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The Law Society of Upper Canada | Barreau du Haut-Canada

THE ANNOTATED Shareholder Agreement 2016

CHAIR

Samantha Horn
Stikeman Elliott LLP

September 21, 2016

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THE ANNOTATED SHAREHOLDER AGREEMENT 2016

Chair: **Samantha Horn, *Stikeman Elliott LLP***

September 21, 2016
9:00 a.m. to 12:00 p.m.
Total CPD Hours = 2h 30 m Substantive Hours + 30 m Professionalism

The Law Society of Upper Canada
130 Queen Street West
Toronto, ON

SKU CLE16-0091001

Agenda

9:00 a.m. – 9:05 a.m. **Welcome and Opening Remarks**

Samantha Horn, *Stikeman Elliott LLP*

9:05 a.m. – 9:25 a.m. **Preliminary Considerations**

Rory Cattanach, *Wildeboer Dellelce LLP*

9:25 a.m. – 9:45 a.m. **Management and Governance of the Corporation**

Jordan Dolgin, *Dolgin Professional Corporation*

9:45 a.m. – 10:05 a.m.	**Transfers and Exit Rights** Samantha Horn, *Stikeman Elliott LLP*
10:05 a.m. – 10:20 a.m.	**Financing the Corporation** David Dunlop, *McMillan LLP*
10:20 a.m. – 10:35 a.m.	**Coffee and Networking Break**
10:35 a.m. – 10:55 a.m.	**Options to Purchase Shares on Termination, Death, and other Triggering Events** Samantha Horn, *Stikeman Elliott LLP*
10:55 a.m. – 11:15 a.m.	**Shareholder Disputes** Stanley Freedman, *Aird & Berlis LLP*
11:15 a.m. – 11:45 a.m.	**Professionalism Issues When Dealing with Shareholder Agreements** (30 minutes Ⓟ) Jordan Dolgin, *Dolgin Professional Corporation* David Dunlop, *McMillan LLP* Caterina Galati, Senior Competence Counsel *The Law Society of Upper Canada*
11:45 a.m. – 12:00 p.m.	**Go Ahead and Ask Us (Question and Answer Session)**
12:00 p.m.	**Program Ends**

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David Dunlop, *McMillan LLP*

Caterina Galati, Senior Competence Counsel
The Law Society of Upper Canada

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TAB 01

THE ANNOTATED Shareholder Agreement 2016

Fact Situation

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Fact Situation

Jennifer Day and Heather Night started a nursery school Brantford about 20 years ago. At the time, they incorporated a company to hold the school and issued 50% of the shares to each of them personally. Each of them is a director. They also entered into a shareholders' agreement which contains restrictions on transfer (other than to family members) and a shotgun provision.

The school thrives, they move premises and a number of times and purchase land and a building. Their lawyer suggests that the building should be owned in a separate company, rather than by the School Co., so they incorporate a new company (Land Co.) to own the building.

Soon, the business expands further and decide to open a separate school north of Hamilton. That school is also run by School Co. and the building and land they buy is also owned by Land Co.

By this time, they both have children of their own and decide to do some estate planning. They both incorporate holding companies and issue shares to themselves and family members. They use the same lawyer that set up School Co. and Land Co. and that drafted the original shareholders agreement.

Heather Night decides she would like to retire. At first, they try to find buyers for the school, but they cannot agree on which buyers they prefer. Jennifer thinks she might be able to borrow money to buy out Heather or bring in a new partner, but she doesn't know where to begin. Time passes and Heather is getting more and more anxious to get something done. At the last meeting with their lawyer, she said she

might have to invoke the shotgun provision. Jennifer Day comes to you for advice.

Questions:

At what times along the time line of these facts would it have been prudent to readdress the shareholders agreement?

What are the problems with exercising the shotgun provision in the face of the changes to the business over the intervening years since the shareholders agreement was put in place?

Are there conflict issues for the lawyer involved that should have been discussed?

What are some other provisions that could have been included in the shareholders agreement that might have assisted them when it came to a time for a sale?

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TAB 02

THE ANNOTATED Shareholder Agreement 2016

The Annotated Shareholder Agreement 2016

Jordan Dolgin, *Dolgin Professional Corporation*
David Dunlop, *McMillan LLP*
Stanley Freedman, *Aird & Berlis LLP*
Samantha Horn, *Stikeman Elliott LLP*

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ANNOTATED SHAREHOLDER AGREEMENT

Provisions relating to

Corporate Governance

Financing and Capital Requirements

Confidential Information

Non-Competition

Dispute Resolution

September 21, 2016

Samantha Horn is a partner of Stikeman Elliott LLP. Ms. Horn would like to acknowledge and thank Stanley W.L. Freedman, Aird & Berlis LLP, Rory Cattanach, Wildeboer Dellelce LLP, David Dunlop, McMillan LLP and Jordan Dolgin, Dolgin Professional Corporation for their assistance. This paper is a revised version (for the program held September 22, 2014) of the document originally prepared by Stanley W.L. Freedman for The Law Society of Upper Canada's program entitled "The Annotated Shareholder Agreement 2012" held on September 14, 2012.

The elements relating to Corporate Finance and Capital Requirements were updated by David Dunlop, McMillan LLP for the program held September 21, 2016.

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[Note to reader: Many shareholder agreement precedents are available, and there can never really be such a thing as a "standard form" of shareholder agreement. The attached shareholder agreement is not intended to be an exhaustive agreement. Counsel must always look to the requirements of the particular shareholders of the particular corporation, the character of those shareholders (corporate, individual or trust), the size of the corporation and the business being carried on by it, all of which will ultimately determine the content of the shareholder agreement.]

[UNANIMOUS] SHAREHOLDER AGREEMENT[1]

THIS AGREEMENT dated as of [●].

BETWEEN:

[●][2]

("[●]")

and

[●]

("[●]")

and

[●]

(the "Corporation")[3]

---

[1] Under the Canada Business Corporations Act (the "CBCA") and the Business Corporations Act (Ontario) (the "OBCA"), management of the business and affairs of a corporation is reserved to its directors, who cannot at common law be relieved by an agreement from their duties to manage the corporation, subject to the provisions that permit unanimous shareholder agreements to restrict the powers of directors and transfer such powers to the shareholders, along with the associated liabilities.

This section would only be used in circumstances where the agreement is intended to be a unanimous shareholder agreement which restricts the power of the directors of the corporation to manage the business and affairs of the corporation, and this section is drafted to transfer all powers of the directors to the shareholders (along with the corresponding liabilities as described below). Often, this is not desired by shareholders, who use a corporation in order to insulate themselves from liability and may only wish to transfer certain powers to the shareholders. A unanimous shareholder agreement can set out which specific powers are to be transferred to shareholders. If the unanimous shareholder agreement restricts the discretion or powers of the directors to manage the business and affairs of the corporation, the corporate law statute applicable to the corporation may provide that the directors are released from their duties and liabilities relating to such restricted powers, and those duties and liabilities are assumed by the shareholders, thereby releasing the directors of such personal liability.

[2] The parties should be described in sufficient detail so that they are identifiable. Particulars, such as address, etc., may be useful for registering security, providing notice, etc., however, the agreement will often contain this information in a following section entitled "Notice".

[3] The corporation is a party because there are provisions in most shareholder agreements that directly bind the corporation. Including the corporation as a party addresses issues of privity.

FOR REFERENCE ONLY

RECITALS

1. In these recitals,[4] all capitalized terms, unless otherwise defined, shall have the meanings given to them in [Section 1.1];

2. The Corporation was [incorporated/amalgamated/continued] under the Act by articles of [incorporation/amalgamation/continuation] dated [●];

3. Each of the Shareholders is the registered and beneficial owner of the number and class of shares in the capital of the Corporation set out opposite such Shareholder's name below:[5]

Name	Number and Class of Shares
[●]	[●]
[●]	[●]

and the said shares in the aggregate represent all of the issued and outstanding shares in the capital of the Corporation as at the date of this Agreement; [and]

4. [individual] and [individual] (referred to individually as **"Principal"**, and collectively as "Principals") are the sole registered and beneficial shareholders of [corporate shareholder];

5. The parties to this Agreement desire to enter into certain agreements relating to, among other things, their shareholdings in the Corporation, their rights and duties as Shareholders of the Corporation and the management and operation of the Corporation;

NOW THEREFORE[6] in consideration of the mutual[7] covenants and agreements contained in this Agreement, the sum of one dollar and other good and valuable consideration[8], the receipt and sufficiency of which are acknowledged[9], the parties agree as follows:

---

[4] Recitals are used to set out the background facts and purpose of the agreement. Caution should be used when drafting recitals; if the body of the agreement contains ambiguity, courts will often turn to the recitals to determine the intent of the parties. Some lawyers will elect not to have recitals at all. It is useful in your agreement to have the parties represent the truth and accuracy of the recitals by including the following language: "The parties acknowledge and declare that the foregoing recitals are true and correct in substance and in fact".

[5] Consider using a schedule rather than a chart in the agreement where there are many shareholders and/or many classes of shares.

[6] A statement of consideration follows the recitals. The common law distinguishes between a contractual obligation characterized by consideration which is enforceable and a gratuitous or voluntary promise unsupported by consideration which is unenforceable. A statement of consideration is not necessary if there is in fact consideration. This statement is somewhat antiquated. From a "plain English" style of drafting, the phrase "IT IS AGREED" is preferable and may be substituted.

[7] The concept of "mutuality" is important to indicate that the parties are each bound in some way.

[8] This incorporates the concept that consideration is something, such as money, which has some value in the eyes of the law.

[9] This goes to the sufficiency of the consideration.

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ARTICLE 1

INTERPRETATION

1.1 **Defined Terms**. [10], [11] In addition to the terms otherwise defined in this Agreement, the following terms shall have the meanings set out below:

"Act" means [the *Canada Business Corporations Act* or the *Business Corporations Act* (Ontario)], and any successor legislation thereto;

"Affiliate" shall have the meaning ascribed to it in the Act;

"Agreement" means this [unanimous] shareholder agreement and all schedules attached to this agreement, all as may be supplemented or amended from time to time;

"Articles" means the articles of incorporation **[amalgamation][continuance]**of the Corporation dated [●], as amended from time to time;

"Board" means the board of directors of the Corporation;

"Business Day" means any day other than a Saturday, Sunday or statutory holiday in the Province of **[Ontario] [jurisdiction where Corporation's head office is located];**

"By-law" means each by-law of the Corporation, including without limitation, general By-law No. 1 in the form enacted on [●] (collectively the **"By-laws"**);

"Corporation" means [●] and any successor resulting from any amalgamation, merger, arrangement or other re-organization of or including the Corporation or any continuance of the Corporation under the laws of another jurisdiction;

"Directors" means the directors of the Corporation;

"Governmental Entity" means any (i) governmental or public department, central bank, court, commission, board, bureau, agency, commissioner, minister, governor-in-council, cabinet, tribunal or instrumentality whether international, multinational, national, federal, provincial, state, municipal, local or other, (ii) subdivision or authority of any of the above, or (iii) quasi-governmental or private body exercising any regulatory, expropriation or taxing authority under or for the account of any of the above.

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[10] Definitions are used in agreements to express, as precisely and clearly as possible, the terms of the agreement and the parties' intentions regarding their respective rights and obligations. If a term is not defined, courts will adopt the literal and ordinary meaning of the language used.

[11] Defined terms should begin with the first letter capitalized to ensure the reader knows it is a defined term for the purposes of the agreement. A few rules: do not use unnecessary definitions; avoid "forced" definitions or definitions that create a special or extraordinary meaning for words which already have an established meaning such as defining "black" to mean "white"; avoid "loaded" definitions which contain too much information, and avoid "ping-pong" definitions which are definitions that include other defined terms.

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"Majority Shareholder" means a Shareholder who holds [●]% or more of the total issued and outstanding Shares of the Corporation, which, at the time of execution of this Agreement, shall mean each of [●] and [●];

"Minority Shareholder" means a Shareholder **[who holds less than [●]% of the total issued and outstanding Shares of the Corporation,] [who is not a Majority Shareholder]** which, at the time of execution of this Agreement, shall mean each of [●], [●] and [●];

"Person" means an individual, person, partnership, corporation, limited liability company, unlimited liability company, joint stock company, trust, unincorporated association, joint venture or other entity or Governmental Entity, and pronouns have a similarly extended meaning.

"Shareholder" means any Person who from time to time holds Shares and is bound by the provisions of this Agreement which, at the time of execution of this Agreement, shall mean [●], [●], [●], [●] and [●]; and

"Shares" means the **[common]** shares in the capital of the Corporation, the rights, privileges, restrictions and conditions attaching to which are described in the Articles.

"[●]…"

1.2 **Currency.**[12] All amounts referred to in this Agreement are intended to be in lawful money of Canada[13] unless otherwise specified in this Agreement.

1.3 **Computation of Time Periods.** In this Agreement, in the computation of periods of time from a specified date to a later specified date, unless otherwise expressly stated, the word "from" means "from and including" and the words "to" and "until" each mean "to but excluding" and all references to "day" or "days" shall mean calendar days unless designated as "Business Days".

1.4 **Schedules.**[14] The following schedules are attached to and incorporated in this Agreement by reference:

Schedule A – [●]

Schedule B – [●]

1.5 **Miscellaneous**. In this Agreement:

(a) unless the context otherwise requires, the singular shall include the plural and vice versa, and in particular the definitions of words and expressions set forth in Section

[12] Consider whether the Currency Act applies to the agreement in which case the currency of the agreement will be the currency of Canada unless otherwise provided for.

[13] Note that "lawful money" actually is a defined term in the Currency Act. The preferred expression is "currency of Canada" which is broader than "lawful money".

[14] Where a schedule, appendix or other document is attached to an agreement, the agreement should include a clause stating whether that document is an integral part of the agreement or attached for reference and information only.

FOR REFERENCE ONLY

1.1 shall be applied to such words and expressions when used in either the singular or the plural form;[15]

(b) unless the context otherwise requires, words importing a particular gender shall include the other gender;

(c) unless otherwise indicated, references to Articles, Sections, Subsections or Schedules should be construed as references to the applicable articles, sections, subsections or schedules of this Agreement;

(d) the division of this Agreement into Sections, the insertion of headings and the provision of a table of contents are for convenience of reference only and are not to affect the construction or interpretation of this Agreement;[16]

(e) any reference to a statutory provision shall include that provision as from time-to-time modified or re-enacted providing that in the case of modifications or re-enactments made after the date of this Agreement the same shall not have effective substantive change to that provision;[17]

(f) references to, or to any particular provision of, a document shall be construed as references to that document as amended to the extent permitted by this Agreement and in force at any time.

FOR REFERENCE ONLY

[15] This is an "extended meanings" clause which is simply inserted to extend the meanings of certain words.

[16] Headings should not influence the interpretation or construction of either the agreement or a particular provision as they are not always truly descriptive of the subject matter.

[17] The general rule is that in the absence of an express statement in the agreement that legislative changes and amendments will apply as they occur, courts will deem references to statutes in agreements to refer to the original legislation.

ARTICLE 2

BUSINESS, ORGANIZATION, MANAGEMENT, GOVERNANCE AND AFFAIRS OF THE CORPORATION[18]

2.1 **Business of the Corporation.**[19] The Corporation shall carry on the business of [describe business] (the **"Business"**).

2.2 **Action in Accordance with this Agreement.** Each Shareholder shall vote his, her or its Shares to give effect to this Agreement, whether at a meeting of Shareholders or by written resolution of the Shareholders.

2.3 **Number and Nomination of Directors**.[20] The number of Directors to be elected within the minimum and maximum limits set out in the Articles shall be [●]. Each of the Majority Shareholder(s) shall be entitled to nominate [●] Directors to the Board, as long as they continue to hold at least ●% of the Shares. The Minority Shareholder(s) shall, by majority vote of the Minority Shareholder(s), be entitled to nominate [one] Director to the Board, **[provided that such Minority Shareholder hold in the aggregate [●%] or more of the issued and outstanding shares.]**.[21]

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[18] One of the key matters addressed by shareholder agreements is the way in which the affairs of the corporation are to be conducted. As with any agreement, the parties may agree on virtually any principles, rules and procedures to govern the affairs of the corporation. The organization, management and governance of a corporation will depend on the business deal between the parties and the goals that they are trying to achieve. If the client has not fully articulated his or her concerns in relation to the organization, management and governance of the corporation, counsel may wish to provide the client with a checklist or similar document to give some guidance and enable the client to formulate proper instructions.

[19] It is useful to describe the business of the corporation to ensure that there is agreement among the shareholders regarding the corporation's goals, particularly where the corporation is newly-formed or launching a new business. Reference may be made later in the agreement to the defined term "Business" to the extent that shareholder and/or board approval is required to modify or expand the Business of the corporation or for the purpose of dealing with restrictive covenants.

[20] In drafting the section of the agreement regarding directors, consider reviewing the following questions with your client: Will the number of directors be the same as the number of shareholders? If the shareholders do not own equal numbers of shares, will some shareholders have the right to nominate more than one director? If a shareholder acquires more shares, will that shareholder be entitled to nominate more directors? Will a reduction in the number of shares held by a shareholder extinguish director nomination rights? Should any of the directors be "independent? How will the number of directors be changed? Will each individual shareholder or principal of a corporate shareholder personally act as a director or will each shareholder nominate some other Person? Is the CEO to be a director? May a shareholder replace himself or his or her nominee as a director at any time? If any director retires or is unable to serve, may the Person who nominated that director nominate a replacement? How many directors must be present for quorum to exist? Do the nominees of particular shareholders have to be present for a quorum to exist? If so, what will happen if such directors are not able to be present because they are either physically or mentally incapacitated? Will decisions of the board of directors be passed by a simple majority, or is a greater number required? Does the director nominated by a particular shareholder have to agree to particular resolutions? In case of a tie, will the chairperson of the meeting have a second or "casting" vote? Are directors to be paid for their services to the corporation or for attending meetings of the board? If so, on what basis? Will the corporation pay a director's fee or only for reasonable out-of-pocket expenses? Is there to be a chairperson of the board and, if so, how is such Person to be appointed? Will there be committees of the board and, if so, how will they be selected? What will their mandates be? Also, note that control of the board of directors may have tax implications.

[21] Where the corporation has a few significant or dominant shareholders, they will likely want the right to nominate a majority (if not all) of the board. However, it may still be possible for the minority shareholders to negotiate board

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OR

2.3 **Number and Nomination of Directors.** The Board shall consist of a minimum of [●] and a maximum of [●] Directors. Initially, the number of Directors shall be set at [●]. The Board shall be empowered by a special resolution of the Shareholders (as defined in the Act[22]) to set the number of Directors from time to time in accordance with the provisions of this Agreement. Each of: (i) [●], (ii) [●] and (iii) [●] shall be entitled to nominate [●] Director(s) to the Board during such time as they beneficially own at least [●]% of the Shares outstanding at such time (calculated without regard to any Shares issued after the date of this Agreement) (the **"Minimum Percentage"**) provided, however, if at any time any of (i) [●], (ii) [●] or (iii) [●] beneficially owns less than the Minimum Percentage of the Shares outstanding at such time, they, acting jointly with any other Shareholder, may be entitled to nominate [●] Director(s) to the Board if he or she or it, together with such other Shareholder, (i) collectively beneficially own at least the Minimum Percentage, and (ii) execute and deliver to the Board a voting trust agreement in respect of such Shares in form and substance satisfactory to the Board, acting reasonably.[23]

2.4 **Filling Director Vacancies and Replacement of Nominees.**[24] If a Director ceases to be a Director for any reason (including, by reason of death, resignation or retirement of such Director), the nominating party that nominated the former Director shall forthwith notify the Corporation and the other Shareholders of his, her or its new nominee, and the Corporation and the Shareholders shall execute all such resolutions or other documents and do such other acts and things as the Corporation or such nominating party, acting reasonably, may request for the purpose of electing such nominee to the Board. If a nominating party wishes to replace one or more of the Directors nominated by his, her or it from time to time, the Corporation and each Shareholder shall execute all such resolutions or other documents and do all such other acts and things as the Corporation or such nominating party, acting reasonably, may request for the purpose of effecting any such replacement.

OR

2.4 **Filling Director Vacancies and Replacement of Nominees.** If any vacancy occurs in the Board, such vacancy shall be filled by a person nominated by the Shareholder(s) who originally nominated the vacating Director. A Director may be replaced at any time by the Shareholder(s) who nominated such Director, provided that in **[each case such replacement Director shall be approved by the other Shareholder] [the case of such replacement by the Minority Shareholders, such replacement Director shall be approved by the Majority Shareholders].**

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representation and to require certain fundamental issues to be subject to a "super majority" approval (for example, certain fundamental issues may require the approval of all majority shareholders and 50% of all minority shareholders).

[22] CBCA does not require the shareholders to set a specific number of directors for the board.

[23] If there are only a few shareholders, the agreement could provide that when one shareholder reaches a certain percentage shareholding, that shareholder will be entitled to additional board representation. If there are many shareholders but none hold a significant percentage of the outstanding shares, and if certain groups of shareholders form logical groups, the agreement could give a collective right to board representation to such group, rather than to individuals.

[24] It is important to determine in advance the procedure for filling vacancies on the board to avoid confusion, potential conflicts and the loss of the ability to achieve quorum.

FOR REFERENCE ONLY

2.5 **Election of Directors.** The Shareholders shall vote their Shares, otherwise exercise their influence in respect of the Corporation and take all other action that may be required to ensure that the Board shall be constituted at all times with the persons nominated from time to time in accordance with this Agreement.

OR

2.5 **Election of Directors.** The Shareholders agree to vote at all meetings of the Shareholders and to act in all other respects in connection with the corporate proceedings of the Corporation so as to ensure that the nominees of the parties provided for in this Agreement are elected and appointed and retained in office from time to time as members of the Board.

2.6 **Notice of Meeting of Directors.**[25] Any meeting of the Directors may be called by any Director on not less than [●] days written notice given to all the other Directors, which notice shall contain or be accompanied by an agenda of the business to be considered at the meeting and a reasonably detailed description of each item of business, provided that all the Directors may, by an instrument in writing delivered before or after the meeting or by participating at the meeting, waive notice of any meeting of the Directors. Any such meeting shall be considered to be duly constituted notwithstanding the absence of notice in respect thereof.

OR

2.6 **Notice of Meeting of Directors.** The Corporation or any Director shall notify each member of the Board, in writing, of the intended date of any meeting of the Directors at least [●] Business Days prior to the date of such intended meeting. If any Director notifies the other Directors and the Corporation, in writing, on or before the day immediately preceding the day of the intended meeting, requesting a delay of the intended meeting, the Corporation shall delay the intended meeting [●] days from the day originally scheduled for the intended meeting or such earlier date as may be contained in such notice. Each Director shall be entitled to deliver such notice to the other Directors no more than [●] with respect to each meeting of the Directors.

2.7 **Place and Frequency of Directors' Meetings.**[26] Subject to the Act, meetings of the Directors shall be held in Person at the offices of the Corporation or at such other place as agreed upon by the Directors, or by way of telephone conference call. The Directors shall meet at least [quarterly].

OR

2.7 **Place and Frequency of Directors' Meetings.** Meetings of Directors shall be held [quarterly] at any place within or outside of Ontario. If all the Directors present at or participating in a meeting

[25] The notice may contain any details, and the notification period may be for any length of time, that the client desires. Consideration should be given, however, to the practicality of requiring very detailed notices, or very long or very short notice periods, which could lead to a situation where a director claims that a notice was improperly given.

[26] Subject to the provisions of the governing act, these provisions may contain any detail that the client desires. However, it is important that the requirements be practical and reasonable. For example, it may not be reasonable to expect that a board of 10 directors be available for board meetings on a weekly basis.

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consent[27], a meeting of Directors may be held by means of such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously, and a Director participating in such a meeting by such means is deemed for the purposes of the Agreement to be present at that meeting.

2.8 **Quorum for Directors' Meetings.** A quorum for a meeting of the Directors shall be [●], provided that the Directors nominated by [●] and [●] must be present for such a meeting to be properly constituted.

OR

2.8 **Quorum for Directors' Meetings.** A quorum for meetings of the Directors shall be a majority of the Directors then in office, present in person or by means of telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously (and, for greater certainty, a meeting of the Directors may be constituted at which some Directors are present in person and other Directors are present by means of such communication facilities). If (i) no such quorum is present within [half an hour] following the time at which the meeting is scheduled to take place, the meeting shall stand adjourned to the same day in the immediately following week (or, if that day is not a Business Day, the next following Business Day) at the same time and place, and (ii) no such quorum is present within [half an hour] following the time at which the second adjourned meeting is scheduled to take place, subject to the Act, the Directors present thereat shall constitute a quorum for the transaction of the business for which the meeting was called.

OR

2.8 **Quorum for Directors' Meetings.** A quorum for a meeting of the Directors shall be [●]. If a quorum is not constituted at any meeting of the Directors for which notice has been duly given by reason of the failure or refusal of certain Directors to attend, any Director who did attend such meeting may thereupon give notice of a further meeting of the Directors to transact the business which was to have been transacted at the meeting at which no quorum was constituted and a quorum for such further meeting of the Directors shall be any [●] Directors present in person or by proxy.

2.9 **Decisions of Directors.**[28] Any resolution of the Directors shall only be validly passed and effective if:

(a) at a duly constituted meeting of the Directors, such resolution receives the affirmative vote of at least [a majority] of the Directors participating in the meeting (each Director having only one vote) **[and the Directors voting in the affirmative include at least [●] nominee of [●] and at least [●] nominee of [●]]**, or

(b) all the Directors consent in writing to such resolution.

[27] Consider obtaining a generic consent from directors that meetings can be held by electronic means to avoid having to obtain consent each time.

[28] This provision provides flexibility for board meetings. Directors may make decisions by way of a meeting of the directors or by way of written resolution. This is also provided for in both the OBCA and CBCA and as such may be left out of the agreement.

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2.10 **No Casting Vote.** The chairperson of any meeting of the Directors shall be the Chief Executive Officer of the Corporation for the time being, if present, and, in his or her absence, shall be such nominee of the Directors as shall be determined at the meeting. The chairperson of any meeting of the Directors shall not have a second, double or casting vote if there is a tie in the votes cast at any meeting of the Directors. [29]

OR

2.10 **Casting Vote.** If at any meeting of the Directors the total number of votes (determined without regard to the exercise of any second or casting vote contemplated in this Section) in favour of a particular resolution is equal to the total number of votes against such resolution, then the chairperson of the meeting (if a Director) shall have, in addition to any other vote to which the chairperson is entitled, a second or casting vote.

2.11 **Powers and Duties of Directors.** All matters or questions requiring action or decision at a meeting of the Directors shall be determined by a [majority] of the votes cast at such meeting except that the following actions require the prior approval of [two-thirds] of the votes cast at a meeting of the Directors and such other approval as is required by law:[30]

[29] It is generally not recommended that directors be given casting votes unless there is a potential for a deadlock or tie-vote situation (unless the shareholders intend the corporation to be deadlocked, which may be the case), as the director with the casting vote will be in a position to exercise board control. Unless this is the intended result (which may in fact be the case in circumstances, for example, involving a majority shareholder and a minority shareholder), the agreement should specifically provide otherwise. If this is the intended result, consider allowing each shareholder to nominate the director with the casting vote for a certain period of time. By rotating control, the shareholders can try to ensure fairness throughout the term of the agreement. Of course, the appropriateness of either of the two suggested sections will depend upon the circumstances. An exception may be where a casting vote resides with a director who is neutral vis-à-vis all shareholders.

[30] The following matters represent a possible listing of issues which may be relevant, although counsel should ensure that these matters do not conflict with those listed later in the agreement under the heading "Powers and Duties of Shareholders". Of course, in any particular situation there may be other specific issues that the shareholders would want to include in this section. Recall that directors have a fiduciary duty to act in the best interests of all shareholders (and not any particular shareholder) in making any determination. Consider the following issues: any change to the articles; the enactment, amendment or repeal of any by-laws; employment contracts with, and remuneration of, key employees; the declaration or payment of any dividend or other distribution to shareholders; the purchase, sale, mortgage or lease by the corporation of any real property; any purchase, commitment, lease or expenditure which, if completed, would raise the aggregate capital expenditures of the corporation in any fiscal year to more than $[●]; the lending or borrowing of money by the corporation; the authorization or execution by the corporation of any contract, the performance of which by the corporation will require more than one year to complete; the guarantee by the corporation of obligations of any other Person, or the provision of other financial assistance by the corporation; the approval of the annual budget or business plan of the corporation; the approval of the corporation's financial statements; the amendment of the signing authority relating to the corporation's bank accounts; a change in the corporation's bankers; a change in the corporation's auditors or accountants; a change in the number of directors of the corporation; an amalgamation of the corporation with any other corporate entity; the initiation of any steps to dissolve or wind-up the corporation, whether voluntary or involuntary; the sale of all, or substantially all of the property of the corporation; the transfer of any shares in the capital of the corporation; the allotment or issue of any shares or other securities of the corporation; the purchase or redemption of any shares in the capital of the corporation; any other action or transaction not in the ordinary course of business of the corporation; any change in the financial year of the corporation; any change in the corporation's business. Many of these matters already require a special resolution of shareholders (i.e. a two-thirds majority) under the OBCA and CBCA.

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(a) any capital expenditure by the Corporation which individually exceeds $[●] or which would result in the Corporation incurring capital expenditures in excess of $[●] in any financial year;

(b) any declaration or payment of dividends or any other distributions on the Shares, other than dividends on the Shares in any financial year of the Corporation in an amount less than [●]% of the net profits after tax of the Corporation (as determined by the Corporation's auditors) during its immediately preceding financial year;

(c) any creation of, amendment, alteration or variance to any profit sharing, stock option or purchase, pension, insurance or other employee benefit plan;

(d) any mortgage, charge, grant of security interest in or encumbrance by the Corporation of any of the assets of the Corporation, except for purchase money security interests incurred in the ordinary course of business;

(e) any sale, lease, exchange or other disposition of any assets of the Corporation having an aggregate value in excess of $[●] in any financial year, other than inventory disposed of in the ordinary course of business;

(f) except in the ordinary course of business, any borrowing of funds or incurring of indebtedness, obligation or liability by the Corporation in excess of or which would involve the expenditure by the Corporation of any amount in excess of $[●];

(g) any acquisition greater than [●]% of the securities of or substantially all the undertaking, property or assets of any other entity;

(h) any financial assistance by the Corporation, by means of loan, guarantee or otherwise, to any Shareholder, Director or employee of the Corporation or to any Person or entity related (within the meaning of the *Income Tax Act* (Canada)) to such Shareholder, Director or employee;

(i) any issuance by the Corporation of any additional Shares or other securities; and

(j) the hiring, termination or amendment to the compensation package of any employee of the Corporation.

2.12 **Notice of Meeting of Shareholders.**[31] Any meeting of the Shareholders may be called by resolution of the Directors and shall be called by the Directors upon the request of any Shareholder or Shareholders owning not less than [●]%[32] of the Shares then outstanding, in either case on not less than [●] nor more than [●] days' written notice, which notice shall state (i) the nature of the business to be

[31] The notice may contain any details, and the notification period may be for any length of time, that the client desires. Consideration should be given, however, to the practicality of requiring very detailed notices, or very long or very short notice periods, which could lead to a situation where a shareholder claims that a notice was improperly given. Make sure by-laws are consistent with the agreement.

[32] The CBCA and OBCA provide that a shareholder holding 5% or more of the shares that can be voted at a meeting can requisition a meeting. Consider if seeking a higher threshold is preferable.

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transacted thereat in sufficient detail to permit the Shareholder to form a reasoned judgment thereon, and (ii) the text of any resolution to be submitted to the meeting, provided that all the Shareholders of the Corporation may, by an instrument in writing delivered before or after the meeting or by participation at the meeting, waive notice of any meeting of Shareholders, in which event any such meeting shall be considered to be duly constituted notwithstanding the absence of notice in respect thereof.

OR

2.12 **Notice of Meeting of Shareholders.** The Corporation or any one Shareholder may call a meeting of the Shareholders, and the Corporation shall notify each Shareholder, in writing, of the intended date of any meeting of the Shareholders at least [●] Business Days prior to the date of such intended meeting. If any Shareholder notifies the other Shareholders and the Corporation, in writing, on or before the day immediately preceding the day of the intended meeting, requesting a delay of the intended meeting, the Corporation shall delay the intended meeting [●] days from the day originally scheduled for the intended meeting or such earlier date as may be contained in such notice. Each Shareholder shall be entitled to deliver such notice to the other Shareholders no more than [●] with respect to each meeting of the Shareholders.

OR

2.12 **Notice of Meeting of Shareholders.** Any meeting of the Shareholders may be called by resolution of the Directors or by any Shareholder who owns not less than [●]% of the outstanding Shares entitled to vote at such meeting, on not less than [●] days written notice given to all the Shareholders of the Corporation, which notice shall set out the matters to be raised at such meeting, provided that all the Shareholders of the Corporation may, by an instrument in writing delivered before or after the meeting or by participation at the meeting, waive notice of any meeting of Shareholders, in which event any such meeting shall be considered to be duly constituted notwithstanding the absence of notice in respect thereof.

2.13 **Place and Frequency of Shareholders' Meetings.**[33] Subject to the Act, meetings of Shareholders shall be held in person at the offices of the Corporation or at such other place as the Shareholders unanimously determine. The Shareholders shall meet at least [annually].

OR

2.13 **Place and Frequency of Shareholders' Meetings.** Meetings of Shareholders may be held at any place within or outside of Ontario. If all the Shareholders of the Corporation present at or participating in a meeting consent, a meeting of Shareholders may be held by means of such telephone, electronic or other communication facilities as permit all Persons participating in the meeting to communicate with each other simultaneously and instantaneously, and a Shareholder participating in such a meeting by such means is deemed for the purposes of the Agreement to be present at that meeting.

[33] Subject to the provisions of the incorporating act, these provisions may contain any detail that the client desires. However, it is important that the requirements be practical and reasonable. For example, it may not be reasonable to expect that 10 shareholders be available for shareholder meetings on a monthly basis.

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2.14 **Quorum for Shareholders' Meetings.** A quorum for a meeting of Shareholders shall be Shareholders, represented by proxy or attending in person, holding not less than [●]% of the aggregate number of Shares, and shall include at least each of [●] and [●].

OR

2.14 **Quorum for Shareholders' Meetings.** A quorum for meetings of the Shareholders shall be a majority of the Shareholders, present in person or by means of conference telephone or other communications equipment as permits all Persons participating in the meeting to communicate with each other simultaneously and instantaneously (and, for greater certainty, a meeting of the Shareholders may be constituted at which some Shareholders are present in person and other Shareholders are present by means of such communication facilities). If (i) no such quorum is present within [half an hour] following the time at which the meeting is scheduled to take place, the meeting shall stand adjourned to the same day in the immediately following week (or, if that day is not a Business Day, the next following Business Day) at the same time and place, and (ii) no such quorum is present within [half an hour] following the time at which the second adjourned meeting is scheduled to take place, subject to the Act, the Shareholders present thereat shall constitute a quorum for the transaction of the business for which the meeting was called.

2.15 **Decisions at Shareholder Meetings.**[34] Any resolution of the Shareholders of the Corporation shall only be validly passed and effective if:

(a) such resolution is voted on at a duly constituted meeting of the Shareholders entitled to vote thereon and the votes in favour of such resolution constitute not less than [●]% of the total number of votes attached to all then issued Shares for the time being enjoying voting rights at such meeting, or

(b) all the Shareholders entitled to vote thereon consent in writing to such resolution.

2.16 **Powers and Duties of Shareholders.** No action shall be taken in regard to any of the following matters except with the prior express approval of a resolution of the Shareholders approved by the holders of not less than [●]% of the then issued and outstanding Shares expressed by a resolution passed at a meeting of the Shareholders or signed in writing by all the Shareholders and any other consent or consents required by law by the holders of a class of shares voting separately and as a class: [35]

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[34] This provision provides flexibility for shareholder meetings. Shareholders may make decisions by way of a meeting of the shareholders or by way of written resolution. This is also provided for in the OBCA and CBCA and as such may be left out of the agreemet.

[35] The following matters represent a possible listing of issues that may be relevant, although counsel should ensure that these matters are not also covered in the agreement under the heading "Powers and Duties of Directors". Of course, in any particular situation there may be other specific issues that the shareholders would want to include in this section. Consider the following issues: any change to the articles; the enactment, amendment or repeal of any by-laws; employment contracts with, and remuneration of, key employees; the declaration or payment of any dividend or other distribution to shareholders; the purchase, sale, mortgage or lease by the corporation of any real property; any purchase, commitment, lease or expenditure which, if completed, would raise the aggregate capital expenditures of the corporation in any fiscal year to more than $[●]; the lending or borrowing of money by the corporation; the authorization or execution by the corporation of any contract, the performance of which by the corporation will require more than one year to complete; the guarantee by the corporation of obligations of any other Person, or the provision of other financial assistance by the corporation; the approval of the annual

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(a) the acquisition or commencement of any business other than the Business or any material change in the Business;

(b) any amendment or other variation to the Articles, including any proposal to increase the authorized share capital of the Corporation or any proposal to create, reclassify, redesignate, subdivide, consolidate or otherwise change any Shares (whether issued or unissued), provided that the Board determines (without inquiring into or giving effect to the personal circumstances of any individual Shareholder) that the interests of no one Shareholder shall be disproportionately adversely affected vis-à-vis the interests of any other Shareholder by such reorganization, arrangement, amalgamation or merger;

(c) any dissolution, liquidation or winding-up of the Corporation or other distribution of the assets of the Corporation for the purpose of winding-up its affairs, whether voluntary or involuntary, except where such dissolution, liquidation or winding-up or other distribution is done voluntarily by the Corporation in order to reorganize its corporate structure provided that the Board determines (without inquiring into or giving effect to the personal circumstances of any individual Shareholder) that the interests of no one Shareholder shall be disproportionately adversely affected vis-à-vis the interests of any other Shareholder by such reorganization;

(d) any transaction between the Corporation and any Person not dealing at arm's length with the Corporation or any of the Shareholders or any transactions by the Corporation for the benefit of any of the Shareholders or any Person not dealing at arm's length with the Corporation or any of the Shareholders, including any guarantee by the Corporation of any obligations of any such Person; provided, however, that the Corporation may enter into employment agreements with its employees in the ordinary course of business;

(e) the issuance of any shares in the capital of the Corporation or any securities, warrants, options or rights convertible into, exchangeable for, or carrying the right to subscribe for, shares in the capital of the Corporation;

(f) the redemption or purchase for cancellation of any shares in the capital of the Corporation, other than any purchase of Shares in accordance with this Agreement;

(g) the transfer by the Corporation of any right, title or interest it may now or hereafter have in or to any shares in the capital of any other Corporation;

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budget or business plan of the corporation; the approval of the corporation's financial statements; the amendment of the signing authority relating to the corporation's bank accounts; a change in the corporation's bankers; a change in the corporation's auditors or accountants; a change in the number of directors of the corporation; an amalgamation of the corporation with any other corporate entity; the initiation of any steps to dissolve or wind-up the corporation, whether voluntary or involuntary; the sale of all, or substantially all of the property of the corporation; the transfer of any shares in the capital of the corporation; the allotment or issue of any shares or other securities of the corporation; the purchase or redemption of any shares in the capital of the corporation; any other action or transaction not in the ordinary course of business of the corporation; any change in the financial year of the corporation; any change in the corporation's business. Tax issues may arise where a shareholder controls most major decisions applicable to a corporation.

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(h) the conversion, exchange, reclassification, redesignation, subdivision, consolidation or other change of or to any shares in the capital of the Corporation;

(i) any change in the auditors of the Corporation;

(j) any capital expenditure involving liability of the Corporation of $[●] or more;

(l) any issue of Shares or the granting of any option or right (including convertible securities, warrants, or convertible obligations of any nature) for the purchase or issuance of any Shares or other securities of the Corporation;

(m) any declaration or payment of dividends by the Corporation or other payment or distribution by the Corporation to any of the Shareholders or any Person not dealing at arm's length with them;

(o) the approval of, or the approval of any material alteration in, the annual operating budget of the Corporation;

(p) any material capital expenditures or leasing of capital equipment by the Corporation;

(q) any proposed sale, lease, exchange or other disposition of property or assets of the Corporation other than in the ordinary course of business;

(r) any purchase of assets or shares by the Corporation other than in the ordinary course of business, including without limitation any investment in or purchase of any business by the Corporation, whether directly or by acquiring the entity through or by which the business is operated or in any other manner;

(s) any borrowing or other financing by the Corporation or the application for, or obtaining of, any line of credit by the Corporation from any financial institution or any material alteration in such financing arrangements;

(t) any assignment, mortgage, charge, pledge, encumbrance of, or grant of a security interest in, property or assets of the Corporation other than in the ordinary course of business;

(u) any provision of any guarantee, indemnity or other financial support by the Corporation other than in the ordinary course of business;

(v) the hiring or dismissal by the Corporation of a manager of its business or any other senior executive or key employee of the Corporation and the determination of, or any material alteration in, the remuneration and compensation or other terms and conditions of employment of such manager or employees;

(w) any proposed sale, lease, exchange or other disposition of **[assets of the Corporation having a value in excess of $[●] in the case of any one such transaction or $[●] in the aggregate in any fiscal year;][all or substantially all of the assets of the Corporation]**

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(x) any purchase of assets or shares by the Corporation and any investment in or purchase of any business by the Corporation, whether directly or by acquiring the entity through or by which the business is operated or in any other manner with a cost in excess of $[●] in the case of any one such transaction or $[●] in the aggregate in any fiscal year; and

(y) any change in the number of Directors on the Board.

2.18 **Business Plan.** At least [●] month(s) prior to the end of each fiscal year, the Corporation shall prepare an updated business plan for the next fiscal year period of the Corporation and present it to the Board for approval. Upon approval, a copy of the business plan shall forthwith be provided to each of the Shareholders. The Board shall be entitled to revise the business plan at any time and from time to time in accordance with this Agreement.

2.19 **Budgets.**[36] Prior to the commencement of each fiscal year, the President or Chief Executive Officer of the Corporation shall prepare and present to the Directors an annual operating and capital expenditures budget for the following fiscal year, which budget will be subject to final approval by resolution of the Directors.

Any variance in budgeted items of greater than [●]% per item shall be set out in a statement to be delivered to the Directors and each Shareholder concurrently with the delivery of monthly financial statements to the Directors and each Shareholder as set out in this Agreement.

Any capital expenditure in excess of $[●], individually or in aggregate, which (i) does not appear on a budget approved by the Directors, or (ii) exceeds by more than [●]% of the amount of such capital expenditure appearing on a budget approved by the Directors, shall require approval of the Directors.

2.20 **Books and Records.**[37] The Corporation shall maintain books of account at its registered office which shall contain accurate and complete records of all transactions, receipts, expenses, assets and liabilities of the Corporation. The Corporation shall provide all Shareholders with reasonable access to such books and records during usual business hours. Proper books of account and entries shall be made therein of all matters, transactions and things as are usually written and entered in books of account kept by Corporations engaged in concerns of a similar nature together with all books, securities, letters and other things belonging to or concerning how the Corporation's business is being carried on. Each of the Shareholders shall have free access **[at all times**] to examine and copy them and shall at all times furnish to the other Shareholders correct information, accounts and statements of and concerning all transactions pertaining to the Corporation without any concealment or suppression. Each Shareholder shall also be entitled from time to time, during usual business hours on reasonable notice to the

[36] For most businesses, a budget is part of the routine financial planning process, and a provision similar to this one is generally appropriate in a shareholder agreement particularly if there are passive shareholders. For shareholders who are not actively involved in the business of the corporation, a budget provides a review of management's financial expectations for the corporation and affords an opportunity for comparison against actual results reflected in the corporation's periodic interim financial statements.

[37] If a corporation has more than one place of business, this provision should be altered to permit books of account to be kept at the various business locations. This section gives shareholders broad access to the corporation's books of account. Consider the appropriateness of such broad access in respect of minority shareholders holding a small interest in the corporation.

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Corporation, to examine (or cause its representatives to examine) (i) the Articles and the By-laws, and (ii) the minute books of the Corporation.

OR

2.20 **Books and Records.** Any Shareholder may, at any time during usual business hours and without causing unreasonable disruption of the operations of the Corporation, cause such Shareholder's employees, agents, professional advisors or other authorized representatives to review any of the books and records of the Corporation.

2.21 **Information to be Provided to Shareholders.**[38] [39] The Corporation shall maintain proper, complete and accurate books and accounts in accordance with generally accepted accounting principles consistently applied and in effect from time to time. The Corporation shall supply on a timely basis all necessary financial and other information to the Shareholders as of the end of their respective fiscal and/or tax accounting years in order to permit each Shareholder to comply on a timely basis with its respective reporting, tax and other requirements imposed by law or otherwise. Each Shareholder shall also be entitled to receive from the Chief Financial Officer of the Corporation:

(a) within [●] days following the end of each fiscal year of the Corporation, a copy of the Corporation's audited financial statements for such fiscal year, including a balance sheet as at the end of such fiscal year and statements of changes in financial position and profit and loss for such fiscal year, together with notes to such financial statements, management's discussion and analysis of financial condition and results of operation, comparative statements for the prior fiscal year, a comparison to the statements included in the last approved Business Plan;

(b) when available following the end of each fiscal year of the Corporation, a post audit review letter of the Corporation's auditors for such fiscal year;

(c) **[a copy of any new or updated Business Plan or any revision from time to time to any Business Plan, forthwith after such new or updated Business Plan or such revision has been approved by the Directors in accordance with this Agreement;]**

[38] Periodic financial statements are often desired for monitoring of the operations of the corporation. The specific statements produced periodically for the shareholders will vary depending upon the nature of the business and the shareholders' involvement. Shareholders who are not actively involved in the business of the corporation will likely be interested in receiving periodic statements to monitor their investment. However, the level and frequency of statements set out in this provision may not be workable or warranted for all businesses. Consider whether such access is appropriate for minority shareholders. Under the OBCA and CBCA, only annual financial statements are required to be delivered to shareholders.

[39] Consider whether provisions should be added to require information to be provided to a potential purchaser of a shareholder's shares (assuming transfers are permitted) subject to an appropriate non-disclosure agreement with the corporation.

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2.22 **Auditors.**[40] The Shareholders agree that, unless otherwise required by law, at each annual meeting they shall dispense with the requirement under the Act to appoint an auditor and shall execute such documents as are reasonably required to effect the foregoing.

OR

2.22 **Auditors.** The Directors shall from time to time appoint auditors for the Corporation (the "Auditors"). Unless otherwise agreed, the Corporation shall cause the Auditors to prepare and deliver to each of the Shareholders, as soon as possible after each fiscal year end, audited financial statements for the applicable fiscal year, including a balance sheet, a statement of earnings and retained earnings and a statement of source and application of funds, together with an audit report. For the foregoing purposes, the Auditors shall have access to all books of account, records and all vouchers, cheques, papers and documents of or which may relate to the Corporation.

2.23 **Deposit of Shares and Power of Attorney.**[41] Upon the execution of this Agreement and throughout the term of this Agreement, each Minority Shareholder shall deposit any original share certificates representing its issued Shares with the Secretary **[or any other officer]** of the Corporation, duly executed for transfer in blank on the reverse of such share certificates. Each Minority Shareholder acknowledges that in the event that he, she or it fails to execute or cause to be executed all such agreements and documents as may be necessary under this Agreement, the Act, the Corporation's articles and by-laws or otherwise to enable the completion of a Sale Transaction or a sale under Article 7 or Article 8, the Secretary **[or such other officer]** may execute and deliver all such agreements and documents as may be required to be executed and delivered by he, she or it pursuant to this Agreement (and for such purposes each Minority Shareholder irrevocably constitutes and appoints the Secretary **[or such other officer]** as the true and lawful attorney for the Minority Shareholder with full power of substitution in the name of and on behalf of the Minority Shareholder, with no restriction or limitation in that regard). This power of attorney is coupled with an interest, shall not be revoked or terminated by any act or thing nor, to the extent permitted by law, by the death or disability of the Minority Shareholder (in which case the heir, executors, administrators and estate shall be bound hereby to the maximum extent permitted by law), unless this Agreement is terminated. This power of attorney supersedes any prior delegation of authority that conflicts with it. **[Do we need 2 witnesses to each shareholder's signature under the *Power of Attorney Act*?]**

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[40] Counsel should review the applicable corporate law statute to ensure that the auditor arrangements are in compliance with legislation. For example, the decision not to appoint auditors is only valid until the next succeeding annual meeting of shareholders and only if consented to in writing pursuant to the governing act by all the shareholders, including shareholders not otherwise entitled to vote.

The auditor provision could provide that shareholders holding a specified percentage of shares be entitled to require that an auditor be appointed. If counsel includes such a provision, the specified percentage should be kept low enough that shareholders having a substantial equity interest in the corporation may require that an auditor be appointed without being in breach of the agreement.

If the business is still in the initial development and growth stage, counsel may wish to include provisions concerning the appointment of an accountant in lieu of an auditor until the corporation's revenues exceed a specified dollar amount.

[41] Coupled with a "Further Assurances" clause, this provision will help to ensure that the refusal of any obstinate shareholder to comply with his, her or its obligations to deliver materials under the agreement can be overcome.

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ARTICLE 3

CORPORATE FINANCE AND CAPITAL REQUIREMENTS[42]

3.1 **Additional Capital.**[43] Except as provided in this Agreement or as otherwise agreed by a particular Shareholder, none of the Shareholders or Principals shall be obligated to subscribe for shares, make loans to the Corporation or guarantee any of its indebtedness.

OR

3.1 **Additional Capital.** Except as provided in this Agreement, or as agreed by a particular Shareholder, none of the Shareholders shall be obligated to acquire additional Shares or to make loans to the Corporation, or guarantee its indebtedness or provide any other financial assistance. It is the intention of the parties that further funds required by the Corporation from time to time will be obtained, to the extent possible, by borrowing[44] from a Canadian chartered bank or other lender acceptable to the

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[42] Incorporation is often undertaken for the purpose of limiting shareholder liability, including any obligation to fund the operations of the corporation. In certain circumstances, there may be a desire to include funding obligations. Ensure your clients understand the implications of such obligations. See Schedule 3 for sample provisions.

[43] It is appropriate that a shareholder agreement contain some description of the manner in which the corporation will be permitted to raise additional capital as the need arises. In general, a corporation may expect to require additional capital in one of two situations: (a) where the corporation requires capital to expand its existing operations, or (b) where the corporation is thinly capitalized or otherwise performing poorly and thus in need of a capital infusion to continue operating. In most cases, shareholder agreements merely establish that a corporation may request additional capital contributions without imposing a corresponding obligation on shareholders to provide such capital. In some cases, however, corporations (and even shareholders themselves) will demand the ability to require further capital contributions from other shareholders, often in the form of loans or additional share subscriptions. Often the entire purpose of incorporating is to limit shareholder liability and insulate them from the obligation to fund the corporation.

When drafting provisions relating to future capital contributions, counsel must assess the future financial needs of the corporation. In addition, counsel should address technical issues such as: (a) the basis upon which the corporation may initiate a funding call (i.e. unanimous or majority approval of the directors and/or shareholders), (b) the available and preferred methods of financing the loans or subscriptions, (c) the order in which the corporation should seek funding, e.g. going to banks first, (d) whether security will be given for loans, (e) whether the personal guarantees of the shareholders will be required (i.e. whether such guarantees shall be several, joint and several, etc.), and (f) the repercussions of non-compliance with the provision.

As the ability to access additional capital will vary with time and from shareholder to shareholder, counsel must also consider the needs and perspective of their client. Where the client is a minority shareholder or has limited access to additional capital, counsel must be mindful of any provision that would allow the client to be "squeezed out" or diluted by other shareholders. Conversely, where the client is a majority shareholder or highly capitalized, counsel must ensure that the capital contribution provisions do not put the client in the position of being disproportionately responsible for providing the future capital needs of the corporation. In some cases, minority shareholders will have their shareholdings significantly diluted as the result of non-participation in share issuances. Consider whether an optional "call right" on such minority shares becomes available to be exercised on a proportionate basis by all other shareholders if such minority shareholding falls below an agreed percentage.

[44] Shareholder loans are often preferable to share subscriptions from the perspective of the lender, as they may be secured against the assets of the corporation or, where applicable, other shareholders and the principal repaid on a tax free basis. Where shareholder loans are involved, counsel must ensure that such loans (and accompanying interest payments) are permitted by, and/or will not put the corporation into non-compliance with, financial covenants in other creditor documents and that the debt (and security granted) thereby created will automatically be subordinated to bank indebtedness (and the bank's security). Consider as well if an imbedded formula or amount determined by the directors and/or shareholders in successive financial years of the corporation is set aside and available for repayment of all or a portion of any shareholder

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[Board of Directors and/or Shareholders][45], by way of [list of approved financial arrangements (i.e. loans, revolving credit facilities, etc.)].

3.2 **Pre-emptive Rights.**[46] Except as the Shareholders shall otherwise [unanimously, by a majority, etc.] agree, each offering by the Corporation of Shares shall be made in accordance with this Section, other than **[NTD: build in exceptions for employee stock option plans, acquisitions using shares approved by the Board, existing convertible securities, shares issued as a dividend, shares issued in a financing and other exceptions from the requirement to make an offering to all Shareholders, as applicable]**.

Each offer shall be made to the then Shareholders as nearly as may be made in proportion to the number of Shares respectively held by the Shareholders at the date of the offer.

Each offer shall be made in writing **[by the Secretary of the Corporation]**, shall indicate the price at which the Shares are being offered **[as determined from time to time by the Board OR as determined pursuant to this Agreement]**, shall state the use of proceeds of the issue and shall state that any Shareholder who desires to subscribe for Shares in excess of their proportion shall, in their subscription, specify the number of Shares in excess of their proportion which the Shareholder desires to purchase. If any Shareholder does not subscribe for their proportion, the unsubscribed Shares shall be used to satisfy the subscriptions of the Shareholders for Shares in excess of their proportion. If the subscriptions in excess are more than sufficient to exhaust the unsubscribed Shares, the unsubscribed Shares shall be divided pro rata among the Shareholders desiring Shares in excess of their proportion in proportion to the number of Shares held by them respectively at the time of the offer, but no Shareholder shall be bound to take any Shares in excess of the amount the Shareholder so desires.

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loans after having taken into account its working capital and other capital requirements, including potential capital reserves. Counsel should also exercise caution that the amount of any shareholder loans are not postponed until payment of any bank or other third party indebtedness.

[45] Depending on the circumstances, it may be advisable to further define what constitutes an acceptable lender or to set out specifically which institutions or types of institutions constitute acceptable lenders. In addition, in some cases one or more shareholders may be interested in being a lender to the corporation before financial arrangements are made with a bank or other third party. In such cases, consideration can be given to providing one or more shareholders with the first opportunity (but generally not the obligation) to provide funding to the corporation, including the general or specific parameters as to interest, repayment of capital and any security to be provided for the loan.

[46] While shareholders may not wish to obligate themselves to providing the corporation with future capital, they will in most circumstances desire the opportunity to participate in any future share issuances, if for no other reason than to avoid the dilution of their proportionate holdings. For this reason, shareholder agreements often include a pre-emptive right stipulating that if a corporation's board of directors decides in its discretion to issue additional shares, such shares must first be offered pro rata to existing shareholders.

In the usual course, shares not subscribed for will be re-offered to all participating shareholders on a pro rata basis until there are either no shares left for subscription or no shareholders willing to purchase them. Alternatively, some agreements provide that shareholders may elect to subscribe for either more or fewer shares than their pro rata entitlement. Consequently, if a shareholder were to subscribe for less than his, her or its pro rata entitlement, the balance of the shares offered to that shareholder would be available to the other shareholders who subscribed for shares. Such pre-emptive rights generally require the delivery of a notice to shareholders advising them of the board's decision to issue further shares, followed by a specified period within which shareholders must elect whether they wish to participate.

Where a pre-emptive rights clause contemplates the sale of shares of the corporation to third parties, the clause will usually contain a provision which requires that third party subscribers agree to be bound by the terms of the shareholder agreement.

FOR REFERENCE ONLY

If the Shares of any issue shall not be capable, without division into fractions, of being offered to or being divided among the Shareholders in the proportion above-mentioned, the same shall be offered to or divided among Shareholders as nearly as may be in these proportions and any balance shall be offered to or divided among the Shareholders or some of them in such manner as may be determined by the Board.

If all of the Shares of any issue are not subscribed for within a period of [●] days after the same are offered to the Shareholders pursuant to the provisions of this Section, the Corporation shall, during the following period of [●] days, offer all or any of the Shares not taken up by the Shareholders to any Person who is not a Shareholder, but the price at which the Shares may be allotted and sold shall not be less than the subscription price offered to the Shareholders, pursuant to this Section.

Every issue of Shares shall be subject to the condition that the subscriber therefor shall, if not a party, agree to be bound by the terms of this Agreement and become a party in accordance with this Agreement.

ARTICLE 4

CONFIDENTIAL INFORMATION

4.1 **Confidential Information.**[47] Any matters, financial or otherwise, with respect to the Corporation, its subsidiaries or Affiliates, including without limitation the terms of this Agreement, which are not divulged by the Corporation to the public in the ordinary course of its business shall be deemed to be confidential and any Shareholder who wishes to divulge such confidential information to any third party (other than a purchaser as permitted under this Agreement who is subject to obligations of confidentiality in favour of the Corporation) shall, as a condition to such divulging, obtain the prior approval of the Board.

OR

4.1 **Confidential Information.** Each Shareholder [and Principal] acknowledges that in their capacity as a shareholder or principal of a Shareholder, director, employee or officer of the Corporation they may from time to time be entrusted with [consider types of confidential information – e.g., customer lists, financial information, marketing strategies, production techniques, software etc.] and other information of a privileged and confidential nature which, upon disclosure, would be highly prejudicial to the interests of the Corporation (collectively the **"Confidential Information"**).

Each Shareholder [and Principal] acknowledges and agrees that the right to possess and maintain confidential all such Confidential Information constitutes a proprietary right of the Corporation which the Corporation is entitled to protect.

[47] Shareholders, particularly in closely-held corporations where the shareholders are often performing in a number of capacities, such as officers and employees, may become privy to sensitive information. These two alternative provisions provide examples of relatively brief and more lengthy treatments of the obligations which may be imposed on shareholders with respect to such information.

FOR REFERENCE ONLY

Each Shareholder [and Principal] agrees that it will not at any time, whether then a shareholder of the Corporation or not, directly or indirectly disclose Confidential Information to any Person **[other than the Shareholder's own professional advisors on a need-to-know basis or a purchaser as permitted under this Agreement who is subject to obligations of confidentiality in favour of the Corporation)]** not authorized by the Corporation to receive such information.

Each Shareholder shall return to the Corporation all property, written information and documents of the Corporation and all Confidential Information and all copies of the same, whether in written, electronic or other form or certify as to such information's destruction forthwith upon his or her cessation as a Shareholder.

For greater certainty, nothing in this Agreement imposes liability upon any Shareholder for making disclosures of Confidential Information where such disclosure:

(a) is required by law or court order; or

(b) is otherwise disclosed not as a result of a breach by the Shareholder of his, her or its obligations hereunder.

ARTICLE 5

NON-COMPETITION

5.1 **Restriction on Competition.** Each Shareholder (each a **"Covenantor"**) agrees with each of the other Shareholders and the Corporation (the **"Covenantees"**) that, from the execution of this Agreement and until the expiry of [●] years[48] from the date the Covenantor ceases to be a shareholder of the Corporation (the **"Binding Period"**), the Covenantor will not, directly or indirectly, either alone or in partnership or in conjunction with any Person or Persons as principal, agent, shareholder or in any other manner whatsoever:

(a) carry on or be engaged in or be concerned with or interested in, or advise, lend money to, guarantee the debts or obligations of, or permit his, her or its name or any part thereof to be used or employed by any Person engaged in or concerned with or interested in any business competitive with the Business or any aspect thereof as conducted at any time during the Binding Period;[49]

(b) solicit, interfere with or attempt to solicit or adversely interfere with any supplier, employee, customer or client of or to the Corporation or any Shareholder away from the Corporation other than in the case of an employee through a general solicitation by newspaper, internet or similar advertisements of a general nature; or

[48] The appropriate time period (i.e., the time period which, if challenged, a court would find unobjectionable) may vary among industries or sectors.

[49] The provided language is relatively broad in scope; circumstances may warrant more defined limitations in geographic scope or market sector. Examples of such limitations may be found in the non-competition language found in the "Employment" provisions of this agreement. To be enforceable, a non-competition clause must be reasonable as to the nature, geographic scope and time period of the restriction.

FOR REFERENCE ONLY

(c) **[engage the services of any Person that was an employee, agent or sales representative of the Corporation or any of its Subsidiaries at any time during the Binding Period.[50]]**

Notwithstanding the foregoing, this Section shall not prevent: (i) a Shareholder from purchasing as a passive investor up to [●]% of the outstanding publicly-traded shares or other securities of any issuer listed on a recognized stock exchange (a **"Public Company"**); or (ii) a change of control of a corporate Shareholder whereby a Public Company becomes the controlling shareholder of such Shareholder, *provided, however,* that such Public Company cannot be controlled by a Shareholder.

ARTICLE 6

DISPUTE RESOLUTION

6.1 **Dispute Resolution.**[51] All disputes and questions whatsoever which shall arise between any of the parties in connection with this Agreement, or the construction or application thereof or any Section or thing contained in this Agreement or as to any act, deed or omission of any party or as to any other matter in any way relating to this Agreement, shall be resolved by arbitration.[52,53] Such arbitration shall be conducted by a [single arbitrator].[54] The arbitrator shall be appointed by agreement between the parties or, in default of such agreement, such arbitrator shall be appointed by a Judge of the Superior Court of Justice sitting in Toronto, upon the application of any of the parties and such judge shall be entitled to act as such arbitrator, if he or she so desires.[55] [Unless otherwise agreed to by the parties,] the

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[50] A non-engagement clause is not as common as a non-solicitation.

[51] Shareholders may specify the type of mechanism they wish to use to resolve a dispute, disagreement, deadlock or other such matters of controversy requiring resolution. Commonly, the parties to a shareholder agreement will specify in the shareholder agreement that disputes and questions arising between any of the parties that relate to the shareholder agreement must be submitted to arbitration for resolution. Alternatively, recourse to arbitration may be limited to specific issues. See, for example, "Alternative Arbitration Provision – Limited Recourse to Arbitration".

Dispute resolution mechanisms such as arbitration are sometimes perceived as having the advantage of being more expeditious and economic than traditional litigation. Another perceived advantage of arbitration is the private nature of the proceedings and the ability of the parties to the dispute to select a decision-maker with expertise in a particular area.

[52] An alternative introductory sentence for the first sample provision is provided below:

If any dispute or controversy shall occur between the parties relating to the interpretation or implementation of any of the provisions of this Agreement, such dispute shall be resolved by arbitration.

[53] Alternatively, a recourse to mediation rather than arbitration may be specified. Mediation is sometimes viewed as being less adversarial than arbitration in the sense that the results of mediation proceedings are intended to be mutually acceptable to all parties involved. In contrast, arbitration may be more adversarial and often produces a win-lose result. In circumstances where the parties to a dispute will have an ongoing relationship, a mutually acceptable mediated result may better facilitate the success of the ongoing relationship.

[54] It is open to the parties to decide whether a single arbitrator is required or whether a panel of arbitrators is preferable. As such, the number of arbitrators should be clearly stated in the shareholder agreement. Further, where a panel of arbitrators will act as the decision-maker, the shareholder agreement should stipulate whether a majority or a unanimous decision of the panel is required. For instance, see "Alternative Arbitration Provision – Multiple Arbitrators".

[55] The shareholder agreement may stipulate that the arbitrator(s) be selected from a defined class of Persons, i.e. those having a particular training or accreditation. This approach may be used to help ensure that the arbitrator(s) chosen will have a level of expertise and/or experience that is acceptable to all parties involved.

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arbitration shall be held in [the City of Toronto].[56] The procedure to be followed shall be agreed to by the parties or, in default of such agreement, determined by the arbitrator.[57] The arbitration shall proceed in accordance with the provisions of the *Arbitration Act, 1991* (Ontario). The arbitrator shall have the power to proceed with the arbitration and to deliver his or her award notwithstanding the default by any party in respect of any procedural order made by the arbitrator. The decision arrived at by the arbitrator shall be final and binding and no appeal shall lie therefrom.[58] Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

OR

6.1 **Alternative Arbitration Provision – Multiple Arbitrators.** If any disagreement arises between any of the parties with respect to [the interpretation of this Agreement][59] and upon which the parties cannot agree, then every such disagreement shall be referred to arbitration pursuant to the provisions of the *Arbitration Act, 1991* (Ontario) and in accordance with the provisions of this Section [●]. The following provisions shall govern any arbitration:

(a) the reference to arbitration shall be to [●] arbitrators, one of whom shall be chosen by each of [●] and [●] which arbitrators shall, together, appoint a third mutually acceptable arbitrator;

(b) a decision and any award shall be made by a majority of the arbitrators; and

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The nature of the dispute to be submitted to arbitration will aid in determining whether narrowing the class of Persons from which to select an arbitrator is desirable. For example, if the scope of arbitration is limited to matters of valuation, then one might consider limiting the pool of potential arbitrators to chartered accountants or chartered business valuators. See "Alternative Arbitration Provision – Limited Recourse to Arbitration".

[56] Choice of venue should be considered carefully. Specifying the location of arbitration may avoid disputes arising at a later time regarding this issue. Convenience and accessibility of the venue to all parties are important factors, in addition to underlying factors such as travel and accommodation expenses for parties and counsel, proximity to residence and employment of the parties.

[57] The procedural issues of arbitration are often left to the agreement of the parties, failing which the arbitrator is usually vested with the authority to determine such procedural matters as appropriate. Alternatively, many shareholder agreements provide a comprehensive and detailed regime addressing the procedural matters such as the means of initiating arbitration (i.e. notice requirements), issues of cost, the need for written decisions, evidentiary issues and standing.

[58] As noted above, arbitration provisions are intended to facilitate the resolution of disputes arising from or related to the contractual relationship between parties to a shareholder agreement. Although the samples provided in this Agreement vary with respect to the level of detail and the issues that they address, all arbitration provisions (if the parties intend them to have effect) should accomplish the following: (1) preserve the integrity of the arbitrator's decision and (2) ensure that the arbitrator's decision is binding and cannot be appealed.

[59] Note that the parties may want to specify particular matters or provisions of the shareholder agreement that are not to be submitted to arbitration. For instance:

If any disagreement arises between any of the parties with respect to the interpretation of this Agreement, [other than matters governed by the provisions of Sections ● and ●], and upon which the parties cannot agree, then every such disagreement shall be referred to arbitration pursuant to the provisions of the *Arbitration Act, 1991* (Ontario) and in accordance with the provisions of this [Section ●].

Such exceptions may be used, for instance, in circumstances where the parties have provided a mechanism for resolving disputes regarding the valuation of shares or a formula for the determination of fair market value.

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(c) there shall be no appeal from any award of the arbitrators.

OR

6.1 **Alternative Arbitration Provision – Detailed Procedure.** Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination shall be submitted to and finally resolved by arbitration as follows:

(a) any party may serve notice upon the others to submit such dispute to expedited arbitration;

(b) a single arbitrator shall be appointed by agreement between the parties as soon as possible after the date of notice requiring arbitration has been delivered;

(c) counsel for the parties shall meet with such arbitrator to determine the schedule and procedure for the arbitration;

(d) the arbitration shall take place in the [City of Toronto] and the arbitrator shall fix the time and place in the [City of Toronto] for the purpose of hearing such evidence and representations as the parties may present and, subject to the provisions of this Agreement, the decisions of the arbitrator in writing shall be binding upon the parties;

(e) the arbitrator shall, after hearing any evidence and representations that the parties may submit, make his or her decision and reduce the same to writing and deliver one copy thereof to each of the parties;

(f) the arbitrator may determine any matters of procedure for the arbitration not addressed by counsel pursuant to (c) above. Insofar as they do not conflict with the provisions of this Article, the provisions of the *Arbitration Act, 1991* (Ontario) shall be applicable to an arbitration held under this Article and the arbitrator shall have jurisdiction to do all acts and make such orders as provided in such act. The arbitrator shall [not] have the power to award costs of the arbitration [which shall be shared equally by the parties to the arbitration];

(g) the arbitrator shall have the power to proceed with the arbitration and to deliver his or her award notwithstanding the default by any party in respect of any procedural order made by the arbitrator; and

(h) the decision arrived at by the arbitrator shall be final and binding upon the parties and no appeal shall lie therefrom.

OR

6.1 **Alternative Arbitration Provision – Limited Recourse To Arbitration.**[60] If the relevant parties cannot agree on the calculation of fair market value when same must be determined pursuant to

[60] Care should be taken when drafting arbitration clauses so as not to deny shareholders access to a very powerful remedy if oppressed.

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Section [●], determination of the fair market value shall be referred to the arbitration of a single arbitrator chosen according to Section [●]. The award and determination of the arbitrator shall be binding upon the parties and their respective executors, administrators, personal representatives, assigns and successors, without limitation.

The arbitrator referred to in Section [●] is to be [an independent **"Chartered Business Valuator"**] and to be chosen from one of the following firms of chartered accountants:

(a) [Firm 1];

(b) [Firm 2].

Unless the relevant parties otherwise agree, the Person who shall be the arbitrator shall be such Person as is designated by the firm so chosen.

If the parties are unable to agree on one of the firms listed above from which the arbitrator may be chosen, the arbitrator shall be selected from [Firm 1], and shall be such Person as may be appointed by [Firm 1], unless the relevant parties otherwise agree. If [Firm 1] refuses to act, then the arbitrator shall be selected from [Firm 2] (and shall be such Person as may be appointed by [Firm 2], unless the relevant parties otherwise agree). If [Firm 2] refuse to act, the aforesaid procedure shall be repeated thereafter with another accounting firm of recognized national standing.

All costs and expenses charged by the arbitrator shall be paid by [list parties and details regarding apportionment of costs].

ARTICLE 7
GENERAL

7.1 **Term of Agreement.** This Agreement shall take effect on [●] and shall remain in full force and effect unless otherwise agreed by the parties.

<u>OR</u>

7.1 **Term of Agreement.** This Agreement shall terminate on the earlier of:

In Armstrong v. Northern Eyes, 48 O.R. (3rd) 442 (Div. Ct.), the court stated that it is open to shareholders, by agreement, to select arbitration as the sole means of resolving their disputes and thus, absent extraordinary circumstances (see Deluce Holdings Inc. v. Air Canada, [1992] 12 OR (3rd) 131), to oust the jurisdiction of the court to entertain an oppression remedy proceeding under the OBCA. The court further noted that there is a very strong public policy reason why parties who agree by contract to resolve their differences by arbitration instead of resorting to the court, should be held to their agreement.

Therefore, with a properly constructed and sufficiently broad arbitration clause in a shareholder agreement, it is possible to oust the right of a shareholder alleging oppression to pursue an action for relief under the oppression remedy as well as the jurisdiction of the court to entertain an oppression remedy proceeding under either the OBCA or CBCA.

However, the residual inherent jurisdiction of the courts must not be overlooked. The particular circumstances surrounding each case of alleged oppression will be determinative of whether the oppressed shareholder is permitted to rely on the oppression remedy under the OBCA or CBCA. Such circumstances would likely include the nature of the oppression being complained of as well as the scope and nature of arbitration clause being considered.

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(a) the date on which a Person becomes the registered and beneficial owner of all the Shares;

(b) the date this Agreement is terminated by written agreement of all **[or a supermajority]** of the Shareholders;

(c) [the date upon which there is an initial public offering of Shares;] or

(d) the date upon which the Corporation is wound-up, liquidated or dissolved, whether voluntarily or involuntarily; and

(e) with respect to any individual Shareholder, upon the sale or disposal of all of such Shareholder's Shares in accordance with this Agreement.[61]

Notwithstanding the foregoing, the provisions of Sections [●] and [●][62] and any other obligations under this Agreement which by their terms survive the termination of this Agreement, shall survive the termination of this Agreement.

7.2 **Further Assurances.**[63] The parties shall sign such further and other documents, cause such meetings to be held, cause such resolutions to be passed and such by-laws to be enacted, exercise their vote and influence and do and perform (and cause to be done and performed) such further and other acts or things as may be necessary or desirable in order to give full effect to this Agreement and every part of it. [Any actions required to be taken pursuant to this clause shall be undertaken at the sole cost and expense of the party undertaking such actions.] [Each of the parties agree that they will at all times be faithful to the others and will do their best to further the interests of the Corporation and will at all times cast their votes for the election of the persons as provided in this Agreement as directors of the Corporation, and will at no time cast their vote as a Director or Shareholder for the purpose of ousting the other parties from office, nor shall any of the parties take any measure by way of entering into a conspiracy or agreement for the purpose of ousting the other parties from office or for doing that which may prove detrimental to the interests of any of the parties.]

7.3 **Implementation of Agreement.** If any conflict shall appear between the Articles, By-laws or resolutions of the Corporation and the provisions of this Agreement, the provisions of this Agreement shall govern and supersede the provisions of the Articles, By-laws and resolutions. If there shall be any such conflict, the Shareholders shall amend the Articles, By-laws and resolutions so as to ensure conformity with the terms of this Agreement.

7.4 **Legend on Certificates.** All share certificates of the Corporation shall be endorsed with the following legend:

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[61] Note that this provision may be inconsistent with provisions stipulating that purchasers become parties to the shareholder agreement as a condition of purchasing the shares.

[62] Confidentiality and non-competition provisions should survive the termination of the shareholder agreement.

[63] Parties may be recalcitrant in executing documents or otherwise taking future steps necessary to give effect to an agreement. Because shareholder agreements often set out closing procedures for future sales of shares, a "further assurances" clause is particularly appropriate.

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> "The Corporation is bound by, and the securities evidenced by this certificate are subject to, a **[unanimous]** shareholder agreement, as may be amended from time to time, and such securities may not be pledged, sold or otherwise transferred except in accordance with the provisions thereof. Any transferee of the securities evidenced by this certificate is deemed, and required, to be a party to that agreement."[64]

7.5 **Copy of Agreement.** The Corporation shall keep a true copy of this Agreement at its registered office and on reasonable prior notice from any party shall make the same available for examination by such party during the Corporation's regular hours of business at such office.

7.6 **Notices.**[65] All notices, requests, demands or other communications required or permitted to be given by one party to another pursuant to this Agreement shall be[66] given in writing by personal delivery, courier service, registered mail (postage prepaid), **[what about email?]**, or facsimile transmission,[67] addressed or delivered to [such other party as follows] [the most recent address for such party on the records of the Corporation]:

[Party Name]

[Party Address]

[Facsimile No.:]

[Attention:]

[with a copy to:]

or at such other address of which written notice is given [to the other parties] [to the Corporation]. Such notices, requests, demands or other communications shall be deemed to have been received when

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[64] Section 108(8) of the OBCA provides that a transferee of shares subject to a unanimous shareholder agreement "shall be deemed to a party to the agreement whether or not that Person had actual knowledge of it when he or she acquired the share". Section 108(9) of the OBCA, however, provides that if such Person is a "purchaser for value without notice of the unanimous shareholder agreement and the transferor's share certificate, if any, did not contain a reference to the unanimous shareholder agreement, the transferee may, within 60 days after he or she actually receives a complete copy of the agreement, send to the corporation and the transferor a notice of objection."

[65] Issues to be addressed by a notice provision include: (i) how (i.e., by what methods) to give notice; (ii) whether notice by electronic communication is permitted; (iii) whether a specific time period must pass before notice sent by a particular method is deemed to be received; (iv) what happens if there is a postal disruption; (v) the address and to whom delivery must be made (it should be made relatively easy to allow a party to change their selected address).

[66] Note that this language is mandatory rather than permissive (i.e., "shall be given" rather than "may be given"); this is to provide certainty regarding the forms of notice and time periods for deemed receipt. A permissive approach would allow a party to use an alternate means of delivery, which could inject unwanted uncertainty into the process. The Ontario Court of Appeal in Ross v T. Eaton Co., (1992), 27 RPR (2d) 33 considered a permissive notice provision in a lease and held that a party could properly depart from the methods found in the agreement if they used a method which was "not less advantageous" than the enumerated methods. It is better to build certainty into the notice process during the drafting stage, rather than trying to seek certainty once a dispute regarding notice arises.

[67] Parties should consider whether to include alternate means of communication (e.g., email). Precedents should be reviewed to eliminate any obsolete or rarely-used technologies (e.g., telex, telegram).

FOR REFERENCE ONLY

delivered, or, if mailed, on the [●][68] Business Day after the mailing thereof, or, if sent by facsimile transmission, on the [●] Business Day after confirmed transmission. If a notice, request, demand or other communication is delivered by registered mail, and regular mail service shall be interrupted by strikes or other irregularities on or before the [●] Business Day after the mailing thereof, such notice, request, demand or other communication shall be deemed to have been received only upon personal delivery thereof.

7.7 **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.[69] All of the parties to this Agreement irrevocably submit to the [exclusive] [non-exclusive] jurisdiction of the courts of the Province of Ontario.

OR

7.7 **Applicable Law.** This Agreement and all other documents provided for in this Agreement and the rights and obligations of the parties thereto shall be governed by and construed and enforced in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein and the parties hereto attorn to the jurisdiction of the courts of the Province of Ontario and the appellate courts therefrom.

7.8 **Entire Agreement and Amendment.** This Agreement [including the Schedules and Exhibits] [together with …][70] constitutes the entire agreement between the parties with respect to the matters in this Agreement and supersedes all prior agreements and negotiations, whether written or oral, relating to the subject-matter of this Agreement. The execution of this Agreement has not been induced by, nor do any of the parties rely upon or regard as material, any representations, promises, agreements or statements whatsoever not incorporated in this Agreement and made a part of this Agreement. This Agreement shall not be amended, altered or qualified except by an instrument in writing signed by [all of the parties] [the party against whom enforcement of such amendment, alteration or qualification is sought].[71]

7.9 **Waiver.** No party to this Agreement shall be deemed or taken to have waived any provision of this Agreement unless such waiver is in writing, and then such waiver shall be limited to the circumstances set forth in such written waiver. No failure or delay on the part of a party in exercising

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[68] The length of time allowed before notice is deemed to be received may also need review in particular circumstances. If your client's address is in a foreign or inaccessible location, these periods may need to be lengthened; alternatively, there may be strategic advantages to be gained by having relatively short time periods for deemed receipt.

[69] If all shareholders are located in the same jurisdiction, the choice of a governing law should be uncontroversial, however, it is advisable to set out the governing law and suitable venue, and is virtually necessary where shareholders are spread across multiple jurisdictions. If making the choice of venue exclusive, consider whether your client may find himself or herself in the difficult position of trying to bring a suit in another jurisdiction.

[70] In certain circumstances a number of agreements addressing different parts of a transaction may be signed simultaneously. It may be appropriate to schedule subsidiary agreements to a master agreement, or acknowledge the existence of such agreements in the "Entire Agreements" clause.

[71] Consider use of a percentage of shareholders or other formula for amendments where there are multiple minority shareholders. In this case, it is customary to provide that where an amendment would affect one shareholder differently from other shareholders, such affected shareholder's written consent is required.

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any right, power or remedy shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy. No waiver by a party of a default shall operate against such party as a waiver of such default unless made in writing and signed.

7.10 **Enurement and Assignment.** [72] This Agreement shall be binding upon and enure to the benefit of the parties, their respective heirs, executors, administrators and other legal representatives, and, to the extent permitted, their respective successors and permitted assigns. No party to this Agreement may assign, transfer or otherwise dispose of all or any part of its rights or obligations or any interest in this Agreement without the prior consent of the parties.

7.11 **Severability.** [73] If any provision of this Agreement or the application of such provision to any Person or circumstances shall be held illegal, invalid or unenforceable, the remainder of this Agreement, or the application of such provision to Persons or circumstances other than those as to which it is held illegal, invalid or unenforceable shall not be affected thereby. Each provision of this Agreement is intended to be severable, and if any provision is illegal, invalid or unenforceable in any jurisdiction, this will not affect the legality, validity or enforceability of such provision in any other jurisdiction or the validity of the remainder of this Agreement.

7.12 **Independent Legal Advice.** Each of the Shareholders acknowledges that (i) he, she or it has been advised to obtain independent legal advice with respect to this Agreement, (ii) he, she or it has obtained independent legal advice or has expressly determined not to seek such advice, and (iii) he, she or it is entering into this Agreement of his, her or its own free will with full knowledge of the contents of this Agreement and his, her or its rights and obligations under this Agreement.

7.13 **Counterparts.** [74] [This Agreement may be executed in any number of counterparts with the same effect as if all parties had all signed the same document.] [This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and all of which, taken together, shall constitute one and the same instrument.] [Delivery by facsimile of any executed counterpart of this Agreement shall be equally as effective as delivery of a manually executed counterpart thereof.] [Any party delivering an executed counterpart by facsimile shall also deliver a manually executed counterpart of this Agreement, but failure to do so shall not affect the validity, enforceability or binding effect of this Agreement.]

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[72] One of the primary functions of most shareholder agreements is to provide for restrictions on the transfer of shares and to address the expiration of rights upon death of a shareholder. Therefore, enurement/assignment clauses are often superfluous.

[73] This clause incorporates the common law doctrine of severance which allows that an objectionable portion of a contract may be separated from the otherwise valid portions. Some commentators have noted that this power may give courts unwarranted ideas regarding the advisability of removing certain clauses. Despite the dangers posed by judges with overly-ambitious "blueline" pencils, a severability clause may prove useful when addressing a clause to which courts often take a dim view, such as non-compete clauses.

[74] Agreements may be executed in counterparts whether or not they expressly so provide, however parties may wish to make clear the obligation to provide a manually executed original. This can remove the uncertainty created by the execution of documents which may be different from one another in some respect.

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[NTD: consider use of an amending formula for certain circumstances where a significant number of shareholders desire an amendment to the shareholder agreement and achieving unanimity may be difficult]

IN WITNESS WHEREOF, the parties have executed this Agreement as of [the date first written above] [the Effective Date].[75]

[PARTY A]

By: _____

[Name:]

[Title:]

[Authorized Signatory]

[PARTY B]

By: _____

[Name:]

[Title:]

[Authorized Signatory]

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[75] It is advisable, for ease of conducting a closing, to avoid inserting the date of the agreement on the signature page. Reference should be made instead to the date first identified on the front page of the agreement, or to the "Effective Date" if such concept is necessary in the circumstances of the agreement.

ADDITIONAL RESOURCES

BOOKS AND ARTICLES

Aird & Berlis, Shareholders Agreements: An Annotated Guide, Second Edition (Toronto: Canada Law Book, 2009).

Creation and Termination of Unanimous Shareholder Agreements: Sportscope Television Network Ltd. v. Shaw Communications Inc. Gray, Wayne D., (2001) 34 Rev. can. dr. comm. 146-156.

Ewasiuk, Ricky W., Drafting Shareholder Agreements, Second Edition (Toronto: Carswell, 2012).

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ADDENDA

Significant Legislative Changes to the Ontario Business Corporations Act 2006 – 2008

- *Business Corporations Act*, R.S.O. 1990, c. B-16, s. 54.
- *Business Corporations Act*, R.S.O. 1990, c. B-16, ss. 56 (1), (3)-(5), (10).
- *Business Corporation Act*, R.S.O. 1990, c. B-16, s. 84.
- *Business Corporation Act*, R.S.O. 1990, c. B-16, ss. 108 (4), (7)-(11).

Significant Legislative Enactments 2006 – 2008

- *Securities Transfer Act*, S.O. 2006, c. 8.

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Noteworthy Court Decisions (2005-2014)

Pusateri v. Trozzo, (2005), [2005] O.J. No. 5605 (S.C.J.)

There was a breakdown in the relationship between the shareholders of Pusateri's, an upscale food store in Toronto, and both sides desired a winding-up of the company. The appropriate remedy was a court-supervised auction process.

BNY Capital Corp. v. Katotakis, (2005), [2005] O.J. No. 640 (C.A.)

Katotakis, Waters, and BNY Capital Corporation held over 80% of the shares in Financial Models Company Inc. The shareholders' agreement contained provisions which allowed Waters and BNY to sell their shares to another bidder, provided they give Katotakis notice and an opportunity to better the offered price. Waters and BNY delivered selling notices at a price of $12 per share "on terms and conditions substantially in accordance with the terms and conditions set forth in 'a draft acquisition agreement and in a draft lock-up agreement to the extent applicable'". Katotakis accepted the offers to buy at $12; Linedata subsequently offered $14. Both the acquisition agreement and lock-up agreement contained "superior proposal" conditions. The shareholders' agreement explicitly permitted the seller to include any other terms and conditions not contrary to the provisions of Article 4 of the shareholders' agreement (rights of first refusal and right of first offer), and the superior proposal conditions were deemed not contrary to Article 4.

Matthews Investments Ltd. v. Assiniboine Medical Holdings Ltd. (2007), [2007] M.J. No. 353 (Crt. Q.B.)

At trial, counsel for the plaintiffs sought to have the 1985 shareholders' agreement admitted into evidence for purpose of assisting in the interpretation of paragraph 10 of the 1993 agreement setting out the duties and obligations of directors. Although, by virtue of the parole evidence rule, evidence of an earlier shareholders' agreement may not be admitted to interpret a later shareholders' agreement that is ambiguous, where an oppression remedy is sought, evidence of the earlier agreement may be admitted as relevant and probative of a shareholder's reasonable expectations.

[ntd: consider whether to include]

2982825 Ontario Inc. v Platinum Wood Finishing Inc, 2008 CarswellOnt 5615 (SCJ [Commercial List]), aff'd 2009 CarswellOnt 1808 (Div Ct)

A signed letter agreement restricted the powers of the directors to manage or supervise the management of the business and affairs of the corporation such that certain shareholders were not able to alter the salary of another shareholder without his consent. Court held that a letter agreement signed by all shareholders can constitute a unanimous shareholders' agreement.

PriceWaterhouseCoopers Inc. v R, 2012 TCC120

The majority of the company's shares were held by non-residents, but the provisions of the unanimous shareholders' agreement did not allow non-residents to elect the majority of the board. Court clarified several aspects of unanimous shareholder agreements including the binding nature of these agreements on future shareholders, and the fact that an agreement signed by all shareholders that

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increases the number of votes required for certain actions could in exceptional circumstances be taken as a unanimous shareholders agreement even if it does not restrict or transfer any of the board's powers.

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Business Corporations Act, Section 108

R.S.O. 1990, CHAPTER B.16

Amended by: 1993, c. 16, s. 2; 1994, c. 17, s. 30; 1994, c. 27, s. 71; 1998, c. 18, Sched. E, ss. 20-32; 1999, c. 6, s. 3; 1999, c. 12, Sched. F, ss. 1-9; 2000, c. 26, Sched. B, s. 3; 2000, c. 42, Sched., ss. 1, 2; 2001, c. 8, ss. 1, 2; 2001, c. 9, Sched. D, s. 2; 2001, c. 23, s. 6; 2002, c. 8, Sched. I, s. 2; 2002, c. 22, s. 8; 2002, c. 24, Sched. B, ss. 25, 27; 2004, c. 8, s. 46; 2004, c. 16, Sched. D, Table; 2004, c. 19, s. 3; 2004, c. 31, Sched. 4; 2005, c. 5, s. 4; 2005, c. 28, Sched. B, s. 1; 2006, c. 8, ss. 106-122; 2006, c. 9, Sched. A; 2006, c. 19, Sched. G, s. 2; 2006, c.34, Sched B; 2007, c.7, Sched 7, s.181; 2008, c.19, Sched. V, s.1; 2009, c.33, Sched. 17, s.1.

Agreement between shareholders

108. (1) A written agreement between two or more shareholders may provide that in exercising voting rights the shares held by them shall be voted as therein provided.

Idem

(2) A written agreement among all the shareholders of a corporation or among all the shareholders and one or more persons who are not shareholders may restrict in whole or in part the powers of the directors to manage or supervise the management of the business and affairs of the corporation.

Unanimous shareholder agreement

(3) Where a person who is the registered holder of all the issued shares of a corporation makes a written declaration that restricts in whole or in part the powers of the directors to manage or supervise the management of the business and affairs of a corporation, the declaration shall be deemed to be a unanimous shareholder agreement.

Party to unanimous shareholder agreement

(4) A transferee of shares subject to a unanimous shareholder agreement shall be deemed to be a party to the agreement.

Where shareholder has power, etc., of director

(5) A shareholder who is a party to a unanimous shareholder agreement has all the rights, powers, duties and liabilities of a director of a corporation, whether arising under this Act or otherwise, including any defences available to the directors, to which the agreement relates to the extent that the agreement restricts the discretion or powers of the directors to manage or supervise the management of the business and affairs of the corporation and the directors are relieved of their duties and liabilities, including any liabilities under section 131, to the same extent.

Unanimous shareholder agreement

(5.1) Nothing in this section prevents shareholders from fettering their discretion when exercising the powers of directors under a unanimous shareholder agreement.

Matter that a unanimous shareholder agreement may provide

(6) A unanimous shareholder agreement may, without restricting the generality of subsection (2), provide that,

(a) any amendment of the unanimous shareholder agreement may be effected in the manner specified therein; and

(b) in the event that shareholders who are parties to the unanimous shareholder agreement are unable to agree on or resolve any matter pertaining to the agreement, the matter may be

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referred to arbitration under such procedures and conditions as are specified in the unanimous shareholder agreement.

Issuance or shares subject to unanimous shareholder agreement

(7) If a unanimous shareholder agreement is in effect at the time a share is issued by a corporation to a person other than an existing shareholder,

(a) that person shall be deemed to be a party to the agreement whether or not that person had actual knowledge of it when the share was issued;

(b) the issue of the share does not operate to terminate the agreement; and

(c) if that person is a purchaser for value without notice of the agreement, that person may rescind the contract under which the shares were acquired by giving notice to that effect to the corporation within 60 days after the person actually receives a complete copy of the agreement.

Transfer of shares subject to unanimous shareholder agreement

(8) If a unanimous shareholder agreement is in effect when a person who was not otherwise a party to the agreement acquires a share of the corporation, other than under subsection (1),

(a) the person who acquired the share shall be deemed to be a party to the agreement whether or not that person had actual knowledge of it when he or she acquired the share; and

(b) neither the acquisition of the share nor the registration of that person as a shareholder operates to terminate the agreement.

Notice of objection

(9) If a person referred to in subsection (8) is a purchaser for value without notice of the unanimous shareholder agreement and the transferor's share certificate, if any, did not contain a reference to the unanimous shareholder agreement, the transferee may, within 60 days after he or she actually receives a complete copy of the agreement, send to the corporation and the transferor a notice of objection.

Rights of transferee

(10) If a person sends a notice of objection under subsection (9), that person is entitled to,

(a) rescind the contract under which the shares were acquired by giving notice to that effect to the corporation and the transferor within 60 days after the transferee actually receives a complete copy of the unanimous shareholder agreement; or

(b) demand that the transferor pay the transferee the fair value of the shares held by the transferee, determined as of the close of business on the day on which the transferor delivers the notice of objection to the corporation, in which case subsections 185 (4), (18) and (19) apply, with the necessary modifications, as if the transferor were the corporation.

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (b) is amended by striking out "the transferor delivers the notice of objection" and substituting "the transferee delivers the notice of objection". See: 2011, c. 1, Sched. 2, ss. 1 (7), 9 (2).

Deficiency

(11) A transferee who is entitled to be paid the fair value of the transferee's shares under clause (10) (b) also has the right to recover from the transferor the amount by which the value of the consideration paid for those shares exceeds their fair value.

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Business Corporations Act, Section 54

R.S.O. 1990, CHAPTER B.16

Amended by: 1993, c. 16, s. 2; 1994, c. 17, s. 30; 1994, c. 27, s. 71; 1998, c. 18, Sched. E, ss. 20-32; 1999, c. 6, s. 3; 1999, c. 12, Sched. F, ss. 1-9; 2000, c. 26, Sched. B, s. 3; 2000, c. 42, Sched., ss. 1, 2; 2001, c. 8, ss. 1, 2; 2001, c. 9, Sched. D, s. 2; 2001, c. 23, s. 6; 2002, c. 8, Sched. I, s. 2; 2002, c. 22, s. 8; 2002, c. 24, Sched. B, ss. 25, 27; 2004, c. 8, s. 46; 2004, c. 16, Sched. D, Table; 2004, c. 19, s. 3; 2004, c. 31, Sched. 4; 2005, c. 5, s. 4; 2005, c. 28, Sched. B, s. 1; 2006, c. 8, ss. 106-122; 2006, c. 9, Sched. A; 2006, c. 19, Sched. G, s. 2; 2006, c.34, Sched B; 2007, c.7, Sched 7, s.181; 2008, c.19, Sched. V, s.1; 2009, c.33, Sched. 17, s.1.

Certificated or uncertificated securities

54. (1) A security issued by a corporation may be represented by a security certificate or may be an uncertificated security.

Uncertificated securities

(2) Unless otherwise provided by the corporation's articles, the directors of a corporation may provide by resolution that any or all classes and series of its shares or other securities shall be uncertificated securities, provided that such resolution shall not apply to securities represented by a certificate until such certificate is surrendered to the corporation.

Notice to holder of uncertificated security

(3) Within a reasonable time after the issuance or transfer of an uncertificated security, the corporation shall send to the registered owner of the uncertificated security a written notice containing the information required to be stated on a share certificate pursuant to subsections 56 (1) and (2).

Parity of rights

(4) Except as otherwise expressly provided or authorized by law, the rights and obligations of the registered owners of uncertificated securities and the rights and obligations of the holders of certificated securities of the same class and series shall be identical.

Fee

(5) A corporation may charge a fee, not exceeding the prescribed amount, for a security certificate issued in respect of a transfer.

Joint holders

(6) A corporation required to issue a security certificate is not required to issue more than one security certificate in respect of securities held jointly by several persons, and delivery to one of several joint holders is sufficient delivery to all.

Definition

(7) In this section,

"certificated security" means a certificated security as defined in the *Securities Transfer Act, 2006*.

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Business Corporations Act, Section 56

R.S.O. 1990, CHAPTER B.16

Amended by: 1993, c. 16, s. 2; 1994, c. 17, s. 30; 1994, c. 27, s. 71; 1998, c. 18, Sched. E, ss. 20-32; 1999, c. 6, s. 3; 1999, c. 12, Sched. F, ss. 1-9; 2000, c. 26, Sched. B, s. 3; 2000, c. 42, Sched., ss. 1, 2; 2001, c. 8, ss. 1, 2; 2001, c. 9, Sched. D, s. 2; 2001, c. 23, s. 6; 2002, c. 8, Sched. I, s. 2; 2002, c. 22, s. 8; 2002, c. 24, Sched. B, ss. 25, 27; 2004, c. 8, s. 46; 2004, c. 16, Sched. D, Table; 2004, c. 19, s. 3; 2004, c. 31, Sched. 4; 2005, c. 5, s. 4; 2005, c. 28, Sched. B, s. 1; 2006, c. 8, ss. 106-122; 2006, c. 9, Sched. A; 2006, c. 19, Sched. G, s. 2; 2006, c.34, Sched B; 2007, c.7, Sched 7, s.181; 2008, c.19, Sched. V, s.1; 2009, c.33, Sched. 17, s.1.

Contents of share certificate

56. (1) There shall be stated on the face of each share certificate issued by a corporation,

(a) the name of the corporation;

(b) the words "Incorporated under the law of the Province of Ontario", "Subject to the *Ontario Business Corporations Act*" or words of like effect;

(c) the name of the person to whom it was issued; and

(d) the number and class of shares and the designation of any class or series that the certificate represents.

Idem

(2) Where a corporation is authorized to issue shares of more than one class or series, the corporation shall legibly state on each share certificate issued by it,

(a) the rights, privileges, restrictions and conditions attached to the shares of each class and series that exists when the share certificate is issued; or

(b) that the class or series of shares that it represents has rights, privileges, restrictions or conditions attached thereto and that the corporation will furnish to a shareholder, on demand and without charge, a full copy of the text of,

(i) the rights, privileges, restrictions and conditions attached to that share and to each class authorized to be issued and to each series in so far as the same have been fixed by the directors, and

(ii) the authority of the directors to fix the rights, privileges, restrictions and conditions of subsequent series, if applicable.

Par value share certificate

(6) A share certificate issued,

(a) prior to the 29th day of July, 1983 by a corporation; or

(b) prior to the date of the certificate of continuance by a body corporate continued under section 180,

does not contravene this Act merely because the certificate refers to the share or shares represented thereby as having a nominal or par value.

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Information to be furnished by corporation

(7) Where a share certificate issued by a corporation contains the statement mentioned in clause (2) (b), the corporation shall furnish to a shareholder on demand and without charge a full copy of the text of,

(a) the rights, privileges, restrictions and conditions attached to that class authorized to be issued and to that series in so far as the same have been fixed by the directors; and

(b) the authority of the directors to fix the rights, privileges, restrictions and conditions of subsequent series, if applicable.

Notice of restrictions

(8) Where the articles of a corporation restrict the issue, transfer or ownership of shares of any class or series for a purpose set out in clause 42 (2) (c) or (d), the restriction or a reference to it shall be noted conspicuously on every share certificate of the corporation evidencing a share that is subject to the restriction if the certificate is issued after the day on which the share becomes subject to the restriction under this Act and any reference to the restriction shall include a statement that the corporation will furnish to a shareholder, on demand and without charge, a full copy of the text of the restriction.

Furnishing text of restrictions

(9) Where a share certificate of a corporation contains a reference to a restriction under subsection (8), the corporation shall furnish to a shareholder, on demand and without charge, a full copy of the text of the restriction.

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Schedule 3
Shareholder Loans

3.1 **Shareholder Loans.** On or before the [●] day of [●], 20[●] each of the Shareholders shall advance to the Corporation as a loan the sum of $[●] and the Corporation shall issue a receipt to evidence its receipt of any amount so advanced. Subject to any other terms of this Agreement, and provided that each of the Shareholders advance the aforesaid amount to the Corporation as a loan, and unless the Shareholders otherwise [unanimously, by a majority, etc.] agree:

(a) [no] interest shall be payable [at a rate of [●]% per annum] on or with respect to any unpaid portion of such loans;

(b) no amount shall be paid at any time on account of either loan unless the same amount is paid at the same time on the other loan; and

(c) each loan shall be [secured, unsecured].]

[3.2 Additional Capital. Notwithstanding any other provision contained in this Agreement, if the Board, in the exercise of good faith and in its reasonable judgement, determines that the Corporation requires additional funds and such funds cannot be obtained from a Canadian chartered bank or trust company on reasonable commercial terms and without guarantees of, or recourse to, the Shareholders [or Principals] or any Person not dealing at arm's length (as defined in the *Income Tax Act* (Canada)) with any Shareholder [or Principal], the Board may request, by issuance of a notice (a "Funding Notice") to the Shareholders, that the Shareholders each contribute, within [●] Business Days after the issuance of the Funding Notice (the "Funding Period"), additional capital to the Corporation, *pro rata* based upon the number of Shares held by the Shareholders, by way of [subscription for Shares and/or loan], as determined by the Board and set forth in the Funding Notice.

If additional capital is to be contributed pursuant to this Section by way of subscription for Shares, the subscription price for each such Share shall be the fair market value of a Share (as shall be determined from time to time by [●]) as of the time of the Funding Notice, as determined [by the Board and set out in the Funding Notice <u>OR</u> in accordance with the relevant provision in the Shareholder Agreement]. Forthwith upon the determination of the subscription price, the Corporation shall issue to each Shareholder making a contribution of capital pursuant to the Funding Notice, out of its treasury, such number of Shares as shall be equal to the number (rounded, if necessary, to the nearest lower whole number) obtained by dividing the amount of the contribution to be made by such Shareholder by the per Share subscription price, upon receipt by the Corporation of such contribution.

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If additional capital is to be advanced pursuant to this Section by way of loan, each such loan shall be made on reasonable commercial terms [and shall be secured/unsecured] and at the rate of interest (which shall not exceed the rate payable on reasonable commercial terms) and repayable by the Corporation all as determined by the Board, provided that the terms of all such loans made pursuant to the same Funding Notice (other than the principal amounts) shall be the same for all Shareholders.

If any Shareholder (a "Defaulting Shareholder") fails to contribute its *pro rata* portion of the funding required as set forth in the Funding Notice, then any other Shareholder (an "Excess Subscribing Shareholder") may, but shall not be obligated to, within [●] Business Days after the expiry of the Funding Period, advance to the Corporation all or any portion of the amount which the Defaulting Shareholder failed to advance (such additional amount advanced by the Excess Subscribing Shareholder being referred to as the "Excess Advance").

At the option of the Excess Subscribing Shareholder making the Excess Advance, exercisable by written notice to the Corporation at the time such Excess Advance is made:

(a) the amount of the Excess Advance shall be treated as a Shareholder Loan which is repayable upon demand and, until repaid the amount outstanding from time to time shall bear interest at a rate per annum equal to [●]% above the prime rate for commercial loans in Canada denominated in Canadian dollars, compounded [annually, monthly, etc.], and shall be payable at the same time as the payment of principle. Forthwith upon the Excess Advance being made to the Corporation, the Corporation shall issue an instrument to the Excess Subscribing Shareholder evidencing the indebtedness of the Corporation to the Excess Subscribing Shareholder for the Excess Advance on the terms provided for in this Section; or

(b) the amount of the Excess Advance shall be used by the Excess Subscribing Shareholder (and applied by the Corporation) in respect of the subscription, by such Shareholder, for additional Shares, at a subscription price for each Share equal to [●]% of the price to be determined in accordance with this Section (as at the day the Board issued the Funding Notice). Forthwith upon such determination of the subscription price, the Corporation shall issue to such Shareholder, out of its treasury, such number of Shares as shall be equal to the number (rounded, if necessary, to the nearest lower whole number) obtained by dividing the amount of the Excess Advance made by such Shareholder, by the subscription price.

For greater certainty, under no circumstances shall any Defaulting Shareholder who has failed to provide funds to the Corporation in response to a Funding Notice be considered to be in default under this Agreement or be in any way personally liable for the payment of such funds or repayment of any Excess Advance to an Excess Subscribing Shareholder. [76]

[76] The non-compliance of a shareholder or shareholders with a mandatory financial contribution clause may be addressed in any number of ways, including but not limited to: (a) the conferral upon non-defaulting shareholders of the option to purchase the shares of the defaulting shareholders at a price usually less than fair market value, (b) the conferral upon non-defaulting shareholders of the option of fulfilling the defaulting shareholders financial contribution obligations and thus granting the non-defaulting shareholders a priority loan, often at a premium interest rate, (c) the issuance of new shares to the

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OR

3.3 Ongoing Financing. If at any time the Board determines that:

(a) the Corporation requires an amount of money to enable the Corporation [in the following [●] months] to (i) carry on its business as contemplated in the then current budget approved by the [Shareholders and/or the Board] or (ii) pay it liabilities as they become due, and

(b) the amount required by the Corporation exceeds the funds and credit available to the Corporation from its usual sources of financing (referred to as the "Required Amount"), and

(c) the Shareholders be requested by the Corporation to provide the Required Amount to the Corporation, and

(d) the Corporation gives to all Shareholders a written notice in which each Shareholder is requested to advance to the Corporation, by way of a [loan bearing an interest rate of [●]%/non-interest bearing loan], an amount equal to the amount obtained when the Required Amount is multiplied by the proportionate shareholdings of the Shareholders,

then, within [●] days of receiving such notice, each Shareholder shall advance to the Corporation, by way of a [loan bearing an interest rate of [●]% per annum/non-interest bearing loan], the amount that is requested as determined in accordance with the notice.

If within [●] days after receiving such notice all or any portion of the amount to be advanced by a Shareholder (a "Defaulting Shareholder") has not been advanced in accordance with this Section, then at any time before the Defaulting Shareholder advances such amount, the amount which has not been advanced in respect of the Defaulting Shareholder may be advanced by one or more other Shareholders (any such Shareholder being referred to as a "Supporting Shareholder"). An amount advanced by a Supporting Shareholder in respect of a Defaulting Shareholder shall be a loan of such amount from the Supporting Shareholder to the Defaulting Shareholder which shall bear interest at the rate of [●]% per annum calculated [daily, weekly, monthly, etc.] and shall be payable on demand.

Each Shareholder agrees that if any amount becomes payable by the Corporation to the Shareholder at any time when the Shareholder owes an amount in respect of one or more loans from Supporting Shareholders made pursuant to this Section, then to the extent of the amounts owing in respect of such loans, the Corporation shall pay to the Supporting Shareholders the

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non-defaulting shareholders, thus diluting the relative shareholdings of the defaulting shareholders, or (d) the suspension of the defaulting shareholders voting rights or rights to receive dividends. It should be noted, however, that any provision which is deemed too onerous may be struck down by a court as a non-enforceable penalty.

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amount payable to the Defaulting Shareholder and each Shareholder irrevocably authorizes and directs the Corporation to do so.

3.4 Payment of Indebtedness to Shareholders.[77] At any time when the Corporation [or a subsidiary of the Corporation] makes a payment to a Shareholder (the "Initial Shareholder") on account of the indebtedness of the Corporation to the Initial Shareholder, it shall at the same time make payment to each other Shareholder (the "Secondary Shareholders") so that the payment received by each Secondary Shareholder from the Corporation is proportional to the amount paid to the Initial Shareholder in relation to the total indebtedness of the Corporation to the Secondary Shareholders and the indebtedness of the Corporation to the Initial Shareholder.

[Once in any calendar year, calendar month, etc.] the Corporation may make a payment (the "Permitted Payment") of no more than $[●] to a Shareholder on account of the Corporation's indebtedness without the need to apply with the foregoing provisions of this Section].[78]

3.5 Deferral of Payment to Shareholders.[79] Unless the Shareholders otherwise agree in writing, subject to the provisions of this Agreement, the Corporation shall be entitled to defer payment of the aggregate amount owing by it to a Shareholder. The Corporation shall pay on account of indebtedness to Shareholders such amounts as are from time to time determined by the [unanimous, majority, etc.] agreement of the Shareholders acting reasonably [or by resolution of the Directors], to be available for such purpose.]

3.6 Guarantees.[80] If guarantees from each of the Shareholders are required for any borrowings of the Corporation, the Shareholders agree that they shall attempt to obtain such funds upon their several guarantees only with each one guaranteeing a percentage of the Corporation's obligation to repay such funds which is proportional to their pro rata shareholdings; provided that if such funds can only be obtained upon the joint and several guarantees of the Shareholders, then the Shareholders will execute and deliver such joint and several guarantees or other assurances as may be required in that regard.

<u>OR</u>

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[77] While it is common for shareholder agreements to contain provisions requiring proportional repayment of shareholder loans, special consideration (i.e. a priority on repayment) may be advisable for shareholders who advance disproportionately more funds than the other shareholders.

[78] A proportionality clause similar to the one in the previous paragraph may also be employed to ensure payment to all shareholders pursuant to this provision.

[79] This provision enables a corporation to defer the payment of debt owed to its shareholders. This provision may be altered to relieve the corporation only from the payment of any principal amounts (i.e. requiring that any interest on the indebtedness still be paid to shareholders), or to stipulate the interest rate payable to shareholders in respect of debts deferred pursuant to this provision.

[80] Bank guarantees maybe unavoidable for shareholders, especially when the corporation is in its initial stages or otherwise thinly capitalized. The business and credit records of individual shareholders and/or principals will also impact upon the ability of the corporation to obtain financing without the guarantee of one or more of the shareholders. Generally, each shareholder will only be required to guarantee a share of the corporate indebtedness proportionate to the individual shareholder's equity stake in the corporation. Nevertheless, the shareholder agreement should include an indemnity to protect shareholders from exposure to additional liability in this respect.

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3.6 Guarantees. If the Board, in the exercise of good faith and in its reasonable judgement, determines that the Corporation requires additional funds and such funds can be obtained from Canadian chartered banks or trust companies on reasonable commercial terms except that guarantees of, or recourse to, the Shareholders [or Principals] is required by the lender preferred by the Board then, to the extent acceptable to such lender such guarantees or other assurance shall be provided on a several, and not joint, basis by each Shareholder [or Principals] pro rata based upon the number of Shares beneficially owned, directly or indirectly, by each Shareholder [or Principal]. If funds can only be obtained upon the joint and several guarantees or other assurances of any or all of the Shareholders [or Principals], then the Shareholders [or the Principals] will execute and deliver such guarantees or other assurances but to the extent that any Shareholder [or Principal] is required to provide more than its proportionate share of liabilities under any such guarantee or other assurances based upon the number of Shares beneficially owned, directly or indirectly by such Shareholder [or Principal], then the other Shareholders shall indemnify and pay to such Shareholder [or Principal], on demand, the amount of such excess in such proportions as each such Shareholder should have, but did not, provide.

<u>OR</u>

3.6 Guarantees. Each Shareholder shall provide such guarantees to the Bank from time to time as such bank may from time to time require, provided that nothing in this Section shall obligate the Shareholders at any time to provide:

(a) any guarantee unless the other of them provides a guarantee in the same form and at the same time; or

(b) any guarantee which could result in his, her or its liability under all such guarantees as shall have been given pursuant to this Section and are outstanding at such time being in excess of $[●].]

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TAB 03

THE ANNOTATED Shareholder Agreement 2016

Management & Governance of the Corporation

Jordan Dolgin
Dolgin Professional Corporation

September 21, 2016

cpd Continuing Professional Development

Management & Governance of the Corporation

Preliminary Considerations

- Every SHA needs to address 2 key questions - governance and liquidity – this is a global issue.

- Governance should be considered at 3 separate levels – board, shareholders and key employees/job descriptions.

- Every SHA needs to be tailored to the particular "power" balance among the shareholder base and address differences among shareholder groups (i.e., passive vs. active; founders/angels vs. institutional investors).

- Consider interplay among classes of shares – e.g., valuation issues among common and preferred/special shares; retraction/redemption rights for preferred/special shares.

- Consistency with bylaws/articles.

- Need to revisit the agreement as the company evolves and as players change over time.

Specific Considerations

- Board nomination rights.
- Changes in board size.
- Observer rights.
- Meeting quorums and approval thresholds.
- Shareholder Veto rights.
- Drag-along thresholds (shares and assets).
- Financing drag-along.
- USA aspects/Deemed USA provisions.
- Employee shareholder considerations and voting powers.
- Access to information and information disclosure obligations – F/S, budgets, business plans, banking/litigation docs, etc.
- Audit exemption.
- General sale provisions/powers of attorney.
- Officers/signing authorities.
- Employment agreements and job descriptions.
- Power to amend or terminate the agreement.
- Dispute resolution mechanism – arbitration vs. mediation vs. valuation

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TAB 04

THE ANNOTATED Shareholder Agreement 2016

Extracts of Buy-Sell Provisions in Shareholders' Agreement with Annotation

Samantha Horn
Stikeman Elliott LLP

September 21, 2016

cpd Continuing Professional Development

ANNOTATED SHAREHOLDER AGREEMENT

BUY-SELL PROVISIONS

Samantha Horn is a partner at Stikeman Elliott LLP. This paper is an updated version of "Extracts of Buy-Sell Provisions in Shareholders' Agreement with Annotation" paper from the Law Society of Upper Canada's, "Annotated Shareholder Agreement" program most recently held in September, 2014. It is based on a paper originally produced by Nathalie Mercure in a program held on September 18, 2003.

SEPTEMBER 2016

EXTRACTS OF BUY-SELL PROVISIONS IN SHAREHOLDERS' AGREEMENT WITH ANNOTATION

The following contains certain examples of Buy-Sell provisions. The following is not meant to be a comprehensive set of buy-sell provisions and please note that each article is not a complete draft of the particular provision. Each set of factual circumstances requires unique provisions. The following is meant to be a tool to assist lawyers in the thought process to draft a shareholders agreement.

ARTICLE 1
SHARE OWNERSHIP AND RESTRICTIONS ON TRANSFER

Consider whether there should be a period of time when no transfers (or no third party transfers) would be permitted.

Section 1.1 Restrictions on Transfer.

(1) No Shareholder shall Transfer any of the Shares owned by it except to Persons and in the manner expressly permitted in the Articles and this Agreement. Any attempted Transfer of Shares made in violation of this Agreement shall be null and void. Neither the Board of Directors nor the Shareholders shall approve or ratify any Transfer of Shares made in contravention of this Agreement and the Corporation shall not permit any such Transfer to be recorded on the share register of the Corporation maintained for the Shares.

(2) From and after the date of an attempted Transfer, unless otherwise expressly provided in this Agreement and subject to applicable law, all rights of the Shareholder purporting to make the Transfer shall be suspended and inoperative and no Person shall be entitled to vote such Shares or receive dividends or other distributions until the Transfer is rescinded by the transferor and transferee.

Section 1.2 Permitted Transferees.

(1) Subject to the provisions of this Section 1.2, each Shareholder (a "**Transferor**") shall be entitled, upon prior written notice to the Corporation and the other Shareholders, to Transfer the whole **[or any part]** of its Shares to any Permitted Transferee of the Transferor. No such Transfer shall be or become effective until the Permitted Transferee executes and delivers to the Corporation a counterpart copy of this Agreement or a written agreement in form and substance satisfactory to the other Parties agreeing to be bound by

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the terms and conditions of this Agreement. No such Transfer shall release or discharge the Transferor from any of its liabilities or obligations under this Agreement until it becomes effective and then only to the extent provided in this Agreement.

"Permitted Transferee" means, in relation to any Person, any one or more of:

(a) The Person's spouse;

(b) The issue of the Person;

(c) A trust, the sole beneficiaries of which are any Person or Persons specified in any one or more subsections of this definition, provided that the terms of the trust include a valid condition precedent that the Shares or securities of a Shareholder shall vest in the beneficiary of such trust only if such beneficiary has complied with the provisions of Section 2.4; and

(d) A corporation, partnership, limited partnership or other Person, a majority of the voting securities or other ownership interests of which are owned by any Person or Persons specified in any one or more subsections of this definition.[1] The Transferor shall, at all times after the transfer of Shares to a Permitted Transferee, (i) be jointly and severally liable with the Permitted Transferee for the observance and performance of the covenants and obligations of the Permitted Transferee under this Agreement, (ii) indemnify the other Parties against any loss, damage or expense incurred as a result of the failure by the Permitted Transferee to comply with the provisions of this Agreement, and (iii) ensure that the Permitted Transferee remains qualified as a Permitted Transferee for so long as it owns any Shares.

1. *On the assumption that the original shareholders know and trust one another, this requirement gives comfort to the remaining shareholders that their original co-venturer will ensure the Permitted Transferee honours its obligations. If there is no obligation to remain a Permitted Transferee, then the prohibitions on transfer can easily be circumvented.*

2. *Consider adding a provision whereby Principals of a corporation or other Permitted Transferees that is not an individual covenant not to transfer or approve the transfer of securities in the capital of the Shareholder of which it is Principal to any other Person or permit such Shareholder to issue any*

[1] Consideration should also be given if there is a transfer of Shares to a Permitted Transferee to person who will then be entitled to exercise the voting rights of the Shares being transferred and what impact that may have on control of the voting shares of the Corporation, the ability to elect directors and other matters.

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additional securities to any Person at all or if, as a result, there would be a Change of Control of the Shareholder.

* * * * *

ARTICLE 2
TRANSFERS TO THIRD PARTIES; RIGHT OF FIRST REFUSAL

1. *A right of first refusal is used to give Shareholders who wish to dispose of their shares an opportunity to sell them, subject to giving the other shareholders a prior right to acquire them. A Shareholder must comply with these provisions before it can sell its Shares to a third party. For the Shareholders exercising the right of a first refusal, they avoid having a third party become a Shareholder if, for any reason, they believe that would be undesirable.*

2. *Another alternative is a "right of first offer" which allows a selling Shareholder that desires to sell its shares to give notice to the other Shareholders setting out at least the price and terms that it is willing to accept. The non-selling Shareholders are then entitled to purchase the shares of the selling Shareholder on the terms set out in the notice, but if they do not do so, the selling Shareholder may then sell its shares to a third party on price and terms no less favorable than those originally offered to the non-selling Shareholders. Following are some of the matters to be considered when deciding between a right of first refusal and a right of first offer.*

3. *In a right of first refusal, the requirement that a bona fide third offer be obtained gives the remaining Shareholders some level of comfort as to the value of the Shares. It also provides the Shareholders an opportunity to see all the terms of the transaction proposed with the third party, and importantly to know the identity of the third party that will become the new shareholder of the Corporation. On the other hand, for the selling Shareholder, the requirement that a bona fide offer be obtained from a third party can be a costly one. In circumstances where the third party is interested in purchasing Shares which are subject to a right of first refusal, the third party might require that the selling Shareholder reimburse it for all or some portion of the expenses which the third party incurs in connection with due diligence matters and professional expenses if the transaction is not ultimately completed as a result of the right of first refusal. In addition, the existence of a right of first refusal may tend to discourage a number of potential purchasers from pursuing a transaction and therefore, make it more difficult to find a purchaser for the Shares. Furthermore, it may result in the price ultimately negotiated being lower than it might otherwise have been if the uncertainty associated with the right of first refusal did not exist.*

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4. *Consider whether it may be appropriate in certain businesses to defer the application of the right of first refusal or whether it should apply to all shareholders equally. For example, the business may require the active involvement of one particular shareholder who should not be permitted to seek a sale of his or her shares. Similarly, some shareholders may not be in a financial position to exercise a right of first refusal which may make the provision less useful.*

Section 2.1 Third Party Offer.

(1) No Shareholder may Transfer any Shares to any Person other than to a Permitted Transferee and in compliance with this Article.

(2) If any Shareholder (the **"Offeror"**) receives a *bona fide* written offer (a **"Third Party Offer"**) from any Person dealing at arm's length (as defined in the *Income Tax Act* (Canada)) with the Parties (the **"Buyer"**) to purchase all but not less than all of the Shares owned by the Offeror (the **"Purchased Shares"**), which Third Party Offer is acceptable to the Offeror, the Offeror shall, by notice in writing to the other Shareholders (the **"Offerees"**), make an offer (the **"Offer"**) to sell the Purchased Shares to the Offerees at the same price and upon the same terms and conditions as are contained in the Third Party Offer.

1. *This version is where a bona fide third party offer to purchase the applicable shares is required.*

2. *A number of issues arise if parties agree that shareholders may dispose of partial interests. It is better, unless there is some compelling reason which justifies complicating the agreement, to require parties to dispose of all their shares. If partial sales are permitted, consider a provision requiring the various shares forming part of the original block to be dealt with as if they continue to be one block for purposes of notices and voting.*

(3) The Offer shall (i) identify in reasonable detail the Buyer and, if the Buyer is not an individual, identify those Persons who Control the Buyer, (ii) be accompanied by a true copy of the Third Party Offer setting forth all of the terms and conditions of the Third Party Offer, and (iii) provide such information concerning the business experience and expertise of the Buyer and its financial condition as is reasonably available to the Offeror. The Offer shall not be revocable except with the consent of the Offerees.

This provision is onerous on the selling shareholder so consider its inclusion depending upon which party is your client. Note that in a situation where a third party offer has to be obtained first, ensure, if the offer includes non-cash consideration, whether the remaining shareholders can exercise such right by cash payment equal to fair market value of that consideration.

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(4) Each Offeree shall have a period of **[ten] [thirty]** days from the date the Offer is received (the **"Offer Period"**) to accept the Offer in writing, and each Offeror who accepts such Offer shall specify whether the Offeree (i) wishes to accept the Offer on the condition that it is able to purchase all of the Purchased Shares, or (ii) wishes to accept the Offer on the condition that it is able to purchase its rateable portion of the Purchased Shares or the number of Purchased Shares in excess of its rateable portion it is willing to purchase.

The remaining shareholder(s) will want a longer period for acceptance, for example, to arrange financing. However, the longer the acceptance period, the more difficult it will be for the selling shareholder to get a third party offer.

Section 2.2 Acceptance of Offer.

(1) If the Offer is accepted by Offerees within the Offer Period and such Offerees have indicated their willingness to purchase in the aggregate all of the Purchased Shares, then the Offeror shall sell and the Offerees shall purchase the Purchased Shares upon the terms and conditions contained in the Offer. In such case, the Offerees shall purchase the Purchased Shares from the Offeror rateably and any Purchased Shares in excess of an Offeree's rateable portion shall be allocated pro rata based on those Offerees willing to purchase in excess of their rateable proportion pursuant to their acceptance of the Offer provided that no Offeree shall be required to purchase Purchased Shares below his or her rateable portion or in excess of the number of Purchased Shares specified in its acceptance of the Offer.

Consider adjusting this provision if there are various classes of shares outstanding.

(2) The closing of the transaction of purchase and sale pursuant to the Offer (a **"Sale Transaction"**) shall take place at the Place of Closing at the Time of Closing on the date which is thirty days after the expiry of the Offer Period (the **"Date of Closing"**).

The agreement should provide for procedures of Closing as part of the general sale provisions.

Section 2.3 Third Party Sale.

(1) If no Offeree accepts the Offer during the Offer Period or if all not all of the Purchased Shares are accepted to be purchased, then, subject to the provisions of this Section 2.3 and Section 2.4 and Section 2.5, the Offeror shall be entitled, within a period of sixty days after the expiry of the Offer Period, to sell the Purchased Shares to the Buyer in accordance with the Third Party Offer.

1. Consider whether a floor price should be fixed by some mechanism.

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2. *Consider whether the sale to the Buyer should be for the remaining or all of the Purchased Shares after the right of first refusal is exercised.*

3. *Consider requiring that before consenting to the transfer of the Purchased Shares to the Buyer, the board of directors of the Corporation shall be entitled to require proof that the sale to the Buyer took place in accordance with the Third Party Offer.*

4. *In cases where debt represents a material component of a Shareholder's investment in the Corporation, it is important that the Agreement deal with the sale or repayment of such debt in the circumstances where the Shareholder is selling its Shares. This may be done by providing that such debt is to be repaid either immediately or in instalments with or without interest or that it is to be purchased by the party acquiring the shares. The financial condition of the debtor corporation can also contribute to difficulties in dealing with indebtedness to its shareholders.*

Section 2.4 Piggy-Back [or Tag-Along] Rights.

(1) If an Offeror is entitled to and proposes to sell its Shares in accordance with the Third Party Offer pursuant to Section 2.3 **[and if the sale of the Purchased Shares would result in a Change of Control of the Corporation]**, the Offeror shall, at least **[fifteen]** days prior to the date specified for completion of the Third Party Offer, give notice in writing (a **"Disposition Notice"**) to the Offerees.

(2) Each Offeree shall have the right, exercisable within **[five]** days of receipt of a Disposition Notice, upon notice in writing to the Offeror and the Buyer (the **"Piggy-back Notice"**), to require the Buyer to purchase all but not less than all of the Shares held by such Offeree, at the time of completion of, and upon the same terms and conditions as those contained in, the Third Party Offer.

(3) If any Offeree gives a Piggy-back Notice to the Offeror and the Buyer within such period, then the Offeror shall be entitled to sell the Purchased Shares to the Buyer pursuant to the Third Party Offer only if such Buyer also offers to purchase from the Offeree all of the Shares held by the Offeree, conditional upon the completion of the transaction of purchase and sale contemplated in the Third Party Offer.

(4) The Shareholders who have accepted or been deemed to have accepted an offer under this Section 2.4 shall be the **"Vendor"** and the Shareholders who have elected or are required to purchase Shares under this Section 2.4 shall be the **"Purchaser"**.

1. *This Section 2.4 contemplates that if one or more of the shareholders is selling Shares to a third party, then the Other Shareholders should be entitled to require that the sale not be completed unless the third party also*

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makes an offer to purchase their shares on the same terms if it would result in a Change of Control. These types of provisions provide protection for shareholders in the event of the departure of a shareholder whose active participation in the business is instrumental to the business.

2. *Consider if the concept of a pro rata sale should be applicable where, if a buyer is only interested in purchasing a specific number of shares, each shareholder may sell its pro rata share of such number of shares.*

3. *Consider what should be done with any shareholder loans that may be outstanding.*

Section 2.5 Carry-Along [or Drag-Along] Requirement.

(1) If any of the Shareholders receive a *bona fide* offer (a **"Take-Over Bid"**) from a third party (the **"Bidder"**) dealing at arms-length (as defined in the *Income Tax Act* (Canada)) with them which they wish to accept and if the Take-Over Bid contains a provision to the effect that the Bidder will complete the sale contemplated by the Take-Over Bid only if the Bidder acquires all of the issued and outstanding Shares, the recipient Shareholder (the **"Bid Recipient"**) will immediately advise the Other Shareholders of the Take-Over Bid. If Shareholders holding not less than **[75%]** of the Shares wish to accept the Take-Over Bid, such Shareholders shall have the right to require the Other Shareholders on ten days' notice in writing (a **"Compulsory Sale Notice"**) to sell all of the Shares held by them to the Bidder pursuant to the terms of the Take-Over Bid.

1. *The right provided in Section 2.5 enables a Shareholder to compel the Other Shareholders to sell their shares to a third party. The ability to deliver 100% of the shares, if requested by the third party purchaser is an essential provision of a shareholder agreement. However, the Shareholder who is compelled to sell its investment in the Corporation may not wish to do so for any number of reasons such as the belief that the sale is badly timed or on terms which are unfavourable.*

2. *Consider if a floor price, confirming no shareholder is entitled to collateral benefits outside of the terms of the Take-Over Bid, limiting liability to several and not joint and several liability for breaches of representations and warranties or indemnities and limits for certain shareholders on non-competition provisions should be added. Consider also how to deal with "non-cash" consideration.*

3. *Consider revising this section to also permit a sale of assets rather than shares and the associated covenants such dragged along shareholder should step up to including voting in favour of a shareholder resolution to sell all or substantially all of the assets of the Corporation. This will require more broad wording in (3) below to contemplate transactions other than a sale of shares.*

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(2) If the Shareholders give a Compulsory Sale Notice to the Other Shareholders, then each of them shall be obligated to sell all of the Shares held by it, upon the terms specified in the Take-Over Bid to the Bidder, conditional upon the completion of the transaction of purchase and sale contemplated in the Take-Over Bid.

Consideration must be given to the treatment of shareholders loans, if applicable.

(3) Each Shareholder acknowledges that in the event that it receives a Compulsory Sale Notice and it fails to execute or cause to be executed all such agreements and documents as may be necessary under the Act, the Articles, or otherwise to enable the Shares held by it to be sold to the Bidder as provided in this Section 2.5, the Bid Recipient and the Other Shareholders who have sent the Compulsory Sale Notice may, and each Shareholder irrevocably constitutes and appoints any other Shareholder who complies with this Section 2.5 as the true and lawful attorney for such Shareholder with full power of substitution in the name of and on behalf of such Shareholder in accordance with the *Powers of Attorney Act* (Ontario), with no restriction or limitation in that regard and declaring that such power of attorney may be exercised during any subsequent legal incapacity on its part, execute and deliver all such agreements and documents as may be necessary to permit the sale of such Shares to the Bidder to be completed as provided in this Agreement and reflected on the books of the Corporation. Such appointment is coupled with an interest and this power of attorney shall not be revoked or terminated by any act or thing unless this Agreement is terminated or unless such Shareholder ceases to be bound by the provisions of this Agreement. Such power of attorney supersedes any other power of attorney which may have been granted by a Shareholder.

Consider adding a provision that if a sale of the Purchased Shares to the Buyer pursuant to the Third Party Offer is not completed within a certain period of time, no sale of the Purchased Shares can be made without complying again with the terms of this Article 2.

* * * * *

ARTICLE 3
COMPULSORY BUY-SELL [OR SHOT GUN] PROVISION

These provisions represent a method of last resort for Shareholders to end their relationship in the Corporation. In most cases when "shotgun" arrangements are resorted to, there will have been a breakdown in the relationship among Shareholders or groups of Shareholders. Accordingly, it is very important that it be well-drafted and deal in a comprehensive way with bringing the relationship of the Shareholders

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to an end. Caselaw[2] has demonstrated that such provisions should be followed carefully and where shareholders have deviated from the agreed upon process, there is the possibility that such provisions become unenforceable. Parties have to be 'sufficiently compliant' which should not be interpreted as perfect compliance. While they are generally considered inherently fair, given that the Offering Shareholder may be a purchaser or a seller at the price that is chosen, the financial circumstances and business contributions of the Shareholders are often different which may affect how equitable the provision may be in the circumstances. These provisions are reasonably rare and considerations around including them and how they should work in a particular set of factual circumstances are complicated and require significant thought and consideration.

Section 3.1 Offer to Purchase.

(1) If any Shareholder (the **"Offering Shareholder"**) desires to purchase the Shares owned by the remaining Shareholders (the **"Remaining Shareholders"**), the Offering Shareholder shall make an offer (the **"Shotgun Offer"**) in writing to the Remaining Shareholders to purchase all, but not less than all, of the Shares owned by the Remaining Shareholders. The Offering Shareholder shall specify in the Shotgun Offer the terms of the purchase and sale including the price (the **"Shotgun Price"**) to be paid for the Shares owned by each of the Remaining Shareholders.

If debt may be involved, the shotgun provision should also consider the details to be set out in the Shotgun Offer in respect of any outstanding debt/shareholder loans.

Section 3.2 Acceptance or Counteroffer by Remaining Shareholders.

(1) Within **[twenty-one]** days after the receipt by the Remaining Shareholders of the Shotgun Offer pursuant to Section 3.1(1), each Remaining Shareholder shall advise the Offering Shareholder in writing either:

(a) That the Remaining Shareholder accepts the Shotgun Offer to sell its shares on the terms and conditions set out in the Shotgun Offer; or

(b) That the Remaining Shareholder elects to purchase Shares owned by the Offering Shareholder on the terms and conditions set forth in the Shotgun Offer, *mutatis mutandis*, in which case the Remaining Shareholder shall specify whether it (i) elects to make such purchase on the condition that it is able to acquire all of such Shares or (ii) elects to make such purchase for only its rateable portion of such Shares or the number of shares in excess of its rateable portion it is prepared to purchase.

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[2] *Western Larch Limited v. Di Poce Management Limited, 2013 ONCA 722*

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(2) If all Remaining Shareholders elect to purchase all of the Shares of the Offering Shareholder, then (i) it or they shall be conclusively deemed to have made an offer to purchase the Shares of the Offering Shareholder on the terms and conditions, including the Shotgun Price, set out in the Shotgun Offer, *mutatis mutandis*, and the Offering Shareholder shall be conclusively deemed to have accepted such offer of the Remaining Shareholders, and (ii) where more than one Remaining Shareholders have made such election, each Remaining Shareholder shall purchase from the Offering Shareholder its rateable portion of such Offering Shareholder's Shares and any Offering Shareholder's Shares in excess of each Remaining Shareholder's rateable portion shall be allocated pro rata based on those Remaining Shareholders willing to purchase in excess of their rateable proportion pursuant to their election provided that no Remaining Shareholder shall be required to purchase any Offering Shareholder's Shares below his or her rateable portion or in excess of the number of shares specified in its election.

Consider amendments which may be necessary with multiple classes of shares.

(3) If (i) all Remaining Shareholders accept the Shotgun Offer for all of the Offering Shareholder's Shares, (ii) there are Offering Shareholder's Shares which no Remaining Shareholder is prepared to purchase, or (iii) the Remaining Shareholders fail to advise the Offering Shareholder in writing within the period specified in Section 3.2(1) of their intention to purchase the Shares of the Offering Shareholder, then (i) the Remaining Shareholders shall be conclusively deemed to have accepted the Shotgun Offer to sell their Shares on the terms and conditions set out in the Shotgun Offer, and (ii) the Offering Shareholder shall purchase from each Remaining Shareholder its Shares.

If not all of the Shares are elected to be purchased by the Remaining Shareholders as a group, this provision provides that the offer is void and the Remaining Shareholders must sell their Shares to the Offering Shareholder. Consider whether this is appropriate. In situations involving Shareholders that have relatively small shareholdings, consideration should be given to modifying this paragraph so that the Shotgun Offer will only become void if the Remaining Shareholders who accept the Shotgun Offer hold less than a specified percentage.

Section 3.3 Purchase Price.

The purchase price for the Shares of the Shareholder who has accepted or been deemed to have accepted an offer under Section 3.2 (the **"Purchased Shares"**) shall be an amount equal to the Shotgun Price (the **"Purchase Price"**).

Consider adding an anti-flip provision to the effect that if the Purchasing Shareholder resells the Purchased Shares within a certain period of time, the difference between the Purchase

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Price received and the Purchase Price paid shall be shared with the Selling Shareholder on a pro-rata or some other basis. Consider addressing valuation of non-cash consideration, if any.

Section 3.4 Intervening Death.

If a Shareholder becomes an Inactive Shareholder before the Time of Closing of a Sale Transaction pursuant to the provisions of this Article 3 as a result of the death of the Shareholder or its Principal, the provisions of Article 5 shall apply and the provisions of this Article (except for this section) shall be suspended until completion of the Sale Transaction contemplated by Article 5.

* * * * *

ARTICLE 4
PUT AND CALL RIGHTS

Put and call rights can be triggered on occurrence of various events. Different triggering events may result in different share pricing mechanisms. This Article 4 deals with special put and call rights given to specific shareholders. For example, a venture capital or private equity investor may have a specific time period during which an exit must be consummated. Article 5 is a further elaboration on such rights for events like death, disability and defaults. It will be necessary to ensure availability of funds to pay out calls in these circumstances. Consider whether it should be the Corporation or other shareholder(s) who have the call right (purchases by a Corporation of shares in its capital may have significant tax consequences).

Section 4.1 Put of Shareholder B.

If the Corporation has not **[insert the triggering event]** on or prior to **[date]**, at any time thereafter until **[date]**, Shareholder B shall be entitled, upon notice in writing (a **"Put Notice"**) to the Corporation to require, at the option of the Corporation, the Corporation or the other Shareholders to purchase all but not less than all of the Shares owned by it (collectively, the **"Purchased Shares"**). Upon receipt of such Put Notice, the Corporation shall specify the purchaser (the **"Purchaser"**). In the event that the Corporation elects to acquire the Shares but is unable to meet the applicable solvency test under the Act, then the Purchaser shall be deemed to be all of the Shareholders according to their Proportionate Interest. Thereafter, Shareholder B (the **"Vendor"**) shall sell to the Purchaser and the Purchaser shall purchase from the Vendor, the Purchased Shares upon the terms and conditions set forth in this Article 4 and in the general sale provisions in this Agreement (a **"Sale Transaction"**). The Put Notice shall specify an estimated Fair Market Value for the Purchased Shares.

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Section 4.2 Call of Shareholder C.

At any time following the **[first anniversary]** of the date of this Agreement, each of Shareholder A and Shareholder B, if they are then Shareholders of the Corporation, shall be entitled, upon a joint notice in writing (a **"Call Notice"**) to the Corporation and to Shareholder C and any Permitted Transferee to whom Shareholder C has transferred its Shares (collectively, the **"Vendor"**), to require the Vendor to sell all but not less than all of the Shares owned by it (the **"Purchased Shares"**) to (i) each of Shareholder A and Shareholder B rateably based on the proportion that their respective beneficial ownership of Shares bears to one another, or in such other proportions as they may mutually agree, or (ii) the Corporation, as set out in the Call Notice. Upon receipt of such Call Notice, the Vendor shall sell to Shareholder A and Shareholder B or the Corporation, as the case may be (the **"Purchaser"**) and the Purchaser shall purchase from the Vendor the Purchased Shares upon the terms and conditions set forth in this Article 4 and in the general sale provisions in this Agreement (a **"Sale Transaction"**). The Call Notice shall specify an estimated Fair Market Value for the Purchased Shares.

Section 4.3 Calculation of Purchase Price.

(1) In the event any Party disagrees with the estimated Fair Market Value contained in the Put Notice or Call Notice, as the case may be, and notifies the Corporation that it so disagrees within five Business Days of receipt of the notice, the Fair Market Value shall be determined in accordance with the general sale provisions of this Agreement. If no dispute notice is received within the prescribed time, the Parties shall be deemed to have accepted the estimated Fair Market Value contained in the Put Notice or the Call Notice, as the case may be.

(2) Subject to Section 4.3(1), the purchase price for the Purchased Shares under Section 4.1 and Section 4.2, as the case may be, (the **"Purchase Price"**) shall be the product obtained by multiplying the estimated Fair Market Value of the Shares as set out in the Put Notice or Call Notice, as the case may be, by the number of Purchased Shares.

This calculation works if there is one class of shares. Variations will be required if that is not the case and if any debt is involved.

* * * * *

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ARTICLE 5
CESSATION OF INVOLVEMENT IN THE CORPORATION

Section 5.1 Inactive Shareholders.

(1) A Shareholder shall be deemed to be an Inactive Shareholder immediately following the occurrence of any of the following events (each a **"Triggering Event"**):

Provide for a list of triggering events such as (i) death, (ii) disability, (iii) sentenced to imprisonment, (iv) resignation or termination of employment, (v) bankruptcy, (vi) shares becoming liable to seizure, (vii) Family Law Act (Ontario) applications or proceedings brought by a spouse or a former spouse which require the transfer of the shares.

Examples follow:

(a) on the date of the death or disability of its Principal or, if such Shareholder is an individual, on the date of death or disability of such Shareholder;

(b) on the date immediately preceding the date on which a Shareholder or its related Principal is declared bankrupt, makes a proposal in bankruptcy, becomes the subject of bankruptcy or other similar proceedings which are not being contested in good faith, makes an assignment for the benefit of creditors or otherwise acknowledges its insolvency; or

(c) on the date the Principal, or if such Shareholder is an individual on the date, the Principal or Shareholder has become the subject of an application or proceeding brought by a spouse under the Family Law Act (Ontario) or similar applicable legislation that determines that the spouse is entitled to Shares or shares of the Shareholder if not an individual,

(d) On the day a Transfer of Shares is made by a Shareholder contrary to the terms of this Agreement.

(e) On the day a Principal's employment with the Corporation is terminated by the Corporation, or, if such Shareholder is an individual, on the date the employment of such Shareholder with the Corporation is terminated by the Corporation. Consider separating cause from without cause terminations.

(f) On the day that a Principal's employment with the Corporation is terminated by voluntary resignation of the Principal or, if such Shareholder is an individual, on the date such Shareholder's employment with the Corporation is terminated by voluntary resignation.

(2) Each Shareholder or Principal, or its executor, administrator, or other legal or personal representative, as the case may be, (each being a **"Representative"**), shall give notice in writing to the Corporation promptly following the occurrence of a Triggering Event.

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Section 5.2 Irrevocable Option to Purchase Shares of Inactive Shareholder.

(1) Each Shareholder grants to the other Shareholders **[and the Corporation]** an irrevocable option (which option shall not be revoked by the death of the Shareholder or its Principal) (the **"Purchase Option"**), exercisable in the event that it becomes an Inactive Shareholder, to purchase all but not less than all of the Shares held by it and its Permitted Transferees (the **"Purchased Shares"**).

(2) The Corporation shall deliver a notice to each Shareholder other than the Inactive Shareholder (the **"Other Shareholders"**) immediately following the receipt of notice of, or otherwise becoming aware of, a Triggering Event. The Purchase Option shall be exercisable by the Other Shareholders at any time within **[thirty]** days following receipt of notice of the Triggering Event (the **"Exercise Period"**) upon notice in writing (the **"Exercise Notice"**) to the Inactive Shareholder or its Representative and the Corporation.

Consider whether a significantly longer period should be permitted. Consider if the Corporation should have an option to purchase the Purchased Shares in lieu of Other Shareholders that do not exercise the Purchase Option. There may be adverse tax consequences to the selling Shareholder if the Shares are sold to the Corporation.

(3) If the Other Shareholders elect to exercise the Purchase Option, they shall be entitled to purchase the Purchased Shares *pro rata* in the proportion that each of their holdings of Shares bears to the total number of Shares held by the Remaining Shareholders or in such other proportions as the Other Shareholders may mutually agree and such purchase may be made by one or more Other Shareholders jointly or by any one of them alone.

Section 5.3 Compulsory Purchase by Corporation.

If a Shareholder becomes an Inactive Shareholder pursuant to Section 5.1 and the Other Shareholders do not exercise the Purchase Option or require the Corporation to purchase the Purchased Shares pursuant to Section 5.2, the Inactive Shareholder or its Representative shall have the right, upon notice to the Corporation (the **"Compulsory Purchase Notice"**) within **[thirty]** days following the expiry of the Exercise Period (the **"Compulsory Purchase Period"**), to require the Corporation to purchase the Purchased Shares.

Consider whether this is an appropriate use of the Corporation's funds and resources. In many circumstances, it is only appropriate to require the Corporation to purchase the Shares in the event of death in which case the Corporation may decide to take out an insurance policy to fund such purchase.

Section 5.4 Purchase Price for Shares.

The purchase price (the **"Purchase Price"**) for the Purchased Shares of the Inactive Shareholder (the **"Vendor"**) shall be the product obtained by multiplying

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the number of Purchased Shares and the Fair Market Value per Share determined in accordance with the provisions of Article 6.

1. *Consider whether there should be a floor price. Consider reducing the Purchase Price for certain triggering events by a percentage to reflect a "punishment" factor which may be appropriate in "fault based" circumstances such as termination for cause or imprisonment.*

2. *Consider providing for the obligation of or option for the Corporation to obtain life insurance policies in the name of each Shareholder who is an individual and in the name of each Principal of a corporate shareholder to enable the Corporation to fulfil its obligation hereunder.*

3. *Consider tax treatment to the Corporation and to the individual.*

4. *Consider suspending the right of the Inactive Shareholder to cease having any informational rights or to nominate any directors and/or to have any nominee director resign from the board of directors.*

Section 5.5 Suspension of Certain Provisions.

Following a Triggering Event pursuant to Section 5.1 an Inactive Shareholder shall only be entitled to transfer its Shares in accordance with this Article and the provisions of any other buy-sell provisions of this Agreement shall be suspended and inoperative with respect to such Inactive Shareholder.

* * * * *

ARTICLE 6
FAIR MARKET VALUE

The three most common methods for determining the price to be paid for the Shares are:

(1) a value that is fixed in advance by the parties and updated periodically;

(2) a value that is determined by the board of directors and if disputed is determined by an independent third party like the Corporation's accountant or auditor (consider who should pay the costs of the valuation); or

(3) a value established by a formula in the agreement.

The determination of a value of the shares to be purchased and sold involves a two-stage process. In the first stage, a value for the company as a whole must be established. This can be done by using an asset or an earnings-based approach. Depending on the type of company involved, it is probable that in the early stages an asset-based approach is more realistic. A switch to an earnings-based valuation would likely be made as the company's profitability improves. The second stage in the valuation process is to establish a value for the departing shareholder's interest in the company. A decision must be made as to whether this will simply be a

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rateable portion of the value of the whole company or whether a discount will be applied in the case of a minority interest or a premium added in the case of a majority interest.

With respect to the three methods of establishing the value of the shares of a company each method has advantages and disadvantages. The formula method is perhaps the least advantageous of the three methods. The circumstances of the company are bound to change over time and therefore, formulae rarely stay correct for any length of time. Moreover, formula valuation clauses tend to be extremely complicated and are often a source of litigation.

A valuation by an independent third party is better than the formula method but it can sometimes prove to be a lengthy and expensive process. Requiring the disputing party to pay the costs of the valuation if it is not significantly different from that suggested by the board of directors can be an effective method of making sure third party valuations are entered into only where necessary.

The final method is fixing a value annually. Consider who should be responsible for annual updates (the parties or the board) and what should happen if such updates are not undertaken. Consider providing that if an annual review valuation has not been carried out within the twelve month period immediately preceding the triggering event, the shares will be valued as at the date of the triggering event. The clause should also provide a dispute resolution mechanism.

Consider defining the Fair Market Value, as a going concern, with specification with respect to minority discount, private company discount and whether the availability of insurance proceeds are to be taken into consideration in determining the Fair Market Value.

If the business is specialized think carefully about how a valuator is to be selected. It may be possible to agree to a list of valuators at the outset, in which case, however, it will be necessary to ensure that it is kept current in light of any changes or conflicts that arise.

Section 6.1 Definitions.

"Expert" means a national accounting or valuation firm to be agreed upon by the Shareholders or, if they are unable to agree within three Business Days, then **"Expert"** means ●, Chartered Accountants, or an affiliate thereof, or if they are unable or unwilling to accept an appointment to undertake the valuation required under section ●, then **"Expert"** shall mean ●, Chartered Accountants, or an affiliate thereof.

"Fair Market Value" means, for the purposes of valuation by the Expert hereunder, the highest cash price in terms of money which would be obtained as at the date specified in the applicable section hereof if all the Shareholders of the Corporation sold all of their respective Shares in an open and unrestricted market (recognizing that the Shares are securities of a corporation which cannot offer its securities to the public) without compulsion to a willing and knowledgeable purchaser acting at arm's length (as defined in the *Income Tax Act* (Canada)) and where in determining

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such Fair Market Value: (1) the value of each common share is based on the value of all common shares; (2) no diminution or accretion in value is attributed to any majority or minority interest; (3) the value of any insurance on the life of any shareholder or employee and the proceeds of such insurance shall be excluded; and (4) the value of all intangible and unrecorded assets is included;

Section 6.2 Determination of Fair Market Value.

(1) In circumstances where a Triggering Event has occurred pursuant to Section 5.1, the Fair Market Value per Share for the purposes of Section 5.4 shall be estimated by the Board of Directors. In the event the Inactive Shareholder disagrees with such determination, the Corporation will instruct the Expert to prepare and deliver to the Corporation and the parties within 30 days a report setting forth such firm's estimate of the Fair Market Value per Share and the basis upon which such estimate has been calculated, which shall be based upon the definitions set forth in this Article 6. The determination of the Expert shall be final and binding on the parties, absent manifest error.

(2) The costs and expenses of the Expert will be paid by the Corporation unless the determination of the Expert shall be within 10% of the estimate provided by the Board of Directors, in which case the disputing Inactive Shareholder shall pay all costs and expenses of the Expert.

* * * * *

ARTICLE 7
GENERAL SALES PROVISIONS

Section 7.1 Application of Sale Provisions.

(1) Except as may otherwise be expressly provided in this Agreement, the provisions of this Article shall apply to any sale of Shares between or among Shareholders, any sale of Shares by a Shareholder to a third party pursuant to Article 2 or, to the extent applicable, between Shareholders and the Corporation pursuant to the provisions of this Agreement.

(2) For the purpose of this Article , the terms **"Vendor"**, **"Purchaser"**, **"Date of Closing"**, **"Time of Closing"**, **"Purchase Price"** and **"Purchased Shares"** with respect to any Sale Transaction shall have the meanings specified in Articles 2, 3, 4 and 5, as the case may be.

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Section 7.2 Obligations of Vendor.

At or prior to the Time of Closing, the Vendor shall:

(a) Assign and transfer to the Purchaser the Purchased Shares and deliver the share certificate(s) representing the Purchased Shares duly endorsed for transfer to the Purchaser or as directed by it;

(b) Do all other things required in order to deliver good and marketable title to the Purchased Shares to the Purchaser free and clear of any Liens whatsoever;

(c) Deliver to the Corporation and the Purchaser all necessary documents (which documents shall be in form and substance reasonably satisfactory to the solicitors for the Purchaser) required to transfer to the Purchaser the indebtedness of the Corporation and the other Shareholder to the Vendor or to otherwise comply fully with the intent of this Agreement;

(d) Deliver to the Corporation signed resignations of the Vendor and its nominees, if any, as Directors, officers and employees of the Corporation, as the case may be;

(e) Deliver to the Corporation releases by the Vendor and its nominees, if any, of all claims against the Corporation with respect to any matter or thing up to and including the Time of Closing in their capacities as Directors, officers, Shareholders, employees or creditors of the Corporation, as the case may be**[, except for any claims which might arise out of the Sale Transaction or (list ongoing agreements, if any]**;

Consider whether requiring a release to be delivered in every sale is appropriate.

Section 7.3 Release of Guarantees etc.

If, at the Time of Closing, the Vendor, a Principal of the Vendor or any other Person for and on behalf of the Vendor, shall have any guarantees, securities or covenants lodged with any Person to secure any indebtedness, liability or obligation of the Corporation or the remaining Shareholders, then the Corporation shall use its best efforts to deliver up or cause to be delivered up to the Vendor or cancel or cause to be cancelled all of such guarantees, securities and covenants at the Time of Closing. If, notwithstanding such best efforts, the delivery up or cancellation of any such guarantee, security or covenant is not obtained, the Corporation shall deliver to the Vendor, the Principal and such other Person an indemnity in writing, in form reasonably satisfactory to counsel for the Vendor, indemnifying them against any and all claims, losses, costs or damages which may be or which shall have been paid, suffered or incurred by them with respect to the guarantee, security or covenant.

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Section 7.4 Repayment of Debts.

If, at the Time of Closing, the Corporation is indebted to the Vendor in an amount recorded on the books of the Corporation and verified by the Auditor, the Corporation shall repay such amount to the Vendor at the Time of Closing. If, at the Time of Closing, the Vendor is indebted to the Corporation in an amount recorded on the books of the Corporation and verified by the Auditors, the Vendor shall repay such amount to the Corporation at the Time of Closing and, if the Vendor fails to make such repayment, the Purchaser shall be required to pay the amount of such indebtedness to the Corporation from the Purchase Price and the amount of the Purchase Price payable to the Vendor shall be reduced accordingly.

Section 7.5 Payment of Purchase Price.

Unless otherwise agreed in the Sale Transaction and permitted by this Agreement, the Purchase Price (less an amount withheld equal to the face amount of any indebtedness of the Vendor to the Corporation or the other Shareholders or to repay a Lien) shall be paid by the Purchaser in full by cash or bank draft at the Time of Closing.

Section 7.6 [Non-compliance with Conditions.

If at the Time of Closing (i) the Purchased Shares are not free and clear of all Liens or are subject to any withholding tax under applicable Law, the Purchaser may, without prejudice to any other rights which it may have, make the payment necessary to repay such Liens and/or make the payment of tax required, as the case may be; and in each such case the Purchase Price payable by the Purchaser for the Purchased Shares shall be satisfied, in whole or in part, as the case may be, by such payments and the amount so paid shall be deducted from the Purchase Price payable at the Time of Closing).]

Section 7.7 Non-Completion by Vendor.

(1) If, at the Time of Closing, the Vendor fails to complete the Sale Transaction, the Purchaser shall have the right, if not in default under this Agreement, without prejudice to any other rights which it may have, make payment of the Purchase Price payable to the Vendor at the Time of Closing by depositing such amount to the credit of the Vendor in the main branch of the Corporation's bankers in the City of Toronto. Such deposit shall constitute valid and effective payment of such amount to the Vendor irrespective of any action the Vendor may have taken to transfer or grant of Lien on the Purchased Shares. If the Purchase Price has been so paid, then from and after the date of deposit, the Sales Transaction shall be deemed to have been full completed and all right, title, benefit and interest, both at law and in equity and to the Purchased Shares shall conclusively be deemed to have been transferred to and become vested in the Purchaser and all right, title, benefit

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and interest, both at law and in equity, in and to the Purchased Shares of the Vendor or of any transferee or assignee of the Vendor shall cease and determine. The Purchaser shall also have the right to execute and deliver, on behalf of and in the name of the Vendor, such deeds, transfers, share certificates, resignations and other documents that may be necessary to complete the Sale Transaction and each Shareholder, to the extent it may be a Vendor irrevocably appoints any Shareholder who becomes a Purchaser in a Sale Transaction its attorney in that behalf in accordance with the *Powers of Attorney Act* (Ontario), with no restriction or limitation in that regard and declaring that this power of attorney may be exercised during any subsequent legal incapacity on its part.

(2) The Vendor shall be entitled to receive the amount deposited with the Corporation's bankers pursuant to Section 7.8(2) together with the releases and indemnifies to which it may be entitled pursuant to Section 7.3 and Section 7.4 on delivery to the Purchaser of the documents referred to in Section 7.2 and in compliance with all other provisions of this Agreement.

Section 7.8 No Joint Liability.

For greater certainty, the Parties acknowledge and agree that where a Sale Transaction involves more than one Purchaser, the Purchasers in such Sale Transaction are not jointly liable for the payment of the Purchase Price for the Purchased Shares and any indebtedness purchased, but are only liable for their proportionate share.

Section 7.9 Consents.

The Parties acknowledge that the completion of any Sale Transaction shall be subject, in any event, to the receipt of all necessary governmental and regulatory consents and approvals to the transfer of Shares contemplated thereby.

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TAB 05

THE ANNOTATED Shareholder Agreement 2016

Shareholder Disputes & Shareholder Agreements

Stanley Freedman
Aird & Berlis LLP
with assistance from Ian McLeod

September 21, 2016

cpd Continuing Professional Development

Shareholder Disputes & Shareholder Agreements

Stanley Freedman

with assistance from Ian McLeod

September 21, 2016

AIRD & BERLIS LLP

Barristers and Solicitors

airdberlis.com

Why Shareholder Agreements?

- Corporate law, by-laws and articles may be insufficient
- Corporate control & share transfers
  - Minority shareholder protection
  - Exit strategies
  - Family businesses & succession
  - Triggering events (e.g. death, disability, retirement)
- Dispute resolution & management
  - Director appointments & decision making
  - Shareholder approval for key business decisions
  - Mandatory arbitration
  - Distributions (e.g. dividends and compensation)

Business Corporations Act Relief

- Examples from *Business Corporations Act* (Ontario)
- Oppression remedy

248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c. 27, s. 71 (33).

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a ***unanimous shareholder agreement***;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities; R.S.O. 1990, c. B.16, s. 248 (3). [emphasis added]

- Winding up by court

207. (1) A corporation may be wound up by order of the court,

(b) where the court is satisfied that,

(iv) it is ***just and equitable for some reason***, other than the bankruptcy or insolvency of the corporation, that it should be wound up; R.S.O. 1990, c. B.16, s. 207 (1). [emphasis added]

Scenario 1: No SHA? You May Be Stuck

Falus v Martap Developments 87 Ltd., 2012 ONSC 2301

- Corporation's main asset is a commercial and residential building
  - Tom and Vince each own 50% of the corporation
  - They've worked together for 30+ years, essentially operating as a partnership within a corporate entity
  - Generally, it is a passive business, subcontracted building management company handles day to day duties
  - No shareholders agreement, no minute book, infrequent shareholder meetings
- With Tom's permission, Vince's shares restructured as part of an estate freeze – Vince's children become shareholders
- Vince's children become increasingly involved in the business – generates dispute with Tom

- Tom applies to Court for buy-out or winding up of the corporation
- Tom argues that he had a reasonable expectation to only do business with Vince
- Therefore, despite no shareholders agreement, Court should order implied buy-out option when Vince leaves the business or order a wind-up of the corporation because business arrangement with Vince's children not tenable

No SHA? You May Be Stuck

Falus v Martap Developments 87 Ltd. … continued

- Holding – no implied right to buy-out and no basis to order wind-up of corporation
- Key factors
  - **No shareholders agreement**
  - No evidence of discussions about retirement or withdrawal
  - No life insurance to cover buy-out on death
  - Parties *chose* corporate vehicle, not partnership
  - Business is passive real property ownership, therefore management dispute not enough to merit winding-up of corporation
- Tom is now stuck in a soured business relationship with no remedy

Scenario 2: Shotgun Minimum Offer

Buttonwood Holdings v Zeubear Investments, 2010 ONCA 825

- Zeubear purchases 40% of Buttonwood for $1.2 million, financed by two promissory notes
- Shotgun clause contains "minimum terms" of offer provision
  - 50% of PP on closing and a promissory note for the remaining balance
- B triggers shotgun with offer exceeding minimum terms – entire PP shall be paid in full on closing
- B's offer is for $1.8 million – for Z to buy-out B, he would have to pay almost $3 million ($1.8 + $1.15 owed under terms of promissory notes)
- Z's reply accepts offer to purchase B's shares, delivers 50% of PP and promissory note for balance of PP
- B refuses to close

Minimum terms or actual terms of offer?

- B argues Z's acceptance is void because it does not conform to shotgun offer
- Z argues SHA implies 50% PP + 50% promissory note offer term even though B's shotgun offer exceeded the "minimum terms"
- Trial judge held Z's buy-out invalid – constituted a counter-offer because it did not conform to B's initial offer
  - SHA stated *minimum* terms of offer to trigger shotgun
  - B's offer exceeded minimum terms, Z's buy-out had to conform to B's offer

The Shotgun Provisions

Buttonwood Holdings v Zeubear Investments … continued

Section 4.12(1) *Notice of Shotgun Buy-Sell Offer.*

The Notice shall contain: [an offer to buy or an offer to sell all the shares]; and …

(c) the terms and conditions, including the price to be paid for each Share, which shall apply to both the Sell Option and Purchase Option (*in this section, the 'Terms')* [emphasis added]

Section 4.12(2) *Minimum Terms.*

Notwithstanding any other provision hereof … the Terms shall be deemed to provide, *inter alia*, that …

(c) Payment of the Purchase Price for all the shares to be purchased pursuant to this section shall be made by delivering on completion:

(i) at least 50.0% of the Purchase Price in cash or by certified cheque or bank draft; and

(ii) A promissory note for the balance of the Purchase Price, … [emphasis added]

Decision & Analysis

Buttonwood Holdings v Zeubear Investments ... continued

- Appeal allowed – Z's non-conforming reply is valid, B must sell shares
- Although B's offer exceeded minimum terms, provision deems terms implied in *any* shotgun offer under the SHA
- Key wording is *"the Terms are deemed to provide"*
- Trial judge and B are inconsistent with the words of the section
- Commercially reasonable to interpret clause in manner that levels playing field between the parties
- Court's suggested alternative

"An offer shall provide the amount of the Purchase Price that shall be paid on completion by way of cash, promissory note or bank draft, provided that such amount is not less than 50% of the Purchase Price. The balance, if any, shall be paid by way of promissory note …"

Scenario 3: Shotgun Form of Notice

Abdollahi v Nickpour, 2013 BCSC 1853

- Parties are equal shareholders in corporation that owns a hotel in Vancouver
- Highest number of by-law infractions in the city
- Corporation has mortgage with VanCity, backed by personal guarantees from both Abdollahi and Nickpour
- Dispute arises
- Abdollahi triggers shotgun provision, applies for declaration of Court to enforce shotgun clause in SHA
- Nickpour initially accepts Abdollahi's offer to buy, but eventually refuses to close the transaction

- Nickpour argues closing documents deficient because
  1. Abdollahi tendered materially improper form of release; and
  2. Abdollahi failed to comply with an implied term releasing Nickpour of his personal guarantee

Argument 1: Improper Form of Release

Abdollahi v Nickpour … continued

- <u>Shareholders Agreement version</u>

"I hereby confirm that [after the sale of the shareholders' loans the Company] is not indebted to me in any way and in particular as a **director, officer, shareholder, consultant or as an employee of the Corporation as the case may be**"

- <u>Tendered version</u>

"I hereby confirm that [after the sale of the shareholders' loans the company] is not indebted to me in any way and in particular as an **officer, director, employee or ordinary creditor**"

Holding – Form of Release

Abdollahi v Nickpour … continued

- Nickpour argues the tendered form of release is materially wrong because he would be personally liable under his guarantee to VanCity but unable to sue the company for indemnification

- Court disagrees – tendered form of release not materially different from shareholders agreement
  - Release speaks to a point in time, namely, a state of facts at time of execution
  - Both forms of release say “the company is not indebted to me in any way”

Argument 2: Implied Term in Release

Abdollahi v Nickpour … continued

- Article 3.05 – Schedule ‘B2’ will include, in addition to the Purchase Price and other allocations for the Purchase Shares, **the adjustments as to the pay-out by the Corporation of that portion of the mortgage in favour of VanCity and a Credit Line in favour of VanCity as to the proportion due by the Vendors**

- Nickpour agues
  1. Above provision implies a release of his personal guarantee of the mortgage and this should have been tendered at closing
  2. Implying such term is necessary to give business efficacy to the contract

Holding – Release from Guarantee

Abdollahi v Nickpour … continued

- Release of personal guarantee is not implied from that wording
  - Court considered provision alone and in context of agreement as a whole
- "Parties here are players in a commercial enterprise"
- Parties could have included such a term but *chose* not to

The Appeal

Abdollahi v Nickpour, 2014 BCCA 131

- Appeal dismissed – deficiencies are immaterial, echoes trial judge's reasoning

Argument 1 – Form of Release

- Tendered form of release is not broader than form of release in shareholders agreement
  - Tendered release narrowly crafted to include obligations extant at discrete point in time (i.e. closing)
  - Release must be construed having regard to factual situation existing at time of closing

Argument 2 – Implied Release from Guarantee

  - Parties did not specifically provide that Nickpour's guarantee would be released upon closing
  - Business efficacy does not require implied term
  - Article 3.05 clearly accepts responsibility for payment of financial obligations to VanCity

Scenario 4: Triggering Events

Ziegler Estate v Green Acres (Pine Lake) Ltd. 2008 ABQB 552

- Defendant corporation is family owned & operated campground
- Plaintiff, Crystal Ziegler, is widow of shareholder Garth
- Form of USA was executed by all 4 shareholders – 2 parents and 2 sons (Justin and Garth)
- March 2005: Garth marries Crystal with whom he already has a daughter
- Two months later, Garth dies in an accident
- Corporation made payments to Crystal equivalent to Garth's salary for 1 year (6 months longer than was required by USA)
- August 2006: corporation issues to plaintiff Notice of Intention to Purchase Shares pursuant to USA section 11.01

Triggering Provision

Ziegler Estate v Green Acres (Pine Lake) Ltd. … continued

11.01: **In the event that sickness, accident or disability** affect and prevent any shareholder or principal shareholder from continuing active full time employment with the corporation (the Afflicted Shareholder) […]

In the event that the Afflicted Shareholder remains unable to return to active full time employment for a period in excess of 12 months from the date of the affliction, the other shareholders may serve notice on the Afflicted Shareholder of intention to purchase the Afflicted Shareholders' shares …

Implications & Issue

Ziegler Estate v Green Acres (Pine Lake) Ltd. … continued

- If disposing, shares' value may differ depending on share valuator's methodology
- Shareholders agreement unclear as to methodology of valuing shares, in fact, accountants or auditors to value but not given specific direction
- Court found different triggering events may lead to different values
- If section 11.01 does not apply, then different valuation may take place
- Parties did not ask Court to rule on valuation issue but readily acknowledged such issue might form the subject of a separate application

- Green Acres argues that Garth died in an "accident", therefore section 11.01 should apply

Is Crystal required to sell Garth's shares to the remaining shareholders pursuant to USA section 11.01?

Holding

Ziegler Estate v Green Acres (Pine Lake) Ltd. … continued

"This matter comes before this Court not as an intellectual exercise in contract interpretation"

- *Ejusdem generis* – where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not be construed to
- Although an accident can cause death, "sickness" and "disability" contemplate a living person. Green Acres' argument widens meaning of accident beyond nearby words
- Standard form nature of USA is irrelevant, Court must undertake its own analysis in the context of *this* USA
- Death is not a triggering factor in s.11.01; therefore Garth's estate retains ownership of the shares

Scenario 5: Arbitration Clauses

Gorman v Kosowan, 2016 ONSC 4371

- Motion by Kosowan to stay proceedings brought by Gorman for relief from oppression
- Executed shareholder's agreement provides that Gorman and Kosowan are each 50% shareholders, directors, and managing directors of corporation
- Via separate entitlement agreement, Gorman to obtain beneficial ownership of 50% through "sweat equity"
- Dispute arises in 2014, continues until February 2016
  - By letter, Kosowan terminates Gorman's employment by the corporation
  - Kosowan unilaterally serves Gorman with Notice of Default under shareholder's agreement but, surprisingly, still permitted Gorman, if he wished, to pay $4 million to acquire beneficial interest in 50% of company
  - Kosowan issues Notice to Gorman stating any attempt to enter the property of the corporation would constitute trespassing

Arbitration Provisions

Gorman v Kosowan … continued

- USA - Decisions requiring resolution of SHs include:

"*...the hiring or dismissal by the Corporation of a manager of its business or any other senior executive or key employee of the Corporation, and the determination of, or any material alteration in, the remuneration and compensation or other terms and conditions of employment of any such manager or key employees...*"

DISPUTES: The parties agree that disputes other than disputes regarding the conduct of day to day business, which are not resolved at meetings, or other disputes under this Agreement shall be resolved as follows:

(b) If the parties cannot settle the issue in dispute informally with the assistance of David Fram, the parties agree to arbitrate the disagreement.

(g) there shall be no appeal from the award of the arbitrator or arbitrators.

The Parties' Arguments

Gorman v Kosowan … continued

- Kosowan argues that motion to stay Gorman's oppression application should be granted because arbitration clause "covers the field"

- Gorman argues stay should be denied because
  1. Kosowan breached the USA by acting unilaterally;
  2. Kosowan is using the arbitration clause as a tool of oppression; and
  3. Hiring and dismissal of employees is a "day to day" activity, therefore excepted from arbitration

Holding

Gorman v Kosowan … continued

- Motion to stay granted
- "disputes under this Agreement" is a broad phrase encompassing all disputes controlled by, in accordance with, provided for by and governed by the USA
- Only exception is "conduct of day to day business"
- Hiring and firing managers expressly dealt with in USA, therefore not "day to day business"
- Although Kosowan likely violated several USA clauses when terminating Gorman, the breach is arbitrable

Sources Cited

Legislation

- *Business Corporations Act* (Ontario), RSO 1990, c B.16

Case Law

- *Abdollahi v. Nickpour*, 2013 BCSC 1853, [2013] B.C.W.L.D. 9465, 19 B.L.R. (5th) 46, 233 A.C.W.S. (3d) 372
- *Abdollahi v. Nickpour*, 2014 BCCA 131, [2014] B.C.W.L.D. 2887, 239 A.C.W.S. (3d) 919, 24 B.L.R. (5th) 182, 353 B.C.A.C. 231, 603 W.A.C. 231
- *Buttonwood Holdings Inc. v. Zeubear Investments Ltd.*, 2010 ONCA 825, 103 O.R. (3d) 578, 196 A.C.W.S. (3d) 695
- *Falus v. Martap Developments 87 Ltd.*, 2012 ONSC 2301, [2012] O.J. No. 1622, 214 A.C.W.S. (3d) 437, 2 B.L.R. (5th) 292
- *Gorman v. Kosowan*, 2016 ONSC 4371, 268 A.C.W.S. (3d) 346
- *Ziegler Estate v. Green Acres (Pine Lake) Ltd.*, 2008 ABQB 552, [2008] A.W.L.D. 4899, [2008] A.J. No. 1081

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Thank You

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TAB 06

THE ANNOTATED Shareholder Agreement 2016

Resources for Panel on Professionalism Issues When Dealing with Shareholder Agreements

Jordan Dolgin, *Dolgin Professional Corporation*

David Dunlop, *McMillan LLP*

Caterina Galati, Senior Competence Counsel,
The Law Society of Upper Canada

September 21, 2016

cpd Continuing Professional Development

Resources for Panel on
Professionalism Issues When Dealing with Shareholder Agreements

Rules of Professional Conduct

http://lsuc.on.ca/lawyer-conduct-rules/

Definition of Client – Section 1.1

Definition of Conflict of Interest – Section 1.1

Conflicts of Interest – Section 3.4

Joint Retainers – Rules 3.4-5 – 3.4-9

Law Society Resources

Steps for Dealing with Conflicts of Interest under Rule 3.4 of the *Rules of Professional Conduct*

http://www.lsuc.on.ca/with.aspx?id=2147499259&langtype=1033

Steps for Dealing with the Joint Retainer Rules

http://www.lsuc.on.ca/with.aspx?id=2147499258&langtype=1033