwant Singh Bhandir, a Trustee of Satnam Trust and Manager of Khalsa Broadcasting Corporation;
- Ms. Sundeep Dhaliwal, a lawyer;
- Mr. Satwant Singh Sandhu, a director of Khalsa Credit Union and current Chair of the credit union's Board of Directors;
- Mr. Bahadur Singh Vinning, a director of Khalsa Credit Union;
- Mr. David Fushtey, an expert witness and lawyer specializing in governance practice;
- Mr. Karnail Singh Manhas, a director of Khalsa Credit Union;
- Ms. Krystyna Bondi, a chartered accountant and Director of Credit Unions and Trusts at the Financial Institutions Commission.

14. Extensive documentary evidence was also filed at the Hearing. The documentary evidence included minutes of KCU Board meetings and of KCU Board Committees; correspondence, including email correspondence; Commission orders, internal reports and documents, and other relevant documents and recordings.

15. It would not be practical to recite in this decision every piece of evidence that was tendered before us. We do wish to make clear, however, that as we proceed in this decision to analyze whether each of the Superintendent's particulars has been proven, and to explain our conclusions, we have considered thoroughly, and with care, all the evidence tendered in this matter. The time it has taken us to issue this decision reflects the importance to the Hearing Panel of assessing all the evidence with care, and issuing a proper and careful decision that reflects the important responsibility conferred upon us.
16. We have found it convenient to structure this part of the decision by considering first each of the particulars advanced by the Superintendent. In deciding whether we should consent to KCU's application to be released from supervision, it is logical to start by exploring the Superintendent's position regarding any or all of the particulars he has alleged. Once we have undertaken our analysis and expressed our conclusions regarding each of those particulars, we will be in a position to turn to the larger question whether, in accordance with the purposes and objects of the FIA and the evidence and arguments advanced at this Hearing, we should grant the consent that KCU has sought.

PARTICULAR #1: "THE INAPPROPRIATE HIRING OF MS. SUNDEEP K. DHALIWAL AS COUNSEL FOR KCU"

17. On December 12, 2003 (one day before the KCU Board meeting held on December 13, 2003), Ms. Sundeep K. Dhaliwal, of Yaletown Law Corporation, sent letters to the Chair and CEO of the KCU Board offering legal services to KCU. In this letter Ms. Dhaliwal described her firm's practice, gave information about herself, the previous firm for which she worked, her contact with the Sikh community, her personal membership in KCU and the lower hourly rates that she proposed to charge KCU for her legal services. This one page letter was not accompanied by a curriculum vitae, or a description of work experience or a list of references.

18. The proposal of Yaletown Law Corporation to provide legal services to KCU was added to the agenda for the December 13, 2003 KCU Board meeting after that meeting was called to order. At the KCU Board meeting, the KCU Board held a conference telephone call with Ms. Dhaliwal and thereafter promptly passed a motion "to approve the law firm, Yaletown Law Corporation, for their legal services at the rate of $75.00/hour subject to the concurrence of the Stabilization Central Credit Union".

19. On December 24, 2003, KCU's CEO, Mr. Sohi, wrote to SCCU seeking its concurrence in respect of the appointment. On January 5, 2004, SCCU responded in writing enquiring whether the KCU Board had, amongst other things, checked references
or considered potential or perceived conflicts of interest. At the next KCU Board meeting on January 31, 2004, the KCU Board decided not to avail itself of Ms. Dhaliwal’s services.

20. A principal influence in the KCU Board’s decision was that Ms. Dhaliwal is a baptized Sikh and has been active in volunteer organizations within the Sikh community. As Mr. Vinning stated: "It would be good for the credit union to use someone that has accomplished so much" and "to use someone within the community". The Mission Statement of KCU states that KCU is to be a community-spirited organization. We appreciate that the approval of Ms. Dhaliwal as a Sikh lawyer who might be used by KCU was on its face attractive to the KCU Board members and was seen as furthering the aims of KCU.

21. Ms. Dhaliwal uses her maiden name. Friends of Ms. Dhaliwal included directors, officers and employees of KCU.

22. It was known by the KCU Board, all of whose members attended her very large wedding, that she is married to Mr. Jaspree S. Malik, her law partner at Yaletown Law Corporation.

23. Mr. Jaspree Malik is the son of Mr. Ripudamin Singh Malik. Mr. Jaspree Malik acted as legal counsel for discharged employees of KCU in matters against the interest of KCU during the two years immediately prior to the KCU Board approval, including one employment matter quite close in time to the KCU Board meeting. Also, only three months earlier, in September 2003, a Supreme Court Justice disbelieved the sworn evidence of Mr. Jaspree Malik and other family members on financial matters: R. v. Malik, [2003] B.C.J. No. 2167 (S.C.).

24. Having set out this background, we wish to emphasize that our analysis of this particular is not intended to represent the Hearing Panel’s opinion on the quality or calibre of the legal services offered by Yaletown Law Corporation or either of its partners. Our analysis is focused on the governance process the KCU Board used in making this decision to approve legal services.
25. Mr. David Fushtey was called by KCU to give expert evidence on the subject of corporate governance. Mr. Fushtey stated there are no definite rules about whether a board of directors should be involved in retaining or approving counsel - the matter tends to be organization-specific. Mr. Fushtey noted that a board of directors might well properly choose to involve itself in such a decision on the basis that a legal counsel, like an auditor, is considered to be a key advisor to an organization. Mr. Fushtey agreed that because management typically have to work with counsel, a board engaged in good governance and seeking to make such a decision would typically seek the advice of its CEO.

26. Mr. Sandilands states that the question to be answered is not whether Ms. Dhaliwal is qualified but rather whether the KCU Board interfered with the CEO by passing a resolution to approve Ms. Dhaliwal's law firm at their meeting on December 13, 2003. If the KCU Board did not interfere with the CEO then Mr. Sandilands submits that this incident cannot be held to be poor corporate governance. Mr. Hira submits that the actions of the KCU Board were ill advised, reckless and represented an interference with the discretion of the CEO. Further, Mr. Hira states that without the intervention of SCCU, the KCU Board's actions with regard to Ms. Dhaliwal would not have been rescinded.

27. We accept that it is not per se poor corporate governance for a board of directors to approve the appointment of lawyers. However, it would have been prudent for the KCU Board to have consulted meaningfully with its CEO on the subject, given the CEO's responsibilities, the CEO's previous hiring of other labour law counsel for KCU, the CEO's ongoing involvement with legal counsel regarding active files and the KCU Board's own lack of experience with these matters. The haste with which the telephone call and decision of December 13, 2003 unfolded provided little opportunity (and certainly no invitation) for Mr. Sohi to express to the KCU Board his reservations. Mr. Vinning testified that Mr. Sohi did comment during the meeting on it being a mistake to bring Ms. Dhaliwal into ongoing union negotiations. From this, it might be suggested that Mr. Sohi could have imposed himself on the meeting if he had had very strong
objections. It is apparent from Mr. Sohi's evidence that the KCU Board had taken charge on the issue and Mr. Sohi himself was at a disadvantage at the time of the meeting because he did not (despite also attending the wedding) realise the identity of Ms. Dhaliwal, given that she uses her maiden name.

28. The proposed approval of Ms. Dhaliwal was made before adequate information had been determined on which to base a sound decision. While one witness testified that the telephone call lasted as long as 30 minutes, the length of the conference call was, according to Mr. Sohi, between 5-7 minutes, and according to Ms. Dhaliwal herself, approximately 10 minutes. During the call the items discussed were her hourly rates, her experience, and her community involvement. No attempt was made to request a *curriculum vitae*, or a more detailed record of her experience. She was not asked for, and did not offer, any references. When Mr. Hira told Mr. Sohi at our Hearing that Ms. Dhaliwal had only been called to the Bar for one year prior to the letter, he said he was surprised to learn that. There was no apparent appreciation or exploration of potential conflict of interest issues or concerns arising from KCU retaining a lawyer from a firm that had acted against KCU, or retaining a lawyer who might be put in the position of acting for KCU against personal friends in labour matters. Those were, in our view, obvious questions that, along with standard reference checks and a proper *curriculum vitae*, ought to have been raised for exploration as part of the due diligence involved in approving an important advisor for a significant financial institution. They may or may not have been satisfactorily addressed if they were asked, but they were not asked.

29. Ms. Dhaliwal's involvement in the Sikh community did not in our view relieve the KCU Board from the obligation, as a matter of sound corporate governance, to obtain information that would normally be taken into consideration when making a significant decision of this nature. The KCU Board may have felt that they were only approving Ms. Dhaliwal to be placed on a list to possibly provide legal services to KCU and were not appointing her to perform any specific work for the organization. This position stands against the fact that, unlike KCU's conveyancing work, there was not at that time any standing "list" of lawyers for its labour work. Even if this appointment were seen as the creation of a first-time "list" for such work, it is obvious that when the KCU Board places
a lawyer on a list of lawyers approved to provide legal services, that decision would naturally authorize KCU staff to use this person for legal work without further investigation of credentials and qualifications. It would be more than strange to approve a lawyer for an approved list first and ask questions about their qualifications and references later.

30. It is noted as well that the KCU Board’s actual decision was not to approve Ms. Dhaliwal, but to approve Yaletown Law Corporation. As noted earlier, her husband, Mr. Jaspreet Malik had previously acted for an employee against KCU. Only three months earlier, in September 2003, a Supreme Court Justice disbelieved the sworn evidence of Mr. Jaspreet Malik on financial matters: \( R. \ v. Malik, [2003] B.C.J. No. 2167 \) (S.C.). The fact that Mr. Jaspreet Malik was disbelieved was a matter known to at least some of the KCU directors, and while Mr. Vinning agreed it was relevant to the KCU Board’s deliberations, it was not discussed. The minutes show that the KCU Board did not in its decision-making draw a distinction between hiring Ms. Dhaliwal and the Yaletown Law Corporation.

31: Section 101 of the \( FIA \) is a provision that applies to all financial institutions, including credit unions:

**Standard of care for directors and officers**

101 (1) A director or officer of a financial institution, in exercising the powers and performing the functions of a director or officer, must

(a) act honestly, in good faith and in the best interests of the financial institution, and

(b) exercise the care, diligence and skill of a reasonably prudent person under comparable circumstances,

and in doing so must take into account the interests of shareholders, depositors, if any, and policy holders, if any, and, without limiting this, of those to whom the directors owe a fiduciary duty.

(2) The provisions of this section are in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors of a corporation.
32. The proposed appointment of Yaletown Law Corporation by the KCU Board was in our judgment a decision made in a poor and inappropriate manner. The KCU Board did not undertake the due diligence and care that should reasonably be expected of the directors of a significant financial institution in retaining counsel, but rather allowed the community considerations surrounding Ms. Dhaliwal to take precedence to an inappropriate extent. The KCU Board failed to inform itself sufficiently about this proposed appointment. The KCU Board should have required proper references, a proper curriculum vitae, the considered views of its CEO, and at least identified and discussed with Ms. Dhaliwal the potential issues that were apparent on the information known to or available to the KCU Board. The KCU Board arrived at this decision with undue haste.

33. Mr. Fushtey suggested that the KCU Board’s decision might not necessarily be seen as sub-standard in light of the fact that its decision was provisional on SCCU approval, and as such there might later be additional steps. That characterization is, in our view, not especially helpful. The fact that the KCU board was willing to put such a poorly developed proposal to SCCU, despite many years of supervision, is itself problematic. The KCU Board cannot reasonably have expected or intended SCCU to perform reference checks. If KCU had not been under supervision and SCCU had not been available to identify the inquiries that needed to be made, the decision to approve the hiring of Ms. Dhaliwal without conducting proper due diligence would have proceeded.

34. We can find no mitigating circumstance here, as might have arisen had the KCU Board later come to the realization that its approval process was insufficient. The KCU Board revoked its earlier decision not because it realized any error, but because it did not want to provoke a conflict with SCCU in circumstances where it was intending and seeking to be removed from supervision. Mr. Sohi’s description of the discussion surrounding the KCU Board’s January 31, 2004 decision that KCU “not avail the services” of Ms. Dhaliwal is revealing: “It was some discussion that because of concerns from Stabilization Central, let’s not approve it and if we have to, we can approve it later....”. Mr. Vinning continued to assert, in cross-examination at our Hearing, that the KCU Board’s decision-making was not inappropriate, and reflected due diligence.
35. The Hearing Panel agrees with the Superintendent that the circumstances surrounding the proposed approval of Yaletown Law Corporation to provide legal services to KCU reflected a poor corporate governance process. We would describe this process as sub-standard on a matter of significant importance for a financial institution of substantial size and responsibility.

PARTICULAR #2: "THE INAPPROPRIATE PROCESS FOLLOWED BY THE BOARD OF DIRECTORS TO FILL THE VACANT DIRECTOR'S POSITION CREATED BY THE RESIGNATION OF JASPREET S. MALIK"

36. On May 2, 2004 Mr. Jaspreet S. Malik was appointed a director of KCU at the Annual General Meeting of KCU. On May 27, 2004 the Superintendent of Financial Institutions issued a Notice of Intent to issue an order to Mr. Jaspreet S. Malik that he was an individual who ought not to be in a position to control or influence a financial institution. Mr. Jaspreet S. Malik first took a leave of absence as a director and later, in a letter dated September 27, 2004 he resigned as a director. The KCU Board accepted his resignation on October 4, 2004.

37. On November 27, 2004, at an in camera meeting of the KCU Board, it was resolved that KCU Board members forward the names of candidates to fill the vacant ninth director position on the KCU Board. At a further in camera session held at the KCU Board meeting on December 11, 2004, the appointment of a new director was deferred.

38. Normally the KCU Board meets once a month, and had previously met on December 11, 2004. For reasons that are not entirely clear, the acting KCU Board Chair, Mr. Jarnail Singh Heer, called an extraordinary meeting of the KCU Board for December 23, 2004 – a date when three directors, including the KCU Board Chair, were away in India. Mr. Heer initiated and pushed for this KCU Board meeting to address and fill the vacancy for the ninth director's position. This was the only item on the agenda.
39. It is unclear precisely how much notice was given to the KCU Board about this meeting, but it was short notice. Mr. Corsbie of SCCU, on becoming aware of the proposed meeting, sent an email to Mr. Sohi expressing his concerns with the process and requesting that Mr. Sohi relay a copy of his e-mail message to Mr. Heer in advance of the meeting. Mr. Corsbie's email provided, in part:

_We are aware a board meeting is scheduled for this evening. The key agenda item for this meeting is the vacant director position and the possible appointment of an individual to fill this vacancy. We note that this meeting has been called on relatively short notice. We are also aware a number of directors will not be present for this meeting. Given these circumstances we question whether it would be appropriate to make a determination on the appointment of a replacement director at this meeting. A proper governance process to deal with this vacancy would include some or all of the following steps, first defining the process, sourcing a number of qualified and interested candidates, having them submit resumes, possible board or committee interviews, the filing of PIRs (we note the credit union requires candidates for election as directors to submit PIRs in advance for the review of the board), consideration of the skill set of the existing board and identification of possible gaps and the participation of all (or virtually all) directors in the decision._

_It would appear the process you are going through falls far short of this._

40. Mr. Sohi testified that no KCU Board meeting was held on December 23, 2004 because by the time the email had been received, KCU Board members from Nanaimo and Williams Lake had called advising of their unavailability, resulting in a lack of quorum. At the KCU Board meeting on January 29, 2005, Mr. Corsbie's email was discussed and it was decided to consider the appointment of a replacement director at the April 2005 KCU Board meeting.

41. Mr. Fushtey agreed that in the absence of an extenuating emergency it was inappropriate to call a KCU Board meeting on December 23, 2004 with a short notice period, when it was known that several directors would not be available.

42. Mr. Sandilands submits he was not clear about the concern from this series of events. He states that SCCU advised that a protocol for the appointment of a new

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1 "PIR" refers to a Personal Information Return. This Return is a form to be completed by prospective directors that gives details of education, experience and like matters.
director should be established. This was done and no objection was raised to it. Mr. Sandilands makes no mention of the haste to call a KCU Board meeting on December 23, 2004. Mr. Sandilands in his oral submission denies that this issue was hastily dealt with. Mr. Hira's position is that there is no urgency to call this KCU Board meeting and therefore this conduct amounts to poor corporate governance.

43. No explanation was adduced in evidence concerning the reason for calling a KCU Board meeting on December 23, 2004, aside from Mr. Sohi's evidence that Mr. Heer was pushing to hold it on that date. There is no evidence that information about potential candidates was distributed in advance of the meeting, nor was there any evidence why this issue needed to be dealt with at this time and why a meeting had to be called so quickly. The meeting appears to have been called without adequate preparatory work being completed in connection with the very important responsibility of appointing a replacement director to participate in oversight of a financial institution with about $120 million of assets. We find that this constituted poor corporate governance.

44. If SCCU had not intervened and two out of town directors had not been available, the meeting to make the very important decision to appoint a new director would have proceeded despite a totally inadequate process to prepare for it. The fact that the Acting Chair pushed to hold this meeting in circumstances where the KCU Board was under supervision is even more surprising. This is another example of a serious lack of basic knowledge and judgment regarding a fundamental requirement of corporate governance as it pertains to a significant financial institution.

PARTICULAR #3: "THE BOARD OF DIRECTORS' INTERFERENCE WITH MR. DALBIR S. SOHI'S (THE "CEO") EFFORTS IN HIRING A SENIOR MANAGER OPERATIONS"

45. In October 2004 the then Senior Manager of Operations (SMO) was dismissed from his employment with KCU. Mr. Sohi thereupon started a process to hire a new SMO. He advertised the position both internally and externally and received several replies by the cut off date of January 15, 2005. One of these replies, dated January 12,
2005, was from Mr. Aniljit S. Uppal. This is the same Mr. Uppal discussed in the CAC’s October 23, 2000 appeal decision, and in particular its order (page 25, paragraph 7) that KCU “attempt to negotiate with Mr. Uppal a resolution that is fair and that settles his possible claims.”

46. On January 18, 2005 Mr. McQueen, an employee of SCCU, met with Mr. Sohi to review the applications for the SMO position and preliminary discussion took place about a short list. At this time, Mr. Sohi’s thinking (not at that time conveyed to the KCU Board) was to have only one senior management position below the CEO rather than two, and for this position the candidate he preferred was the one internal applicant, Mr. Bahia. Mr. McQueen suggested that, before proceeding further, Mr. Sohi should take legal advice with regard to Mr. Uppal’s application. Mr. McQueen followed this up with a January 19, 2005 email to Mr. Sohi:

We have had the opportunity to review the application of Mr. Uppal for the position of Senior Manager Operations. Based on the history of this applicant with Khalsa CU we would suggest that you refer this matter to your lawyer for advice.

In seeking advice you may wish to consider the ruling of the Commercial Appeals Commission, the previous settlement proposal(s) and the background to them, and whether it is appropriate to refer the application to the Superintendent.

47. Mr. Sohi testified that one of the reasons for obtaining the advice was to determine whether, as a result of the CAC decision, KCU had any outstanding obligations to Mr. Uppal. Subject to any such obligation, it was Mr. Sohi’s opinion that three other candidates were better qualified. On February 15, 2005, Mr. Sohi wrote to legal counsel who had been involved in the drafting of settlement proposals regarding Mr. Uppal at the time of the CAC matter. As this counsel had already advised on the matter she would know the background to the issues between Mr. Uppal and KCU.

48. In this context, Mr. Sohi talked with Mr. Manhas, who was then acting Chair of the KCU Board, and had been following up regularly with Mr. Sohi on the SMO issue.

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2 As matters unfolded, there was no payment made to Mr. Uppal and no action was commenced by Mr. Uppal against KCU.
Mr. Manhas objected to Mr. Sohi’s use of previous counsel who had been involved at the time of the CAC hearing, and told Mr. Sohi to change legal counsel. Mr. Manhas stated that his reason was that this previous counsel involved in the negotiations with Mr. Uppal on behalf of KCU was biased against Mr. Uppal.

49. Mr. Sohi advised Mr. Manhas that, to change legal counsel, he would have to receive approval from SCCU. Mr. Sohi met with Mr. Corsbie and Mr. McQueen on March 24, 2005, at which time they advised Mr. Sohi that there was no need for legal advice, as FICOM would not approve Mr. Uppal’s hiring. Mr. Sohi conveyed Mr. Corsbie’s advice to the KCU Board meeting on March 26, 2005. The minutes of that meeting read:

"In regard to Senior Manager, Operations hiring, Mr. Sohi advised the Board that as per direction given to him by Mr. Manhas to take up the issue with Stabilization Central Credit Union for changing the lawyer ... he had requested for a meeting to Mr. Jim McQueen to discuss the issue of changing the lawyer. Accordingly, he had a meeting at Stabilization Central Credit Union’s office on March 24, 2005. He was advised by Mr. Corsbie and Mr. McQueen that there is no need for legal advice because FICOM will not approve & will object to Aniljit Singh’s hiring, if hired. In view of this and in order to have full management team, Mr. Sohi advised the Board that he will have to hire Senior Manager, Operations, out of other applicants."

50. The KCU Board discussed this matter and then passed a resolution, proposed by Mr. Manhas. The essence of the resolution was that, in light of the CAC’s previous finding that Mr. Uppal was not disqualified and that his employment should be considered with an open mind, (a) Mr. Sandilands be instructed to find out from FICOM why they object to the hiring of Mr. Uppal; and (b) that a Senior Manager Operations not be hired until the matter of Mr. Uppal had been settled.

51. On April 7, 2005, Mr. Harchand Singh Gill, then Chair of the KCU Board, sent a letter to Mr. Jim McQueen of SCCU headed “Re: Aniljit Singh Uppal”. The letter expressed concern at advice that Mr. Sohi was verbally instructed not to consider Mr. Uppal for the SMO position, and also about the conflict between that advice and the earlier suggestion that legal advice be sought about the CAC decision. Mr. Gill stated the KCU Board’s opinion that the CAC did not consider Mr. Uppal to be disqualified for any
reason, quoted from the CAC decision and emphasized and quoted from the CAC's findings regarding Mr. Uppal. Mr. Gill, on behalf of the KCU Board, closed with this statement: "The Board is of the opinion that Mr. Uppal is the most qualified candidate who has yet sought the advertised position". In evidence Mr. Sandhu and Mr. Vinning agreed that this was the position taken by the KCU Board.

52. Mr. Sohi testified that he did not tell the KCU Board that Mr. Uppal had applied for the position. The KCU Board had obviously obtained this information elsewhere.

53. On April 8, 2005, Mr. Sohi wrote to Mr. Gill clarifying, inter alia, that he was not "instructed" by SCCU not to hire Mr. Uppal, but only that SCCU advised him that there is no need for legal advice because FICOM would not approve the hiring. On April 13, 2005, SCCU also wrote to the KCU Board making the same point, and questioning why the KCU Board was involved in what SCCU regarded as the CEO's mandate.

54. On August 2, 2005, Mr. Sohi was asked by Executive Committee members how he was doing without a SMO. Mr. Sohi stated that he was overburdened as far too much operational work fell on him. The Committee members stated they would discuss the issue in more detail in camera. After the 40 minute in camera session the Executive Committee meeting reconvened and the directors present advised Mr. Sohi that he could, once again, start the search for a SMO. Mr. Sohi stated "I was asked to take along one independent consultant, Mr. Bill Samler, and then I was asked to hire SMO with or without Aniljit Singh Uppal."

55. On August 20, 2005, Mr. Sohi re-advertised the position in The Vancouver Sun newspaper with a September 10, 2005 application deadline. From that process, he received 10 applications.

56. At a meeting of the Executive Committee held on September 24, 2005, Mr. Sohi reported that a new search for a SMO had begun, and that he would begin the hiring process during the first week of October. The Committee emphasized that the position be filled as soon as possible, and Mr. Manhas suggested that the CEO involve an
independent person in the hiring process to avoid what the amended minutes refer to as "any perception of putting pressure/influence on the CEO". The full KCU Board's minutes from their meeting of September 24, 2005 state:

The detailed discussion was done in regard to engaging an independent person/outside help to CEO for hiring SMO in view of the direction given by the Executive Committee. The discussion revolved around the issue of why outside help when our CEO is experienced in the hiring function. It was discussed that this is to avoid pressure/influence by Board or by Stabilization Central Credit Union/FICOM. It was stated that the Board put a freeze on SMO hiring few months ago and to lift this freeze Executive gave a direction to CEO to engage an independent person. Mr. Malik stated that Aniljit Singh is an applicant for SMO and this being a controversial issue Executive Committee unanimously gave the direction to CEO to take along an independent person. He also stated that it could go to court on this matter and to avoid any controversy CEO was advised to involve an independent person.

57. As Mr. Samler, who was previously suggested by the KCU Board in August, was not available to consult for health reasons, Mr. Sohi retained Mr. Saunders, a commercial loans consultant. When Mr. Samler subsequently called advising of his availability, Mr. Sohi retained him too, resulting in his having two consultants to give advice on the hiring.

58. Mr. Samler testified that the CEO's preferred candidate was, both as a matter of trust and competence, Mr. Bahia, the candidate who had applied from within the organization. Mr. Sohi reported to the KCU Board meeting on October 28, 2005 that he had filled the position of SMO with an internal applicant from within KCU.

59. Mr. Fushtey's evidence was that it is not unusual for boards of directors to become involved with the hiring of senior staff of an organization. Although he did not feel that the involvement of the KCU Board in the hiring process of the SMO was poor corporate governance, he was of the view that it was inappropriate for the KCU Board to have concluded, as they evidently had quite early in the process, that Mr. Uppal was the most qualified candidate when they had not even seen the resumes of other candidates.
60. Mr. Sandilands submits that it was not inappropriate for the KCU Board to be part of the process of hiring a SMO. He states that directing the CEO to appoint a lawyer, other than counsel who had previously been retained; to halt the hiring process while the matter of Mr. Uppal was clarified; and directing the CEO to engage a consultant to assist in the hiring, were all matters of a trivial nature even if one assumes they were outside of the KCU Board’s sphere of authority. Mr Hira submits that the conduct by the KCU Board was inappropriate because it was an unwarranted and unnecessary interference in the hiring and management functions being exercised by Mr. Sohi.

61. We agree with Mr. Fushtey that it was appropriate for the KCU Board to have some involvement in the hiring of a senior member of the management team. One of the KCU Board’s most critical responsibilities as stated in the Corporate Governance Policy of KCU is to “ensure that qualified and competent management are appointed”, and we interpret this to mean that it is acceptable for the KCU Board to have some involvement in the hiring of a SMO. Mr. Sandhu gave evidence that he regarded Mr. Sohi coming to the KCU Board and discussing the filling of the SMO position as Mr. Sohi wanting to obtain the KCU Board’s input on this matter and not as the KCU Board dictating to Mr. Sohi that he had to take certain actions. We accept this evidence and find that if Mr. Sohi came to the KCU Board to discuss a matter then he must be prepared for discussion to take place and even for the KCU Board to provide direction on the matter.

62. When the KCU Board did give specific directions to Mr. Sohi the KCU Board had adequate reasons for this direction. The KCU Board was understandably concerned, in light of the CAC decision and the previous process, that the present hiring process be as fair and objective as possible. They acted prudently in not wanting to proceed with any other candidate until the position of Mr. Uppal was clarified. They wished to appoint a consultant to assist Mr. Sohi once it was decided to go ahead in August 2005 so that the process would be shown to be independent, as the possibility of Mr. Uppal being hired as the SMO was seen to be a controversial issue.

63. Mr. McQueen of SCCU stated in a letter to Mr. Gill concerning this hiring that: “It is the CEO’s responsibility to hire, we therefore question why the board is involved
and interfering in his ability to perform his job." Mr. Sohi obviously felt the same way as he stated this in an interview with Ms. Bondi of the Superintendent's office. It is not interference by the KCU Board if board members are involved with considerations pertaining to a fair process relative to the hiring of a senior member of management, but it would be interference if the CEO was forced by the KCU Board to accept a particular candidate. We do not find that such interference occurred in this instance.

64. We take a different view, however, with respect to the KCU Board's earlier assertion to SCCU concerning Mr. Uppal being the most qualified candidate. The KCU Board obviously felt that Mr. Uppal was the preferred candidate and we find on all the evidence that they wished to have him appointed, despite knowing nothing about the other candidates. Their interest in him seems to us more than would arise merely out of concerns for due process. The Chair of the KCU Board stated in writing that Mr. Uppal was the most qualified candidate, and other KCU Board members felt that he was qualified to the extent that they placed him at the top of the list of candidates.

65. The CAC's decision showed Mr. Uppal had sound credentials. However, the CAC's decision was based on evidence submitted to that body in the early summer of 2000. The KCU Board made no attempt to find out any details of Mr. Uppal's work experience during the intervening five years, and on the evidence the KCU Board had no objective justification for suggesting that he was superior to all other candidates. We find it very troubling that those having the ultimate authority for the operations of KCU were prepared to conclude and assert that Mr. Uppal was the most qualified candidate for the very important position of SMO. They came to this conclusion without reviewing the resumes of other candidates, updating Mr. Uppal's curriculum vitae, or engaging in a detailed discussion of his credentials with the CEO. In reply, Mr. Sandilands characterizes the letter about Mr. Uppal's suitability as "brash". It is more than that. It is troubling in at least two respects. First, the letter would reasonably convey the impression to its supervisor (SCCU) that the KCU Board has reviewed the other resumes, when in fact this was not so. One would think that, after several years of supervision, the conveying of false impressions would be the last thing the KCU Board would want to occur. Second, on the assumption the KCU Board did not intend to convey any false
impression to SCCU, it is impossible to understand how the KCU Board could have rationally purported to rank Mr. Uppal at any level of qualification compared to others when it had not seen the resumes of the other candidates, had not obtained Mr. Sohi's views on the matter, and was concerned for due process in this hiring.

66. The KCU Board asserted a position on a very important personnel matter, based on incomplete information and reflecting poor judgment. Once again—as with Ms. Dhaliwal and the proposed election of a ninth director—we find this to be another instance of poor corporate governance and poor judgment.

PARTICULAR #4: "THE BOARD OF DIRECTORS INTERFERENCE WITH THE CEO'S BUDGET AND MARKETING PLAN WITH RESPECT TO ADVERTISING"

67. On September 20, 2004, a letter on the letterhead of Satnam Trust and signed by Mr. Balwant Singh Bhandher, Trustee of Satnam Trust, was faxed to KCU. This letter presented KCU with the opportunity to exclusively sponsor live daily radio broadcasts from the Darbir Sahib, Golden Temple, Amritsar in India. The letter states that this is an opportunity to promote the Sikh religion throughout North America, is the only live broadcast of Darbar Sahib, and that Satnam Trust has 900 subscribers currently in British Columbia but expects to double this number within the next 12 months. The letter also states that no advertising is allowed on the broadcast channel, but that KCU would be regularly announced as the sponsor, and a short message promoting KCU could be included in the announcement. The cost to KCU would be $2,000 per month, plus taxes. At this time KCU was already advertising on Amrit Bani Radio. This advertising was costing $300 per month plus GST and was paid into the account of Khalsa Broadcasting Corporation (KBC).

68. On February 3, 2005, a letter on the letterhead of Khalsa Broadcasting Corp. and signed by Mr. Balwant Singh Bhandher, Manager, was sent to KCU for the attention of Mr. Gill, Chair. This letter stated that KBC owned the right to broadcast on four satellite channels, and one of these channels is dedicated to daily broadcasts from Darbir Sahib in
Amritsar, India. The letter went on to state "The right to broadcast the Darbar Sahib program was originally granted to Satnam Trust and Khalsa Broadcasting Corporation has purchased the 4 Satellite stations to broadcasting this service."

69. There were extensive and lengthy discussions at Audit Committee and KCU Board meetings after both the original and the second letter were received but no decisions were made on a course of action. An investigation was conducted but during this investigation Mr. Vinning testified that no attempt was made to verify that Satnam Trust had invested $40,000 in the technology necessary to bring the Golden Temple radio broadcasts to North America nor was any market analysis conducted. The investigation did not attempt to determine the extent of the coverage of the broadcasts in North America; did not conduct any corporate searches; did not attempt to find out the connection between Satnam Trust and KBC; and did not attempt to determine who was the owner of KBC or who would benefit from money paid to KBC. The investigation was conducted by phone calls and it is unclear whether any formal conclusions were reached as no written report was prepared and only oral presentations were made to the Audit Committee and the KCU Board. The Audit Committee recommended that the KCU Board approve $2,000 per month to be paid to KBC to sponsor the Golden Temple broadcasts, but that KBC must fulfill the Canadian Customs and Revenue Agency (CCRA) requirements and KBC should introduce new business to KCU.

70. At the KCU Board meeting on March 26, 2005, Mr. Manhas and Mr. Gill excused themselves from the meeting and then the KCU Board passed the following resolution:

*Be it resolved to approve monthly payment of $2,000 to Khalsa Broadcasting Corporation as advertising expense effective April 1, 2005 and discontinue current advertising expense of $300 to Amrit Bani Radio. Management to carry these expenses from current advertising budget and can be approved excess amount later if needed.*

71. Mr. Sandhu presented evidence that Mr. Manhas and Mr. Gill withdrew from the meeting because there is a perception that Satnam Trust and Satnam Education Society are the same although this is not the case. Both Mr. Manhas and Mr. Gill are connected
with the Satnam Education Society. Mr. Sandhu, who was later shown to be an authorized signatory on the KCU account of KBC, did not withdraw from the meeting.

72. There was considerable discussion at various KCU Board and Audit Committee meetings about how the $2,000 per month payable to KBC should be reflected in KCU's 2005 Budget. As the money was payable to KBC it was felt that it could not be classified as a donation but must be classified as an advertising expense. The KCU Board had direct control of donations but the CEO controlled advertising expenses. Eventually it was decided that the $2,000 per month payments must be classified as an advertising expense but the 2005 Budget was not changed to reflect this additional item. Mr. Sohi was told to come back to the KCU Board at a later date if he needed more money to be added to the 2005 Budget item for advertising expenses.

73. After the September 2005 KCU Board meeting, Mr. Sohi was asked to look at the details of the bank account of KBC with KCU. He determined that the authorized signatories to this account were Mr. Jaspreet S. Malik, Mr. Satwant Singh Sandhu, Mr. Gudwal Singh Dhaliwal and Mr. Balwant Singh Bhandher. At this time both Messrs Jaspreet S. Malik and Satwant Singh Sandhu were directors of KCU. These two directors were also listed in the records of KCU for bank account purposes as directors of KBC. Mr. Jaspreet Singh Malik is shown in the KCU records as being the sole shareholder of KBC. Mr. Vinning stated in evidence that he was not aware that Mr. Jaspreet S. Malik was a director of KBC until September 2005. He also stated in evidence that it was inappropriate to have done business with KBC because Mr. Jaspreet S. Malik had been a director of KCU from April to September 2004. The ownership of KBC was transferred to Mr. Bhandher in the fall of 2005.

74. Mr. Sandhu testified that he had never been a director of KBC. The possible conflict of interest by Mr. Harchand Singh Gill and Mr. Satwant Singh Sandhu were reviewed by the Conduct Review Committee of the KCU Board (CRC) at its meeting on October 11, 2005. At that meeting it was decided that Mr. Harchand Singh Gill may be in a conflict situation and that there is a serious conflict issue and gross breach of policy by Mr. Satwant Singh Sandhu. The CEO was asked by the committee to seek legal
advice and he sought this advice from Mr. Keith Mitchell of Harris and Company. Mr. Mitchell gave his opinion that there was not a conflict of interest on the part of Mr. Gill but that at a minimum there was a perception of a conflict of interest by Mr. Sandhu. This was acknowledged by Mr. Sandhu. The CRC met on October 29, 2005, reviewed Mr. Mitchell’s letter, and accepted that Mr. Harchand Singh Gill was not in a conflict of interest position. A letter was received from Mr. Satwant Singh Sandhu in which he stated that he never signed cheques and forgot he was a signing authority on the KBC account. The CRC reviewed Mr. Sandhu’s letter together with Mr. Mitchell’s opinion, and concluded that there is a perception of a conflict of interest but it was clear that Mr. Satwant Singh Sandhu did not take any benefit. Mr. Sandhu apologized to the KCU Board for his actions and removed himself as a signatory of the KBC bank account at KCU.

75. A meeting of the KCU Board started on October 28, 2005, was adjourned, and resumed on October 29, 2005 after the meeting of the CRC on the same day. At this meeting the following motions were passed:

- Conduct Review Committee recommended that motion of Audit Committee be accepted in regard to expense of $2,000 per month.

- Be it resolved that Board has decided to suspend payments to Khalsa Broadcasting Corp. until the conflict of interest issue is resolved. Following resolution of the conflict, the Board will reconsider a new application for funding.

76. The first motion stated above was intended to correct the motion passed at the KCU Board meeting held on March 26, 2005, so that it was now in accord with the motion passed by the Audit Committee on March 26, 2005. In particular the Audit Committee motion now adopted by the KCU Board reflected the idea that KBC must fulfill CCRA’s requirement and ensure that KBC should introduce new business to KCU. Mr. Sohi gave evidence that payments to KBC by KCU had been stopped effective November 1, 2005.
77. KBC was set up as a separate company so that any legal liability that might arise from broadcasts would be diverted from Satnam Trust to KBC. After KBC was set up the broadcasting rights previously held by Satnam Trust were transferred to KBC. Satnam Trust is a non-profit organization. KBC is a normal commercial company that cannot issue charitable donation receipts.

78. KBC operates through satellite broadcasts. This means that only people having a receiving dish can receive their broadcasts. They broadcast on one channel as Amrit Bani Radio; the broadcasts from the Golden Temple in Amritsar are broadcast on another channel. To receive Amrit Bani Radio a special chip must be installed in the receiving equipment as well as needing a receiving dish.

79. Mr. Bhandher stated that there is no written contract between KBC and KCU – it is simply a “word of mouth” arrangement.

80. Mr. Fushtey was of the opinion that it was poor practice for the KCU Board to have decided to spend $2,000 per month for advertising with a satellite radio station that has about 900 satellite dishes in British Columbia without conducting investigations or ensuring that proper contractual documentation was in place.

81. Mr. Sandilands points out that there was no evidence introduced to show that the CEO had a marketing plan for advertising, and we agree. Mr. Sandilands also states that the line item for advertising was deleted from the 2005 budget. This is true but the discussions at the KCU Board and statements by the KCU Board that if more money is required then the CEO should return to the KCU Board for approval, show that the KCU Board and Mr. Sohi always understood that advertising money was to be spent during 2005.

82. Mr. Sandilands states that the KCU Board saw the Golden Temple broadcasts as a contribution to Sikhism, not just a promotional gimmick. He states that it was a public relations gesture to the community and a benefit to the community. All the evidence supports this conclusion. When Mr. Sandhu was giving evidence he waxed quite lyrical
about the importance of broadcasts from the Golden Temple. It is worth quoting his exact words as they display strong feelings of attachment and veneration to this shrine of Sikhism in India:

As Vatican is to Catholics, Golden Temple is the same to Sikhs. And I can't explain to you, to the non-Sikhs, how serene, how peaceful, you become...

It actually soothes your soul, and people who goes there – I go – every time I go to India, I go to that place and sit there a few hours to calm myself down. And people who just can't go or who – who wants to listen to this thing every day, it's for them.

Both Mr. Manhas and Mr. Vinning strongly supported the concept that the Golden Temple broadcasts would benefit the community at large and indirectly place KCU in a favourable light in the community.

83. Mr. Sandilands submits that it is clear from the evidence that the KCU Board had no intention of interfering with the mandate of the CEO. Whatever their intent, we find that they did interfere with the CEO by directing that the advertising through Amrit Bani Radio be discontinued. Mr. Hira submits that the KCU Board wrongly and inappropriately directed the CEO to spend KCU's funds in a poorly thought out scheme to further the interests of KCU Board members.

84. We find that the situation that developed was as follows. Many members of the KCU Board were attracted to the concept of sponsoring the Golden Temple broadcasts because they personally would like to hear these broadcasts and they felt that other members of the Sikh community would have similar feelings. When they found that they could not receive charitable donation tax receipts for payments that KCU would make to sponsor these broadcasts, they decided that these payments could not qualify as donations. As charitable tax receipts could not be obtained but the KCU Board still wished that KCU would sponsor these broadcasts, the KCU Board then decided to classify the payments as advertising. The KCU Board then directed the CEO to spend $2,000 per month of his advertising budget on the Golden Temple broadcast and to stop payments of $300 per month that were already being paid to Amrit Bani Radio.
85. The KCU Board decided to sponsor the Golden Temple broadcasts because they felt they would be a benefit to the Sikh community. It is not poor corporate governance for the KCU Board to reserve unto itself the approval of donations. However, in this situation the KCU Board was not authorizing a donation but entering into a commercial contract. It is inappropriate for the KCU Board to commit the financial institution to such a contract without conducting any analysis concerning how the money being spent would be in the best interests of KCU or its depositors. The investigation that was undertaken was rudimentary at best. There was insufficient information on which to base a sound decision in the best interests of the financial institution. No consideration was given whether the $2,000 per month would be of any greater benefit to KCU than the $300 per month that the CEO was then spending. We find that the directors did not exercise the care and diligence that might reasonably be expected of them in the making of the decision to pay $2,000 per month as an advertising expense. Failing to exercise this care and diligence was poor corporate governance.

86. As is apparent in other findings we have made, the KCU Board’s interaction with its CEO is also a cause for concern. Mr. Sohi’s objection to discontinuing the Amrit Bani broadcasts was not properly considered, and there was inadequate involvement of the CEO in this decision.

87. Mr. Sandhu testified that he forgot he was a signatory to the KBC bank account at KCU and therefore did not inform the KCU Board or its committees or its Chair that he may have a possible conflict of interest when discussing KBC. KCU Directors have an obligation to take all reasonable proactive steps to protect the institution and to declare conflicts of interest. Mr. Sandhu’s forgetting about something as important as being a signing authority in circumstances where this entire matter had been discussed over several months, is not in our view consistent with the standards befitting a director of a financial institution.

88. When KCU found out about the possible conflict of interest of Messrs Sandhu and Gill we find that it acted appropriately and expeditiously to resolve the matter. We give credit to KCU for this. However, we note that when the conflict of interest of Mr.
Jaspreet S. Malik was identified, no action was taken, but presumably this was because Mr. Jaspreet Malik had by then resigned as a director of KCU.

89. The transaction with KBC entailed payments of over $24,000 annually. It is poor corporate practice that no formal contract or any other kind of written material exists to reflect the terms of this deal. KCU’s depositors have a right to expect that transactions of this magnitude are appropriately documented.

90. While we do not find overt misconduct by the KCU Board in respect of this particular, we do find, in our overall assessment, that it represents yet another example of sub-standard sophistication and corporate governance by the KCU Board in the administration of an important financial institution.

PARTICULAR #5: “THE BOARD OF DIRECTORS' INTERFERENCE WITH THE CEO’S EFFORTS TO TERMINATE A MANAGER”

91. In his June 2005 Report to the KCU Board, Mr. Sohi, the CEO, raised an issue with regard to the mortgage renewal rate used on a mortgage renewal for a personal mortgage to Mrs. KCU.

92. Mr. Sohi’s Report to the KCU Board was distributed to the KCU directors prior to the July 23, 2005 meeting of the KCU Board. Three pages of this five-page report concerned matters connected with the under the heading “Mortgage Rate Scandal and Irregularities/Exceptions by”. Under this heading there was a lengthy dissertation on various events connected with Ms. and this can be divided into two portions. Firstly, the matter of mortgage rate renewal irregularities for Ms. own mortgage, and secondly, a litany of problems with Ms. personal conduct as a staff member and as. At the end of this report Mr. Sohi stated that a lawyer “is being consulted about Ms. conduct, several incidents of insubordinate behaviour, mortgage rate scandal and irregularities and exceptions by her since a warning given to her in June, 2000”. The KCU Board then decided that the Executive Committee should consider the report. The CRC had already
decided to look at those aspects of the report that reflected possible conflicts of interest. At this meeting the KCU Board advised Mr. Sohi to look for another lawyer to handle personnel matters of the credit union. In evidence, Mr. Sohi stated that he advised the KCU Board at this meeting that the lawyer could not be changed as legal counsel had already been retained on this matter.

93. The portion of Mr. Sohi's report concerning the mortgage renewal rate matter was considered at the meeting of the CRC held immediately before the KCU Board meeting on July 23, 2005. The CRC decided that they would delay further consideration until a legal opinion was obtained. The remainder of the portion of Mr. Sohi's report that concerned the conduct of Mrs. was reviewed and discussed by the Executive Committee at its meeting on August 2, 2005. Committee members were evidently confused about the sequence of events and suggested to Mr. Sohi that he revisit the matter and fully investigate the circumstances. Mr. Sohi agreed to do this.

94. At the Executive Committee meeting held on September 24, 2005 the matter of Ms. was again considered. By this time an opinion letter had been received from legal counsel but had not been distributed to members of the Executive Committee although Mr. Manhas had seen it as Chair of the CRC. The Executive Committee members stated that they could not give input on the Ms. matter without seeing the lawyer's letter so they were given a copy of this letter. The minutes record: "Executive also advised CEO that he can deal himself without Executive Committee's input. CEO stated that it is in his mandate to decide for the final decision. CEO asked for the Executive Committee's input and Executive Committee members were given the copy of the opinion letter."

95. Mr. Sohi took the minutes of the Executive Committee meeting of September 24, 2005. His initial record of the minutes stated with regard to Ms. "It was discussed that CEO is to abide by Executive's input." At the meeting of the Executive Committee held on October 4, 2005, this sentence was deleted before the minutes were approved. Conflicting evidence was presented on this point. Mr. Sohi was adamant that
his record was correct but Mr. Vinning and Mr. Manhas both gave evidence that this was not said.

96. Mr. Sohi gave evidence that on several occasions after October 1, 2005 he had tried to meet with Mrs. [redacted] but this had not happened, as Mrs. [redacted] had always been sick on these occasions. She has been on sick leave since October 7, 2005.

97. Although Mr. Sohi speculated that a KCU Board member or KCU Board members may have been leaking information on the KCU Board's deliberations directly to Ms. [redacted] there is no evidence on this point.

98. Mr. Sandilands submits that the problem appears to be that the KCU Board and its committees did not understand what Mr. Sohi wanted from them. Mr. Sandilands submits that even if the events were correctly recorded by Mr. Sohi (who wrote the minutes), it is apparent from subsequent dealings that the KCU Board did not intend to impose any restrictions. Further, Mr. Sandilands states that it is clear that the KCU Board did not have confidence in counsel and wanted Mr. Sohi to use another lawyer but that the KCU Board did not direct Mr. Sohi to use another lawyer relative to Ms. [redacted] We agree with Mr. Sandilands on this latter point although it would be natural for Mr. Sohi to deduce that the KCU Board would be happier if he did not continue to use existing counsel in this instance.

99. Mr. Vinning gave evidence regarding the reason that a different lawyer was preferred, which, whether objectively valid or not, showed a legitimate concern for the reputation of KCU and how KCU deals with its staff. In any event, Mr. Sohi did not change counsel because counsel had already been retained on this matter. The KCU Board did not challenge this decision or attempt to alter it. We therefore agree with Mr. Sandilands' submissions stated above.

100. In this Hearing we are concerned with matters of corporate governance and so we are not commenting on the actions taken or proposed with regard to Ms. [redacted] but rather with the corporate governance and/or decision-making aspects of these events. Having prepared a lengthy report to the KCU Board and its Committees, Mr. Sohi must
expect it to be read and arising from this reading for discussion to occur. This is what happened. We conclude that Mr. Sohi presented his report as a record of a series of events connected with Ms. that was troubling him. Those KCU Board members reading the report naturally reacted to it and offered their comments. Mr. Sohi might well have thought that they should not give advice in this manner and they were therefore interfering in the CEO’s mandate. However we find that the KCU Board members were acting in exactly the way that would be expected of them after they received a long and detailed report on a matter of importance. In short, we find that the KCU Board and its committees were asked for advice and gave it, but they did not interfere with the CEO in the performance of his duties.

101. Mr. Sohi quite correctly brought the matters concerning Ms. to the attention of the KCU Board and the KCU Board correctly allocated them to the relevant committees to deal with them. They are matters within the mandates of these committees. The committees should decide on the matters before them but then leave it to the CEO to take the appropriate action. With the exception of the conflicting evidence about what Mr. Sohi was instructed to do, that is precisely what took place. Even assuming Mr. Sohi was told at the meeting that he was to abide by the KCU Board’s input this is clearly not what happened as Mr. Sohi was shortly thereafter given liberty to terminate Ms. employment. He was unable to do so because Ms. went on sick leave. We do not in all the circumstances find that the KCU Board interfered with Mr. Sohi’s efforts to terminate Ms.

PARTICULAR #6: “THE BOARD OF DIRECTORS APPOINTMENT OF RIPUDAMIN S. MALIK AS A DIRECTOR WHEN THE BOARD KNEW, OR REASONABLY OUGHT TO HAVE KNOWN, OF HIS UNSUITABILITY FOR THAT POSITION”

102. In September 2004 Mr. Jaspreet S. Malik resigned as a director of KCU. This created a vacancy on the KCU Board. The KCU Board was empowered to fill this vacancy by appointing a director themselves. In other words, when a vacancy occurs
because a director has resigned, the KCU Board may appoint a replacement director and not wait until the next Annual General Meeting for a replacement to be elected.

103. The KCU Board asked SCCU about the appropriate manner to proceed when appointing a new director in these circumstances. They were advised by SCCU to appoint a Nominating Committee. The KCU directors would then send names of suitable persons who might be considered for this position to this committee and it would qualify these candidates with regard to whether they fulfilled certain requirements of the Sikh religion. The KCU Board followed this process. Four candidates were suggested to the Nominating Committee. This committee then contacted these candidates and attempted to arrange for their affirmation at a Sikh Temple. Three of the candidates withdrew during this process or did not appear for their affirmation. Only one candidate, Mr. Ripudamin Singh Malik was therefore confirmed and recommended by the Nominating Committee.

104. At the Annual General Meeting of KCU held on April 24, 2005 the following motion was passed by the members present:

**Whereas:**
- There is a vacancy on the Board;
- Ripudamin Singh Malik is the founding Chairman of Khalsa Credit Union;
- Ripudamin Singh Malik is the founding General Manager of Khalsa Credit Union;
- Ripudamin Singh Malik has spent countless hours in service of the Sikh community through his leadership and stewardship of Khalsa Credit Union since its inception in 1986; and
- Ripudamin Singh Malik has not been found guilty of any crime by the BC Supreme Court and is now available to serve the Sikh community again.

**Be it resolved that:**
The Membership requests the Board of Khalsa Credit Union invite Ripudamin Singh Malik to fill the vacant seat on the Board until an election can be held in the Spring of 2006.

105. The Parliamentarian at the Annual General Meeting advised the members present at the meeting that the above motion was not binding on the KCU Board. The members were also advised by legal counsel that by passing the motion, Mr. Malik will not
automatically be a member of the KCU Board, and that the directors have to follow KCU's rules and procedures in appointing a director. Mr. Harchand Singh Gill advised the members that nomination of suitable candidates was still open.

106. In March 2005 Ripudamin Malik was acquitted of murder charges in connection with the June 1985 Air India bombing. The trial was one of the longest criminal trials in Canadian history and attracted widespread publicity both in Canada and abroad.

107. At an in camera session of the KCU Board meeting held on May 14, 2005, the KCU Board appointed Mr. Ripudamin Singh Malik to fill the vacant director's position. Two directors voted against this appointment. Mr. Karnail Singh Manhas was one of them. In evidence he gave his reason for voting negatively to be that he did not want a hassle with FICOM or SCCU and for the sake of the credit union, Mr. Malik should not be appointed.

108. Prior to the Air India trial Mr. Malik approached the Attorney General for funding for his defense. In applying for funding he claimed that although he had assets with which to fund his defence they were not in the form of cash and that it would take time for him to liquidate them. In or about February 2002 Mr. Malik and the Attorney General entered into an interim funding agreement pursuant to which the Attorney General agreed to advance funds to Mr. Malik in order for him to fund his defense.

109. After the Attorney General had advanced funds under the interim funding agreement Mr. Malik then claimed to be insolvent because his unsecured creditors, all family members, took priority over his obligation to contribute to his legal fees. Because he was insolvent Mr. Malik claimed that he had no duty to contribute to his legal fees and was entitled to keep his interest in his assets that he jointly owned with his wife.

110. As a result of a position taken by Mr. Malik the Attorney General terminated the interim funding agreement. After Mr. Malik was denied legal aid he applied for Charter relief by way of a Rowbotham order in order to aid his constitutional right to a fair trial.
111. On September 19, 2003, Madam Justice Stromberg-Stein in *R v Malik* [2003] B.C.J. No. 2167 made the findings of fact we have summarized in the previous three paragraphs and dismissed Mr. Ripudamin Singh Malik's application for Rowbotham funding. In dismissing the application Madam Justice Stromberg-Stein stated that she found Mr. Ripudamin Singh Malik's evidence unreliable. Not only did she not believe Mr. Malik's evidence, but she found that facts had been manipulated and there was evidence of collusion in an effort to secure an alleged loan from a family member in order to reduce Mr. Malik's equity in property.

112. None of the findings by Madam Justice Stromberg-Stein at the Rowbotham application were disputed in the proceedings before us.

113. On cross-examination by Mr. Hira, Mr. Fushtey gave his opinion that the KCU Board should not have appointed Mr. Ripudamin Singh Malik given the fact that he had been disbelieved by a Supreme Court judge even if he had been approved by the nominating committee and the AGM.

114. Mr. Sandilands in his submissions on behalf of KCU states that the KCU Board had acted responsibly in appointing Mr. Ripudamin Singh Malik as a director because they were unaware of the allegation that a Justice of the British Columbia Supreme Court had disbelieved him. He further states that the KCU Board had acted responsibly because the Superintendent had not expressed concerns about Mr. Malik prior to the appointment being made. We disagree.

115. During the course of submissions in connection with Mr. Ripudaman Singh Malik's appointment as a director we requested submissions from counsel about the test to be applied in determining whether the directors had fulfilled their duties. We requested that these submissions addressed our concern of whether it was a subjective test based upon actual knowledge or whether it was an objective test based upon what the directors reasonably ought to have known.
116. Mr. Sandilands submitted that in analyzing the knowledge of the directors it is the directors' actual knowledge at the time of the decision that must be considered rather than what they ought to have known. Mr. Hira submitted that it is an objective test that must be applied rather than a subjective test and that a board's decisions must be considered based upon what they ought to have known.

117. Section 101 of the *FLA* speaks to the standard of care expected of those acting as directors or officers of a financial institution. The provision has been quoted above, but we quote it again for convenient reference:

**Standard of care for directors and officers**

101 (1) A director or officer of a financial institution, in exercising the powers and performing the functions of a director or officer, must

(a) act honestly, in good faith and in the best interests of the financial institution, and

(b) exercise the care, diligence and skill of a reasonably prudent person under comparable circumstances,

and in doing so must take into account the interests of shareholders, depositors, if any, and policy holders, if any, and, without limiting this, of those to whom the directors owe a fiduciary duty.

(2) The provisions of this section are in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors of a corporation.

118. In *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, 2002 CarswellOnt 2096, 214 D.L.R. (4th) 497 (WL) (Ont.S.C.J.) [*UPM*] (Tab 1) affirmed, 2004 CarswellOnt 691, 250 D.L.R. (4th) 526 (WL) (Ont.C.A.) [*UPM Appeal*] (Tab 2), Madam Justice Lax in an oppression remedy case considered the duties of a board of directors when reviewing and considering the compensation of a company's chairman and a director. There was no serious complaint that the directors who had approved the contract had not acted honestly and in good faith. In finding that the board had failed to discharge its duty of care Madam Justice Lax states the following at paragraphs 125 – 126:

*It is settled law that the duty of care requires that where directors make decisions likely to affect shareholder welfare, their decision must be made on an informed*
and reasoned basis. In CW Shareholding, Mr. Justice Blair expressed it this way:

In the end, they must make decisions and exercise their judgment in an informed and independent fashion, after a reasonable analysis of the situation and acting on a rational basis with reasonable grounds for believing that their actions will promote and maximize shareholder value...

A Board is entitled, indeed encouraged, to retain advisors, but this does not relieve directors of the obligation to exercise reasonable diligence. In Hanson Trust PLC v. ML SCM Acquisition Inc., the United States Court of Appeals for the Second Circuit was asked to determine if directors' approval to grant a lock-up option of substantial corporate assets in a take-over struggle was protected by the business judgment rule. As Pierce J. stated, in duty of care analysis, a presumption of propriety inures to the benefit of directors, who enjoy wide latitude under the business judgment rule in devising strategies. However, as he noted:

The proper exercise of due care by a director in informing himself of material information and in overseeing the outside advice on which he might appropriately rely is, of necessity, a pre-condition to performing his ultimate duty of acting in good faith to protect the best interests of the corporation.

119. In dealing with this issue Mr. Sandilands submitted that it is primarily section 101(1)(a) of the FIA that we should rely upon. Therefore he stated that it is the actual knowledge of the directors that is the critical consideration in determining whether the KCU Board acted honestly in good faith and in the best interests of KCU. This reading, however, ignores the express wording in section 101 which requires that both 101(1)(a) and (b) must be taken into account in determining whether or not a director or officer of a financial institution has met the appropriate standard.

120. It is section 101(1)(b) that requires that directors demonstrate diligence in arriving at decisions. And it is in this regard that, in our view, the directors failed to exercise any reasonable due diligence in assessing Mr. Ripudam Singh Malik's suitability.

121. The fact that neither the Superintendent nor SCCU raised objections to the possibility that Mr. Ripudam Singh Malik might be appointed as a director is no excuse for the KCU Board not to conduct its own due diligence. It should have been clear to any
reasonable director that the appointment of Mr. R. S. Malik would be controversial and that it would therefore be necessary to make enquiries and carefully consider Mr. Malik's suitability. Mr. Manhas appreciated this fact and simply voted against the appointment to avoid controversy. Those directors who wished to appoint Mr. R. S. Malik should have made inquiries. Evidently they did not and once again chose to pass a resolution without proper enquiry or consideration.

122. It is important to note that Mr. Satwant Sandhu who was in attendance at the May 14, 2005 in camera KCU Board meeting and voted in favour of Mr. Ripudamin Singh Malik's appointment admitted that he had been made aware of the Rowbotham application sometime in 2004. Even though he was aware that the Superintendent had concerns arising out of the decision, he claimed he made no investigations with respect to the Superintendent’s concerns, nor did he consider advising his fellow KCU Board members that it would be prudent to make enquiries before appointing Mr. R. S. Malik.

123. Mr. Vinning gave evidence that he knew that Madam Justice Stromberg-Stein had disbelieved Ripudamin Singh Malik at the Rowbotham application with respect to financial matters. He also gave evidence that he was not present at the May 14, 2005 KCU Board meeting when Mr. R. S. Malik was appointed as a director of KCU. As a decision on this appointment had been made at that meeting, Mr. Vinning did not see fit to later discuss this matter. Given that Mr. Malik’s name was under consideration before the May 14, 2005 meeting we find it difficult to understand why Mr. Vinning did not alert his fellow directors about potential problems with respect to Mr. Malik’s candidacy.

124. Mr. Jaspreet S. Malik resigned as a director in September 2004. Mr. J. Malik’s decision to resign was no doubt made, at least in part, because the Superintendent had delivered notice that he intended to remove him as a director because alleged misconduct in connection with his father's Rowbotham application made him unsuitable to act as a director of a financial institution. It might be expected that when a director resigns then his fellow directors would want to know the reason. However, in this case they apparently showed little interest and chose not to find out why this had occurred. Although this was the evidence that was presented we find this hard to accept. If they
had enquired about Mr. Jaspreet Malik's decision to resign they would have found that the Superintendent's concerns about Mr. Jaspreet Malik also led to a concern about his father, Mr. Ripudamin S. Malik. Mr. Vinning admitted that he knew about the Rowbotham application and about the Superintendent's concerns about Mr. Ripudamin Malik and yet he chose not to discuss them with the other directors.

125. There was publicity in newspapers, radio and television about Mr. Ripudamin Malik being denied funding under his Rowbotham application. The decision of Madam Justice Stromberg-Stein was delivered about eight months before the appointment of Mr. Ripudamin Malik as a director of KCU so it is difficult to understand why not one of the directors felt that these court proceedings should be reviewed before this new director appointment was made. The entire matter seems to carry, on the part of the directors, an air of willful blindness.

126. The KCU Board acted prematurely and without proper due diligence when it appointed Mr. Ripudamin Singh Malik to be a director of KCU. The KCU Board did not enquire about Mr. Malik's suitability. The KCU Board simply reached a conclusion based on their personal knowledge of Mr. Malik without conducting any further investigation. We find that this is another example of poor corporate governance practice by the KCU Board and of poor decision-making as they did not have the complete facts before them on which to base a decision.

127. Mr. Sandilands states that the Superintendent and SCCU hold opinions about the suitability of persons for office (Mr. Uppal and Mr. Ripudamin Malik) and they are apparently unwilling to express these concerns and the reasons for them. Although it might have been helpful for the KCU Board to have this information, we find that this does not excuse the KCU Board from conducting their own appropriate investigations. If the KCU Board wished to rely on the direction of the Superintendent and SCCU then this points towards KCU continuing under supervision. It is within the KCU Board's power to determine the views of SCCU and/or the Superintendent. It would have been a mature and proper course for the KCU Board to have determined these before the appointment.
was made especially as the possibility of this appointment had been telegraphed by the vote of members at the Annual General Meeting.

PARTICULAR #7: THE DIRECTORS’ UNDERMINING OF THE CEO BY ENCOURAGING COMPLAINTS ABOUT THE CEO FROM EMPLOYEES.

128. A letter dated November 17, 2004 addressed to the Chair of the KCU Board was received by the then Acting Chair, Mr. Jarnail Singh Heer, on or about November 20, 2004. The letter was three pages long and was headed “Loss of Confidence in CEO, Mr. Dalbir Singh Sohi”. Subheadings were “Lack of Staff Recognition”, “Staffing Decisions made by the CEO”, “Business Decisions” and “Climate of Fear and Intimidation”. Part of the opening paragraph of this letter reads:

Representatives of the staff have met with the CEO Mr. Dalbir Singh Sohi.... on a number of occasions. However after each discussion, we were left with the impression that our concerns were either ignored or dismissed as being one sided and certainly were not followed up. We feel that any more meetings with the CEO are meaningless. It is the view of the staff that decisions being made by Mr. Sohi are having a potentially negative effect on the long-term viability of the Credit Union and is taking an emotional toll on the management and staff.

129. A copy of the letter was produced to the Hearing Panel but the signatories to it were not revealed as it was agreed that the identity of these people should remain confidential. In evidence, varying numbers from 25 to 30 were stated as the number of staff members who signed this letter. One signatory was Ms. Grewal who already had an issue with Mr. Sohi because he has been disciplining her. It was also established that the present total staff of KCU, including all members of management, numbers forty-two which means that at least 59% of the total staff signed this letter.

130. At an in camera session of the KCU Board held on November 27, 2004 the letter from the staff was discussed and it was decided to ask Mr. Sohi for a response by December 9, 2004. On November 29, 2004, Mr Jarnail S. Heer wrote to Mr. Sohi stating that Mr. Sohi had already reviewed a copy of this letter and requesting him to respond in writing by December 9, 2004. One sentence in this letter from Mr. Heer to Mr. Sohi is noteworthy as it states: “We are very concerned and deeply disturbed by this letter”.
Mr. Sohi responded to the KCU Board in a twelve-page letter dated December 8, 2004. An in camera session of the KCU Board was held on December 11, 2004 and the minutes of that meeting with regard to the staff letter are as follows:

Board received CEO's response of staff letter and discussion took place. Board expressed deep concern on CEO's response.

a. CEO did not explain how he is going to solve the problem with staff as Board already discussed with him previously.

b. CEO try to shift the blame to other staff members, after all he is responsible for any action of staff.

c. CEO is acknowledging the problem with staff but not taking responsibility. After discussion, the Board passed the following motion:

1. Whereas Board acknowledge the progress have been made to stable (sic) the credit union by CEO.

2. Whereas staff is most valuable asset of credit union.

3. Whereas Board recognizes its reliance on the CEO with staff issues.

4. Whereas Board recognized the fiduciary duty to respond to the staffing concern.

Be it resolved that Board authorized the Executive Committee to deal with this matter and Mr. Corsbie will draft a memo & fax to Mr. Manhas to help the Executive Committee to solve the problem.

Be it further resolved that Executive Committee will recommend to the Board how to solve and proceed.”

It is difficult to determine exactly what was discussed at a subsequent in camera session of the KCU Board on January 29, 2005. The only items of apparent relevance concerning this particular in the minutes of this meeting are:

Board felt that there was no issue of CEO’s performance. Board was only discussing staff’s letter and their concern.

Mr. Sohi testified that he did not receive any response or feedback to his December 8, 2004 letter after either the KCU Board meeting on December 11, 2004 or after the in camera session of the KCU Board on January 29, 2005. Mr. Vinning testified that the KCU Board’s response to Mr. Sohi’s letter was to recommend training for Mr. Sohi in communication skills to staff. This training was to be performed by Mr. Ken Langland and the KCU Board began exploring this in January 2005. Such training was
not approved by the KCU Board until November 2005 and had not begun by December 2005.

134. Mr. Sandilands argues that the KCU Board acted reasonably after they received the complaint letter and we agree. Mr. Hira argues that the complaint was very serious and went to the heart of Mr. Sohi’s responsibilities and duties. He notes that it might be expected that more serious action would be taken against Mr. Sohi than simply asking him to write a letter of rebuttal. In the event, the KCU Board decided that Mr. Sohi needed some training but this hadn’t started by the date of this Hearing, which was over a year after the complaint letter was written. Mr. Hira argues that if the KCU Board felt so strongly about this letter and Mr. Sohi’s reply then they would not simply let the training that they recommend start almost one year later. We agree with Mr. Hira and find it to be poor corporate governance that this matter was allowed to become sidelined so quickly with little or no follow-up.

135. Mr. Sohi suggested that a director instigated this letter but no credible evidence was produced to support this contention so we have not considered it further.

CONCLUSIONS

136. Having reviewed each particular, we now turn to the larger question of whether KCU should be released from supervision. Before setting out our decision on that issue, there are four preliminary points that we wish to emphasize.

137. Before this Hearing started, KCU questioned the fairness of the present process on the basis that, on May 5, 2005, the Commission conveyed to KCU notice of its intention to deny KCU’s application to be released from supervision. In evidence before us was KCU’s September 14, 2005 letter to the Minister of Finance, sent two months before this Hearing convened, stating: “we doubt a fair hearing will occur because it will be heard by FICOM and its position is already well known.” Mr. Sandilands’ cross-examination of Ms. Bondi demonstrated that on April 26, 2005, the date that KCU representatives met with the FICOM Commissioners, KCU had not been provided with
the briefing materials given to the Commission. Mr. Sandilands also effectively demonstrated that several of the statements or assumptions contained in certain briefing materials had a questionable factual foundation.

138. It is precisely because of the summary nature of the process that gives rise to “intended” decisions, that the Legislature, in the 2004 amendments to the FLA that abolished the CAC, conferred on an applicant the right to request a “hearing” – which we have understood to be a full and fresh hearing – before the Commission on the subject matter of the intended decision. The present process is thus not an appeal, but a full rehearing on the subject matter at issue, and we have approached it accordingly. We repeat the advice we provided to the parties at the very outset of the Hearing:

*We accept the legal advice we have received that a request for a hearing must be meaningful. This means we must be open and prepared to revisit the matters set out in our May the 5th letter. The panel is therefore approaching this hearing process with an open mind that is prepared to fairly and impartially consider all the evidence tendered. Thus, while our May the 5th letter has given Khalsa notice of the Commission’s concerns about its request to be released from supervision, we are prepared to come to conclusions different from those set out in our earlier letter if that is where the evidence takes us.*

139. The fact that we have approached this Hearing afresh does not prevent us having regard to the views and recommendations of the staffs of SCCU and FICOM prior to the Hearing that (subject to two provisos) KCU was ready to be released from supervision. However, we find that several of the facts asserted in background documents were not demonstrated, and we have given them very little weight. Staff recommendations, whether positive or negative, cannot be permitted to fetter the Hearing Panel’s discretion. This is so not only because the ultimate decision-making responsibility is ours, but also because staff did not have the benefit of all the evidence we heard, and indeed some of the evidence we heard post-dated staff’s recommendation. Given that the Superintendent at our Hearing took a position opposing release from supervision, the only proper position we can and do take is that our decision is to be based on our own independent judgment on the evidence that was tendered before us.
140. The related point must also be made about the CAC's October 2000 decision. While we agree with Mr. Sandilands that it is not appropriate for this Hearing Panel to reject findings made by that tribunal, the decision we have to make is not a decision to revisit the CAC's findings, but rather (as the particulars we have reviewed demonstrate) to make a decision on the facts as we find them six years later. We wish to be clear that our decision in this case is not based on any disagreement with conclusions the CAC arrived at on the evidence before them. The particulars argued before us had not occurred at the time of the CAC hearing and even the questions about Mr. Uppal and Mr. Ripudamin Malik were different events than those before this Hearing.

141. The second preliminary point we wish to make concerns the onus of proof. There are three ways of looking at onus in this case. One is that the onus is on the applicant to prove it should be released from supervision. Another is that the onus is on the Superintendent to prove that KCU should remain under supervision. A third, suggested by Mr. Hira during the Hearing, is that onus of proof may not properly capture the statutory task before us, which is more properly understood in the nature of an inquiry that is meant to enable us to form a risk assessment opinion.

142. While we find that there is much to commend the latter characterization of our statutory task, we have proceeded on the basis most favourable to KCU – i.e., that KCU should be released from supervision unless we form the affirmative opinion, on the evidence adduced at the Hearing, that KCU should be subject to supervision in light of the purposes and objects of the FIA.

143. This naturally leads to a third point, which arises from the fact that in this Hearing the Superintendent has not taken issue with KCU's financial performance and financial controls. How, it may be asked, can supervision be justified over a financial institution whose financial performance is adequate? Of course the answer is that a financial institution whose corporate governance is inadequate in respect of important questions has a real and significant risk of making judgments that are contrary to the best interests of depositors and stakeholders. In this present case, KCU's financial performance has improved during a period of general economic growth and while subject to supervision.
It would be folly to assume that, without effective corporate governance, it would continue to do so without supervision and/or during periods when economic times are less favourable.

144. Finally, we acknowledge that this case deals with seven particulars in the context of a large number of KCU Board meetings and transactions that we have not examined in minute detail. We recognize the importance of keeping things in proper perspective. If several series of transactions in any corporation are examined in detail, it might be expected that one or more of them would prove to have flaws or inadequacies. This is particularly the case if a party that wishes to prove they were in error has chosen the transactions. We find that there have been significant inadequacies revealed in many of the seven different series of transactions that have been examined in this Hearing. However, these do not, in themselves, necessarily show a lack of good corporate governance or of poor decision-making that is sufficient to continue KCU under the supervision of the Commission. The question for the Hearing Panel to answer is whether the transactions examined within KCU are of such a magnitude or show such a pattern that they either did, or they had the potential of doing, significant harm to KCU. Individually any of these transactions may not have significantly harmed the credit union but they may reveal a pattern of inadequacies that, if allowed to continue, could lead to inappropriate decision making or poor corporate governance that could place the institution at risk.

145. Corporate governance is at the heart of running a financial institution. The division of responsibilities between the KCU Board and the management and staff are an important component of this governance process. Corporate governance is not so much the application of a set of rules as it is a codification of the way in which an organization will run so that it is effective and efficient. The present and future direction and effective management of KCU depends on sound decisions being made at the senior levels of the organization. For these decisions to be appropriate it is necessary that they are based on as complete and accurate information as it is possible to obtain. They should be made without bias and taking into consideration all the relevant factors. Although the
timeliness of decisions is important, they should not be rushed, and it may be appropriate to take time to reflect on all the effects of a major decision before it is made. We view being a member of the KCU Board as a responsibility that should not be taken lightly. Good written policies and practices are already in place but the real challenge for the directors and staff of the organization is to effectively administer the affairs of the credit union so that the operation is sound and there is complete confidence that decisions and transactions will be completed in a business-like manner.

146. Having carefully and independently considered all the evidence and argument in this matter in light of the considerations outlined above, it is our judgment that the transactions argued before this Hearing show that there is an underlying pattern of thinking and decision making at KCU that does not inspire confidence that the directors will consider matters in the depth and breadth that is necessary at a large financial institution. Corporate governance is primarily about process so we have concentrated throughout this decision on the processes that were used relative to corporate governance and decision-making rather than ruling on individual matters of fact. The KCU Board has been shown to be poor at making appropriate decisions and this means that they may exercise sub-standard corporate judgment. On several extremely important questions that significantly impact the organization - and even while under supervision - these poor exercises of judgment have raised red flags for us that demonstrate that the KCU Board is not yet ready for KCU to be released from supervision. In answer to Mr. Sandilands' question: "what is to be gained by keeping the credit union under supervision?", the answer is, protection of depositors and stakeholders by ensuring that a board whose governance judgment is not sufficiently mature and sophisticated to run an important financial institution will be overseen by a professional regulatory authority.

147. Khalsa Credit Union is a sizeable financial institution. It has about $120 million of assets and over 11,000 depositors. This is not a small organization and its governance should reflect the fact that many members of the Sikh community have chosen to entrust their savings to its safekeeping. They have also chosen to transact other important financial business with the credit union such as the provision of loans and mortgages. This places a heavy responsibility on the KCU directors. The credit union cannot be run
as though it is a small, intimate, club but must be run in a manner that is appropriate to its size and importance.

148. We have found that there was inadequate decision-making with regard to the approval of legal counsel, the hiring of a Senior Manger of Operations, the appointment of a KCU Board Director and the decision regarding advertising. These lapses, the specifics of which are described in detail above, and which occurred while under supervision, were not minor, and the first three involved key organizational questions such as legal counsel, the second most important management position and the appointment of a Director. Collectively, the specifics of these events demonstrate inadequate judgment regarding corporate governance for this institution. These decisions in and of themselves reflect a type of decision-making that has a real potential to harm the credit union, and raises serious questions regarding how the KCU Board would be able to make governance decisions in less favourable economic circumstances than those that have presented themselves over the past several years.

149. The appointment by the KCU Board of Mr. Ripudamin Singh Malik as a director of KCU was made inappropriately. It is incumbent upon a board of directors when making such an important decision that full details of a candidate for a directorship are available to those making the decision. These directors must then properly consider them with care and diligence before the decision is made. This was not the case in this appointment. The directors should have paid at least as much attention to Mr. Malik’s personal credentials to be a director as they paid to his affirmation within the Sikh religion. They did not do this. In fact, they did not have full particulars before them relating to Mr. Malik’s personal credentials when they made their decision and then appointed him in a manner that was secretive and less than open.

150. There were many signals that Mr. Ripudamin S. Malik’s untruthfulness at the Rowbotham application should have been carefully examined. The directors chose not to do so and this is the prime example presented to the Hearing of poor decision-making and inappropriate corporate governance. As KCU is a financial institution that safeguards its
depositors funds the Hearing Panel is of the opinion that the highest standards of
behaviour, especially with regard to financial matters, is necessary for its directors.

151. There were two examples (the appointment of Mrs. Dhaliwal and the process
followed to fill the director’s vacancy caused by the resignation of Mr. Jaspreet S. Malik)
where inappropriate actions would likely have been taken but for SCCU intervention.
This shows that a supervisor indeed added value in these important circumstances. This
points toward the need for the continued presence of a supervisor.

152. In our view, the relationship of the CEO with the KCU Board is not as effective
as it should be. The CEO is the interface of the management and staff with the KCU
Board and he will see more of the day-to-day operations than the KCU Board. He is
dealing with the KCU operations every hour of his working day and this gives him
experience and knowledge that the KCU Board does not possess. He also has expertise
in the running of KCU that is invaluable when it is freely available to the KCU Board.
The CEO is their most senior employee and the relationship between the KCU Board and
their CEO should be one of strength, understanding, and cooperation. The KCU Board
should see Mr. Sohi as one of the most important sources of knowledge and advice
available to them. Open communication between him and the KCU Board in a non-
defensive atmosphere should be established with a desire by the KCU Board to hear the
opinion of the CEO and with the CEO not being reticent on providing his views to the
KCU Board. We noted a tendency for the KCU Board to exclude Mr. Sohi from
discussions on some matters. The KCU Board should require their CEO’s input on all
items before them. Similarly, the CEO should freely give his advice and not feel
constrained from doing so. It is the healthy interplay of the KCU Board and the CEO that
will produce the most benefit to the KCU Board. The correct and effective relationship
of the CEO and the board of directors is the basis of the practice of much good corporate
governance. The KCU Board should make every effort in future to ensure that this
relationship is re-examined and improved.

153. In November 2004 the KCU Board received a letter of complaint about the CEO
signed by about 60% of the staff. Quite rightly, they took this letter very seriously and
asked for a response from Mr. Sohi to the allegations in it, but by January 2005 they appear to have lost interest. The KCU Board or any members of it did not communicate with Mr. Sohi about this matter anymore. The issue appeared to evaporate as the KCU Board followed up very little. After an analysis that demonstrated a much greater concern than simply one of better communication with staff, this is the only course that the KCU Board decided to follow. Even at that, their interest continued low so that the training in communication skills with staff that they felt so necessary in January 2005 still had not begun by the end of the year. This does not indicate good corporate governance when a very serious matter is not followed up with the vigour that might be expected. It may well be that the proper outcome was that the complaints were groundless, but one would think that some outcome would have been reached on the matter, particularly given the consistent evidence that the directors were pleased with Mr. Sohi's performance.

154. The whole apparatus of decision-making by the KCU Board must be improved. For good decisions to be made it is necessary that they should only be made after all appropriate, required, and timely material has been presented; a full and thorough discussion has taken place in an atmosphere where all opinions may be freely discussed; and that as many directors as possible are involved. Possible conflicts of interest should be considered, as should the alternatives available and the effects of taking different courses of action. These elements of good decision-making are not unique to KCU but form the basis of all good decisions. They are in evidence for some items coming before the KCU Board but should be in evidence for all items coming before it, and most especially those of greatest importance to the organization. It is a heavy responsibility to be the director of a financial institution and it is necessary that the KCU Board have every possible facility available to enable this responsibility to be properly and appropriately discharged.

DECISION

155. For the reasons given in this decision, the Hearing Panel has concluded that KCU should not be released from supervision at this time.
The questions of when KCU should be released from supervision, or whether the terms of supervision should be relaxed, are not questions we are prepared to answer in this decision. We are very conscious that KCU's financial performance recently has improved but, as stated earlier in this decision, this favourable financial performance cannot be taken as the sole reason for KCU to be released from supervision. The corporate governance practices of the KCU Board arising from poor decision-making and the relationship of Mr. Sohi, the CEO, with the KCU Board are matters that need urgent examination and improvement. If the Superintendent and his delegates work proactively with KCU to point out problems as they arise in future, so that KCU establishes and maintains a track record of sound corporate governance and addresses the types of deficiencies outlined in this decision then KCU may expect to be released from supervision more quickly. We would not want this to be interpreted as a commitment by the Commission but rather as an expression of the actions that need to be taken for KCU to be released from supervision. It does not take into account any circumstances that might come to light in future that might call for FICOM or the Superintendent to take action under s 277, s 278 or s 279 of the FLA and should not be taken as any fettering of the ability of FICOM or the Superintendent to take action in future under these sections of the FLA if they deem this necessary.

Dated at Vancouver, British Columbia, this 14th day of June 2006.

J. Stewart M. Cunningham, Commissioner and Chair

William G. Hopkins, Commissioner

Janet Fau, Commissioner