

Selected Topics in Preparing a Shareholder Agreement

Insight Paper ***Negotiating and Drafting Major Business Agreements***

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Toronto, Ontario

Mark A. Surchin
Partner

Goodmans LLP

Goodmans^{LLP}

SELECTED TOPICS IN PREPARING A SHAREHOLDER AGREEMENT

Mark A. Surchin
Partner

Goodmans LLP
Toronto, Ontario

1. Purpose of a Shareholder Agreement

A corporation is a creation of statute. The governing legislation, whether the *Business Corporations Act* (Ontario) (the “OBCA”) or the *Canada Business Corporations Act* (the “CBCA”), generally regulates certain aspects of how a corporation is governed. There is no requirement that any particular corporation be governed by a shareholder agreement. However, shareholder agreements are often used to supplement the statutory framework that applies to corporations. The major points for shareholders to address in considering whether to enter into a shareholder agreement and, if so, what should be addressed, include the following points:

- (a) governance of the corporation including how to resolve deadlocks;
- (b) whether any special rights should be offered to the minority such as requiring special approval for specified material decisions;
- (c) providing for how the corporation is to be financed and any related shareholder obligations;
- (d) to create liquidity for otherwise unmarketable shares;
- (e) to describe any special role that is expected of any particular shareholder; and
- (f) to anticipate likely future events such as the death of a shareholder.

Shareholder agreements are most critical in a closely held corporation to regulate governance, including the resolution of deadlocks, and to provide liquidity mechanisms for the shares.

2. **Unique Nature of a Shareholder Agreement**

The main focus of a shareholder agreement is to plan for the future by having the shareholders agree at the outset of their business relationship what rules are to govern their relationship in various circumstances. Some other major business agreements, in contrast, tend to focus more on describing the terms of a transaction to be completed at a particular moment in time. For example, in some other agreements, special attention is paid to the allocation of risk among the parties should certain assumptions (essentially contained in representations and warranties) prove not to be correct. What can be difficult in settling a shareholder agreement, in order to make it useful to the shareholders over a long term relationship, is assessing precisely what future circumstances should be contemplated so that they can be considered in preparing the agreement.

The lawyer's role in preparing the agreement, as is the case with all major business agreements, is to learn as much as possible about the client's objectives, needs, best case thoughts and worst case fears. All of this information can be used to turn a form precedent into a living agreement that makes sense to a particular client in its own unique circumstances. If the circumstances suggest a shareholder agreement that may be complex, or if the parties are not sophisticated, it may well be advisable to commence the process with a term sheet or list of issues rather than with a full draft agreement. It is often easier for parties to discuss points that are briefly set out in a short term sheet than to review and absorb a more lengthy and dense legal document.

3. **Unanimous Shareholder Agreements**

A unanimous shareholder agreement (a "USA") is a written agreement among all the shareholders of a corporation (or among all the shareholders and one or more persons who are

not shareholders) that restricts in whole or in part the powers of the directors to manage or supervise the management of the business and affairs of the corporation.

In the absence of a USA, the directors of the corporation would have the sole power to manage the corporation subject only to certain shareholder rights specified in the applicable corporate statute. Accordingly, a USA becomes one of the corporation's constating documents with the effect of transferring certain powers of the directors of a corporation to the shareholders of that corporation. Both the OBCA and the CBCA allow a corporation to be governed by a USA. A sample precedent annotated USA is attached to this paper. This precedent does not address all points covered in this paper and should be viewed only as a basic starting point for an analysis as to what is needed in specific circumstances.

It should be noted that a shareholder agreement may be entered into among all shareholders without constituting a USA if such agreement does not restrict the powers of the directors. An agreement among only a portion of the shareholders cannot by definition constitute a USA, as unanimity is lacking. Where a shareholder agreement is not a USA, it is simply a regular contract that is subject to the corporation's articles and by-laws.

Where a shareholder agreement is a USA, and shares of the corporation are transferred, the transferee is bound by the USA as long as the share certificates contain a legend in respect of the existence of a USA.

Since a USA is one of a corporation's constating documents, it is important to avoid any conflicts between the USA and the corporation's articles or by-laws. It is not clear that the provisions of a USA will supercede the provisions of the articles or by-laws, so consideration to be given to including a clause in the by-laws to the effect that the provisions of any shareholder agreement that is in effect will prevail over the by-laws in the event of any conflict or inconsistency.

4. Governance Considerations

Except in the case of a USA which transfers all or a portion of the powers of the directors to the shareholders of a corporation, the directors of a corporation have the sole power to manage the affairs of the corporation on a day to day basis. However, even in the absence of a USA, both the OBCA and CBCA require approval of the shareholders in respect of certain fundamental matters.

Where there is no USA, it will be especially important that the shareholder agreement provide for how directors are to be elected by the shareholders. Typically, each of the shareholders is given (or is expressly not given) an entitlement to nominate a particular number of directors and all shareholders agree to vote for the nominees of all shareholders. (An example is set out in Section 3.1 of the sample USA.) It is important to describe whether a particular shareholder's entitlement to board representation is static or whether it can be increased or reduced depending on any changes to its ownership of shares in the corporation. (Section 3.2 of the sample USA contemplates such a reduction.) In some cases a shareholder may lose an entitlement to board representation if it is in default of its obligations under the agreement.

Once a director has been elected, even if such election derives from the nomination by a particular shareholder, such director will be bound by the applicable corporate statute and, among other things, will be required to act honestly and in good faith with a view to the best interests of the corporation. Shareholders and directors will need to understand that the application of this standard may not lead to the automatic result of a particular director voting in accordance with a particular shareholder's wishes. Directors also will be bound by detailed rules regarding conflicts of interest.

It is not uncommon for a person who has a business relationship with a corporation to acquire some equity in the corporation and/or to be entitled to board representation. An

investor's nominee directors may well find themselves wrestling with these statutory duties in respect of matters to be approved which relate the corporation's relationship to the investor.

Both the OBCA and the CBCA provide that where a USA exists, a shareholder who is a party to such USA has all the rights, powers, duties and liabilities of the directors, to the extent that the USA restricts the discretion or powers of the directors to manage the business of the corporation, and the directors are relieved of their liabilities to the same extent. Accordingly, the statutory duties otherwise applicable to directors will become duties of the shareholders. However, statutory liabilities to which corporate directors are subject are found in many other statutes and it is not clear that the existence of a USA will be sufficient to transfer such liabilities to the shareholders. This will be a particular concern in respect of statutory liabilities arising under the laws of a jurisdiction other than the corporation's governing corporate jurisdiction. To the extent that not all of the powers of the directors are transferred to the shareholders, the directors will remain bound by the applicable corporate statute to the extent of their powers that have not been transferred to the shareholders.

Even where a USA is in force and all powers of the directors have been transferred to the shareholders, the corporate statutes nonetheless still require that the corporation maintain an actual board of directors that is properly constituted. For instance, the board, even if it does not possess any meaningful powers, must continue to meet the statutory residency requirements.

Where the size of the board and the composition of shareholders is such that deadlock in decision making is foreseeable, consideration should be given to how deadlocks can be resolved. The most drastic way to resolve a governance impasse is for one shareholder to exit by means of one of the methods of share sale discussed below. Mediation and arbitration are other mechanisms included in some shareholder agreements to resolve disputes. These mechanisms

may not be ideal in respect of fundamental business decisions which are the subject of the deadlock, as it is difficult to in effect delegate core business decisions to a third party.

In circumstances when one shareholder has a majority on the board, it is important to consider whether there are any issues that should not be decided by a majority vote of the board. A class of material decisions to be set out in the agreement instead may require unanimous director and/or shareholder approval, either by a super majority or by unanimous consent of either the directors or the shareholders. (An example of such a list defined as “Material Decisions”) is contained in the sample USA.)

It also is important to address quorum and other requirements for director and shareholder meetings. In some cases a particular director or shareholder must be present at a meeting in order for a quorum to exist. On the other hand, it may be important to provide for a circumstance where a party whose presence otherwise is required simply refuses to attend and thereby obstructs the ability to deliberate and make a decision.

It is also typical for a shareholder agreement to describe the corporate offices and the individuals who will serve as the initial corporate offices, as well as the process whereby future officers are appointed.

Other governance clauses to consider relate to annual budgets and financial plans, financial statements and other reporting obligations and whether the shareholders wish to regulate the distribution of the corporation’s profits in some manner.

5. Share Transfers and Liquidity Issues

It is typical for there to be a primary rule that no shares may be transferred without prior approval of the directors. Other than in respect of related parties (such as a member of the shareholder’s immediate family or a holding corporation), this rule protects the shareholders from ending up in a business relationship with parties who are different those contemplated at

the outset of the relationship. (See Sections 5.2 and 5.4 of the sample USA.) The negative consequence of this primary rule, if not supplemented by other provisions, is that a shareholder that wishes to exit needs to obtain such prior approval and there will be no certainty that such approval will be forthcoming. Similarly, it is typical to provide for some sort of approval regime before a new party subscribes for shares and becomes a party to the shareholder agreement. Accordingly, a number of other mechanisms have developed to co-exist with these rules so as to create some liquidity.

- (a) **Right of First Refusal:** One mechanism to consider is the right of first refusal. (See Section 5.5 of the sample USA). A right of first refusal allows a shareholder who receives an offer to sell its shares to give the other existing shareholders of the corporation the right to match such offer and become the buyer. If the other shareholders do not exercise the right of first refusal so as to purchase the shares of the shareholder who desires to exit, then the “no transfer” rule is waived and that shareholder becomes free to sell its shares to the offering party on the offered terms. It is typical to regulate rights of first refusal so as to provide that the offer must contemplate the payment in full for the shares at closing in cash, or to otherwise regulate the nature of any non-cash consideration. This provision does not work very well from the point of view of a minority shareholder who may not have the resources to purchase the shares of a majority shareholder.
- (b) **Right of First Offer:** Short of a right of first refusal is a right of first offer whereby a shareholder need not present a hard offer from a bona fide third party. Instead, the prospective existing shareholder need only state the terms on which it wishes to exit and, if the other shareholders do not buy its shares, it can then sell on such terms to a third party who wishes to buy on those terms. This sort of

“softer” clause may create more liquidity yet at the same time may allow the departing shareholder to impose a new shareholder on the remaining shareholders who is not a “good fit”. Accordingly, in some instances these clauses describe any persons who may not be buyers.

- (c) **Shotgun “Buy/Sell” Provision:** Another common mechanism is that of the “shotgun” buy/sell provision (see Section 5.6 of the sample USA). That provision typically allows one shareholder to offer the price and other terms under which it is prepared to either buy or sell its shares. The other shareholders then decide whether, under such terms, they wish to either buy the shares of the party invoking the procedure or instead sell their own shares to such party. The theory of such a provision is that the invoking party will have an incentive to be fair in selecting the price and other terms, as it will not be clear whether the other shareholders will choose to be a buyer or a seller. Again, however, where the shareholders have disparate holdings and different economic means, this sort of provision may result in it being difficult as a practical matter for a minority shareholder to actually act as buyer.

The shotgun provision is in some cases limited to situations where the corporation is deadlocked from a governance perspective.

- (d) **“Piggy Back” or “Tag Along” Provisions:** Where a particular provision results in the ability of a shareholder to sell its shares in the corporation, it is not uncommon for the other shareholders to have the right to “piggy-back” or “tag along” in such sale by selling their own shares to the applicable buyer on the same terms and conditions (the third party offer provision contained in Section 5.5 of the sample USA contains such a provision). Inserting such a right in the

shareholder agreement has the advantage of making minority shareholders feel more comfortable that they will be able to exit at the same time as a majority shareholder exits. On the other hand, from the point of view of the exiting shareholder who has found a party to buy its shares, it will be important to secure the agreement of any potential buyer to buy not only its shares but the shares of all other shareholders who wish to exercise these rights. As such, this provision may narrow the universe of potential buyers.

- (e) **“Drag Along” Provisions:** Shareholder agreements sometimes also contain a “drag along” provision such that an exiting shareholder is entitled to force the other shareholders to sell their shares to its buyer on the same terms and conditions. Such a provision improves the marketability of a shareholder’s shares in circumstances where there may be potential buyers interested only in buying all of the shares of a corporation (but not less than all of such shares). Typically the drag along applies only after the shareholder being dragged has had the prior opportunity to be a buyer of the exiting shareholder’s shares, subject only to its economic ability to do so.
- (f) **“Puts” and “Calls”:** Other types of liquidity provisions commonly found in shareholder agreements are “puts and calls”. A put is a right available to a particular shareholder to require the corporation or another party to buy its shares. A call allows the corporation or some other party to buy a particular shareholder’s shares (see Section 6.2 of the sample USA in respect of a call that becomes operative on the default of one shareholder). Puts and calls are typically used in connection with departing employees who have a small number of shares, on the insolvency or default of a shareholder and in connection with stock option plans.

These provisions generally require that the applicable shares be valued pursuant to an agreed formula so that the proceeds of sale resulting from the put or the call can be determined and paid. A put or call may also be the liquidity mechanism on the death or disability of a shareholder or on the occurrence of deadlock, instead of the options already discussed. It may be advisable for life insurance to be in place to fund a purchase following death.

Any provision of this nature will require that the agreement provide a mechanism for the applicable shares to be valued for purposes of determining the purchase price that is payable. In some cases the shareholders agree to regularly value the corporation and the per share value so that value can be more easily determined on an exit. It will be useful to obtain tax and accounting advice in describing any valuation formula as well as some sort of professional advice in performing the valuation calculation. It may also be advisable to include a special purpose dispute resolution mechanism to deal solely with determinations of value.

To the extent that life insurance will serve as an important planning tool to fund any purchase of shares, increases in value may require that the amount of life insurance be increased, assuming that additional insurance is available and at a cost that is affordable.

- (g) **Public Offerings:** Some shareholders share a business objective to grow the corporation's business and then take it public at a later point in time. Where such objective is definitive, it may be advisable to describe how the parties intend to realize that objective and what the consequences will be if the objective is not met.

- (h) **Divestiture Committee:** Some shareholder agreements contain the concept that in certain circumstances, such as where a deadlock exists as to core business issues, or if a contemplated public offering cannot be completed, the corporation is required to form a divestiture to find a buyer for the corporation's business. Such a mechanism tends to work best when there is a larger number of shareholders with diverse interests and the divestiture committee can operate if either by consensus then by majority rule. A next step would be for the shareholder agreement to give such committee the authority to retain an investment banker to find a buyer for the business and to complete an ultimate purchase and sale transaction.
- (i) **Dissolution:** Perhaps the most drastic liquidity mechanism is to require that the corporation be dissolved in certain circumstances, such as the existence of a deadlock where none of the other liquidity mechanisms are available or have been successfully used. This mechanism is generally only of last resort due to the assumption that the corporation will receive a lesser amount of proceeds on dissolution than in the context of a sale as a going concern.
- (j) **Mechanical Issues:** Any ultimate transaction whereby a shareholder sells its shares needs to be treated as an actual transaction. In particular, the shareholder agreement should provide that the new shareholder assume the obligations of the exiting shareholder under the shareholder agreement (see Section 5.3 of the sample USA), that the exiting shareholder's board nominees resign and be replaced by nominees of its buyer (see paragraph 7.1(b) of the sample USA), and that the exiting shareholder be released from any guarantees it has given in favour of the corporation (see paragraph 7.1(d) of the sample USA). To the extent that

the exiting shareholder is a significant shareholder, consideration should be given to a review of all material contracts by which the corporation is bound to assess whether a change of control of the corporation will occur. Third party consents may well be required in order for the transaction to be successfully completed.

6. Funding Considerations

A business corporation will require access to capital. This may require that the shareholders agree to contribute more equity in the future by means of further share subscriptions. Generally the shareholders will wish to have equal rights to subscribe for more shares so that they are not diluted. In addition to such pre-emptive rights, in some cases the shareholders also agree that in circumstances where it is determined as a governance matter that the corporation needs more equity, the shareholders will be obligated to invest more equity.

While it is possible that the proceeds of share subscriptions and general operating revenues will fully finance the corporation, typically a corporation will also require access to some sort of debt financing. If such debt financing is to come from the shareholders, the relevant terms need to be set out in the shareholder agreement. If debt financing is to come from banks and other third parties, guarantees may be required and, in such circumstances, the shareholders should provide for a sharing of liability thereunder. To the extent that the financing needs of the corporation impose contractual obligations on the shareholders to either advance funds or provide guarantees, the shareholder agreement will need to deal with the consequences of a particular shareholder's failure to meet its obligations. Possible consequences include the ability of the other shareholders or the corporation to purchase the defaulting shareholders' shares at a discount to the value thereof. (See Article IV of the sample USA for a template of these provisions.)

7. **The Oppression Remedy**

Applicable corporate statutes generally allow a court a broad range of remedies in the case where the business or affairs of the corporation are conducted or the powers of the directors are exercised in a manner that is oppressive or unfairly prejudicial to or unfairly disregards the interests of a complainant.

A court is unlikely to view the provisions of a shareholder agreement as in and of itself constituting oppression. However, it is possible that the actual conduct of the corporation or of the majority may be found to be oppressive even if a shareholder agreement has been entered into. In particular, where the shareholder agreement simply provides for how the board of directors is to be constituted, it will be open to a minority shareholder to argue that the exercise of power by the board is oppressive or unfairly prejudicial to its interests or that the board has unfairly disregarded its interests.

8. **Pooling/Voting Agreements**

Not every shareholder agreement deals with the full range of possible issues that can be covered by such an agreement. It is possible for two or more shareholders to enter into a more limited agreement dealing with solely how the shareholders are to vote in respect of some or all matters. A pooling agreement generally is one where two or more shareholders agree to vote their shares in a particular way. For example, two shareholders could agree to support each other's nominees in the election of the board of directors. A voting trust agreement goes the next step with the shares of the parties being deposited with the trustee and that trustee having the right to vote the shares. Neither a pooling agreement nor a voting trust agreement is a USA unless it otherwise meets the criteria for a USA.

9. Relationship to Other Agreements

It is often the case that a particular shareholder is party to one or more other agreements with the corporation, such as an employment agreement. In such circumstances consideration should be given to the interaction between the shareholder agreement and such other agreement(s). For example, if a shareholder ceases to be an employee of the corporation, a put or call may become operable in respect of his or her shares. If a shareholder is terminated for cause or is otherwise in default under his or her employment agreement, pricing may be reduced from what otherwise would be applicable, so as to create a disincentive against default.

If it is the expectation that any shareholder is to devote his or her principal time and attention to the business of the corporation, that obligation should be described in the agreement. If the shareholders are to be bound by non-competition and other restrictive covenants, such covenants should be described in the agreement (see Article VIII of the sample USA).

Agreements between the corporation and third parties may have both legal and practical effects on the executed shareholder agreement. For instance, as already noted, a “change of control” clause may be important to address in the context of the various liquidity mechanisms contained in the shareholder agreement. Similarly, various corporate covenants in favour of third parties might be breached in certain circumstances if the corporation were to exercise certain of its rights under the shareholder agreement, such as buying back its shares.

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Overview of Topics to Discuss

- Purpose of a shareholder agreement
- Unique nature of a shareholder agreement
- Unanimous shareholder agreements
- Governance considerations
- Share transfers and liquidity issues
- Funding considerations
- The oppression remedy
- Pooling/voting agreements
- Relationship to other agreements

Purpose of a Shareholder Agreement

- Corporations are creatures of statute and there is no requirement that any corporation be governed by a shareholder agreement
- Shareholder agreements are particularly useful in closely held corporations to deal with governance and liquidity
- Other material topics to address in a shareholder agreement are:
 - Resolution of deadlocks
 - Special minority rights
 - Obligations in respect of equity and debt financing needs of the corporation
 - Describe specific obligations of specific shareholders
 - Otherwise anticipate likely future events

Unique Nature of a Shareholder Agreement

- Many business agreements are oriented towards the present
- Shareholder agreements, in contrast, are focused primarily on anticipating future circumstances
- Given the difficulty of predicting the future, the lawyer's role is to learn as much information as is possible about the client's objectives, needs and concerns and craft a unique agreement
- It may be useful to start the process with a point form issues based term sheet rather than with a long form agreement

Unanimous Shareholder Agreements

- A unanimous shareholders agreement (“USA”) is a written agreement among all shareholders that restricts the powers of the directors in whole or in part
- A USA is a constating document of the corporation and binds transferees of shares

Governance Considerations

- The general rule is the directors have the power to manage the corporation
- A shareholders agreement can transfer all or a portion of such powers from the directors to the shareholders
- Especially where a shareholder agreement is not a USA, it is important to provide for how the shareholders are to nominate and elect the directors
- In some cases the general entitlement to board representation will change as circumstances change, such as in connection with a reduction of share ownership or on default
- All directors are required to adhere to the applicable standards set out in the corporate statute even if nominated by a particular shareholder
- Directors must act honestly and in good faith with a view to the best interests of the corporation and comply with statutory rules in respect of conflicts of interests

Governance Considerations (cont'd)

- In the case of a USA, the directors may remain bound by such standards, even if they no longer possess any effective powers, due to liability exposure contained in other statutes
- Shareholders which assume the rights and duties of the directors become subject to the standards applicable to directors
- In some cases governance will result in deadlock and consideration should be given to how to resolve that deadlock
 - Exercise of a liquidity right
 - Mediation or arbitration
 - Dissolution
- Where one shareholder has a majority, consider a list of material decisions
- Set out quorum and other requirements in respect of meetings
- Set out corporate officers and individuals to serve as officers
- Consider other governance clauses relating to annual budgets, financial plans, financial statements, reporting obligations and dividend and distribution policy

Sample Definition of Material Decisions

- **“Material Decision”** means any decision involving the Corporation:
 - i. except as contemplated by this agreement, declaring or paying any dividends or making any other distribution in respect of any securities of the Corporation or making any other distribution of any nature (including repayment of loans) to any Person not acting at arm’s length with the Corporation or any of its Shareholders, as that concept is construed for the purposes of the *Income Tax Act* (Canada);
 - ii. selling or disposing of any assets or property by the Corporation during any Fiscal Year (whether in one or more transactions) with an aggregate book value in excess of \$●;
 - iii. making or committing to make during any Fiscal Year capital expenditures which, in the aggregate, exceed \$● and which have not been expressly provided for in the Budget for that Fiscal Year;

Definition of Material Decisions (cont'd)

- iv. establishing, acquiring or otherwise becoming involved in any corporate entity or any partnership, joint venture or similar arrangements;
- v. hiring any employee whose annual remuneration exceeds \$● per annum (inclusive of all benefits), or amending, terminating or otherwise altering or waiving the terms of any employment, consulting or management contract with respect to an individual whose annual remuneration exceeds that amount;
- vi. entering into any transactions with officers, directors or employees or members of their families or other Persons with whom they do not act at arm's length, as that concept is construed for the purposes of the *Income Tax Act* (Canada);
- vii. entering into (other than in the ordinary course to fund working capital needs expressly contemplated by the Budget for the applicable Fiscal Year), modifying or cancelling any credit facility;
- viii. creating any mortgage, lien, charge or other form of encumbrance with respect to any of the assets of the Corporation or its subsidiaries;
- ix. altering the nature of the Corporation's business or otherwise engaging in other businesses or activities that are not incidental to the businesses or activities presently undertaken by the Corporation;

Definition of Material Decisions (cont'd)

- iv. entering into any agreement with a term in excess of one year which contemplates the payment by or to the Corporation of more than \$● during its term;
- xi. instituting, modifying or terminating any profit sharing or similar incentive arrangement for employees of the Corporation or its subsidiaries;
- xii. approving the Budget for any Fiscal Year;
- xiii. selecting or changing the auditors of the Corporation;
- xiv. issuing or selling any of its share capital or any rights, warrants or securities convertible into or exercisable or exchangeable for Shares;
- xv. purchasing any of its Shares, except pursuant to the exercise of any retraction or redemption right which attached to such Shares;
- xvi. winding up, dissolving or liquidating;
- xvii. continuing under the laws of another jurisdiction;
- xviii. changing the Fiscal Year; or
- xix. amending the Articles or by-laws of the Corporation.

Share Transfers and Liquidity Issues

- Primary rule is that no shares may be transferred without prior approval
- Generally there are permitted transferees such as members of a shareholder's immediate family and holding corporations

Mechanisms to Consider

- Right of first offer – no hard third party offer must be presented
 - Need only state the terms on which it wishes to exit
- Right of first refusal - this mechanism requires that a shareholder presents a written offer from a bona fide third party purchaser
 - Other shareholders must purchase on the same terms and conditions or the offeree shareholder is entitled to sell to the third party
- Shotgun Buy/Sell provision
 - The initiating shareholder states the terms and the responding shareholder decides whether to be a buyer or seller
- Piggyback or tag-along provisions
 - This allows a particular shareholder the right to sell his shares in the context of a sale of shares by another shareholder

Share Transfers and Liquidity Issues

(cont'd)

Mechanisms to Consider (cont'd)

- Drag along
 - This allows an exiting shareholder to require other shareholders to sell their shares concurrently
- Puts and calls
 - A put allows a particular shareholder to require the corporation or another shareholder to buy its shares
 - A call allows the corporation or a shareholder to buy a particular shareholder's shares
 - Typically used in connection with departing employees with a small number of shares, on insolvency or default or on the death or disability of a shareholder
- Public Offerings
- Divestiture Committees
- Dissolution

Share Transfers and Liquidity Issues

(cont'd)

- Some provisions work best where the shareholders have an equivalent number of shares and equivalent economic abilities
- Shareholders need to balance the desire to create liquidity with the concern that the remaining shareholders will have new “partners” that they do not want
- Piggyback provisions may make a third party offer more difficult to obtain
- Drag along provisions may be desirable in obtaining an offer from a party that wishes to acquire control or the entire corporation
- Where shares need to be valued, it will be important to describe the valuation methods and perhaps provide for a more regular valuation process
- Consider life insurance to fund purchases

Funding Considerations

- The corporation may require equity capital via new share subscriptions from existing shareholders or from new shareholders
- Shareholder loans are another possible source of capital
- Third party debt financing may also be available but may require the shareholders to provide guarantees
- Provide for circumstances where a particular shareholder defaults in respect of its funding obligations

Oppression Remedy

- The oppression remedy is a broad remedy available to a Court
- The remedy is available in respect of conduct that is oppressive or unfairly prejudicial to or unfairly disregards the interests of a complainant
- The contents of a shareholder agreement are unlikely to constitute oppression
- Actual conduct in certain circumstances could be found to be oppressive

Pooling and Voting Agreements

- Two or more shareholders may enter into a limited agreement to vote their shares in a certain way (“pooling agreement”)
- A voting trust agreement involves a trustee being appointed to vote specific shares owned by particular shareholders

Impact of Other Agreements and Related Issues

- Some shareholders are party to other agreements in respect of the corporation, such as employment agreements
- Consider what happens if that shareholder breaches that other agreement
- Forced sale of shares
- Reduced pricing
- May have a practical effect on the shareholder agreement if there are “change of control” provisions or in the context of the corporation purchasing shares
- Consider any requirements for shareholders to devote their full time and attention to the corporation
- Consider non-competition and other restrictive covenants

Goodmans LLP
250 Yonge Street, Suite 2400
Toronto, ON M5B 2M6

www.goodmans.ca

T: 416.979.2211

F: 416.979.1234

Goodmans