BOARDROOM BATTLE: ONTARIO SUPERIOR COURT DENIES SHAREHOLDER'S PROPOSAL TO REMOVE DIRECTOR

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Shareholders and boards often have conflicting visions and strategies for a company's direction which can lead to disputes over corporate governance and decision-making. While shareholders have the right to elect directors, once elected, directors hold the duty and authority to manage the company's business. Shareholders have limited tools to influence the board's business decisions. For Canadian companies, including those governed by the *Business Corporations Act* (Ontario) (the "**OBCA**"), one such tool is a shareholder proposal, which can be submitted to challenge management's actions, including proposing a shareholder's own nominees for director elections. The question of whether this tool could also be used to remove (as opposed to merely nominating) a director was recently considered by the Ontario Superior Court of Justice (the "**Court**") in *OneMove Capital Corporation v. Dye & Durham Limited*.[1]

On September 17, 2024, the Court confirmed that shareholders cannot employ the proposal mechanism under section 99 of the OBCA to remove an incumbent director. Instead, between annual meetings, such action will require the formal requisition of a special meeting. Section 105 of the OBCA, along with sections 122 and 123, establish a complete statutory scheme enabling shareholders to requisition a special meeting to remove one or more directors between annual meetings, while ensuring directors receive proper notice and due process before any removal.

Background to the Dispute

OneMove Capital Corporation ("**OneMove**") is one of the largest shareholders of Dye & Durham Limited ("**Dye & Durham**"), holding approximately 8.4% of its outstanding shares. OneMove's CEO, Tyler Proud, is a founder of Dye & Durham and was a member of its board of directors (the "**Board**") until July 2020.

Throughout 2022 and 2023, OneMove and other shareholders raised concerns about Dye & Durham's governance and financial management, particularly criticizing its aggressive mergers and acquisitions strategy, which they believed was negatively affecting Dye & Durham's debt ratio. In March 2024, another minority shareholder formally requisitioned a special meeting under section 105 of the OBCA (the "**Special Meeting**") to remove three incumbent directors (not including OneMove's nominee on the Board, Mr. Prittie)

and replace them with new nominees due to dissatisfaction with management's decisions and direction.

Despite ongoing discussions with management, OneMove felt that its own concerns were not being adequately addressed by the Board, including by its nominee, Mr. Prittie. In June 2024, instead of submitting its own requisition to remove Mr. Prittie in addition to the other three incumbents named in the earlier requisition, OneMove submitted a proposal under section 99 of the OBCA to remove Mr. Prittie and replace him with a new OneMove nominee at the upcoming Special Meeting (the "**Proposal**").

Dye & Durham indicated that it would not include the Proposal (for the removal of Mr. Prittie) in its management information circular pursuant to section 99(2) of the OBCA by choosing to rely on the exceptions under section 99(5) instead. Dye & Durham justified its decision on the basis that the Proposal was unrelated to its business and was being used to enforce a personal grievance from OneMove's CEO. As a result of this dispute, the Special Meeting was postponed until the Court determined whether the Proposal to remove Mr. Prittie ought to be included in the management information circular.

The Decision of the Ontario Superior Court

The Court ruled that shareholders cannot use the proposal mechanism under section 99 of the OBCA to remove an incumbent director. In doing so, the Court considered the purpose of both sections 99 and 105 of the OBCA, drawing a clear line between the two shareholder rights. Although OneMove's attempt to remove its nominee under section 99 was unsuccessful, the decision reinforced that shareholders' concerns about governance and financial management are legitimate business matters, not simply personal issues. The ruling also reaffirmed that agreements, such as the investor rights agreement with Dye & Durham entered into by OneMove and another significant shareholder (the "**IRA**"), must contain clear, specific and explicit language when prohibiting or restricting a shareholder's statutory rights.

1. Shareholders Cannot Use Proposals to Remove a Director

The central legal question was whether section 99 of the OBCA could be used by a shareholder to remove an incumbent director. In reaching its conclusion, the Court analyzed the relevant statutory provisions while considering the legislative intent behind each section.

The formal process for removing directors is outlined in sections 122 and 123 of the OBCA, which set out specific safeguards such as proper notice and the opportunity for the director to submit a written defence. This process guarantees that incumbent directors are not removed without due process. Section 105 further adds to this process by requiring that shareholders hold at least 5% of voting shares to requisition a special meeting to remove a director. This threshold prevents shareholders without a meaningful stake in the company from disrupting the company with frequent or frivolous removal attempts that can be costly, time-consuming and

destabilizing. Collectively, sections 105, 122 and 123 provide a complete statutory scheme within the OBCA through which shareholders may requisition a special meeting for the purpose of removing one or more directors between annual meetings, while ensuring directors receive proper notice and due process before any removal.

On the other hand, section 99 allows any shareholder to raise "any matter" for consideration at a shareholder meeting, but it is silent on the removal of directors. The Court noted that section 99(4) explicitly allows shareholders holding at least 5% of the voting shares to nominate directors through a proposal, but no such provision exists for removing directors. The Court rejected the notion that any shareholder, regardless of their shareholding, could use a proposal under section 99 to remove a director while a 5% threshold is required for their nomination. The Court further noted that if the legislation had intended to allow the removal of a director by way of a proposal, it would have explicitly included a provision to that effect under section 99.

Ultimately, the Court rejected OneMove's argument that a proposal under section 99 could be used to remove a director, emphasizing that this would bypass the legislative intent, procedural safeguards and due process of sections 105, 122 and 123 of the OBCA.

2. The High Threshold of Personal Grievance Exception Not Met

Although the Court's determination on section 99 was dispositive of the proceeding, it went on to consider whether Dye & Durham had shown that the Proposal fell within the exceptions of sections 99(5)(b) and 99(5)(b.1) of the OBCA. These exceptions require the company to show that a shareholder proposal either seeks to enforce a personal claim or redress a personal grievance against the company or its directors, officers or security holders, or that the proposal does not significantly relate to the business or affairs of the company. These exceptions apply equally to shareholder proposals under section 99 and to meeting requisitions under section 105.

Dye & Durham argued that the Proposal was driven by the personal grievances of OneMove's CEO, who was frustrated with Mr. Prittie's refusal to comply with his demands. In response to this argument, the Court applied the legal principles set out in the Divisional Court decision of *Koh v Ellipsiz Communications Ltd.*,[2] the leading case interpreting section 99 exceptions. The legal principles set out in *Koh* include, among others:

i. the high threshold required under section 99(5);
ii. the onus is on the board to show that a proposal falls under section 99(5)(b);
iii. the standard to be applied for the board is correctness and thus the business judgment rule is inapplicable; and
iv. a mere element of personal interest does not satisfy the section 99(5)(b) exception.

While recognizing the personal dynamics at play, the Court concluded that the alleged improper demands by the CEO and Mr. Prittie's refusal, were insufficient to meet the high threshold required to prove that the purpose of the Proposal was to enforce a personal claim or redress a personal grievance. Further, the Proposal to remove Mr. Prittie was part of OneMove's broader efforts to address legitimate concerns related to Dye & Durham's governance and financial management, which were also raised by other shareholders. OneMove was of the view that Mr. Prittie was not doing enough to change the governance, financial position and business strategy of Dye & Durham. These matters go to the heart of the business and affairs of Dye & Durham. The presence of acrimony and personal framing of disputes are not enough to meet the high threshold of section 99(5) exceptions. The Court emphasized that it is not the Court's role to comment on the merits of various shareholder concerns. The only issue for the Court at this stage is determining whether a proposal arose from a personal claim or grievance, or if it significantly relates to the business or affairs of the company.

3. Shareholder Agreements must Explicitly Restrain Statutory Shareholder Rights

The situation was further complicated by certain provisions of the IRA. While the IRA granted OneMove the right to nominate a director, it did not specifically address the process for removing such nominee mid-term. Dye & Durham argued that this omission meant OneMove lacked the authority to request Mr. Prittie's removal. However, the Court rejected this interpretation, stating that the IRA did not explicitly prohibit OneMove from seeking the removal of its nominee. In the absence of a clear and explicit prohibition in the IRA, the Court ruled that OneMove retained its statutory right under the OBCA to propose Mr. Prittie's removal at a properly constituted meeting. The ruling affirmed that a shareholder's statutory rights under the OBCA cannot be overridden by an agreement unless it contains clear and explicit language to that effect.

Guidance for Shareholders and Directors

The *OneMove* decision provides guidance for both shareholders and boards on the use of shareholder proposals in the context of proxy fights, the ability to rely on the personal grievance exception under the OBCA for proposals and requisitions and the drafting of investor rights agreements.

As the Court made clear, the proposal regime set out in section 99 of the OBCA cannot be used as an alternative means to remove directors. Shareholders who want to remove and replace one or more directors in between annual meetings must requisition a special meeting under section 105 of the OBCA, rather than seek to use a proposal under section 99, to ensure proper notice and due process for the directors faced with removal.

For boards, if they wish to object to a shareholder proposal or requisition by invoking the personal grievance exception, they should be cognizant of the high threshold requirement and that the mere fact of an element of personal interest will not satisfy this exception.

Furthermore, both shareholders and companies should review any agreements between them to confirm that any prohibitions or restrictions of shareholders' statutory rights under the OBCA are clear, specific and explicit.

[1] 2024 ONSC 5114.
[2] 2017 ONSC 3083, McMillan LLP represented the successful appellant.

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A Cautionary Note