



Ellyn Law LLP

Business Litigation • Employment Law • Estate Litigation

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Spouses as Shareholders:
***The Intersection of Family Law
and Shareholder Remedies***

- This presentation is for information only.
- It is not legal advice.
- If you wish to consult with a lawyer in our firm, please call us:
 - Igor Ellyn, QC 416-365-3750
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 - Our assistants, Christine and Nanda will be pleased to arrange a telephone appointment with one of our lawyers to discuss your case
 - Please call 416-365-3700 Ext 3233 or 3225
 - Email to barristers@ellynlaw.com



Spouses as Shareholders:
*The Intersection of Family Law
and Shareholder Remedies*

- Spouses are often also business partners
- Spouse often works in the business even where not an equal shareholder
- Income splitting
- Shareholders' rights
- Shareholders remedies
- Corporation and other shareholders may have independent interests
- Spouses may have unvalued interests in the business



Is it Family Law or Corporate Law?
Usually, it's both!

- | | |
|------------------------|----------------------------|
| ■ Family Law | ■ Corporate Law |
| ■ Family Law Judge | ■ Commercial List |
| ■ Family Law Rules | ■ Rules of Civil Procedure |
| ■ Family Law Act | ■ OBCA |
| ■ Financial Statement | ■ Cross-Examination |
| ■ Questioning | ■ Advance on Legal Fees |
| ■ Disbursements, Costs | ■ Shareholder Position |
| ■ Impact on NEFP | ■ Fraud and Tax issues |
| ■ Equalization Payment | ■ Notice or Severance |
| ■ Source of Support | ■ Derivative Action |
| | ■ Oppression |
| | ■ Winding-up |



Corporate Issues to Consider on Marriage Breakdown

- Structure of the business
 - Partnership
 - Corporation, Joint Venture
 - Holdco, Opco, other corporations
- Who are the shareholders?
- Who are the officers and directors?
- Is there a "USA"?
 - Unanimous Shareholders' Agreement
 - Does it have a shotgun buyout clause?
- Has the USA been observed?
- Have the shares been valued?
- Is there a valuation formula in the USA?



More Corporate Issues to Consider on Marriage Breakdown

- Do both spouses work in the business?
- Can the spouses still co-operate?
- Is wife's salary reflective of her work?
- Notice / Severance on leaving employment
- CRA's review of income splitting/undeclared income
- Have dividends been paid?
- Does the corporation have redundant assets?
- How will the shares be valued?
- Will other shareholders be affected?
- Are there other relatives or partners in the business?
- Is independent representation required for any other party or for the corporation itself?



Corporate Finance Issues to Consider on Marriage Breakdown

- Business is primary source of revenue for support.
- How will corporate action affect it?
- Will attack on corporate activities give rise to:
 - a CRA audit
 - charges under ITA
 - Insolvency
 - Receivership or demand by creditors?
- Will disclosure in family dispute provide fodder for fraud claim by another partner?
- Undisclosed income and its impact on corporate value
- If spouse is a partner, will a voluntary disclosure to CRA be necessary?



Sources of Shareholders' Rights

- Corporate Statutes
 - Business Corporations Acts
 - Securities Acts
 - Extra-Provincial Corporations Act
- Articles of Incorporation
- By-Laws of the Corporation
- Shareholders' Agreements
- Government Agencies - OSC, etc.
- Self-Regulating Organizations – IDA, etc.



OBCA and Securities Acts

- OBCA, CBCA and other *Business Corp. Acts* deal with set up, operation and dissolution of all for-profit corporations
- Securities Acts in each province control the sale of securities to the public as overseen by the Ont. Sec. Comm. and self-regulation by IDA and other groups.



Shareholders' Rights

- Voting
- Attendance at Meetings
- Access to Information
 - Information as to what corporation is doing
 - Information to form a reasoned opinion
- Fair treatment of all shareholders
- Protection against fraud by brokers, etc.



Voting Rights

- Exercisable by a quorum – majority or agreed number: OBCA s. 101(1)
- Election of Board of Directors to manage affairs of the corporation
- Participate in major business decisions affecting the corporation's business
- Subject to limitations in articles of incorporation, by-laws or shareholders agreement



Access to Information #1

- Records required to be kept under OBCA
 - Articles and by-laws and all amendments
 - Unanimous shareholders agreements
 - Minutes of meetings
 - Director and shareholder resolutions
 - Register of directors with info as in s.140(1)
 - Securities register with info as in s.141



Access to Information #2

- Shareholders, directors, creditors may view records at corporation's registered office
- Notices must contain documents / info so shareholders can form reasoned judgment
- Proxy and Information Circulars must also give full disclosure. Drafts are not enough
- When information is deficient, results of meeting may be voided by the Court



Shareholders' Remedies

- Court-ordered Meetings
- Derivative Action
- Oppression Remedy
- Investigations and Audits
- Appraisals
- Winding-Up
- Complaints to OSC, IDA and other SROs

■ SRO – Self-Regulatory Organizations such as MFDA



Court-ordered Meetings

- Quorum required for a meeting
- Failure to attend may thwart the meeting
- Director or shareholder may seek relief
- OBCA s. 106: Court may order a meeting where “impracticable” to call a meeting
- Court has wide discretion as to purpose and structure of the meeting



Oppression Remedy #1

- The most effective and frequently-used shareholder remedy
- Intended to prevent tyranny by the majority
- Came into effect in most Canadian provinces in 1983. A large body of jurisprudence has developed.



Oppression Remedy #2

- Court has a very broad authority where oppressive conduct exists to remedy oppression by appropriate order, including
 - setting aside a transaction
 - amending a shareholder agreement
 - amending corporate articles or by-laws
 - directing purchase of shares or an auction
 - winding-up the corporation
 - directing the trial of an issue



Oppression Remedy #3

- What is oppressive? It's very broad
 - Conduct which is unfairly prejudicial
 - Conduct unfairly taken in disregard of the interests of a shareholder or security holder
 - Conduct which is inconsistent with the *reasonable expectations* of the parties
 - But . . . It does *not* have to be illegal
 - It does *not* have to be in bad faith



Oppression Remedy #4

- The oppression remedy is also available to non-shareholders, including
 - officers and directors
 - employees
 - security holders
 - creditors to prevent fraud by shareholders
 - anyone the court considers a “proper person”



Oppression v. Arbitration

- Many shareholders' agreements have arbitration clauses.
- Is oppression remedy available when there is a mandatory arbitration clause in a shareholders' agreement.
- *Deluce v. Air Canada* (1992 Ont. S.C.) said yes where majority shareholder (AC) managed feeder airline in AC's interest not in Air Ontario's and tried to squeeze out the minority shareholder



Derivative Action

- Powerful remedy to deal with fraud, abuse or breach of fiduciary duty
 - “Complainant”, including, shareholder, officer, director, employee, creditor or “proper person”
 - Seeks permission from Court to sue or defend a suit in name of corporation
 - Claim can be vs. shareholder or management
 - Can be defence of a suit management is unwilling to defend



Derivative Action #2

- Complainant seeks permission to sue or defend in name of the Corporation
- Court has to consider:
 - Fairness to complainant
 - Fairness to corporation
 - Who will bear the legal cost
 - Corporation’s exposure to legal costs
 - Management of corporation going forward



Derivative Action #3

- Four part test for leave to commence
 - Directors' refusal to prosecute or defend
 - Notice to directors of intention to seek leave
 - Complainant is acting in good faith
 - Court is persuaded that the proceeding is in the interests of the corporation

TEAMWORK



Other OBCA remedies

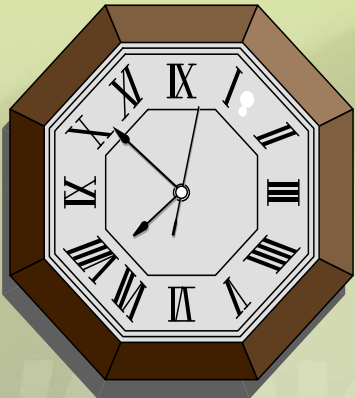
- Investigations, OBCA s.161
 - Looking for instances of fraud
- Appraisal Remedy, OBCA, s.188
 - To require corp. to buy shares of dissenting shareholders' where right of dissent to fundamental change exists
- Winding up, OBCA, s. 207
 - Just and equitable termination of the corp. where deadlock exists between "partners"

TEAMWORK



Final Thoughts

- Corporate and employment law issues arise in many family law cases.
- Are there individuals or corporations who need independent representation?
- Are there corporate law or employment law issues to be further investigated?
- We've only scratched the surface but
- . . . Our time is up.
- Please call us for further information
- 416-365-3750 or 416-365-3700.



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