

Koh v. Ellipsiz Communications Ltd.: The "Personal Grievance" Exception Under the OBCA

January 13, 2017

In *Koh v Ellipsiz Communications Ltd.*,¹ the Ontario Superior Court of Justice ("OSCJ") denied an application for a declaration brought by Tat Lee Koh ("Koh"), the largest shareholder of Ellipsiz Communications Ltd. ("ECL") holding approximately 42% of the outstanding shares, claiming that he validly requisitioned a shareholders meeting. The OSCJ denied the application on the basis that the primary purpose of the requisition was to redress a personal grievance against ECL and a group of its directors, in which case, the ECL board was not obligated to comply with the requisition.

This case is particularly useful in its interpretation of certain provisions under the Ontario Business Corporations Act² (the "OBCA") which, up until this point, have not been the subject of much judicial consideration. It also serves as a reminder to shareholders considering a requisition that their previous correspondence and conduct could be subject to judicial consideration in determining whether their conduct can be said to be motivated by personal grievance.

Background

On November 4, 2015 ECL became a publically traded company listed on the TSX Venture Exchange following a reverse takeover transaction. ECL scheduled its first annual and general meeting as a public company on June 30, 2016 (the "AGM"). In connection with the AGM, the ECL board unanimously approved a management information circular which included a proposed slate of directors.

On June 29, 2016, Koh attempted to withhold his vote with respect to certain Canadian directors (the "Canadian Directors"). However, the scrutineer at the AGM determined that Koh's proxy was noncompliant. As such, the slate of directors initially proposed in the management information circular, including the Canadian Directors, were elected.

On August 22, 2016 Koh demanded that the Canadian Directors resign. When the Canadian Directors refused to resign, Koh formally submitted a requisition on August

30, 2016 seeking a shareholders meeting pursuant to section 105(1)³ of the OBCA, for the purpose of removing and replacing the Canadian Directors (the "Requisition"). Citing its discretion under section 105(3)(c)⁴ of the OBCA, the ECL board advised Koh that it was declining the Requisition on the basis that the Requisition fell within the scope of section 99(5)(b)⁵ of the OBCA, as its primary purpose was to redress a personal grievance against ECL and its directors.

Koh moved to exercise his right under section 105(4)⁶ of the OBCA and called a shareholders meeting for November 28, 2016. Koh took the position that the Requisition did not fall within the scope of section 99(5)(b) of the OBCA and, as such, the ECL board lacked the jurisdiction to deny the Requisition.

Issues & Analysis

On the application, the OSCJ was tasked with resolving two issues. First, what constitutes a "personal grievance" against a corporation or directors of the corporation? Second, whether it is clearly apparent that the primary purpose of the Requisition was to redress a personal grievance. In doing so, the OSCJ offered some useful guidance on the scope and application of sections 99(5)(b) and 105(3)(c) of the OBCA.

What constitutes a "personal grievance"?

Referring to the decision of *Saskatchewan WTF Taekwondo Assn Inc v Taekwondo Canada*,⁷ the OSCJ defined "personal grievance" as "a dispute that does not entail an issue of corporate policy or operations but rather involves an issue primarily pertaining to the personal interest of the complainant."⁸

Further, the OSCJ concluded that in assessing whether a dispute is a personal grievance, relevant considerations could include not only the nature of the dispute, but also other contextual considerations, such as: (i) the extent to which the matters in dispute fall within the purview of a shareholders meeting or are better dealt with by the directors of the corporation; and (ii) the extent to which the complainant acted alone or whether there was the support of other like-minded individuals. The OSCJ made clear, however, that while the contextual considerations are helpful they are not necessarily determinative.

Whether it is clearly apparent that the primary purpose of the Requisition was to redress a personal grievance.

In addressing this issue, the OSCJ took the opportunity to extrapolate on the legal principles governing the operation of sections 99(5)(b) and 105(3)(c) of the OBCA.

The onus of proof rests with the corporation. When sections 99(5)(b) and 105(3)(c) of the OBCA are read together, the onus of proof rests with the corporation. Therefore, the onus of proof was on the ECL board to demonstrate that the primary purpose of the Requisition was to redress a personal grievance.

The onus of proof is a high one. The OSCJ determined that the legislative language of section 99(5)(b) of the OBCA imposes a high threshold on the corporation in meeting its burden. Specifically, that section states that it must be clearly apparent that the primary purpose of the Requisition was to redress a personal grievance. The OSCJ also relied on *Paulson & Co v Algoma Steel Inc*⁹ as further validation for the high onus — there, the court stressed the "fundamental right" afforded to shareholders in respect of corporate governance under the OBCA.¹⁰

The determination must be made on 'objective' evidence. The OSCJ determined that any judicial analysis must focus on objective evidence. Koh, referring to *Michaud c Banque Nationale du Canada*,¹¹ argued that an objective analysis of the evidence should be limited to an examination of the resolutions proposed to be passed at the requisitioned meeting. However, the OSCJ distinguished the present case from *Michaud* arguing that, regardless of whether or not such an objective approach is warranted in a case dealing with corporate policy (as was the case in *Michaud*), such an approach was not appropriate with respect to a requisition looking to reconstitute a board in between annual and general meetings (as was the case here). Further, the OSCJ determined that while it is not appropriate to cross examine the requisitioning party, it is appropriate to examine objective evidence in the form of the requisitioning party's actions, including prior conduct, behaviour and written communications.

Conclusion

Given the analysis above, the OSCJ concluded that the ECL board met its high burden of demonstrating that it was clearly apparent that the primary purpose of the Requisition was to redress a personal grievance against ECL and the Canadian Directors. The Court arrived at its decision based on objective evidence, including the prior conduct, behaviour and written communications of Koh, and minutes taken from ECL board meetings, all of which suggested that there was no issue of corporate policy or operations revealed by the circumstances and that the real issue involved a question of respect for Koh personally.

In addition, the OSCJ pointed to two contextual considerations that were suggestive of the primary purpose of the Requisition being a personal grievance. First, there were no competing factions of directors on the ECL board. All of the directors, including Chong Gin Tan — the second largest shareholder of ECL, holding approximately 27% of the outstanding shares — supported the position of the Canadian Directors. Put simply, Koh was an outlier. Second, the matters at issue were deemed to be better dealt with at the ECL board level rather than the shareholder level — which, according to the OSCJ, is only reinforced by Koh's desire to reconstitute the ECL board.

Note: On December 7, 2016 Koh announced his intention to appeal the OSCJ decision. BLG will continue to monitor the litigation in this matter and report on any developments.

1 2016 ONSC 7345 [*Ellipsiz*].

2 RSO 1990, c B.16 [OBCA].

3 Section 105(1) states 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."

4 Section 105(3)(c) states that "upon receiving the requisition referred to in [105(1)], the directors shall call a meeting of shareholders to transact the business stated in the requisition unless the business of the meeting as stated in the requisition includes matters described in section 99 (5) (b) to (d)."

5 Section 99(5)(b) states that a corporation is not required to comply with a requisition if "it clearly appears that the primary purpose of the [requisition] is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers or security holders."

6 Section 105(4) states that "subject to [105(3)], if the directors do not within twenty-one days after receiving the requisition referred to in [150(1)] call a meeting, any shareholder who signed the requisition may call the meeting."

7 2015 ONSC 2937 [*Sask Taekwando*].

8 *Ellipsiz*, *supra* note 1 at para 29.

9 (2006), 79 OR (3d) 191 [*Paulson*].

10 *Ibid* at paras 40, 41.

11 [1997] RJQ 547 [*Michaud*].

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