BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Jacob Cohen, 2023 BCSECCOM 317 Date: 20230622

Jacob Cohen and YourWay Cannabis Brands Inc.

Panel	Gordon Johnson	Vice Chair
	Judith Downes	Commissioner
	Jason Milne	Commissioner
Hearing Dates	July 29 and August 2, 2022	
Date of Ruling	August 3, 2022	
Date of Reasons	June 22, 2023	

Appearing

Patrick Sullivan Nicole Chang	For Jacob Cohen
John Picone Jordanna Cytrynbaum Rajit Mittal	For YourWay Cannabis Brands Inc.
Jennifer Whately Gordon Smith Nazma Lee	For the Executive Director

Reasons for Ruling

I. Introduction

[1] On July 11, 2022, Jacob Cohen (Cohen) applied to the Commission under section 114 of the *Securities Act*, RSBC 1996, c. 418 (Act) for various orders relating to a management information circular and a proxy form of YourWay Cannabis Brands Inc. (YourWay).

[2] As of June and July of 2022 Cohen was a significant shareholder and the CEO of YourWay and he was also a member of YourWay's board of directors (Board). Cohen had some preferences regarding the future composition of YourWay's Board. On June 16, 2022, Cohen delivered a notice (Notice) to YourWay advising that he proposed to nominate five directors to be voted on by the shareholders of YourWay. Cohen alleges that the Notice was in material compliance with the advance notice provision in YourWay's articles and that as a result his proposed nominees should have been included by YourWay in the Management Information Circular (Management Circular) and Proxy Form (Proxy) which YourWay filed on SEDAR on June 29, 2022.

[3] The Circular did not contain Cohen's proposed nominees. As a result Cohen brought this application seeking orders requiring YourWay to, among other things, amend its Management Circular and the Proxy to include Cohen's nominees, circulate the amended Management Circular and Proxy and refrain from holding a vote until after circulation of the amended Management Circular and Proxy.

[4] On July 29 and August 2, 2022, we heard Cohen's application. The panel considered the written and oral submissions of Cohen, of YourWay and of the executive director.

[5] On August 3, 2022, the panel dismissed Cohen's application (2022 BSECCOM 325), with reasons to follow. These are the reasons for the panel's earlier ruling.

II. Background

YourWay

[6] YourWay is a company incorporated under the laws of British Columbia. YourWay was previously known as Hollister Biosciences Inc.

[7] YourWay is in the business of manufacturing and distributing cannabis products. YourWay is a publicly-traded company and trades on the Canadian Securities Exchange under the symbol YOUR.

[8] At the time of the application the Board consisted of six directors including Mr. R who was then the executive chairman of YourWay.

YourWay's articles

[9] Part 10 of YourWay's articles governs the meetings of YourWay shareholders. Section 10.3 provides that: "The directors may, at any time, call a meeting of shareholders." There is no other provision in the articles for calling a meeting of shareholders.

[10] Part 14 of YourWay's articles governs the election and removal of YourWay directors. Section 14.12 provides that a shareholder may nominate persons for election as directors of YourWay in accordance with section 14.12(b), (c), and (d). Specifically, with respect to when a nomination must be delivered, section 14.12(c) provides:

> (c) To be timely under 14.12(b)(i), a Nominating Shareholder's notice to the Corporate Secretary of the Company must be made:
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> (i) in the case of an annual meeting of shareholders, not less than 30 nor more than 65 days prior to the date of the annual meeting of shareholders; provided, however, that in the event that the annual meeting of shareholders is called for a date that is less than 40 days after the date (the "**Notice Date**") on which the first public announcement of the date of the annual meeting was made, notice by the Nominating Shareholder may be made not later than the tenth (10^{th}) day following the Notice Date; and
>
> …

(iii) Notwithstanding the foregoing, the board may, in its sole discretion, waive any requirement in this §14.12(c).

[11] Section 14.12(f) provides that notwithstanding any non-compliance with the notice provisions, shareholders may still discuss the nominations at the shareholders meeting, and the Board chair has discretion as to whether to disregard the nomination.

[12] Section 14.12(i) provides as follows:

(i) In no event shall any adjournment or postponement of a Meeting of Shareholders or the announcement thereof commence a new time period for the giving of a Nominating Shareholder's notice as described in §14.12(c) or the delivery of a representation and agreement as described in §14.12(e).

The AGSM and director nominations

[13] On April 22, 2022, management of YourWay published a Notice of Meeting and Record Date on SEDAR advising that it intended to hold its annual general and special shareholders meeting (AGSM) on June 30, 2022. At the time management published the meeting materials on SEDAR, the Board had not discussed nor passed a resolution setting a date for the AGSM.

[14] On May 18, 2022, management of YourWay changed the announced date of the AGSM to July 14, 2022. At the time management changed the announced date to July 14, 2022, the Board had not discussed nor passed a resolution setting a date for the AGSM.

[15] On June 7, 2022, management of YourWay changed the announced date of the AGSM to July 18, 2022. At the time management changed the announced date to July 18, 2022, the Board had not discussed nor passed a resolution setting a date for the AGSM.

[16] On June 9, 2022, the then current chief financial officer of YourWay provided the Board with a draft form of proxy, draft form of management information circular, and draft form of board resolution which sought to:

(a) ratify, fix, authorize, and approve the AGSM date of July 18, 2022;

(b) reduce the Board from six directors to five; and

(c) nominate Mr. R, Mr. Cohen, Ms. D, Mr. H and Mr. M (the Management Nominees) for election as directors.

[17] YourWay's chief financial officer asked that the Board endorse the ratification and nomination resolution before the end of June 10, 2022. The Board did not return signed copies of the resolution on June 10, 2022.

[18] On June 11, 2022, Mr. R called an emergency Board meeting to occur on Sunday, June 12, 2022. Mr. R advised that the purpose of the emergency Board meeting was to discuss, among other things, approval of the draft AGSM documents. No emergency Board meeting was held on June 12, 2022.

[19] On June 13, 2022, Cohen provided notice to YourWay of his intention to put forward his own nominees for shareholders (Cohen Nominees) to vote on at the upcoming AGSM. Also on June 13, 2022, management of YourWay changed the announced date of the AGSM to August 8, 2022. At the time management changed the announced date to August 8, 2022, the Board had not passed a resolution setting a date for the AGSM.

[20] On June 16, 2022, through counsel, Cohen provided the Notice to YourWay.

[21] On June 28, 2022, the Board met to discuss the slate of nominees to the Board as well as approval of the Management Circular. At the June 28, 2022 meeting:

(a) YourWay's counsel and Mr. R took the position that the Notice was not effective in accordance with YourWay's articles;

(b) Mr. R asked the Board to approve either the Management Nominees or the Cohen Nominees (which were comprised of substantially new individuals, except for Mr. Cohen and Mr. M);

(c) the Board's vote was tied; and

(d) Mr. R exercised his discretionary 'tiebreaker' vote in favor of putting forward to the shareholders the Management Nominees as directors.

[22] After the June 28, 2022 Board meeting, and 12 days after the Notice was delivered to YourWay, counsel for YourWay sent counsel for Mr. Cohen an email which included the following:

> As your client is aware, the board just approved a slate of director nominees and the circular. As your client was informed during the meeting, the notice that was delivered to Cassels and in your email below was not duly and timely delivered in accordance with the articles of the company and as a result, Jake's nominees are not duly nominated for election as directors at the meeting on August 8th

[23] On June 29, 2022, YourWay filed the Management Circular, the Proxy, and the Notice of Annual General and Special Meeting of Shareholders on SEDAR. Only the Management Nominees were put forward for shareholders to vote on at the AGSM in the materials filed by YourWay.

[24] Cohen did not accept the exclusion of the Cohen Nominees from consideration at the AGSM and filed his application to the Commission on July 11, 2022. In proceedings before us, Cohen submitted YourWay's management was attempting to entrench itself and to prevent the shareholders from having an opportunity to determine who should manage the company. YourWay submitted that Cohen was seeking to change management to shield himself from a possible investigation and that the Notice was defective because it was not timely, it contained inaccuracies about Cohen's ownership interest, it did not disclose material interests of Cohen and another potential nominee regarding a transaction proposed for YourWay and the Notice lacked other information required in a dissident proxy circular.

[25] During the preliminary stages of this proceeding, YourWay questioned the jurisdiction of the Commission to make the orders sought by Cohen. Upon learning that YourWay was challenging the Commission's jurisdiction, Cohen filed a substantially duplicative application with the British Columbia Supreme Court.

III. The issues and our approach to them

[26] This application and the arguments made by the parties raise four primary issues:

(a) does Cohen have standing to bring this application;
(b) does the Commission have jurisdiction to grant the relief sought by Cohen;
(c) if the Commission has jurisdiction, should the Commission exercise that jurisdiction; and
(d) based on the evidence presented to us, should the orders sought be granted?

[27] We have concluded that even if we have jurisdiction to grant the orders sought, this is not an appropriate context for us to exercise our jurisdiction. Our analysis below explains why we reached that conclusion. In light of our conclusion, it was not necessary for us to address the other issues which were argued before us.

IV. Statutory framework

[28] The relevant provisions of the Act are as follows:

Division 1 - Interpretation
Definitions

92 In this Part:

"interested person" means

(a) an issuer that is, or whose securities are, the subject of a take over bid, issuer bid or other offer to acquire, business combination or related party transaction, or an issuer whose securities are the subject of a proxy solicitation,

(b) a security holder, director or officer of an issuer referred to in paragraph (a),

(c) an offeror,

(d) the executive director, and

(e) any person not referred to in paragraphs (a) to (d) who, in the opinion of the commission or the Supreme Court, as the case may be, is a proper person to make an application under section 114 or 115;

"issuer bid" means a direct or indirect offer to acquire or redeem a security or a direct or indirect acquisition or redemption of a security that is

(a) made by the issuer of the security, and

(b) within a prescribed class of offers, acquisitions or redemptions;

"take over bid" means a direct or indirect offer to acquire a security that is

(a) made by a person other than the issuer of the security, and

(b) within a prescribed class of offers to acquire.

Division 2 — General
Making a bid
98 A person must not make a take over bid or an issuer bid, whether alone or acting jointly or in concert with one or more persons, except in accordance with the regulations.

Recommendation relating to bid
99 (1) When a take over bid has been made, the directors of the issuer whose securities are the subject of the take over bid must

(a) determine whether to recommend acceptance or rejection of the take over bid or determine not to make a recommendation, and

(b) make the recommendation, or a statement that they are not making a recommendation, in accordance with the regulations.

(2) An individual director or officer of the issuer whose securities are the subject of a take over bid may recommend acceptance or rejection of the take over bid if the recommendation is made in accordance with the regulations.

Division 7 — Special Applications
Applications to the commission
114 (1) On application by an interested person, if the commission considers that a person has not complied with or is not complying with a requirement under this Part, Part 14 or the regulations related to this Part or Part 14, or that a person is acting contrary to the public interest, the commission may make an order

(a) restraining the distribution of any record used or issued in connection with a take over bid, issuer bid, business combination, related party transaction or proxy solicitation,

(b) requiring an amendment to or variation of any record used or issued in connection with a take over bid, issuer bid, business combination, related party transaction or proxy solicitation, and requiring the distribution of amended, varied or corrected information,

(c) requiring the distribution of any record relating to a take over bid, issuer bid, business combination, related party transaction or proxy solicitation that the commission considers must be distributed,

(d) directing any person to comply with a requirement under this Part, Part 14 or the regulations related to this Part or Part 14,

(e) restraining any person from contravening a requirement under this Part, Part 14 or the regulations related to this Part or Part 14,

(f) directing the directors and officers of any person to cause the person to comply with or cease contravening a requirement under this Part, Part 14 or the regulations related to this Part or Part 14,

(g) varying a period prescribed under a regulation related to this Part or Part 14,

(h) rescinding a transaction with any interested person, including the issue of a security or an acquisition and sale of a security,

(i) requiring any person to dispose of any securities acquired in connection with a take over bid, issuer bid, business combination, related party transaction or transaction in relation to which proxies are being or were solicited,

(j) prohibiting any person from exercising a voting right attaching to a security,

(k) prohibiting any person from exercising a right attaching to a derivative,

(l) requiring that
(i) all persons,

(ii) the person or persons named in the order, or

(iii) one or more classes of persons

cease trading in, or are prohibited from purchasing, any securities or derivatives relating to a take over bid, issuer bid, business combination, related party transaction or proxy solicitation, or

(m) providing that any or all of the exemptions set out in this Act, the regulations or a decision do not apply to a person.

[29] Most of the submissions which we received focused on the proper interpretation of section 114 of the Act, especially the meaning of the words "interested person". The submissions focused on whether the "public interest" discretion to make orders is limited to the context of bids, acquisitions and other activities which are listed in the definition contained in section 92(a) of the Act and which the balance of that part of the Act addresses. In relation to those interpretive issues we heard submissions on the modern approach to statutory interpretation as defined by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC), [1998]1 SCR 27, and we received evidence from Hansard regarding the language used in the Act. We also heard submissions on the relevance of recent statutory changes and we heard submissions on the role of headings in statutory interpretation. Although we need not address all of the submissions we received, we note that we found all submissions were helpful.

V. Analysis

[30] Our own analysis begins with an aspect of section 114 of the Act raised by the following words of the section:

> …if the commission considers that…a person is acting contrary to the public interest, the commission may make an order...

[31] The language of section 114 focuses us on both the conduct of "a person" and what is meant by "public interest" in the Act generally and in section 114 specifically. If the conduct in question relates to an area of public interest which is not grounded in the Act, then at a minimum we should exercise our discretion not to assess the conduct in question and it may be that we have no jurisdiction to do so.

[32] In considering the issues before us, we found the submissions of the executive director describing the distinctions between the objectives and guiding principles of each of securities and corporate legislation very helpful. These submissions are as follows:

> 9. At its core, securities legislation is a disclosure-based framework to ensure that securityholders have the information they need to make investment decisions. Within this framework, the Commission's mission is "to protect and promote the public interest by fostering a securities market that is fair and warrants public confidence, and a dynamic and competitive securities industry that provides investment opportunities and access to capital."
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> 10. The right of shareholders to nominate or elect directors, and specific requirements around holding or calling a shareholders' meeting, are found in corporate law. Corporate governance requirements, including around the duties owed by directors, are also in corporate legislation.
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> 11. There are overlapping areas of regulation as between corporate statutes governing individual reporting issuers and securities legislation. Requirements in securities legislation which reflect corporate law requirements are consistent with the Commission's mission to foster a fair securities market that warrants public confidence, and are designed to complement, but not supplant, corporate law requirements.
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> 12. Of note, securities legislation contains various requirements around the disclosure and content of proxy-related materials, as well as securityholder communication procedures for these materials.
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> 13. The requirement in securities legislation to send a proxy to registered securityholders only applies where management of a reporting issuer gives notice under corporate law of a meeting to its registered holders of voting securities.
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> 14. The requirement in securities legislation to send an information circular is triggered when a person (or company) solicits proxies from registered holders of voting securities of a reporting issuer. Securities legislation also sets out beneficial owner communication procedures to ensure that securityholders of a reporting issuer, whether registered holders or beneficial owners, have the opportunity to be treated alike as far as is practicable.
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> 15. Securities legislation also contains corporate governance requirements around matters such as audit committees and disclosure of board practices and composition. With respect to corporate transactions, in certain jurisdictions there are also detailed requirements concerning related-party transactions.

16. Continuous disclosure requirements in securities legislation also prescribe specific disclosure in the information circular where a reporting issuer proposes to undertake a significant corporate action that will be put to a shareholder vote under corporate law (e.g. plans of arrangement or other actions or transactions under *Part 9–Company Alterations* of the BC Business Corporations Act (BCBCA) that require shareholder approval).

17. However, the requirement to obtain shareholder approval for these corporate actions is contained in corporate law.

18. The Commission's jurisdiction is generally limited to the enforcement of our own requirements under the Act. It generally does not include enforcing compliance with corporate law requirements, including the requirements around shareholder meetings and director nominations and elections, or the application or interpretation of advance notice provisions.

19. Given the different objectives and guiding principles of securities law as compared to corporate law, the remedies for breaches also differ.

20. The Commission has been mindful of the balance that it must strike in considering issues invoking both securities and corporate law considerations, and of the different remedies offered under the two statutes. In *Re Hecla Mining* a joint panel of the BCSC and the OSC stated,

> Public confidence in the capital markets requires us to consider the responsibilities of boards of directors in implementing corporate actions, including the duties owed by directors to the corporation, the standard of care imposed on directors, and the deference afforded to the business judgment of properly informed directors following appropriate governance processes…. We must also take into account that corporate law has its own remedies, available through the courts, for actions that fall short of corporate law standards, including, in appropriate cases, the oppression remedy found in many Canadian corporate law statutes. Contract law may also afford remedies in particular cases as between corporations and their shareholders. It is not the role of securities regulators to offer redress on these grounds or duplicate these remedies.

35. In Re *Hamilton* the panel referred to certain core principles concerning the public interest jurisdiction arising from securities regulators' cases from across the country. One of those "core" principles is:

> …in using and defining the scope of the public interest jurisdiction, panels must tie their analysis to the twin mandates of the Act, which are investor protection and ensuring fair and efficient capital markets[.]

36. The panel went on to develop a threshold for determining whether conduct was "abusive" to the capital markets, which may suggest orders in the public interest were required. In developing this threshold, the panel included a "useful check" on the exercise of the public interest jurisdiction, which is: **"*whether the reasonable expectations of participants in the capital markets would be met with the exercise of the Commission's public interest jurisdiction in the given circumstances*."**

[33] The different objectives and principles of each of securities and corporate legislation forms the basis of our analysis of the issues before us. The core of the dispute between Cohen and YourWay engages corporate law, not securities law. It revolves around director nominations, the interpretation and enforcement of advance notice provisions and the conduct of shareholders meetings. All of the relief claimed in this application is available under the British Columbia *Business Corporations Act* from the British Columbia Supreme Court.

[34] We do not see any issue of law or policy engaged here involving securities or trading in securities which would engage the public interest in the sense that those words are used in section 114. Even if we have jurisdiction, we conclude that the reasoning from *Hamilton* applies to the question of whether we should exercise our discretion to assess and make orders with respect to the conduct of YourWay. We have concluded that the participants in the capital markets would not reasonably expect the Commission to exercise its public interest jurisdiction in these circumstances. As a result, an order under section 114 is not called for.

VI. Conclusion

[35] For the foregoing reasons, we dismissed Cohen's application.

June 22, 2023

For the Commission

Gordon Johnson
Vice Chair

Judith Downes
Commissioner

Jason Milne
Commissioner