**CITATION:** OneMove Capital Corporation v. Dye & Durham Limited, 2024 ONSC 5114
**COURT FILE NO.:** CV-24-00723481-00CL
**DATE:** 20240917

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** OneMove Capital Corporation

**AND:**

Dye & Durham Limited

**BEFORE:** Penny J.

**COUNSEL:** *Shane D'Souza, Jessica Mank* and *Hannah Young,* Counsel for OneMove Capital Corporation and Tyler Proud,

*Joseph Groia, David Sischy, Yona Gal* and *Leanne Grupuso,* Counsel for Dye & Durham Limited

*Sean Grayson*, Counsel for Plantro Ltd.

*Scott Lemke,* Counsel for 1000209608 Ontario Inc.

*Derek Ricci*, Counsel for Engine Capital LP

**HEARD:** August 28, 2024

## REASONS FOR DECISION

### Overview

[1] This shareholder dispute has generated a plethora of pleadings. OneMove has brought an application for an order under s. 99 of the OBCA:

(i) affirming the validity of its proposal for a shareholder vote at a pending special meeting of shareholders meeting to remove and replace a director from the Dye & Durham board of directors;

(ii) directing Dye & Durham to include OneMove's proposal in the Company's information circular in advance of the pending meeting of shareholders; and

(iii) directing the Company to include OneMove's statement in support of its proposal in the meeting circular.

[2] Dye & Durham has brought a "counter-application" seeking:

(i) an order permitting the Company to omit OneMove's proposal from management's circular regarding the pending shareholder meeting pending; and

(ii) a declaration that OneMove and Tyler Proud are in breach of a 2020 Investor Rights Agreement, together with various heads of collateral relief including an injunction against further breaches and damages for, among other things, breach of contract, including breach of the duty of good faith performance.

[3] In addition, Dye & Durham has brought a motion seeking to convert these proceedings into an action on the basis that there are material facts in dispute, the resolution of which will require *viva voce* evidence and findings of credibility following a trial.

[4] The main focus of the dispute in written and oral argument involved five issues:

(a) can a shareholder make a proposal to remove a director under s. 99 at all; and

(b) if such a proposal can be made under s. 99, does the proposal fail under s. 99(5) because it clearly appears that:

(b) the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers or security holders; or

(b.1) the proposal does not relate in a significant way to the business or affairs of the corporation?

(c) does the determination of the s. 99(5)(b) and (b.1) issues involve disputed issues of fact requiring a trial?

(d) does the Investor Rights Agreement prohibit the OneMove proposal to remove its own nominee; and

(e) does the IRA require OneMove to support Plantro's nominees to the board and/or candidate for the role of Chair?

**Background**

[5] Dye & Durham is a software company incorporated under the laws of Ontario. It is listed on the Toronto Stock Exchange and is governed by a board comprised of seven directors.

[6] OneMove is an investment holding company formed under the laws of the British Virgin Islands. OneMove is a founding shareholder of the Company and is currently one of its largest

shareholders, with about 8.4% of the Company's outstanding shares. OneMove's CEO is Tyler Proud.

[7] Plantro Ltd. is a Bahamian company controlled by Dye & Durham's CEO, Matthew Proud. Plantro is another significant shareholder, with about 19 % of the shares. Matthew and Tyler (I will use their first names to avoid confusion) are brothers.

[8] OneMove and Plantro entered into an Investor Rights Agreement on July 17, 2020. The meaning and effect of certain provisions of the IRA are in dispute, as will be explained in more detail in the analysis to follow. Essentially, Plantro takes the position that the IRA precludes OneMove from seeking to remove its nominee, Mr. Prittie, who was previously elected by the shareholders at large to serve as a Dye & Durham director. OneMove maintains there is no such prohibition.

[9] Tyler was chair of the board of Dye & Durham from October 2017 to May 2019, and a member of the board from March 2013 until July 17, 2020. On July 17, 2020, coincident with entering into the IRA, Dye & Durham completed an initial public offering on the Toronto Stock Exchange. Concurrent with the IPO, Tyler resigned as a Board member and Mr. Prittie joined the Board as OneMove's nominee under the IRA. Matthew, as CEO of the Company, became one of Plantro's two nominees to the board.

[10] During 2022 and 2023, OneMove raised concerns about the Company's governance and performance, including what it considered to be excessive mergers and acquisitions activity, which was having a negative impact on the Company's debt ratio. The evidence of Mr. Prittie and the board's former Chair at the time, Mr. Derksen, is that they spoke frequently with Tyler about his concerns.

[11] OneMove was not alone in these concerns. In the fall of 2022 Mr. Derksen assembled feedback from the Company's significant shareholders. This feedback was summarized in a presentation to the Company's board. Mr. Derksen spoke of concerns about "trust" issues in the market, a perception of weak governance, a perception of senior management self-interest and a lack of transparency.

[12] In 2023, the feedback from significant shareholders, as reported by Mr. Derksen to the board, again revealed broad investor concerns regarding: the pace of acquisitions and the resulting increases to the Company's debt load; a lack of forthright and transparent communication from the CEO; and the credibility of senior management. Long term investors, he reported, were confounded and looking for clear direction and consistent action. New investors were "scared" and "staying away" because of these concerns, which were widely known in the market.

[13] In a letter of October 5, 2023 to Dye & Durham, OneMove proposed various steps the Company could take to secure long term shareholder value, including pausing M&A activity and improving the Company's debt ratio. OneMove also recommended finding board members with strong, relevant public company experience -- a recommendation Mr. Derksen had himself endorsed a year earlier.

[14] In late 2023, representatives of several significant shareholders, including OneMove, met with Dye & Durham's corporate governance and nomination (CGN) committee. Three of these investors, including OneMove, proposed the names of new directors who they wanted to see on the recommended slate of proposed directors at the 2023 annual general meeting. Mr. Derksen indicated that he planned to resign as board Chair following the 2023 AGM.

[15] In February 2024, OneMove learned from Mr. Prittie that the search for a new board chair was not being conducted by the CGN committee but by Matthew and Mr. Derksen personally. Further, OneMove became aware that the Company closed an equity offering at $12.10 per share, which was significantly lower than a share buy back program approved by the board in 2023 and had a dilutive effect on existing shareholders.

[16] OneMove says it lost confidence in Mr. Prittie as a director at that point and asked him to resign. There are a number of disputes about who said what to whom, but Mr. Prittie refused to resign.

[17] In March 2024, another minority shareholder, Engine Capital LP made a requisition under s. 105 of the OBCA for a special meeting of shareholders for the purpose of removing three incumbent directors from board (none of them Mr. Prittie) and electing three nominees in their place. Another shareholder, Blacksheep Master Fund Limited, indicated it might also propose a further nominee for election to the Board at the Special Meeting.

[18] In June 2024, OneMove provided notice to the Company that it intended to propose that Mr. Prittie also be removed and a different OneMove nominee be elected to the board at the Special Meeting. The Company was not prepared to accede to this request so, on June 20, 2024. OneMove delivered its proposal under s. 99 of the OBCA, demanding that its proposal be included in the Company's circular for the Special Meeting. On June 30, 2024 the Company responded, advising that while it was willing to nominate OneMove's new nominee for election at the Special Meeting, it would not include OneMove's proposal (for the removal of Mr. Prittie) in the meeting circular because:

> (i) it clearly appeared that the primary purpose of the Proposal is to enforce a personal claim or redress a personal grievance against the Company, its directors, officers and security holders; and,
>
> (ii) it clearly appeared that the Proposal does not relate in a significant way to the business or affairs of the Company.

[19] At a scheduling conference before Osborne J., the parties agreed to hold the Special Meeting requested by Engine Capital in abeyance until the present dispute, over whether OneMove's proposal will or will not be included in the meeting circular, is resolved.

**Analysis**

***Can a shareholder propose the removal of a director under s. 99 of the OBCA?***

[20] The question of whether a s. 99 proposal under the OBCA can be used to remove an incumbent director appears to be one of first instance. Counsel were unaware of any prior case in which the proposal mechanism under s. 99 had been employed for this purpose. All known precedents, apparently, involve a shareholder resolution brought, as the Engine Capital resolution was in this case, under s. 105 of the OBCA.

[21] OneMove argues that there was no need for it to requisition a special meeting of shareholders in this case because one had already been requisitioned by Engine Capital. Section 99(1)(b) of the OBCA provides that shareholder proposals can be used to raise "any matter" not excluded by s. 99(5) at a shareholder meeting. This language is expansive. There is nothing in the statute that constrains the ability of a shareholder to seek the nomination or removal of a director through a proposal under s. 99. Further, from a policy perspective, shareholder proposals were introduced as part of a legislative commitment to the promotion of shareholder participation in corporate governance. As such, proposals represent an important way for shareholders to send a message to the company and its directors and officers, including between annual general meetings. In any event, OneMove submits that the Company's argument is technical in the extreme. OneMove could, at the drop of a hat, issue a requisition for a special meeting of shareholders under s. 105 to do what it has already done in its proposal. Form, it says, should not prevail over substance.

[22] As Dreidger wrote in 1983 (*Construction of Statutes*):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[23] In my view, the starting point of the necessary analysis called for in this now famous passage is ss. 122 and 123 of the OBCA which govern the removal of directors. This can only be done on notice at a meeting called for that purpose. Section 122(1) provides that "the shareholders of a corporation may by ordinary resolution at an annual or special meeting remove any director or directors from office." Section 122(3) provides that "a vacancy created by the removal of a director may be filled at the meeting of the shareholders at which the director is removed". Section 123(1) provides that "a director of a corporation is entitled to receive notice of and to attend and be heard at every meeting of shareholders". Section 123(2)(b) specifically provides that "a director who…receives a notice or otherwise learns of a meeting of shareholders called for the purpose of removing him or her from office…is entitled to submit to the corporation a written statement giving … the reasons why he or she opposes any proposed action or resolution, as the case may be".

[24] In short, the shareholders may resolve to remove a director at a special meeting called for that purpose. The director in question has the right to notice of the meeting. And, the director in

question is entitled to submit to the corporation a written statement giving the reasons why he or she opposes the proposed resolution.

[25] Section 105 of the OBCA governs how and by whom a special meeting of shareholders may be called. It provides that: "The holders of not less than 5 per cent of the issued shares of a corporation that carry the right to vote at a meeting sought to be held may requisition the directors to call a meeting of shareholders for the purposes stated in the requisition."

[26] Section 99 deals with shareholder proposals in the context of a pending meeting of shareholders. "Proposal" is defined broadly simply to mean "a matter that a registered holder or beneficial owner of shares entitled to be voted proposes to raise at a meeting of shareholders. Section 99(1) provides that:

> A registered holder of shares entitled to vote or a beneficial owner of shares that are entitled to be voted at a meeting of shareholders may,
>
> (a) submit to the corporation notice of a proposal; and
>
> (b) discuss at the meeting any matter in respect of which the registered holder or beneficial owner would have been entitled to submit a proposal.

[27] Where a corporation receives notice of a proposal, it is, subject to s. 99(4) and (5), required to set out the proposal in the management information circular or attach the proposal to that circular; or, if there is no circular, set out the proposal in the notice of meeting for the shareholders' meeting at which the matter is proposed to be raised or attach the proposal to the notice of meeting (s. 99(2)). The corporation must also distribute a brief statement from the proposer in support of its proposal (s. 99(3)).

[28] Section 99(4) provides that a proposal may include *nominations* for the election of directors if the proposal is signed by one or more holders of shares representing in the aggregate not less than 5 per cent of the shares entitled to vote at the meeting to which the proposal is to be presented. There is no concomitant provision for a proposal to remove directors.

[29] Finally, s. 99(5) provides that the corporation need not comply with s. 99(2) and (3) if, among other things:

> (b) it clearly appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers or security holders; or
>
> (b.1) it clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation.

[30] It becomes immediately apparent from this review of the relevant statutory provisions, that while only a shareholder with at least 5% of the votable shares can *requisition* a meeting under s. 105, any shareholder, with one exception, can make a proposal for consideration *at* a

meeting. That exception is, of course, where the proposal involves the nomination of a director, in which case the proposer must have at least 5% of the voting shares. Section 99 is silent on proposals to remove directors.

[31] It must be remembered that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corp. Ltd. v. Banking Service Corp. Ltd*., 1922 CanLII 530 (ON SC), [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); *Stephenson v. Vokes*, [1896] O.J. No. 191, 27 O.R. 691 (H.C.J.). The authority to remove must therefore be found in statute law. It is also worth noting that the OBCA itself derives from an attempt to balance various rights and interests; no one set of interests is paramount. In other words, while shareholder rights and engagement is an import element embodied within the OBCA, so too is the right of directors to manage the business and affairs of the corporation and, in this instance, the right of directors who are sought to be removed, to the benefit of a carefully calibrated scheme of notice and other due process.

[32] This generates a conundrum. Does s. 99 mean that any shareholder can propose to remove a director while only a 5% shareholder can propose to nominate a director? I think not. The 5% thresholds in s. 105 and, with respect to nominations at least, in s. 99(4), were clearly enacted to deal with what was referred to in oral argument as the "pesky shareholder" problem. Shareholder meetings can be costly, time-consuming and potentially disruptive. The 5% threshold is designed to prevent shareholders with only a small economic stake and little or no power power to influence the outcome from imposing potentially significant cost and bother on the corporation. This is a crucial consideration in the present context because, as ss. 122 and 123 make clear, there is significant attention paid in the OBCA to due process where the removal of a director is concerned. Given the gravity of the process for removal of directors afforded by the common law and ss.122 and 123 of the OBCA, it is hard to understand what logic would have led the Legislature to impose a 5% threshold for making a proposal to *nominate* a director while permitting any shareholder to make a proposal to *remove* a director.

[33] OneMove also argues that the whole discussion is beside the point because OneMove clearly meets the 5% threshold in any event. But that is not the issue. Under OneMove's theory of the s. 99 proposal right – that it is a broad and expansive conferral of shareholder rights – it does not matter how many shares you own (unless you only want to nominate a director) as long as *someone* (who does have 5% of the shares) has requisitioned a duly authorized meeting of the shareholders. The issue to be resolved is whether a shareholder proposal under s. 99 is a mechanism which can be used to remove a director at all.

[34] OneMove also argues that the "pesky shareholder" problem can be fixed by "reading into" s. 99(4) a concomitant 5% threshold for proposals to remove directors. But that is not the job of the court when interpreting a statute. This is not, in any event, a case where the court could or should engage in rewriting what the Legislature has decided.

[35] Rather, it seems to me the maxim "to express one thing is to exclude another" applies where there is reason to believe that if the legislation had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Sections 122 and 123 require

that a special meeting be requisitioned for the purpose of removing any director. That requisition must be made under s. 105, on notice to that director. Section 99(4) expressly provides a 5% shareholder with the ability to *nominate* a director for election by way of a proposal. Had the legislation meant to include the removal of a director by way of a proposal under s. 99, it is not fanciful, when s. 99 is read as a whole in the context of ss. 122, 123 and 105, to conclude that it would have said so.

[36] I conclude, reading the words of the OBCA in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature, that a shareholder seeking to remove a particular director must requisition a special meeting for that purpose and cannot impose such drastic action simply as a "tag-along" proposal to a different meeting called for a different purpose. That said, I do not read s. 105 as precluding more than one requisition for a shareholder meeting at a time.

[37] Accordingly, as a s. 99 proposal cannot be used for the purpose of removing a director, OneMove's application for an order of the court requiring the Company to add OneMove's proposal to the meeting circular for the meeting requisitioned by Engine Capital must be denied.

***Has the Board Established that OneMove's Proposal Falls Within Exceptions 99(5)(b) or (b.1)?***

[38] Since OneMove chose only to bring a proposal under s. 99, my determination of the first issue is dispositive of the proceedings before me. If I am wrong in my conclusion that the s. 99 proposal process cannot be used to remove a director, however, it would become necessary to go on to consider whether the Company has met its onus of showing, under s. 99(5), either that:

> it clearly appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers or security holders; or
>
> it clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation.

[39] These exceptions apply equally to proposals under s. 99 and to requisitions under s. 105 (see s. 105(3)(c)).

[40] The leading case interpreting these exceptions is the decision of the Divisional Court in *Koh v Ellipsiz Communications Ltd.*, 2017 ONSC 3083. *Koh* is a s. 105 case. The applicable legal principles set out in *Koh* include:

(a) section 99(5) of the OBCA "sets a very high threshold";

(b) "the onus of proof, that the circumstances in any particular case fall within the exception in s. 99(5)(b), rests on the Board";

(c) the "necessary standard" to apply "both for a Board of Directors, and for this Court on review, is correctness";

(d) a board "is not making a business decision and, accordingly, the business judgment rule does not apply";

(e) the substantive rights of shareholders should not be interfered with lightly;

(f) "the mere fact of an element of personal interest does not satisfy the exception"; and

(g) "one of the indicators of a personal grievance is that the subject matter of that grievance bears no real or direct relationship, nor is it otherwise integral, to the business and affairs of the company, or, for that matter, to the griever's role as a shareholder".



[41] Most of the evidence (and essentially all of the disputed evidence) filed on these applications, and most of the oral argument at the hearing, concerns Dye & Durham's allegation that OneMove's proposal to remove and replace Mr. Prittie is motivated solely by Tyler's personal animosity toward Mr. Prittie as a result of Mr. Prittie's failure to do Tyler's bidding as OneMove's nominee to the Company's board.

[42] The argument essentially goes as follows. Tyler is an egotistical, self-important person who remains bitter about being forced out of Dye & Durham's management at the time of the Company's IPO. He thought OneMove's appointee to the board would do what Tyler wanted, contrary to the express provisions of the IRA, which stipulate that nominee directors are independent and owe their duties to the Company, not to the shareholder who nominated them. Tyler became angry and frustrated with Mr. Prittie's refusal to comply with Tyler's frequent and often improper demands. Tyler's motivation in seeking to remove Mr. Prittie is a manifestation of Tyler's personal grievance against him for insisting on his independence as a director. It has nothing to do with the business and affairs of Dye & Durham.

[43] I am unable to accede to this argument.

[44] The long list of allegedly improper demands Tyler made of Mr. Prittie and Mr. Prittie's apparently steadfast refusal to accede to those demands is insufficient to meet the high threshold required by s. 99(5)(b) of showing the purpose of the proposal is to enforce a personal claim or redress a personal grievance. Dye & Durham's argument characterizes the Tyler/Mr. Prittie conflict as nothing but a personality/power struggle over who is calling the shots. This ignores the fact that, consistently and repeatedly, Mr. Prittie's alleged shortcomings were tied to his perceived failure to come to grips with Tyler and OneMove's concerns over the Company's financial status, share price performance, leadership, strategic vision and strategy, corporate governance, CEO compensation, excessive M&A activity, debt leverage to cash flow ratios and the lack of guardrails around senior management decision making.

[45] OneMove's concerns in these areas were raised over two years ago. Not feeling these concerns were being adequately addressed, OneMove escalated these concerns in a formal letter to the board and at a meeting with the CGN Committee. Still not satisfied., and in the face of other dissident shareholder action seeking to replace other board members, OneMove asked Mr. Prittie to resign. Mr. Prittie refused. OneMove then proposed to remove Mr. Prittie and replace him with someone else, employing the proposal mechanism under s. 99.

[46] It must be emphasized that it is not the court's role to comment on the merits of the various shareholder concerns. That is for the shareholders as a whole to decide at a properly constituted meaning to discuss and vote on these issues. The only issue for the court at this stage is whether the proposal arises from a personal claim or grievance or, rather, it relates in a significant way to the business and affairs of the Company.

[47] On its face, a shareholder motion to remove a director relates to the business and affairs of the corporation. Shareholders have the right to do this under the OBCA. While there is obviously a personal element to the proposal – Mr. Prittie is a person, after all -- the real issue is OneMove's perception that Mr. Prittie is not doing enough to influence necessary change to the Company's governance, financial position and business strategy. These are matters which go to the heart of the business and affairs of the Company. I also note that *Saskatchewan WTF Taekwondo Assn Inc v Taekwondo Canada*, involved a disputed requisition under the Canada *Not for Profit Corporations Act*. In that case the Superior Court observed that where the removal of a director is contemplated, courts should be "quite naturally attentive to see whether the members of the board have possibly allowed their personal views or their interest in maintaining their incumbency to influence their reaction": 2015 ONSC 2937, at para 15. This is a consideration here.

[48] The cases where a personal grievance has been proven involve things like seeking to advance and enforce personal claims in a separate shareholder litigation: *Watkin v Open Window Bakery Ltd.*, 1996 CanLII 8284 (ON SC), at para 24; and seeking to utilize a proposal to obtain evidence in support of allegations made in other ongoing litigation: *Fraser c. Canadian National Railway Company*, 2023 QCCA 846, at paras 18-20. All of the cited cases involving removal/nomination of directors held that the removal/nomination of directors could "not properly or fairly be described as reflecting a personal claim or the redress of a personal grievance": see, for example, *Jameson Investment Corporation v Bank*, 2009 CanLII 69105 (ON SC) at para. 14.

[49] In *Koh*, the Divisional Court noted that despite the presence of acrimony and the personal framing of disputes – the shareholder applicant had characterized "his concerns as demonstrating a lack of respect for him" – the evidence demonstrated that the applicant had "significant differences of opinion on business steps being taken" that were valid.

[50] The Divisional Court found that the applicant's three main complaints: (i) who should be directors; (ii) who should occupy corporate positions; and (iii) whether a significant transaction should be entered into, "directly related to the business and affairs of the respondent." Only the complaint that related to personal expenses incurred by the applicant was considered to be

personal. Ultimately, the Divisional Court held that the shareholder applicant and respondent company had a "significant difference of opinion as to the course that the company should take, and how it should be managed," and as a result, "shareholders ought to be permitted to decide those issues." The Divisional Court in *Koh* also noted that, "the degree that other shareholders are of the same view on an issue, as the shareholder making the requisition," makes it more difficult to "characterize the issue as personal."



[51] In this case, the concerns giving rise to OneMove's proposal clearly relate to the business and affairs of the Company. Other shareholders have also been advancing similar concerns as OneMove, as demonstrated by feedback the Board collected on shareholder outreach calls by Mr. Derksen before the 2022 and 2023 AGMs, and the recent actions of Engine Capital in bringing a shareholder resolution for a meeting to remove and appoint new directors.

[52] For these reasons, I find that the Company has not discharged its burden of showing the proposal has been advanced in order to vindicate a personal claim or grievance.

***Disputed Issues of Fact Requiring a Trial?***

[53] It is implicit in what I have said earlier about this issue that the discrepancies over who said what to whom between Tyler and Mr. Prittie, while they may be real, are not pertinent to the core issue of whether this is ultimately a fight about the business and affairs of the Company or nothing but a personal grievance of Tyler's against Mr. Prittie. Accepting Mr. Prittie's version of events for purposes of resolving this issue does not alter or influence my conclusion about whether the business and affairs of the Company, rather than a collateral personal grievance, are at the heart of OneMove's proposal. Whatever moral or legal approbation may attach to Tyler's impugned behaviour, it is simply not relevant to whether his concerns fall into the category of business and affairs of the corporation. I find that the facts necessary to decide the validity of the Company's objection to OneMove's proposal under s. 99(5)(b) and (b.1) do not depend on questions of credibility or require referral to a trial.

***Does the IRA Prohibit OneMove's Request for a Shareholder Vote to Oust Its Nominee?***

[54] Under the terms of the IRA, OneMove is provided with a nomination right for one director on the board but the IRA expressly prohibits that nominee from being Tyler. The IRA also provides a nomination right to Plantro for the CEO (Matthew) to be a nominee and for Plantro to nominate another director. Section 3.2 of the IRA provides:

> **3.2 Designation of Nominees**
>
> Pursuant to the terms and subject to the conditions set forth in this Article 3 and applicable law, in respect of any Director Election Meeting, the Parties shall take all necessary action to nominate a majority of Directors who are independent within the meaning of National Instrument 58-101 – Disclosure of Corporate Governance Practices. In addition, in respect of any Director Election
>
> Meeting:

> (a) as long as Plantro owns, controls or directs, directly or indirectly, in the aggregate, 5% or more of the then-outstanding Shares (on a non-diluted basis) at the time such nomination is delivered in accordance with Section 3.3, (i) the Company's Chief Executive Officer shall be a Nominee, and (ii) Plantro shall be entitled to nominate one (1) Nominee.
>
> (b) as long as Seastone [now called OneMove] owns, controls or directs, directly or indirectly, in the aggregate, 5% or more of the then-outstanding Shares (on a non-diluted basis) at the time such nomination is delivered in accordance with Section 3.3, Seastone shall be entitled to nominate one (1) Nominee, who shall not be Tyler Proud. […]

[55] The IRA does not contain a term permitting OneMove to propose to remove its nominee mid-term. However, s 3.4 of the IRA does expressly provide that prior to the expiration of OneMove's nominee's term, OneMove has a right to designate a replacement. This right is said to arise if OneMove's nominee "resigns, is removed or is unable to serve for any reason." The Company argues that none of these pre-conditions exist. Had the IRA parties intended to provide OneMove itself with a right to remove its nominee director mid-term, section 3.4 would have said so.

[56] I cannot agree.

[57] Unless a right afforded a shareholder under the OBCA is expressly or necessarily by implication abrogated by shareholder agreement, the rights of a shareholder under the OBCA apply.

[58] The IRA specifically provides that OneMove may put forward a new nominee if its existing nominee is, among other things, "removed". Nothing in the IRA prohibits OneMove from asking its nominee to resign (although it cannot, of course, insist upon or enforce that request). Nothing prevents OneMove asking the shareholders at large to remove its nominee at a properly constituted shareholder meeting, in accordance with ss. 122, 123 and 105. I cannot find in the IRA any basis upon which to conclude that it is necessarily or must by implication be the case that OneMove cannot request the removal of its own nominee prior to the expiry of his term of office. Nor can I find in the IRA any basis for concluding such a request would be in breach of the principle of good faith performance of the IRA.

[59] Essentially, Dye & Durham is arguing that OneMove cannot change its mind about the suitability of its nominee to continue to serve as a director. I find no support in the IRA to reach this conclusion.

[60] For these reasons, I conclude that OneMove may, if in compliance with relevant provisions of the OBCA, ask the shareholders at a properly constituted meeting to remove Mr. Prittie as a director. Again, as noted above, I reach this conclusion without making any finding or comment on the merits or advisability of such a request, and it is otherwise without prejudice to the parties' rights and obligations under the IRA and the OBCA.

***Other Alleged Breaches of the IRA***

[61] The Company also argues that Tyler and OneMove have engaged in conduct which is in breach of the IRA in other ways. As the Company puts it, "while the IRA Parties may not be able to control how other shareholders vote, the IRA Parties themselves are bound to act consistently with [these terms] and to ensure as best that they can that the term is given full effect." That means, the Company argues, that OneMove is bound to support Plantro's nominees -- the CEO (Matthew) and one other -- and Plantro is bound to support OneMove's nominee. The Company seeks declaratory relief in this regard, and an injunction prohibiting OneMove from voting otherwise at any pending meeting.

[62] Importantly, once Mr. Derksen is no longer Chair, s. 3.8 of the IRA provides that Plantro's nominee is entitled to serve as Chair of the board:

> **3.8 Chair Rights**
>
> If Plantro has the right to designate a Nominee under Section 3.2, Plantro shall also be entitled to have the Plantro Director serve as Chair of the Board. The initial Chair of the Board will be Brian L. Derksen who is not a Plantro Director, nor is he a Nominee of Plantro. Notwithstanding the foregoing, for so long as Matthew Proud is the Company's Chief Executive Officer, Plantro may not designate him as Chair of the Board.

[63] The "breach" of s. 3.2 is said to arise from Tyler and OneMove's conduct during a November 10, 2024 call (and on other occasions) in which Tyler demanded that a gentleman by the name of Mr. Hibben be appointed Chair and threatened to run a coordinated "withhold" campaign with other shareholders if his demands were not met. Mr. Dirksen was, at the time, still the Chair of the board.

[64] There is no doubt, as submitted by OneMove, that the Company's slate, including the nominees of Plantro and OneMove, are not guaranteed director positions. Each director must be elected at a shareholders meeting. Plantro and OneMove cannot appoint their respective nominees under the IRA, except under s. 3.4 if their nominee steps down between AGMs (s. 3.4). Also, Plantro and OneMove cannot remove their respective nominees under the IRA. Election and removal are both the prerogative of the shareholders at large.

[65] Further, in general, it remains the case that:

(a) all directors, including the nominees of Plantro and OneMove, serve at the pleasure of the Company's shareholders;

(b) any shareholder can suggest director candidates to be included for the remaining 5 spots on the Company's slate;

(c) any shareholder can nominate a director candidate outside of the Company's slate under the OBCA;

(d) shareholders can vote to elect directors at an AGM (or any other meeting involving the election of directors) from the Company's slate or from a nomination submitted by a shareholder (i.e., outside the Company's slate);

(e) shareholders can vote to elect directors at a special meeting from the Company's slate or from a nomination submitted by a shareholder (i.e., outside the Company's slate); and

(f) shareholders can vote to remove directors at a special meeting by passing a resolution submitted by a shareholder.

[66] That said, it does seem to me that, in light of ss. 3.2 and 3.8 of the IRA, it would be a breach of the IRA for OneMove to vote it shares against the CEO or Plantro's nominee or against Plantro's nominee becoming Chair post-Mr. Derksen. However, none of that has happened yet, nor are any of these issues likely to be engaged by Engine Capital's requisition or, if it were make one, OneMove's requisition for a meeting to remove and replace Mr. Prittie. In other words, the "breaches" alleged by Dye & Durham seem to me to be theoretical in nature at this point. They are not, therefore, suitable for declaratory relief: *Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc.* (2023), 2023 CarswellOnt 7509, 2023 ONCA 363 (Ont. C.A.). Nor is this any basis upon which to issue an injunction.

[67] For these reasons, I decline to make any further comment, or to make any order, regarding this final argument made by Dye & Durham.

**Conclusion**

[68] In conclusion:

(a) a shareholder cannot seek to remove a director by means of the proposal process under s. 99 of the OBCA;

(b) if I am wrong about this, the OneMove request for the removal and replacement of Mr. Prittie is not a personal grievance but concerns the business and affairs of the Company under s. 99(5)(b) and (b.1) of the OBCA;

(c) the issues under s. 99(5)(b) and (b.1) of the OBCA do not require the resolution of disputed facts by means of a trial;

(d) the IRA does not prevent OneMove from requesting the removal and replacement of its own nominee to the board; and

(e) whatever constraints under the IRA may exist on OneMove's ability to vote against or oppose Plantro's nominees to the board or to the role of Chair, post-Mr. Derksen, they are not engaged in the present circumstances and represent problems of a theoretical nature at this stage. It is therefore not appropriate to make any order in respect of these issues at this time.

[69] It is not entirely clear to me what I am to make of the Company's application for damages for breach of contract, which was not argued at the hearing. Any issues arising out of Dye & Durham's application not argued at the hearing of this matter should be addressed at a future case conference (at which the proper form of the claims and issues can be reviewed) if they are to be pursued.

**Costs**

[70] Both sides submitted cost summaries for extremely large amounts. This was hard ball litigation involved sophisticated and well-resourced litigants. Given there was divided success on the main issues, however, I make no order as to costs.

Penny J.

**Date:** September 17, 2024