

KEEPING CURRENT

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Closely-held Corporations (and other businesses) Avoiding Litigation and Other Unnecessary Ownership Catastrophes

By Richard Hoffman

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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Everyone always (or almost always) understands, at any and every given moment in time, that he/she is thinking "clearly" and "reasonably". Given such universal reality, it generally or otherwise often flows that the person who is not agreeing with your "clearly reasonable" thinking is thereby 'thinking unreasonably' and 'being unreasonable' in such regard.

In essence, what (in the real world, as distinguished from the law school classroom or the Court room) does the word "reasonable" therefore and thereby often actually (in reality) mean to almost every individual in such situations?

Answer: "Do it my way!"

In closely-held businesses that are owned by more than one individual (including all partnerships of individuals and all corporations whose shares are owned by two or more individuals, etc.), the following three elements play-out a triumvirate type of dynamic that often requires mindful attention and sensitive calibration as applicable:

- A. Ownership
- B. Power
- C. Control.1667

When such three elements are in-harmony with the expectations and satisfaction of the "owners", then all-is-generally well. However, when such three elements are not in harmony with the expectations and satisfaction of the owners, then there is potentially quite catastrophic disruption to the business owner relationship(s), including possibly to the detriment of all of the owners.

In many cases, even the most powerful owner/shareholder who is exceedingly confident in the strength of his control of his relative position can (and often does) end-up with the short-end-of-the-stick when and if such particular owner/shareholder underestimates the lengths and extents that another individual will often be prepared to fight when feeling offensively aggrieved.

In many cases, there can be an owner/shareholder who is not involved (or, not

nearly as involved as other owners/shareholders) in the operation of the business. In such circumstances, much of the Power and/or Control can rest with another or others of the owners/shareholders.

Fertile ground for catastrophic discord is particularly tricky in closely-held businesses among family members where the mixtures of money, emotions, perceived entitlements and ego can ignite heightened elements of unhelpful measures.

In litigation, the only individuals who can possibly win for-sure and will “always” win for-sure in litigation are the litigators who are involved in such litigation. Not ever so assured for any of the clients, though. Indeed, in many cases of litigation, both sides of clients (both sides of the aisle) can and will often ‘lose’ in the litigation... and particularly so after all of the costs of the litigation (including lost-time and large amounts of wasted opportunity-cost and much distracting emotions) are calculated. In all cases of litigation, not only are the costs very high, though, since litigation is almost always risky, since forecasting the future outcome of litigation is always fraught with uncertainty. It is almost always better for all owners/shareholders to sort-out their issues definitively and amongst themselves.

How many times has one been involved in or heard of or read about a situation such as the McCain brothers who, for decades, worked side-by-side beautifully, until one day the roof was blown off by an issue that could have/should have been solved quickly and with “cool heads”, but wasn’t...and the owners/shareholders were suing each other in Court?

Often, once matters have become “escalated” (and especially so, if one party engages a litigator), matters can and will often spin-out-of-control, to the massive detriment of most (if not

all) owners/shareholders involved...and, of course, to the delighted glee of the litigators involved.

Key steps to avoiding such catastrophes include, but of course are not limited to, the following, and from the get-go of the business relationship among the owners/shareholders:

1. Within the business, the selection of the most-capable person for each key oversight position (e.g., CEO, President, CFO and Vice-Presidents).
2. The rational allocation of responsibilities, including matching competencies with such responsibilities...for the best interests of the Business...and not allowing anyone to take-on any significant position through “ego”.
3. Establish clear “process-protocols” for the timely raising of any issues that could possibly become confrontational or otherwise tricky and especially so as to avoid anything ever becoming existentially tricky.
4. Establish the bedrock foundational covenant that, in the event of any issue of large importance to any owner, then all owners will meet (face-to-face...Zoom-call fine if meeting in person is not practical or possible), in a timely manner (no delay), and discuss in a manner that everyone abides by mutual-respect and mutual-courtesy.
5. Establish clear process-protocols for the timely dealing with any issues that get beyond the pale of mutual-respect and mutual-courtesy. Trusted financial/accounting consultants and legal counsel who are highly sensitive to and will



remain “objective” can often provide a calming and otherwise helpful effect, and particularly so if the consultant/ counsel exudes unimpeachable honesty of objectivity and sensitivity to the-cause-of achieving the most sensible decision based upon the prevailing and otherwise existing facts and circumstances.

Contact us

If you have a Business and/or Corporate Commercial matter and are in need of legal advice, please do not hesitate to contact **Richard Hoffman** in our dispute resolution group at 416.865.6623 or via email at rhoffman@grllp.com.

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