CITATION: Re Dye & Durham Limited, 2025 ONSC 7098
COURT FILE NO.: 25-00753608-00CL
DATE: 20251218

ONTARIO SUPERIOR COURT OF JUSTICE

RE:
DYE & DURHAM LIMITED,

Applicant

BEFORE: FL Myers J

COUNSEL: *David Conklin, Tamryn Jacobson and Luke Devine*, for the Applicant

Susan Kushneryk and Karen Galpern, for Ronnie Wahi

HEARD: December 17, 2025

ENDORSEMENT

[1] The applicant finds itself in a Catch-22. It has a problem that it cannot escape without suffering another problem that is just as bad.

[2] From a governance perspective fiscal and calendar 2025 have been chaotic years for the applicant. It has undergone significant changes in its board composition and among senior management. For several reasons, it says that it has been unable to produce its fiscal 2025 audited financial statements yet. As a result, its ability to hold its upcoming annual general meeting is in doubt.

[3] The applicant's most recent year-end was June 30, 2025.

[4] The applicant commits to release its fiscal 2025 audited annual financial statements on or before December 23, 2025.

[5] Under applicable securities regulations, the audited financial statements were due by the end of September, 2025. The shares of the applicant were subject to a management cease trading order because the applicant missed the due date. There has been ongoing communication

between the applicant and the OSC concerning the presentation of the applicant's financial statements for fiscal 2024 and for fiscal 2025.

[6] Under s. 94 (1) of the *OBCA*, the applicant must call an annual general meeting no later than 15 months after the last annual meeting in 2024.

[7] The applicant has scheduled its 2025 AGM for December 31, 2025 with a record date of November 7, 2025.

[8] Subsection 154 (1) of the *Business Corporations Act*, RSO 1990 c B.16 provides, in part:

> **Information to be laid before annual meeting**
> 154 (1) The directors shall place before each annual meeting of shareholders,
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> …
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> (b) in the case of a corporation that is an offering corporation, the financial statements required to be filed under the *Securities Act* and the regulations thereunder relating separately to,
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> (i) …the period that began immediately after the end of the last completed financial year and ***ended not more than six months before the annual meeting***, and
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> (ii) the immediately preceding financial year, if any;
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> (c) the report of the auditor, ***if any***, to the shareholders; and
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> (d) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous shareholder agreement.
>
> …

Copy of documents to shareholders, offering corporations

(3) ***Not less than 21 days before each annual meeting of shareholders***…an offering corporation shall send a copy of the documents referred to in this section to all shareholders who have informed the corporation that they wish to receive a copy of those documents.

[9] According to this section, the audited financial statements required for an annual meeting are to be provided to shareholders not less than 21 days before the AGM. They were to be sent therefore by December 10, 2025.

[10] As the applicant failed to deliver its annual statements by December 10, 2025, its shares have now been cease traded altogether.

[11] There is still time in the 15-month period in s. 94, for the date of the AGM to be moved into 2026. This would give the applicant time to put 21 days between the release of the audited financial statements on December 23, 2025 and the date of the meeting next year.

[12] But the financial statements of the corporation to be provided at the meeting are to be for a period from the last annual meeting until a date not more than six months before the date of the new meeting. The financial statements for year-end 2025 are made as at June 30, 2025. December 31, 2025 is the last day of the ensuing six-month period.

[13] If the applicant moves the date of its meeting into 2026 to comply with the 21-day notice rule, it fears it will run afoul of s. 154 (1)(b)(ii) because the financial statements will be for a period ending more than six-months prior to the meeting. Hence the Catch-22.

[14] Mr. Wahi is a former CFO and former member of the board of directors of the applicant. In his submission, the applicant is reading s. 154 incorrectly. Subpara. 154 (1)(b)(i) does not require annual meetings to be held within six-months of the fiscal year end, he submits. Rather, it allows the applicant to rely on its unaudited quarterly financial

statements for the period after the last year end (June 30, 2025). Using the first quarter fiscal 2026 unaudited financial statements (as at September 30, 2025) as the start of the six-month period allows the applicant to call its AGM well into 2026.

[15] Ms. Kushneryk, for Mr. Wahi, submits that subpara. 154 (1)(b)(i) refers to unaudited quarterly or interim financial statements after the most recent year-end while (ii) requires delivery of the annual statements for the prior fiscal year.

[16] I cannot read subsection. 154 (1) that way. If subpara. 154 (1)(b)(i) refers only to the interim period after the prior year-end, that would mean that in a year where the AGM was held within six months of the prior year end, the corporation would be required to provide its financial statements for the prior fiscal year under (i) and for the year before the prior fiscal year for comparative purposes under (ii). But, in a year where the AGM was held after six months from year-end, even by one day, the corporation would only be required to provide the financial statements for the immediately prior year under (ii) and the ensuing the stub period under (i). There is no reason for such a stark difference in required disclosure.

[17] It may be that disclosure of results for a prior year is required by GAAP or GAAS for comparative purposes in any event. So I do not view the goal of providing comparative statements as the most important interpretive aid. And I understand how the words of these sections could be closely parsed to produce the result submitted by Ms. Kushneryk. But in my view, this result is not the more sensible reading consistent with the purpose of the section and statute as a whole.

[18] The purpose of section 154 is to deal with the disclosure of annual financial reports including annual financial statements at annual general meetings. It is not aimed at dealing with an odd exception. It is in a businessman's statute dealing with the ordinary course first and foremost.

[19] If the Legislature were dealing with a specific problem where a meeting was to be held more than six months after the year end, it would say so and specify how the stub period was to be dealt with. It would not be left to technical parsing of a vague subparagraph. The use of quarterly unaudited financial statements provided for securities law purposes is a

convenient outcome in some cases. It is convenient to postulate this possibility because quarterly statements exist under securities laws. But, where a meeting is late by one day, for example, why would the corporation have to report for the ensuing three months from year-end just to move its AGM by a day? The words of subpara. 154 (1)(b)(i) do not deal with quarterly statements or interim statements that may be prepared regularly by a corporation. The subpara. deals with the period of time between the last fiscal year-end and the date that is six months before the AGM – not the entire next ensuing financial reporting period. How is an offering corporation supposed to make disclosure for the stub period defined in that subparagraph in particular? What if it is a day, a week, or a day short of a month, or a day beyond a quarter? This reading is just not realistic or feasible.

[20] Rather, I read s. 154 as providing that the AGM must be held within six-months of the last year end. That was also the holding of Ground J. in *1184760 Alberta Ltd. v. Falconbridge Ltd*., 2006 CanLII 23948 (ON SC), at para 2:

> The provisions of section 154 of the *OBCA* require the directors to place before the annual meeting financial statements for a period ended not more than six months before the annual meeting ***and that of itself precludes the directors from holding the annual meeting at some date more than six months after the end of the fiscal year.*** In the case of an offering corporation, there may well be the further requirement for approval of securities regulators and stock exchanges on which the corporation's shares are listed***. In addition if the directors purported to hold the annual general meeting at some time in the distant future, a shareholder may apply to the court under section 106 of the OBCA for an order requiring the corporation to hold a meeting by a specified date*** or may resort to the oppression remedy for an order under section 248 of the *OBCA* to call a meeting by a specified date.

[21] Ms. Kushneryk submits that this holding is *obiter dicta* and is not binding upon me. I do not agree. It is a clear and specific holding of law about the meaning of the section. I am required to give it effect under

the doctrine of horizontal *stare decisis*. See: *R. v. Sullivan*, 2022 SCC 19 (CanLII), at para. 65. In any event, I agree with Ground J.

[22] Ground J. not only provided the mandatory meaning of the statute, but he also provided the remedy in cases where it cannot be met.

[23] Subsection 106 (1) of the *OBCA* provides:

> If for any reason it is impracticable to call a meeting of shareholders of a corporation in the manner in which meetings of those shareholders may be called or to conduct the meeting in the manner prescribed by the by-laws, the articles and this Act, or if for any other reason the court thinks fit, the court, upon the application of a director or a shareholder entitled to vote at the meeting, may order a meeting to be called, held and conducted in such manner as the court directs and upon such terms as to security for the costs of holding the meeting or otherwise as the court deems fit.

[24] In addition, in light of the mandatory nature of the shareholders' right to receive financial statements, the Court of Appeal recently concluded that a compliance order under s., 253 of the *OBCA* is also available to compel production of audited financial statements. *Lagana v. 2324965 Ontario Inc.,* 2025 ONCA 607 (CanLII).

[25] Subsection 253 (1) provides:

> Where a corporation or any shareholder, director, officer, employee, agent, auditor, trustee, receiver and manager, receiver, or liquidator of a corporation does not comply with this Act, the regulations, articles, by-laws, or a unanimous shareholder agreement, a complainant or a creditor of the corporation may, despite the imposition of any penalty in respect of such non-compliance and in addition to any other right the complainant or creditor has, apply to the court for an order directing the corporation or any person to comply with, or restraining the corporation or any person from acting in breach of, any provisions thereof, and upon such application the court may so order and make any further order it thinks fit.

[26] A corporation can use s. 253 (1) to seek an order for the general benefit of shareholders. *Arend v. Boehm*, 2017 ONSC 3582 at paras. 49-53; *Centerra Gold Inc. v. Bolturuk*, 2022 ONSC 1040 at para. 89.

[27] Ms. Kushneryk agrees that if the court does not accept her reading of s. 154, the court has authority under these sections to make an order to regularize an AGM. Both provisions allow the court to make such order as the court deems fit.

[28] Ms. Kushneryk submits that if the applicant cannot now hold its AGM without a breach of s. 154 (as I find) then it is important to make an order that provides the shareholders as much time as possible to receive and digest the corporation's financial report and audited financial statements. She would ask me to move the meeting outside the six-month window to provide at least 21 days for shareholders to receive the materials.

[29] Mr. Conklin concedes that should the court make an order to move the meeting date, the applicant will adjust the record date and other relevant dates (such as those under the Advance Notice By-Law) to make the meeting work.

[30] But the applicant submits that the better order for the court to make is to allow the corporation to hold the meeting as scheduled on December 31 2025 with delivery of the financial statements just eight days in advance by December 23, 2025.

[31] Mr. Wahi points to the "chaos" within the company as calling out for proper oversight by shareholders. He notes that he is running to be a member of the board of directors. Shareholders voting for directors should have time to understand the financial statements before making such a critical decision.

[32] Mr. Wahi submits that with Christmas, Boxing Day and weekends, there are really only 1.5 days between the proposed delivery of the financial statement on December 23, 2025 and the deadline for delivering proxies set for the morning of December 29, 2025. I accept that people have other priorities during the holidays especially and on weekends. But dealing with investments is not part of most people's 9 to 5 jobs. People can think about their investments on weekends as or more readily than at work. Moreover, I have no concern for the time crunch for institutional investors. They can have manpower assembled to meet their business priorities.

[33] Having said that, I do not ignore at all the statutory goal of having 21 days as a minimum time for shareholders to review financial statements. Decision at AGMs (and in this case other decisions as well such as approval of the issuance of options to the CEO and an option plan for some employees) are important. This company has been the subject of an OSC review of its financial statements. It has had reporting problems (or perhaps disagreements) that prevented it from providing some information required by its auditors until just last week.

[34] The company says it has provided unaudited financial information to the marketplace in November. But Mr. Wahi says that cherry-picked snippets of unaudited financial metrics are not the same as a financial report with audited financial statements. The whole purpose of requiring an independent audit is so that shareholders and others can have confidence in the reliability of the financial statements knowing they have met GAAS.

[35] In *Packall Packaging Inc. v. Ciszewski*, 2016 ONCA 6 (CanLII), at para. 28, the Court of Appeal recognized the central importance of audited financial statements in our regulated securities environment in as follows:

> It is a core obligation of a corporation to its shareholders to provide them with an annual report card of the corporation's financial position in the form of audited financial statements*: Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd.* (2007), 2007 CanLII 8026 (ON SC), 27 B.L.R. (4th) 299 (Ont. S.C.), at para. 12. A shareholder's right to information or material, including audited financial statements, as granted to her under the *OBCA* is a clear, mandatory right, and it is not necessary for a shareholder to give any reason in exercising her directly held rights under the *OBCA: Labatt Brewing Co. v. Trilon Holdings Inc.* (1998), 1998 CanLII 14697 (ON SC), 41 O.R. (3d) 384 (Gen. Div.), at p. 387.

[36] In the next ensuing paragraphs, the Court of Appeal noted that the court has no authority to exempt a corporation from providing audited financial statements except perhaps as part of an oppression remedy under s., 248 (3) of the statute. (Ground J. averted to that possibility as well in *Falconbridge* above.)

[37] The applicant has several responses, however. First it says, the corporation has been telling the shareholders and regulators that the AGM will be on December 31, 2025. The shareholders' expectations have been created and should be met. Second, the OSC has had full disclosure of the issues in these proceedings. It does not oppose the relief sought provided the court's order makes clear that it is not exempting the applicant from any securities laws nor from the jurisdiction of the OSC. Third, the corporation submits that its board of directors has been very cognizant of its fiduciary duties throughout. It has had advice and has acted to make multiple disclosures to the marketplace as facts emerged including its inability to deliver its financial statements on time and its proposed relief in this proceeding.

[38] In her supplementary affidavit sworn on December 16, 2025, the CFO, Ms. Bell, advised that the board of directors met that evening to consider the issues and the relief requested by Mr. Wahi. The board determined that it was in the best interests of the corporation to ask the court to keep the December 31, 2025 AGM date as long as the audited financial statements were released by December 23, 2025.

[39] Ms. Bell swore:

> 4. The Board understood that this decision would be inconsistent with Mr. Wahi's stated interests, but it believed the interests of other shareholders and the best interests of Dye & Durham require the 2025 AGM to proceed as planned on December 31, 2025, assuming the 2025 Financial Statements were filed on or before December 23, 2025.
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> 5. The Board's conclusion was based on the facts set out in paragraph 55 of my Original Affidavit:
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> (a) Shareholders will be informed when voting at the 2025 AGM if the 2025 Financial Statements are delivered by December [23], 2025;
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> (b) As set out in this affidavit, Dye & Durham has advised the market and shareholders on many occasions about the delayed 2025

Financial Statements and has kept them informed of their status;

(c) On December 8, 2025, Dye & Durham specifically disclosed that it would not meet the 21-day requirement and was applying to the Court for relief from that requirement;

(d) The delay in finalizing the 2025 Financial Statements is not due to any bad faith and is despite Dye & Durham's best efforts to finalize the audit and the 2025 Financial Statements as soon as possible;

(e) Dye & Durham has already produced its preliminary unaudited financial results for the fiscal year ended June 30, 2025 and the first quarter of fiscal 2026, and it is unlikely that the final audited 2025 Financial Statements will differ materially from the information already disclosed;

(f) Dye & Durham stock is liquid and regularly traded and information disclosed to the market is typically considered by shareholders and investors in a short period of time and reflected in the stock price within a couple of business days;

(g) Dye & Durham has had an obligation under the [Management Cease Trading Order]to provide bi-weekly updates to the public for the duration of the MCTO, and it has done so [these have now ceased since the OSC issued a full failure-to-file cease trade order on December 15, 2025];

(h) Dye & Durham has other continuous disclosure requirements which it will continue to abide by; and

(i) The delay being requested will be minimal. If the delay becomes significant such that the 2025 Financial Statements would not be delivered by December [23], 2025, Dye & Durham would return to Court for further consideration.

6. The Board believes that the views of Mr. Wahi are unlikely to represent the views of the vast majority of Dye & Durham's remaining shareholders and other stakeholders, who are likely to consider themselves fully informed at the 2025 AGM if the 2025 Financial Statements are delivered by December 23, 2025, and are likely to have a strong interest in the 2025 AGM taking place as scheduled. The Board understood it could not make a decision that would satisfy both Mr. Wahi and other shareholders who were interested in seeing the AGM held on December 31, 2025.

[40] All the court is asked to do is to exercise the power expressly conferred on it by ss. 106 and 253 to enable the applicant to hold a meeting that the statute otherwise apparently precludes it from holding due to its failure to produce its audited financial statements on time. There has to be an AGM and the statute provides that when it cannot be called or conducted as required by the statute itself, the court may be called upon to make such orders as it deems fit to enable a meeting to proceed.

[41] In considering the outcome, I agree with Mr. Conklin, that there is a presumption that the board of directors acts in good faith barring evidence to the contrary. The board cannot immunize itself from breaches of duties. Nor is the court required to defer to the board in assessing a remedy under ss. 106 or 253.

[42] Although written in a different context, I find the words of the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 (CanLII) instructive:

> [81] As discussed, conflicts may arise between the interests of corporate stakeholders inter se and between stakeholders and the corporation. Where the conflict involves the interests of the corporation,

> it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.
>
> [82] The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.
>
> [83] Directors may find themselves in a situation where it is impossible to please all stakeholders. The "fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction": *Maple Leaf Foods*, per Weiler J.A., at p. 192.
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> [84] There is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

[43] I recognize that the board of directors has brought this proceeding as part and parcel of its own due diligence efforts to meet its obligations as best it can. It is seeking to mitigate known litigation risk as well as advancing the interests discussed by Ms. Bell above.

[44] I am persuaded that the court should adopt the request of the board of directors barring a strong reason to depart from its business judgment. In my view, the fit order is the one sought by the corporation to enable the AGM to proceed as scheduled on December 31, 2025 provided audited financial statements are released on or before December 23, 2025.

[45] Shareholders can always seek to adjourn the AGM if the meeting feels ill-equipped to vote on resolutions or generally. That is up to the meeting.

In addition, Mr. Conklin confirmed that, like the OSC's requirement, if this court orders the AGM to proceed with audited financial statements delivered by December 23, 2025, the order will do nothing more than that. It will not absolve anyone from liability for breaches of statute, regulation, by-laws, fiduciary duties, or oppression. The court is not asked to dictate what is to happen at the meeting. The corporation and those responsible will remain fully accountable in accordance with the law.

[46] Two technical matters remain. First Mr. Wahi asks for reimbursement of his costs. In my view it is fair and reasonable that he be indemnified for his full costs incurred in participating in this proceeding. This is much like an estate or trust case where the participation was needed due to the misadministration of the trust itself (in this case the corporation). Mr. Wahi's engagement was important and helpful. He met the corporation's accelerated timing needs. He produced material that forced the corporation to focus its requests and sharpen the legal bases of its arguments. The outcome became much clearer due to the helpful factual and, especially, legal arguments put forward on Mr. Wahi's behalf. I agree with Ms. Kushneryk that case was not an exercise in "gap filling" or a resort to the inherent jurisdiction of the court as initially pleaded. If the parties disagree on the reasonableness of Ms. Kushneryk's accounts, I can be contacted to fix the quantum of Mr. Wahi's reasonable costs on a full indemnity basis.

[47] Finally, s. 106 of the *OBCA* is available to a shareholder or director. As noted above, s. 253 (1) is available to the corporation. Mr. Conklin says he has a director standing by in case the court needs him to be added as an applicant to invoke its jurisdiction under s. 106. In my view, the effect of the two remedial sections can be combined so that it is unnecessary to add a director personally as an applicant in this lawsuit.

[48] Order signed as asked.

FL Myers J

Date: December 18, 2025