



SHAREHOLDER | PARTNER COUNSEL

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“These shareholders found themselves [in a] ‘finger-pointing, poisonous stand-off’...”

Corporate Litigation: The Ultimate “Price is Right” Game*

Everyone agrees that being in a bad business relationship is like being in a bad marriage. Partners or shareholders with a buy-sell have the means to avoid the unpleasant throes of separation by pulling the trigger and walking away. No unknowns. No games. Those without a mechanism for splitting are in the opposite situation. They may have to seek judicial help (play the ultimate game of chance, some would say) to get the same result.

Take, for instance, the unfortunates involved in Coby’s Cookies Inc., a closely-held Ontario corporation. These shareholders found themselves without an agreed-upon split mechanism in circumstances where, as Justice Farley of the Ontario Court so colourfully put it, their business relationship —based on friendship —had been dissolved into a “finger-pointing, poisonous stand-off”.

In a desperate situation, and with no other way out, two of the company’s shareholders brought an application before Farley J. using Ontario’s shareholder tools – the oppression remedy and the liquidation and dissolution provisions¹. These provisions are mirrored in Alberta’s legislation. The oppression remedy in both provinces allows a Court to look for and rectify a corporation’s acts or omissions that oppress or unfairly prejudice the complaining shareholder. The liquidation and dissolution remedy allows the Court to dissolve the corporation in the face of such conduct (These remedies will be the topic of newsletters to come) where, for instance, it seems to the Court that it would be “fair and equitable” to do so.

Essentially, Farley J. decided that this was not an appropriate situation to invoke the provisions of the oppression remedy. He did, however, decide that it is “fair and equitable” to dissolve a relationship where both parties want it dissolved, and where the existing arrangement between

them has become difficult to live with. In coming up with a solution, Farley J. referred to his previous decision in another case², where the parties wished to disentangle themselves but lacked a tool with which to do it. In that case, Farley J. had said that:

“In circumstances such as these, it seems to me that relief should be given, since both sides want to be rid of the other, and it is just a question of money keeping the two sides apart from realizing their objectives. However, a mechanism does have to be selected which is fair to both sides”.

The parties’ bickering and suspicion had rendered them unable to come up with a splitting mechanism that would be fair to both sides. So, Farley J. came up with an inventive answer to the problem. As they say in the game show, it was his final answer — at least for the moment. (Fortunately for the parties, the Ontario Court of Appeal had the final say). He ordered one representative from each

Did you know...

The financial assistance restrictions in s. 42 of Alberta’s *Business Corporations Act* are to be repealed. Bill 15, which received third reading in May but which has not yet been proclaimed in force, permits Alberta corporations to “give financial assistance to any person for any purpose”. The federal government is going the same route with its Bill S-19. Watch for our announcement of the proclamation of these two bills, and a detailed discussion on them in future issues of *Shareholder/Partner Counsel*.

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“A stopwatch was to be activated to begin the game. From that moment, every six seconds, the purchase price of either team’s shares would drop \$10,000.00...”

“team” to play a version of “The Price is Right”. The two reps were to face each other. Each player’s view was to be restricted to just the other player’s face. Each was to be furnished with a buzzer. A stopwatch was to be activated to begin the game. From that moment, every six seconds, the purchase price of either team’s shares would drop \$10,000.00 from that party’s asking price. Once someone had buzzed in, then the non-buzzer could elect to either “kick or receive”. That is, just like in any other shotgun agreement scenario, he would have the option of either buying the buzzing team’s shares or requiring that the buzzer team purchase his team’s shares at the discounted price buzzed in at.

This mechanism was surely more frightening than the bathroom-cam on “Big Brother”. It seems likely that this was the Court’s way of chiding the parties for not being able to better manage their own affairs – or the end to their affairs. Farley J.’s parting shot was “The parties need relief – relief from each other. They now have the mechanism...”.

About a year later, the Ontario Court of Appeal overturned Farley J.’s decision. While the Court of Appeal found the judge’s order “inappropriate”, it was not for the reasons one might think. The Court of Appeal did not indicate that the lower judge’s decision demeaned the parties or trivialized their difficulties or even that it came uncomfortably close to making the judicial process seem like a sideshow. No, the Court of Appeal found the decision inappropriate because, first, the shares had not been properly valued; and second, because it would be more beneficial to the corporation if the party most involved in its day-to-day operations bought out the other party’s shares. Given this, the Court ordered a valuation

and also ordered that the corporation buy out the less involved shareholders.

Not many businesses could survive such a year of uncertainty and turmoil. One wonders how this one managed it. The moral of this story is that parties without a buy-sell, or shotgun, agreement take a chance. Play a safe game. Get a buy-sell agreement that you can live with *before* you need it.

¹ Re Wittlin et al and Bergman et al (1994) 19 O.R. (3d) 145 (Ont. Ct. Gen. Div.)

² Walsh v. Erectoweld Co. [1993] O.J. No. 24 (Gen. Div.)

In the next issues of *Shareholder/Partner Counsel...*

Watch for more advice on buy-sell agreements, and the tactics and strategies to make them work for you.

The legal professionals at Prowse & Chowne bring you *Shareholder/Partner Counsel*, dedicated to the discussion of issues particularly important to the small businessperson. Look for it bi-monthly for information and insight into the various legal remedies available to shareholders or partners with grievances; means available to resolve inter-shareholder disputes, including mediation; the oppression and derivative action remedies available through the Alberta *Business Corporation Act*; conflicts of interest; issues related to shareholder agreements; and much more.



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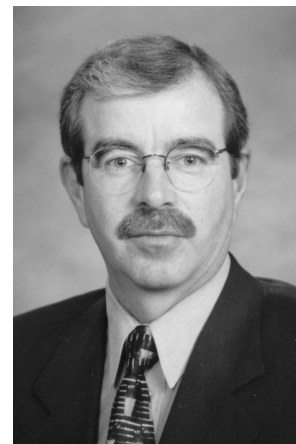
Suite 100 - 10328 - 81 Avenue
Edmonton, Alberta
Canada T6E 1X2

Tel (780) 439-7171
Fax (780) 439-0475

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J. Cameron Prowse, BA LLB, a managing partner in Prowse & Chowne, offers over 22 years of legal expertise to the Alberta and N.W.T. business communities. A recognized and practiced litigator, Cameron has a special interest in business law.



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