

Evolution of the Shareholders' Agreement in Canada

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Business corporations statutes in most Canadian jurisdictions allow the shareholders of a corporation to restrict, in whole or in part, the powers of the directors of the Corporation to manage, or supervise the management of, the business and affairs of the corporation. A typical shareholders' agreement will deal with any number of governance issues, including: (i) special approval requirements for certain important actions the corporation may want to undertake; (ii) the nomination of directors; (iii) the issuance of new shares or the sale/transfer of existing shares; and (iv) the right to receive information regarding the corporation and its business.

A shareholders' agreement is a critical governance tool for any private corporation with more than one shareholder. This is particularly true in situations when a corporation is evolving from being a closely-held/family enterprise to a growing enterprise raising capital from unrelated, third-party investors. Absent a carefully drafted shareholders' agreement, a corporation may face situations where lack of clarity as to decision-making power will frustrate the ability of the corporation to take advantage of business opportunities presented to it.

Where in the past governance issues of the nature described above were addressed in a single shareholders' agreement between a corporation and all of its shareholders, more and more corporations looking to raise capital from angel, venture capital or private equity investors are dealing with governance issues through multiple shareholders' agreements, each addressing discrete sets of governance issues. These shareholders' agreements are typically referred to as: (i) a voting agreement; (ii) a right of first refusal and co-sale agreement; and (iii) an investor rights agreement. Taken together, these shareholders' agreements deal with substantially the same issues as are dealt with in a single, Canadian-style, unanimous shareholders' agreement. The primary reason why corporations are moving away from the traditional approach towards the use of multiple shareholders' agreements can be found south of the 49th parallel; savvy private corporations looking to raise capital are looking to mirror, as much as possible, the shareholder governance practices generally adopted by U.S. based corporations. With the ever-increasing influx of capital from our friends south of the border, making things easier for investors operating out of the world's biggest economy makes good business sense.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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