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Live and Let Dye – Litigation Maneuvers Prior to a Shareholder Vote

On December 16, 2024, the long-running proxy contest in Dye & Durham will come to a head, determining whether control of the legal tech company will remain in the hands of its CEO and co-founder, Matthew Proud.

Dye & Durham provides a variety of legal software services including corporate and title searches, incorporations and other services for real estate deals. The company recently garnered significant attention when it acquired a number of other legal service companies and then implemented a series of price hikes. One related class action was commenced in the Ontario Superior Court but was abandoned in October 2023 (*Burford Law Professional Corp v Dye & Durham Limited*). A separate class action in the Federal Court remains outstanding, though the plaintiffs recently had their proposed litigation funding agreement rejected by the Court (*Dye & Durham Limited v Ingarra*). Aside from the civil claims, the company now also faces an investigation by the Competition Bureau. In March 2024, an activist investor, Engine Capital LP, began its bid for governance changes by requisitioning a special shareholder meeting.

Litigation Maneuvers Prior to a Shareholder Vote

In proxy contests, parties often litigate procedural and substantive matters leading up to a shareholder vote, with a view of affecting its ultimate outcome. These can include disputes on:

- The validity of meeting requisitions;
- The timing of when the meeting will be held, and challenging the validity of any adjournments;
- The venue of the meeting, and its form (in person, electronic or hybrid);
- Who will chair the meeting and whether a “neutral” chair needs to preside;
- Whether proxy solicitations have been conducted in compliance with law;
- Transactions undertaken in the lead up to the meeting, including those that potentially dilute shareholders or

involve the sale of corporate assets to related parties.

Two novel tactics were recently employed in the course of the Dye & Durham contest. The first was by Tyler Proud, a co-founder of the company and brother to CEO, Matthew Proud. Tyler Proud, who owns his stake through his company OneMove Capital, had become dissatisfied with his own nominee to the board, Ted Prittie. With a meeting to revamp the board already requisitioned by Engine Capital, Tyler Proud sought to piggy-back his own shareholder proposal that there be a vote specifically to arrange for Mr. Prittie's removal. The Court ruled in *OneMove Capital Corporation v Dye & Durham Limited*, that section 99 of the *Ontario Business Corporations Act* cannot be used to "tag-along" that type of proposal to a meeting called for a different purpose. Rather a new meeting requisition would be required (though the Court noted there was no limit to the number of requisitions that could be addressed in a single meeting).

The second tactic relates to the Competition Bureau investigation which is proceeding in the background of the proxy contest. On November 7, 2024, the Commissioner of Competition obtained an order from the Federal Court that Dye & Durham must produce records relevant to its investigation into whether it has engaged in anti-competitive conduct, including to abuse a dominant position in the market. It is well known that responding to such orders, which are made under Section 11 of the *Competition Act*, is normally a very onerous and time intensive exercise. Dye & Durham attempted to persuade the Bureau that its ongoing proxy contest was consuming all of management's attention, and reportedly asked that the Bureau include in its proposed order a term providing that "the respondent shall maintain its current directors or a majority thereof" while the Order was outstanding. The Bureau refused to seek such a term, and Engine Capital subsequently criticized and cautioned Dye & Durham in a press release that it should refrain from engaging in such "entrenchment" tactics. Since the modification to the order was refused, it remains unknown how the company might have used it in the proxy contest (and whether such an order might have been subsequently litigated). However, it would seem that it could have provided an opportunity to further adjourn the upcoming meeting and give management more time to shore up support, or pursue a sale process that the company recently announced it was pausing.

The outcome of any proxy contest is ultimately a matter of shareholder democracy and will be determined by the shareholders themselves. However, in a close contest, the

Court battles and litigation strategies pursued in advance can have powerful effects on how such votes are, at the end of the day, finally cast.