



SHAREHOLDERS RIGHTS AND REMEDIES¹

Stephen Antle

INTRODUCTION

Shareholder disputes are more common than most people would expect. Frequently shareholders embark on some business venture without any formal agreement; rather, they have a loose understanding of the financing and conduct of the business and a "standard" set of company articles. This pattern leads to trouble. Moreover, even where a shareholder agreement exists, conflict may arise from a variety of conditions. For example, although remedies may be built into a shareholder agreement to deal with some foreseen problems, it may not address the unanticipated. Some examples of common problems are:

- Equal "partners" in a business may reach a deadlock on the future of the venture.
- "Partners" may develop a lack of confidence in their colleagues but be unable or unwilling to finance their "buy-out" under a shareholder agreement.

Whether or not a shareholder agreement exists, the remedies under the *Business Corporations Act*, S.B.C. 2002, c. 57 ("*Business Corporations Act*" or the "Act") may be required to resolve a dispute. These remedies are explored below.

COURT PROCEEDINGS

General Provisions

In the following discussion, the term "court" refers to the Supreme Court of British Columbia (s. 1(1)).

All applications to court under the *Business Corporations Act* must be made by motion. Under the Rules of Court such applications must be made by petition and the "motion" is normally the

¹ Reviewed and revised annually since February 1994 by Stephen Antle, Borden Ladner Gervais LLP, Vancouver. Current to November 2003.



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hearing of the petition. Note that the court has the power to convert a “proceeding” commenced by a petition to an “action” in the appropriate circumstances.

Unless notice is explicitly required, a motion may be brought without notice (s. 235). If an order is obtained without notice, any person affected by the order has the right to apply to set it aside or vary it on grounds of material misrepresentation, that an application without notice was inappropriate, or on its merits (Supreme Court Rule 52(12.3)). In most cases a company’s shareholders will be persons affected by an order that was obtained without notice.

Documents may be served on a company at its registered office or personally on a director, senior officer, liquidator or receiver manager of the company (s. 9).

Rectification of Irregularities

The court may, either of its own motion or on the application of any interested person, make an order to rectify or modify the consequence of any omission, defect, error or irregularity in the conduct of the business or affairs of a company, which causes a breach of the Act or the company’s memorandum, notice of articles or articles, or renders proceedings at a meeting or a consent resolution ineffective (s. 229).

On application by a company, a shareholder or an “aggrieved person”, the court may also correct the company’s articles, notice of articles or memorandum, minutes of any shareholders or directors meeting or resolution or any of the company’s registers. The court has the power to correct information wrongly entered or retained in, or wrongly deleted or omitted from, these records, and to compensate anyone who suffered a loss as a result of the incorrect information (s. 230).

Relief From Oppression

A shareholder of a company may apply for a court order, under s. 227, on the following grounds:

- the affairs of the company are being or have been conducted (or the powers of the directors are being or have been exercised) in an oppressive manner;



- some act of the company has been done (or is threatened) or some resolution of the members has been passed (or has been proposed) that is unfairly prejudicial to one or more of the shareholders.

For the purposes of s. 227, a shareholder includes a beneficial owner of a share of the company and any other person who, in the court's discretion, is a proper person to make an application under s. 227.

In order to succeed on the basis of oppression, a shareholder will have to satisfy the court that the company is not dealing honestly and fairly with the shareholder in conducting its affairs or that the powers of the directors are being exercised dishonestly or unfairly.

The conduct complained of must be sufficiently serious to be properly described as burdensome, harsh and wrongful.

One way of succeeding on the basis of unfairly prejudicial conduct is for a shareholder to satisfy the court that they have been denied a legitimate expectation to participate in the direction of the company's business affairs. However, there are cases in British Columbia where unfair prejudice has been found without this requirement having been met.

The case law is divided on whether the shareholder must be able to prove an element of bad faith on the part of those conducting the company's affairs. The more recent (and probably better) view is that this is not necessary; what is important is the effect of the conduct complained of.

Breaches of the company's obligations under the Act or its articles can also be oppressive or unfairly prejudicial.

The case law is divided on the effect of a shareholder agreement on a shareholder's ability to seek remedies under s. 227. The courts generally have held that where the shareholder agreement contains remedies for the conduct complained of similar to those sought under s. 227, the shareholder should pursue his or her rights under the agreement.



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The shareholder must be able to point to conduct affecting him or her as a shareholder, not just as a director, officer or employee.

The court may order either interim or final relief. Examples of available remedies are listed in s.227(3). The most common types of relief granted are the following:

- orders that remedy the specific conduct complained of;
- orders requiring the company or other shareholders to purchase the wronged shareholder's shares;
- orders that appoint a receiver or receiver manager; and
- orders for liquidation and dissolution.

If the court makes a payment order and the company is insolvent or payment would make it insolvent, it must pay as much as possible without becoming insolvent (s. 227(5) and (6)).

A shareholder may seek to hold a company's directors or officers personally liable for oppression or unfairly prejudicial conduct. To succeed, the shareholder will have to establish that specific directors or officers did specific things that amounted to oppression. They will also have to show that the circumstances support the oppression being remedied by requiring the directors or officers to personally compensate the shareholder. That may be so in cases where the directors or officers personally benefited from the oppressive conduct or furthered their control over the company through it.

It is important to note that the provisions of s. 227 differ from the analogous provisions of the Federal, Ontario and Alberta Acts. For example, under those acts shareholders, creditors and directors can all bring oppression proceedings. Under s. 227 shareholders alone can. Under the other statutes complainants can bring proceedings where corporate conduct "unfairly disregards" their interests. Relief is unavailable under s. 227 in these circumstances.



Derivative Actions

As distinguished from relief from oppression proceedings, a shareholder or director brings a derivative action in the name and on behalf of the company (s. 232(2)). The purposes of derivative actions are to enforce any right, duty or obligation enforceable by the company, or to recover damages for any breach of those rights, duties or obligations (s. 232(2)). A shareholder or director of the company may also, with leave of the court, defend an action brought against the company (s. 232(2) and (4)).

Section 233(1) requires the shareholder or director, when applying to the court, to have made reasonable efforts to cause the directors to prosecute or defend an action. The shareholder or director must notify the company, and any other person the court may order, of the application. The section also requires that the shareholder or director be acting in good faith and that it be in the best interest of the company that the action be brought or defended. In addition, if the party bringing the derivative action is a shareholder, the shareholder must have been a shareholder at the time of the transaction that has given rise to the cause of action.

The derivative action may not be discontinued, settled or dismissed without the court's approval (s. 233(5)). The court may issue interim and final orders regarding the directions for the conduct of the action and costs for the action (s. 233(3) and (4)).

Section 233(6) states that no derivative action is to be stayed or dismissed by reason only that it can be shown that an alleged breach of a right, duty or obligation owed to the company has been or might be approved by the shareholders of that company. However, evidence of that approval or possible approval may be taken into account by the court when making an order under s. 232.

Order for Liquidation and Dissolution

A company may be liquidated and dissolved by court order, under s. 324 of the Act, if the court thinks it just and equitable to do so, and as a remedy for oppression. Such an order is a drastic remedy. Consequently, a heavy onus rests on the applicant to persuade the court that it is just and equitable. The essential factor is that the relationship between the company's shareholders has deteriorated to such an extent that they have neither trust nor confidence in



each other's ability to manage the company's affairs. The courts are particularly likely to order a liquidation where it appears that the basis of the company was mutual confidence among the shareholders; where the shareholders agreed all were to participate in management; or where a shareholder agreement restricts shareholders' ability to liquidate their investment.

While a liquidation order is a drastic remedy, the test of showing that it is just and equitable that the company be liquidated may be easier to meet than that required for the court to find the shareholder is being oppressed.

In the case of a family company, the courts have held it is appropriate to take a more liberal approach to liquidation. The courts have found it would be just and equitable to liquidate a family company where one family member after working in the business for many years was excluded from management, even though he was never a director and there was no wrong doing by the other family members; see *Safarik v. Ocean Fisheries Ltd.* (1996), 12 B.C.L.R. (3d) 342.

It is important to note that, once the court is satisfied it would be just and equitable to liquidate the company, it is not limited to making a liquidation order. Under s. 324(3), the court may make any of the orders available under s. 227.

DISSENT PROCEEDINGS

General Information

In certain circumstances, a registered shareholder who disagrees with a proposed corporate action can require the company to purchase his or her shares for their "fair value" (s. 237(1)). The actions giving rise to a right of dissent are as follows:

- an alteration in the memorandum of a company by altering the restrictions on the business carried on or to be carried on by the company, or on its powers (s. 260).
- a proposed amalgamation (ss. 272, 287);
- approval of an arrangement (where permitted);



- a proposed disposition of all or substantially all of its undertaking (s. 301(5));
- a proposed continuance outside of B.C. (s. 309); or
- in respect of any resolution or court order permitting dissent.

Waiver

A shareholder may waive their right to dissent with respect to a particular corporate action (s. 239(1)), by providing to the company a waiver, which sets out specified information (s. 239(2)). In that event, the shareholders' right of dissent terminates (s. 239(3) and (4)). A shareholder may not waive their right to dissent generally (s. 239(1)).

Notice of Corporate Action

The company must notify each of its shareholders of corporate actions from which they have a right to dissent. If shareholders are entitled to dissent from a resolution that is to be considered at a shareholders' meeting, the company must notify them of the meeting, the resolution, and their right of dissent, a number of days (to be prescribed by regulation) before the meeting (s. 240(1)). If the shareholders are entitled to dissent from a consent resolution or resolution of directors, the company may, at least 21 days before the specified date, notify them of the resolution and their right to dissent (s. 240(2)). If the company does not, and the resolution is passed, or if a court order provides for a right of dissent, the company must notify the shareholders of the resolution or order and their right to dissent, within 14 days after the passing of the resolution (ss. 240(3) and 241).

Notice of Dissent

A shareholder who intends to dissent from corporate action must send the company a written notice of dissent, within a specified time. The notice must specify the shares in respect of which the shareholder is dissenting, and whether the shareholder is a registered or beneficial owner of the shares or both (s. 242(1) – (4)). If the notice does not comply with s. 242, the shareholders' right of dissent terminates (s. 242(5)).



Notice of Intention to Proceed

If a company that receives a notice of dissent intends to continue with the corporate action, it must send the dissenting shareholder a notice of intention to proceed stating that and advising the shareholder about how their dissent is to be completed (s. 243).

Completion of Dissent

A dissenting shareholder who receives a notice of intention to proceed must, if they still want to dissent, send the company or its transfer agent, within one month, their share certificates and a written statement that they require the company to purchase their shares (s. 244(1)). The shareholder is then deemed to have sold the shares, and the company to have purchased them (s. 244(3)). Once the shareholder has done this, the shareholder may not vote or exercise any shareholder rights in respect of the shares (s. 244(6)). Again, if the shareholder fails to comply with this requirement, their right to dissent terminates (s. 244(4)).

Payment

The dissenting shareholder and the company can agree on the fair value of the shares (s. 245(1)). If they cannot agree, either may apply to the court to determine the fair value of the shares or apply for an order that value be established by arbitration or by reference to a register or referee (s. 245(2)). The company must then promptly pay that amount to the shareholders (s. 245(1) and (3)), unless the company is insolvent, or payment of the fair value would make it insolvent, in which case the company must notify the shareholders of that and not pay (s. 245(5)). The dissenting shareholder may then either withdraw their notice of dissent within 30 days, or claim against the company for the unpaid amount (s. 245(4)).

Loss of Right to Dissent

In addition to losing dissent rights when not complying with the requirements set out earlier, a shareholder loses their right of dissent, if the company abandons the corporate action that has given rise to the right of dissent, a court permanently enjoins the action, or the shareholder votes in favour of the action or withdraws the notice of dissent with the company's consent (s. 246). When these events occur, the company must return the share certificates to the



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shareholder and the shareholder regains the ability to vote the shares and exercise shareholder rights (s. 247).