BUY-SELL PROVISIONS IN SHAREHOLDER AGREEMENTS

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I. INTRODUCTION

When people involved in a business enterprise utilize a corporation as the vehicle for the venture, it is often advisable that they set down their agreement in writing. Normally this is done through a written agreement amongst all of the shareholders of a corporation called a shareholders agreement, or in the event the agreement is to restrict the powers of the directors in some fashion, a unanimous shareholders agreement. The general purpose of a shareholders agreement is to clarify and outline the rules and procedures for the parties' association as shareholders of the corporation. In addition to dealing with operational issues such as what the roles of the parties of the corporation will be, how profits are to be distributed and how decisions are made, shareholders agreements also normally provide for certain mechanisms through which the parties may exit the existing shareholder relationship whereby one or more shareholders buy the shares of the other shareholders. These types of provisions are often referred to as buy-sell provisions.

With respect to the buy-sell exit provisions of a shareholders agreement, these provisions can be beneficial to the shareholders in the context of a corporate divorce as they provide some certainty to the shareholder as they provide clarification on the basis of how a withdrawal will occur and can act as shortcuts to settle disputes between the parties.

II. PURPOSE

The purpose of this paper is to:

1. Examine and discuss some of the most common buy-sell dispute resolution clauses in a shareholders agreement;
2. Discuss the general considerations that a prudent solicitor should take into account before using or recommending buy-sell dispute resolution provisions in a shareholders agreement;
3. Provide a sampling of when and how these dispute resolution clauses may be used; and
4. Provide a description of varying alternatives that may be used in developing dispute resolution provisions.
III. SCOPE OF THE PAPER

This paper is to be read with the following limitations in mind:

1. This paper is intended to deal with the use of buy-sell dispute resolution provisions in small to medium size, closely held companies in the context of a dispute that cannot be resolved other than through the termination of the relationship. This paper does not deal with the use of these provisions in institutional or widely held companies or in the context of "non-terminal" disputes.

2. The comments made with respect to buy-sell resolution provisions in shareholders agreements are in the context of shareholders agreements where the general direct or indirect transfer of shares is restricted in the widest possible manner and the only transfers which are allowed are the specific buy-sell resolution provisions which are expressly provided for in the agreement.

3. This paper does not deal with the cessation of a shareholder relationship through the use of statutory remedies [such as a court ordered sale under the oppression section of The Business Corporations Act (Saskatchewan)] or in the context of a takeover bid.

4. This paper also does not deal with cessation of a shareholder relationship arising from bankruptcy, lapse of time, mergers or amalgamations.

IV. IMPORTANT PRELIMINARY CONSIDERATIONS

While it is common practice, in the context of closely held companies, that shareholders request their lawyer to provide some form of buy-sell exit provisions in a shareholders agreement, a lawyer should not proceed with the drafting of an agreement without first considering a number of important preliminary matters. Some of these preliminary matters which should be considered are:

A. WHAT IS THE ROLE OF THE SOLICITOR?

There are many parties involved with respect to a shareholders agreement (i.e., various shareholders and the corporation itself). It is essential to determine who the solicitor will be acting for at the outset as this will affect his/her role and duty in connection with the drafting of the agreement. Some questions that
should be examined are: Is the solicitor to act on behalf of the corporation in a documenting role or otherwise and is the solicitor acting for the controlling or the minority shareholders? If the solicitor is to act for more than one party, it is essential that full disclosure regarding the various effects on the positions of each of the parties be made to all of the parties involved. Depending upon the disparity in the relative positions of the parties (i.e., financial, percentage of shareholdings), the complexity of the dispute resolution provisions and the differing effects on the parties the possibility of a conflict of interest is greatly heightened. Accordingly, in general it will be prudent that the parties each consider obtaining their own independent legal advice.

B. STAGE OF OWNERSHIP DEVELOPMENT

It is important to discuss and understand the background of the parties and their relationship to the organization. Considerations in this regard include:

1. what are the ownership positions of the parties - i.e., 50:50; majority/minority?;
2. what are the financial positions of the parties?;
3. the relative importance of the parties to the business - i.e., is one or more of the parties a key person to the operation?

Understanding the position of the parties and their relationship to the business will affect the type of buy-sell dispute resolution clauses that will be appropriate for the circumstances. For example, if the business is dependent upon a key person, it may not be appropriate to provide dispute resolution provisions which would remove this person from the company. In addition, if you are acting for a minority shareholder in a weaker financial position the use of a shotgun provision without sufficient controls as to price and timing may not be appropriate for the minority shareholder.

It is also important to understand the stage of the operation and the shareholders' anticipated plans for the future in relation to bringing in other potential investors. For example, if there are initially two shareholders in the corporation, however, the shareholders plan on bringing in additional equity investors who are to be
subject to the terms and conditions of the shareholders agreement, the agreement provisions should contemplate multiple shareholders.

C. OTHER GENERAL DRAFTING CONSIDERATIONS

In drafting buy-sell exit provisions of a shareholders agreement, it is important to remember that these provisions do not stand alone. Merely stating which party or parties will buy the other party's share does not take into account all of the other necessary associated matters. Some of the additional matters which should be considered are:

1. Procedural Mechanisms

How a specific exit provision is to be exercised (i.e., what notice is required - form of notice, time periods for exercise and closing of the transaction) are just as important as providing for which party will purchase another party's shares. Poorly drafted procedures for the exercise of a specific dispute resolution mechanism can create confusion and may result in the whole provision being held to be invalid.

There are various procedural problems that may occur when a buy-sell option is exercised by a shareholder. The method by which notice is provided to the other shareholders has been the subject of judicial consideration on numerous occasions. If a shareholder wishes to provide notice of acceptance of an offer which differs from the notice provisions contained in the agreement, the shareholder may do so subject to certain limitations. The method of notice must not be any less advantageous to the offeror, and the acceptance must be communicated to the offeror.¹

A further consideration is that once an offer is made to a named shareholder, such an offer may not be assignable or transferable to another individual or entity that was not contemplated in the original offer. When an offer is made under a buy-sell agreement, for example, the offeree may not transfer or assign its rights to another party. Subject to the terms of the shareholders agreement, a shareholder is generally

entitled to assign its rights prior to the receipt of an offer under a buy-sell agreement offeree; however, a shareholder may not transfer or assign any rights following the receipt of an offer so as to allow a third party to accept the offer. The policy behind this is that once an offer is made under a buy-sell agreement, the offeror is entitled to deal with the individual to whom the offer was made.²

An important element in the context of procedural issues are the rules relating to notice provisions. The notice is the mechanism which communicates with other shareholders that a shareholder wishes to exercise a particular provision under a buy-sell arrangement.

Some general considerations to keep in mind in this respect include the following:

(a) Consider including or attaching the form of notice or specifying the required contents of the notice.

(b) Specify the parties to whom the notice must be sent.

(c) Mark out the time frame within which the notice may be given.

(d) Ensure the general notice delivery sections in the shareholders agreement work in terms of addresses, changes of address, modes of delivery (i.e., personal, registered mail, facsimile) and the deemed dates of service. The most common methods of sending notice are by:

(i) Registered Mail;

(ii) Facsimile; or

(iii) Personal Service.

It is also important to include provisions whereby notice will be deemed to have been received. In the case of registered mail, it will usually be within three to five days; for facsimile, one day following confirmation the facsimile has been sent; for personal service, effective upon service.

(e) Consider including a rule that in giving the notice, that the notice specify the section of the shareholders agreement under which the notice is being given. This is to avoid confusion over which provision of the shareholders agreement is being used.

(f) Ensure that there is no conflict between the notice delivery and election delivery times and the times afforded for determination of the purchase price. For example, avoid inserting a provision which requires a party to make its election prior to the period specified for a third party to determine the value of the corporation.

(g) Articulate closing requirements including date, time and place of closing and closing delivery obligations.

Also ensure that the election exercise rules whereby shareholders are given a period of time to elect to purchase or sell following the receipt of the initial notice is similarly comprehensively described. Additionally, describe a closing date following the expiration of the applicable election period to allow for the date that related deliveries and closing obligations are to be satisfied.

2. Valuation Formulas

An issue that arises when drafting shareholder buy-sell agreements involves the value placed on shares when a corporate divorce occurs. Many problems can occur if no method of valuation is provided for in a buy-sell agreement. The most common methods of share valuation are:

(a) utilization of a fixed price;

(b) provisions providing for a valuation formula; or

(c) a price to be determined by a third party at a later date.

The fixed price mechanism is the easiest and most efficient mechanism for share valuation. The method involves establishing a price that will used by the parties in the event the buy-sell agreement is exercised. The inherent problem with the fixed price method is that if the price is not periodically updated, it may not
reflect the actual value of the shares over time.³ To prepare for this possibility, a fixed price method of valuation should be occasionally revisited to ensure that the price contained in the buy-sell agreement reflects the current value of the shares.

The use of a share valuation formula is also a common method of valuing shares under a buy-sell agreement. Share valuation formulas often involve using either:

(a) the book value of the shares; or

(b) the capitalization of earnings.⁴

The book value formula entails subtracting liabilities and preferred shares from assets, following which any equity is apportioned to the shares in question.⁵

The capitalization of earnings formula involves computing the average annual income of the corporation and applying it to a capitalization rate.⁶ The capitalization method involves:

(a) determining the annual income;

(b) applying it to a capitalization rate.

The benefit to using the capitalization formula is that you can take into consideration intangibles and goodwill. This feature may be attractive to shareholders depending on the nature of their business.

The third option involves requiring an independent third party to place a value on the shares. The valuator is often the corporate auditor, a recognized business valuator firm or an industry source knowledgeable


⁴Ibid.

⁵Ibid.

⁶Ibid.
about the value of the enterprise. There is no certainty that the value determined by such parties will reflective of the actual value of the shares, however short of agreement on a price or an acceptable formula, this approach serves to facilitate the severance of the relationship of the shareholders in the corporation.

3. Timing Considerations
Special consideration must be given to clauses providing for time periods contained in buy-sell arrangements. Of utmost importance is ensuring that the various time periods coincide with each other. For example, if the agreement provides that a valuator has sixty days to provide an opinion on the value of the shares, the time period for closing must take that factor into consideration. Steps should be taken to avoid the possibility that the requirement to elect to accept an offer or to specify a closing date or a closing period prior to a value being placed on the shares. Furthermore, the time period for electing to accept an offer under a buy-sell arrangement must correspond with the closing and valuation dates.

4. Income Tax
There are two income issues that are of paramount importance in the context of shareholders agreements. The first relates to the different tax treatments accorded to dividends and capital gains. The second relates to a shareholders agreement’s impact upon control of the corporation for income tax purposes.

With respect to the first issue, the sale of shares to an arm’s length party generally results in the recognition of a capital gain by the vendor. Conversely, the sale of shares back to the issuing corporation (be it through repurchase, redemption or retraction) generally results in the realization of a dividend by the vendor. As to whether the vendor would prefer to realize a capital gain or receive a dividend is entirely a function of time and circumstance. For example, one shareholder may prefer capital gains treatment as he or she may be in a position to utilize the lifetime capital gains exemption. On the other hand, that same vendor may prefer dividend treatment for those same shares five years later if he or she used up the exemption on another investment. In addition the frequency and speed at which tax laws change may warrant dividend treatment today and capital gains treatment five years into the future.
Consequently, the point to be made here is that the parties may desire flexibility in their shareholders agreements so that the most tax advantageous option is available to them at the relevant time. For example, the agreement could provide that a retiring shareholder must sell his or her shares to either:

(a) the remaining shareholders; or  
(b) the issuing corporation, with the consent of the retiring shareholder.

By wording the agreement in this manner, the departing shareholder has the ability to choose either capital gains or dividend treatment upon the disposition of his or her shares.

It must, however, be remembered that flexibility for one party may result in the least optimal income tax consequences for another party. In the sample clause given above, capital gains treatment may be preferred by the departing shareholder. However, the remaining shareholders may prefer corporate repurchase as opposed to purchase by each of them personally as the former involves the purchase of shares with dollars that have only been subject to tax at the corporate level (cheaper for the remaining shareholders) and the latter contemplates the purchase of shares with dollars that have been subject to tax at both the corporate and personal levels (more expensive for the remaining shareholders).

The second issue relates to the effect that simply negotiating, drafting and executing a shareholders agreement may have upon the "control" of the corporation under the Income Tax Act. Even though no rights have been exercised or have come to fruition under terms of the agreement, the mere existence of the agreement could have negative income tax consequences for the shareholders.

One potential negative income tax consequence relates to the "association" rules. Generally speaking, if two corporations are "associated" they must share the "small business deduction" (which is, essentially, the application of a lower tax rate to the first $300,000 of active business income for tax years beginning in 2005). Two corporations will be "associated" if they are controlled by the same person. Pursuant to subsection 251(5) of the Income Tax Act, if a person has:
"...a right under contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently...to acquire, shares of the capital stock of a corporation"

that person is deemed to be in the same position of control with respect to that corporation as if he or she actually owned such shares. The foregoing rule does not apply if the contingency is death, bankruptcy or permanent disability.

Consequently, if a shareholder owns all of the shares of, and controls, corporation A and he or she is also party to a shareholders agreement that gives them an option to purchase enough shares to control corporation B, these two corporations will be "associated" and must share the small business deduction. In spite of the legislation referred to above, however, the Canada Revenue Agency has taken the position (in Interpretation Bulletin IT-499R2) that it will not apply that provision solely because a shareholders agreement contains a "right of first refusal" or a "shotgun arrangement".

The foregoing merely touches on the potential negative income tax consequences that may follow the execution of a shareholders agreement, even though no rights under the agreement have come to fruition or been exercised. As a result, the parties and counsel should have a proposed agreement vetted by a tax professional to ensure there are no unintended income tax consequences.

V. FORCED "SHOTGUN" BUY-SELL PROVISIONS
A. THE BASIC PROVISION

The most commonly used shotgun buy-sell provision (i.e., where there are two 50/50 shareholders) essentially provides that either shareholder may activate or trigger the shotgun by providing a notice to the other shareholder of the intention to purchase the shares of the other shareholder at a specified price. The other shareholder must then either sell their shares at that price to the initiating shareholder or purchase the initiating shareholder's shares at that same price. Invoking the provision is normally used to "blast out" one
party in the case of a terminal shareholder dispute, however, it should be noted that it could be used as a way to buyout the other party where no dispute exists.

All things being equal, the use of a shotgun clause can be a fair and effective method for resolving disputes between shareholders by providing a method for one shareholder to exit the relationship. The principle is that the triggering shareholder will seriously consider the terms of their offer and only offer a reasonable price and conditions as he or she may, at the option of the other shareholder, be forced to sell themselves.

That being said, however, there are a number of situations which can dramatically alter the effect of a shotgun provision. Inequalities in financial positions and provisions that do not contemplate how the provision will work in the context of multiple shareholder situations can lead to abuse and result in unwanted confusion or results for the parties. Due to these problems, some authors have suggested that a shotgun provision should only be used in situations where there is a 50/50 shareholder situation and each of the shareholders are also relatively equal financially. Accordingly, caution should be exercised in including a shotgun provision in situations where there are positional differences between the parties or in the case of multiple shareholders agreements. The next two sections of this paper discuss some of the common special considerations involved in the use of a buy sell in these situations.

B. SPECIAL POSITIONAL CONSIDERATIONS

1. The Financial Position of the Parties

Shotgun clauses traditionally favour the shareholder with the superior financial position. Through the use of a shotgun provision the financially superior shareholder could offer a price that is lower than the actual value of the shares and obtain the other shareholder's shares at a discount merely because he/she knows that the other shareholder is not of the financial ability to meet the offer.

As a counter to this, consideration may be made to providing for some payment over time through vendor financing of the purchase price, although, as with most share purchase transactions the parties would prefer
cash on the barrel as opposed to payment over time. In addition, a minimum price per share for the exercise of the shotgun based upon some type of valuation formula could be included. Providing for a minimum price would not by itself solve a basic inability to pay, however, it can prevent a buy-out at an unreasonably low price.

2. Majority and Group Majority Positions

Where you are acting for a majority owner, serious consideration should be had as to whether any form of a shotgun should be included. Such as clause could be used by the minority owner to acquire the company "out from under" the majority. Often a majority owner would like the ability to remove the minority shareholder from the company if required, however, this could be achieved in a safer manner by providing for an option to purchase the minority's shares in the agreement.

In the context of a group majority position (i.e., two or more shareholders hold the majority of the shares) it should also be considered whether the agreement should permit the ganging up by the majority shareholders on the minority shareholders (i.e., the majority shareholders serve a notice on the minority shareholders to purchase their shares). Permitting ganging up would be preferable to those in the group majority as it would allow them to pool their resources and avoid the situation in the case of multiple minority shareholders being required to pick off the individual shareholders one by one. However, it should be noted that allegiances can change and the permitting of ganging up could backfire on a former member of the majority group. (Forexamplesaytheoriginalmembersofthemajoritygroupandtheirshareholdings Party A - 40 shares, Party B - 20 shares and Party C - 10 shares and the members of the minority group are Party D - 10 shares, Party E - 10 shares, Party F - 8 shares and Party G - 2 shares. The majority group could gang up and buy out the minority group, however, Party B and Party C could also join with the minority group and buy out Party A).
3. Minority Positions

Where you are acting for a minority shareholder, the inclusion of a shotgun provision in an agreement could be beneficial to them as it could be used as a way for the minority holder to acquire control of the corporation, especially if they are in a financially superior position. Normally, however, the person in the minority position may not have as much at stake in the company or the resources of the majority owner and accordingly would be at a greater risk of being bought out by the majority owner. In these situations if a shotgun is to be included it might be advisable that the triggering of the shotgun is made by the initiating party offering to sell his or her shares to the other party. The other party would then have the option to accept and buy the shares or elect to sell his or her shares at the same price to the initiating party. This reverse to the normal triggering procedure could help to protect the minority owner as it is unlikely that the majority shareholder initially offer to sell to the minority shareholder.

C. SPECIAL CONSIDERATIONS FOR THREE OR MORE PARTY AGREEMENTS

In the event a shotgun provision is to be included in a shareholders agreement with more than two shareholders, it is important the drafting of the provision contemplates the various ways the provision may be exercised. Failure to take into account the different ways the provision can be exercised can result in confusion and could ultimately result in the entire provision being held to be invalid. In this regard, some of the specific matters that should be considered are:

1. Multiple Triggering

Once a shotgun provision has been invoked between one group of shareholders, are further triggering of the provision to be permitted? (i.e., in the case of four shareholders where A has invoked a shotgun against B, could B invoke against C, C against A, etc.?) The simplest way to deal with this matter is to provide that once a shotgun has been triggered between a group of shareholders, the provision cannot be triggered again until the transaction in respect of the original shotgun has been completed.
2. **Multiple Elections**

Where a shotgun offer is made to a group of shareholders, the agreement should state what is to occur in the event the various shareholders who receive the shotgun offer elect to proceed in different manners. One solution is to provide that all of the shareholders must elect to proceed in the same way or the procedure is voided. This would allow a single shareholder to defeat the procedure, however, the triggering shareholder could always go back and take out the individual shareholders one by one. If, however, the agreement is to provide for the completion of a shotgun transaction in the event of multiple elections, the provision could provide the triggering shareholder with the option to buy only the shares of the shareholder who is elected to sell.

3. **Allocation**

The agreement should specify how the shares will be distributed if there are more than one shareholder on either side of the exercise of a shotgun. One option of dealing with this issue is to provide that the initiating shareholders must specify the required proportion in the notice and in the event the notified shareholders elect to buy, unless the notified shareholders otherwise agree, they will buy in proportion to their respective shareholdings.

D. **SELECTION OF ADDITIONAL TERMS AND CONDITIONS**

As in any share purchase agreement, consideration should also be had as to what level of flexibility should be given to the triggering shareholder to set the additional terms and conditions of the transaction. If the agreement contains no restrictions on what can be set out and merely provides that the triggering shareholder can specify the price and the other terms and conditions of the sale in their notice, one could select unreasonable terms and conditions or ones which are impossible for the other shareholder to meet.

As with any other share purchase agreement, consideration should be made to include provisions in the agreement which deal with the following:

(a) the date, place and time of closing;
(b) the mechanics and procedure of closing, including what and how closing deliveries are to occur;

(c) are any warranties to be provided? (due to the relationship of the parties, some of the standard warranties regarding the financial condition or share structure of the company may not be necessary. That being said other standard warranties such as one of clear title would still be applicable);

(d) what happens if the closing does not occur?

Sample "A" is an example of a basic "shotgun" provision.

VI. ARBITRATION

Shareholders may wish to resort to arbitration as a method to resolve their disputes. The use of arbitration as a final dispute resolution mechanism in the context of having the arbitrator determine whether one shareholder will buyout another shareholder is not, however, a commonly used provision. Most shareholders view it as unattractive since they are at the mercy of a third party who does not fully appreciate the circumstances of the parties. The more common use of an arbitration clause in a shareholders agreement is to refer specific matters, such as questions on procedural issues or valuation, to an arbitrator. As with all arbitration provisions, there are a number of matters which should be considered in connection with the drafting of an arbitration clause including the following:

1. the scope of the arbitrator's jurisdiction (i.e., what matters are to be referred?);
2. the number of arbitrators and the procedure for selecting the same (i.e., one arbitrator, each party selects an arbitrator, each party selects an arbitrator and then the arbitrators select another arbitrator, etc.);
3. is the arbitrator required to have any special expertise (i.e., financial or otherwise)?;
4. the time frames governing the arbitration process;
5. where is the arbitration to take place;
6. what factors can the arbitrator consider in making the decision (Le., in provisions where the valuation of the shares is referred to an arbitrator there are often statements as to what factors the arbitrator can consider in determining the value of the shares. For example, is goodwill to be included or excluded?); and

7. is the arbitrator's decision to be final or are appeals allowed? If appeals are allowed, what is the procedure and to whom is the appeal made?

VII. RIGHTS OF FIRST REFUSAL

A Right of First Refusal (or "ROFR") is generally understood to be a specific type of option to purchase. The ROFR gives the right holder the option to purchase the shares of another shareholder before such shares may be sold to a third party.

At first glance, proposing the inclusion of a Right of First Refusal (or "ROFR") in a shareholders agreement in contemplation of a corporate divorce appears counter-intuitive. This is because a ROFR adds another step for a person to take before they can extricate themselves from the corporation. Practically speaking, however, shareholders agreements are negotiated and prepared on the footing that a person can not transfer their shares unless they are transferred in accordance with the terms of the agreement. Consequently, a ROFR can be viewed as a means of providing for the sale of otherwise non-transferable shares.

There are, generally, two ways in which a ROFR is activated. First, the selling shareholder must receive a bonafide offer for the purchase of his or her shares from a third party, at which time the offer is presented to the remaining shareholders. The remaining shareholders are then, at that time, given the opportunity purchase shares for the same price and on the same terms and conditions or let the third party
purchase the shares. A ROFR drafted in this manner is sometimes referred to as the "hard," version of the ROFR.

The second or "soft" version contemplates the giving of notice by a shareholder, to the other shareholders, that he or she desires to sell their shares at a certain price and on certain terms and conditions without a third party offer. The remaining shareholders are, at that time, given the opportunity to purchase the subject shares. If they do not, the selling shareholder is then free to seek out third parties to purchase his or her shares for the same price and on the same terms and conditions.

There is a third version which is a variation of the "soft" ROFRs. This version allows the departing shareholder to first offer his or her shares to the remaining shareholders without the necessity of first obtaining a bona fide third party offer, which is comparable to the "soft" ROFR. The departing shareholder is then free to entertain offers from third parties but before an agreement for purchase and sale of shares is entered into, the approval of the third party must first be obtained from the remaining shareholders.

When compared to a shotgun provision as a means of effecting a corporate divorce, a ROFR allows a shareholder to increase his or her equity stake in the corporation or maintain the status quo without facing the risk of themselves being bought out or having to come up with the necessary financial resources to purchase another person’s shares in the corporation.

For example, the agreement could provide that after the shareholder gives notice of his or her intention to sell shares to a third party, the remaining shareholders have a ROFR commensurate with the proportion of shares they hold in the corporation at the time notice is given. Consequently, if a shareholder holds 10%...
of the voting shares as between the remaining shareholders, then he or she has a ROFR with respect to 10% of the departing shareholder's shares only. This kind of provision is usually also coupled with another provision wherein the departing shareholder is permitted to sell all of his or her shares to the third party unless all of shares are purchased by the remaining shareholders.

The ROFR may, however, be structured so that a shareholder is entitled to purchase his or her pro rata portion of the departing shareholder’s shares and is given the further opportunity to purchase those shares not otherwise picked up by the other remaining shareholders. In this instance, the status quo may not be maintained. For example, if there are four shareholders who each hold 25% of the common shares and one of them wishes to depart, the remaining three shareholders will each be entitled to purchase one-third of the departing shareholder’s common shares. If, however, one of these shareholders does not wish to purchase his or her pro rata entitlement and the agreement provides that the remaining two shareholders may do so, the one shareholder that does not exercise the option to purchase his or her pro rata entitlement may subsequently find themselves in a minority position.

The advantage to using the ROFR as a means to complete a corporate divorce is that it introduces third parties, and potential new shareholders, into the fold. By doing so, the existing shareholders are exposed to independent valuation information regarding their shares in the corporation, an element that is generally not found into shotgun provisions. There may be no better indicator of price than what an arm’s length party is prepared to pay. This valuation information will be critical in situations where there is not equal information regarding the corporation held by each of the shareholders.

A ROFR provision is typically mandatory in a shareholders agreement that is, essentially, a partnership agreement. Both parties will likely opt for the "hard" version of the ROFR or the variation of the "soft" version that contains the veto power as the personal relationship between the remaining shareholder and a new shareholder is likely of greater importance in these circumstances. However, unless the agreement also contains a shotgun clause, the parties can also consider the inclusion of a provision for the winding-up
of the corporation in the event that the remaining shareholder does not purchase the shares of the person wishing to depart and the remaining shareholder further vetos potential third party purchasers. The parties may consider adding this provision even if a shotgun clause is present if the parties foresee a potential situation where neither wants to remain in the business without the other.

If a ROFR is chosen as a tool to effect a corporate divorce, the agreement should contain additional terms. Specifically, the agreement should contain a condition precedent that before a sale to a third party may be completed, the third party must become party to the agreement.

Sample "B" is an example of a basic ROFR provision.

**VIII. TAG - ALONG RIGHTS**

The Tag-Along Right, or piggyback, is generally a right that is included in agreements for the benefit of minority shareholders. The holder of the right has the option to block the sale of shares by the majority shareholder or shareholders to a third party unless the third party also agrees to purchase the shares of the right holder, for the same price and upon the same terms and conditions as those offered to the majority shareholder or shareholders.

The right comes to fruition when the holder is given notice that the majority shareholder or shareholders desire to sell their shares under the terms of the third party offer received by them. The holder then has the option to compel the purchase of his or her shares or to retain their shares.

The Tag-Along Right is typically negotiated in agreements in anticipation of potential corporate take-over by a third party in the future. Minority shareholders desire Tag-Along Rights in situations where a third party may take control of the company and effectively freeze out their interests. These rights give minority shareholders the opportunity to determine their own fate if the corporation is in the midst of a takeover. However, the Tag-Along Right also has a purpose in the context of a corporate divorce.
When compared to the shotgun clause or ROFR, the Tag-Along Right is advantageous for both majority and minority shareholders. For the minority shareholders, shotgun clauses or ROFR may have no value to them as they may not have the financial resources to purchase the majority's shareholders. For the majority, the existence of a Tag-Along Right, as opposed to these other rights, allows them to dispense with the needless exercise of first offering their shares to minority holders, which step may unnecessarily delay the sale to third parties and allow them time to possibly reconsider the transaction.

Conversely the Tag Along Right may hinder corporate divorce as it, quite simply, serves to restrict a person's ability to sell their shares. Tag-Along Rights will require the majority shareholder or shareholders to negotiate the sale of all of shares in the corporation as a package to third parties. This may diminish the marketability of the shares. In addition, a potential third party purchaser will be uncertain which, if any, of the minority shareholders will be participating in the sale until the Tag-Along Rights are acted upon (absent a corresponding Drag-Along Right). This uncertainty could stall negotiations and have an impact on the final purchase price. In spite of the foregoing, the majority shareholder or shareholders may need to give the Tag-Along Right as a concession for obtaining a Drag-Along Right. In addition, if a Tag-Along Right is to be included, the majority should negotiate shorter time periods for the exercise of these rights following the provision of notice of potential third party sale. Finally, the process for exercise of the right should be clearly established so that it may not later be disputed that the right was, or was not, exercised.

Sample "C" is an example of a basic Tag - Along Right provision:

IX. DRAG - ALONG RIGHTS

The Drag-Along Right is generally included in a shareholders agreement for the benefit of majority shareholders. The holder or holders of the right have the option to compel the minority shareholder or shareholders to sell their shares to a third party for the same price and upon the same terms and conditions as those offered to the majority shareholder or shareholders.
From the perspective of the majority shareholders, a Drag-Along Right serves to increase the marketability of their shares. Potential purchasers may only be interested in purchasing a majority interest while others may want 100% of the issued and outstanding shares in the capital stock of the corporation. The existence of a Drag-Along Right gives majority shareholders the option to negotiate the share sale in either circumstance. From the perspective of minority shareholders, however, Drag-Along Rights may be undesirable as these shareholders face the prospect of having to sell their shares when they may not want to.

Like the Tag-Along Right, the Drag-Along Right has a place in the context of anticipated corporate divorce. If minority shareholders do not have the financial resources, or the desire, to increase their proportionate shareholdings now or in the future, then the person who is least likely to increase their interest in the corporation should be seeking the inclusion of a Tag-Along Right in the shareholders agreement. To have this provision included, however, the minority shareholder or shareholders may have to agree to the inclusion of a corresponding Drag-Along Right.

Ideally, the majority shareholder or shareholders will negotiate the provision so that it allows them the greatest flexibility. Specifically, if a third party purchaser is seeking to purchase less than 100% of the issued and outstanding shares, the majority shareholder or shareholders would prefer to be in a position that allows them to effect this end.

Conversely, a minority shareholder will seek to have the Drag-Along structured so that the Right may only be exercised for all of the shares held by the minority shareholders and not a lesser portion. By structuring the clause in this manner, the majority shareholder or shareholders will be prevented from freezing out a select group of minority shareholders of a share sale where less than 100% is sought by a third party purchaser.

Sample "D" is an example of a basic Drag-Along provision.
X. OPTIONS TO PURCHASE/CALL RIGHTS

An Option to Purchase permits the holder of the right to purchase the shares of another at anytime, at specified times or upon the occurrence of specified events. A "Call Right" found in shareholders agreement is identical to an Option to Purchase with one exception. The Option to Purchase contains specific words of "granting" whereas the "Call Right" does not contain such specific granting wording but is implicit. In the end, however, the practical purpose and effect of the Option to Purchase and the "Call Right" is the same. Like a ROFR, the Option to Purchase allows a shareholder to increase his or her equity in a corporation or maintain the status quo without facing the risk of themselves being bought out.

An Option to Purchase, by its nature, is an effective means of divorcing shareholders from a corporation if the option is given without restriction because it provides greater certainty as to who the parties to the transaction will be and their respective roles. On the other hand, the Option to Purchase can also be restricted and tailored so that the option only becomes exercisable after a certain amount of time has passed or upon the occurrence of "corporate divorce" type events. Examples of such events could include circumstances where the shareholders fail to agree on certain specified matters or where there is an inability to obtain the required level of approval for specified matters (e.g., capital expenditures, dividend payments), or the breach of the non-competition provisions of the agreement (if applicable).

The inclusion of the Option to Purchase may not, however, be the optimal way to achieve corporate divorce. The shareholder who possesses the right may not have the desire or financial resources to exercise the option. Conversely, the seller may not want to sell the shares at the relevant time but he or she will not have a choice if the right holder is ready, willing and able to purchase the shares.

Selection of an Option to Purchase as a means of bringing about a corporate divorce is complicated by the need to arrive at an appropriate purchase price. The Option to Purchase may specify the price at which
the shares are to be purchased, have the price determined by formula or arbitration, or leave it open as a matter to be agreed to by the parties at the time the option is exercised. This represents the relative disadvantage associated with using an Option to Purchase as opposed to a shotgun clause or ROFR in the context of corporate divorce. By their nature, shotgun clauses keep the parties from offering unfair prices (assuming equal knowledge and economic resources) and ROFR's contemplate an even better barometer of fair market value, being the price that an arm's length party would pay for the shares (assuming bona fides).

Parties may avoid including a purchase price in the agreement as it may not be representative of the actual value of the shares at the relevant time. Conversely, leaving the purchase price as a matter to agreed upon at the time the option is exercised would not be prudent as reaching such agreement would be unlikely during the course of a shareholder dispute. In addition, arbitration may not be viewed as a panacea as it usually entails significant expense that would not be otherwise incurred in the context of the exercise of a shotgun clause or ROFR. Finally, the decision to include a formula to determine purchase price must be prefaced with due regard to the potential impact that certain factors may have upon the variables used in such formula. Such factors include the nature of the business in which the corporation is involved and the stage of the corporation's business life-cycle when the shareholder's agreement is being negotiated and drafted. For example, a formula that closely ties share value to earnings may be appropriate for a mature corporation that has an established earnings history and is involved in an industry where the primary assets are not reflected on its balance sheet (i.e. an engineering firm). On the other hand, the same formula may not be appropriate for a corporation that is just starting up in an industry where its primary assets are reported on its balance sheet (i.e. a real estate venture).

Sample "E" is an example of a basic Option to Purchase provision.
XI. OPTION TO SELL/PUT RIGHT

An Option to Sell gives the right holder the ability to compel another to purchase the right holder's shares. Again, the right may be exercisable at anytime, at specified times or upon the occurrence of specified events. A "Put Right" is also identical to an Option to Sell with the exception of the specific words of "granting" contained in the latter whereas the grant is implicit in the former. Like the Option to Purchase and the "Call Right", the practical purpose and effect of the Option to Sell and "Put Right" are the same.

The Option to Sell may be ideal for those shareholders who see themselves as never wanting to purchase additional shares in the corporation but desire a way out should the need arise. The shotgun provision would not be appropriate for this type of shareholder as such clause involves the potential purchase of additional shares by either party. In addition, the Option to Sell is better for this type of shareholder than a ROFR because the former dispenses with the need to locate a willing third party purchaser. In an Option to Sell, the purchaser is already named.

Like the Option to Purchase, an Option to Sell, by its nature, can bring about a corporate divorce in an effective manner. Where the option is given without restriction, the right holder is free to remove himself or herself from the corporation at anytime where they feel it necessary to divorce themselves from the corporation. On the other hand, the person against whom the right is to be exercised (i.e. the person who will be forced to purchase the shares) may wish to restrict the right so that it is only exercisable at certain times or upon the occurrence of "divorce" like events. Like the Option to Purchase, these events may include shareholder disputes that have reached an impasse, or there is a breach of certain covenants like the non-competition or non-disclosure provisions of the agreement, if applicable, by the grantor of the right.

When a Option to Sell is compared to a shotgun clause and a ROFR, the comments previously made with respect to the Option to Purchase apply here also. Shotgun clauses compel the parties to offer fair prices (assuming equal knowledge and economic resources) and ROFR's incorporate a third party's assessment of fair market value (assuming bonafides).
An Option to Sell, however, has the same shortcomings as the Option to Purchase with respect to the purchase price of the shares. The Option to Sell may include a specific exercise price, have it defined by a formula or determined by arbitration or leave it to be agreed upon when, and if, the option is exercised. Like the Option to Purchase, an exercise price established now may not be relevant in the future and leaving it as a matter to be agreed upon when the option is exercised may render the Option to Sell ineffective as means of bringing about corporate divorce at the relevant time. Arbitration, on the other hand, adds expense and may require unwanted and protracted interaction between the parties.

If the parties are contemplating the inclusion of multiple Options to Sell in the shareholders agreement, extreme caution must be exercised in such circumstances. If the right holders are free to exercise their Options to Sell at anytime or upon the occurrence of the same events, the remaining shareholders and the corporation could be placed in financial jeopardy. As a result, the parties may consider staggering the times at which the rights may be exercised or limiting the right to specified parties, for example, venture capital investors. If the agreement contains multiple Options to Sell, this can lead to a scenario where there is a race to the exit, with the last person to give notice left in the position of "turning out the lights".

Sample "F" is an example of a basic Option to Sell provision.

**XII. AUCTION ARRANGEMENTS**

Although not normally seen in shareholders arrangements, the shareholders may agree to deal with terminal disagreements by invoking an auction procedure. Under an auction procedure, the parties involved would submit sealed bids for the purchase of the shares in question with the highest bidder winning the auction. The price would then be reduced by the amount applicable to the shares owned by the winning bidder.

For example, if Party A who owns 60 shares invoked the auction procedure against Party B who owned 50 shares, each of Party A and B would submit a sealed bid for the price they are prepared to pay for the 110 shares in total. If Party A submitted a sealed bid of $2.00 per share and Party B submitted a sealed
bid for $1.00 per share, Party A as the successful bidder would purchase Party B’s shares for $100.00 in total.

As with a shotgun provision, a number of issues should be considered in connection with the drafting of this provision including the differing positions of the parties, both financial and otherwise, and how the provision will work in the context of multiple shareholders. For example, if there are multiple shareholders, can an auction procedure be invoked against one party or can auction procedures only involve all of the parties? For example, if it is to involve all of the parties and there are four shareholders, if the auction procedure is invoked, each of the four shareholders would be required to provide a sealed bid for all of the shares of the corporation. If a party elects not to submit a sealed bid, he or she would be bound to sell to the party succeeding in the auction.

XIII ANCILLARY ISSUES

In addition to the substantive and procedural matters that are required to be addressed in the specific buy-sell corporate divorce provisions, there are also a number of ancillary issues that must be addressed in drafting an agreement which contains these types of provisions. Some of these ancillary issues include:

A. GUARANTEES

In private corporations, the shareholders are often asked to provide guarantees on various credit facilities (loans, supply agreements) and leases. Ideally, a departing shareholder will want to be released from these guarantees and each party would like to see a clause to that effect in the agreement. However, the secured party is not typically compelled to release any shareholder from the guarantee.

As a result, it is common for these releasing provisions to be worded on a "best efforts" or "reasonable efforts" basis coupled with an indemnity from the corporation and/or the parties that purchased the shares. Of course, the problem here is that the indemnity is only as good as the person that gives it and should they
default on the original obligation and the secured party acts on the guarantee, it is also possible that the indemnifying party will not be in a position to honour his or her commitment to the departing shareholder.

B. SHAREHOLDER LOANS

If the shareholders have made loans to or received loans from the corporation, or anticipate making or receiving loans, it is important that the shareholders agreement addresses these loans in the event that shareholder sells his or her shares in the corporation. If the agreement is silent as to shareholder loans, all the parties could be left in a precarious situation. Loans to the corporation could be significant and if repayment or assumption provisions are absent and the departing shareholder demands payment, the corporation and remaining shareholders could face a liquidity crisis if they did not adequately prepare and provide for such event.

The agreement can deal with shareholder loans in a number of ways. One possibility is to have the remaining shareholders purchase the loans that were made to the corporation in the same proportion as the number of shares they are purchasing from the departing shareholder. The potential problem with this option is that some shareholders may not have the financial resources to purchase debt as well as shares, which may then prevent them from participating in the purchase. If it's a situation where the shareholder is indebted to the corporation, the agreement could provide for a set-off or adjustment against the purchase price of shares. Such a provision may enable a cash strapped shareholder to participate in the purchase and sale.

Another way in which loans to the corporation can be dealt with is to simply have the corporation repay them or if the shareholder is indebted to the corporation, have the departing shareholder repay the loans to the corporation. This option will alleviate the potential pressure on individual shareholders.

In addition to considering how the loans will be repaid, is the question of when the loans will be repaid. Immediate repayment could put undue pressure on the parties and impact operations. The agreement may,
therefore, provide that the loans are to be repaid over time with interest. In negotiating an interest rate, the shareholders should keep in mind that once they have sold their shares, they will not be in a position to control the direction and affairs of the corporation. In addition, they will not be on the same footing as other lending institutions as they will likely have adequate security in place and first charge over the assets. They could, therefore, be left in the position of an unsecured creditor. As a result, the rate chosen should be reflective of this fact and the agreement should also consider security for repayment including, for example, a charge over the shares they are selling and, perhaps, over the shares of the remaining shareholders.

C. NON-COMPETITION AND CONFIDENTIALITY ARRANGEMENTS

In the context of a corporate divorce, the buy sell provisions of a shareholders agreement would be exercised to end the existing shareholder arrangement. After the completion of the buy sell one shareholder would be left to run the business while the other shareholder would no longer be involved with the company. Accordingly, to prevent the exiting shareholder from then competing with the company after the exit, it would be advisable to include provisions which provide that upon the exercise of any of the buy sell provisions of the agreement, the exiting shareholder agrees to not compete with the corporation for a period of time. As with all non-competition provisions, there are a number of matters which should be considered in connection with the drafting of a non-competition clause including the following:

(a) the basic scope of the prohibition (i.e., for how long, over what geographic location, specific types or any type of competitive business?);
(b) does it restrict direct, indirect or both types of competition?
(c) is the non-compete also to be coupled with non-solicitation provisions regarding the employees and/or customers of the prior business?
(d) will the provisions terminate upon the occurrence of certain events? (i.e. default in vendor financing conditions, cessation of business, bankruptcy).

Coupled with the non-competition concerns, consideration should also be had to including provisions restricting the use and/or disclosure of certain information regarding the company by the exiting shareholder.
The company may have various items of information (such as trade secrets, business processes and customer lists), which if disclosed to or used by competitors or the general public could have a detrimental effect on the operation or viability of the business. As with non-competition provisions a number of issues should be considered in drafting a confidentiality provision, including the following:

(a) the description of the information covered by the agreement (i.e. everything less exceptions, by category or everything marked "confidential"?);
(b) does it restrict use and/or disclosure of information?
(c) are there any exceptions to the prohibitions? (i.e. information publicly known or independently developed);
(d) will the provisions terminate upon the occurrence of certain events? (i.e. default in vendor financing conditions, cessation of business, bankruptcy).

D. CLOSING ARRANGEMENTS

One of the essential issues to attend to when drafting shareholder exit provisions are those dealing with closing arrangements.

Typical areas that would be covered in addressing closing procedures would include provisions dealing with the following:

(a) A statement that the purchase price is to be paid on closing by solicitor's cheque or certified cheque against delivery by the purchaser of the applicable share certificates, duly endorsed for transfer.
(b) If the formula for establishing the closing date is on a weekend or holiday, a statement that the closing will occur on the next available business day.
(c) A statement as to the time and place of the closing.
(d) A statement that acceptance of payment constitutes a warranty that the vendor has good and marketable title and transfers the securities free of encumbrances.
(e) A statement requiring the vendor to deliver all documents and releases and to do all things reasonably necessary to transfer title to the purchaser.

(t) A statement that if the vendor is indebted to the corporation the purchaser can offset the indebtedness against the final purchase price payment.

(g) With respect to guarantees, a statement that the purchaser will use reasonable efforts to cause a release and failing such release, provide a purchaser indemnification.

(h) A statement that if the vendor does not complete the purchase for any reason, the purchaser can deposit the purchase price into a bank account and such deposit would be deemed the effective payment and that upon such deposit, the shares would be transferred and the transfer recorded into the books of the corporation.

(i) A statement that the vendor appoints the purchaser as the vendor's irrevocable attorney to execute, deliver and effect all transfers and documents necessary to transfer the shares.

(j) A statement requiring the vendor to deliver a statutory declaration confirming that the vendor is not a non-resident under the Income Tax Act (Canada).

E. RESIGNATIONS OF DIRECTOR/OFFICER POSITIONS

It is advisable to include a provision that an exiting shareholder must resign from all director and officer positions held with the corporation. The obvious reason for this is that a shareholder exercising a buy-out provision in order to obtain control over the corporation or remove a shareholder will not want the shareholder who has been bought out to remain in a position of influence.

F. TERMINATION OF EMPLOYMENT ARRANGEMENTS

A further consideration must be given to the fact that many existing shareholders in closely held corporations will also be employees in the corporation. Such circumstances must be contemplated when structuring buy-out arrangements. Will the shareholder exercising the buy-out provision wish to keep the exiting shareholder on in an employment capacity? While the removal or purchase of shares from a key employee may make it difficult for the buying shareholder to efficiently run the corporation, this is usually
accepted as a cost of business in the context of a shareholder dispute or corporate divorce scenario. It is to be remembered that an individual’s role as a shareholder in the corporation is different from his or her role as an employee, and accordingly, the additional cost of severing the employment relationship (and the legal principles surrounding severance of employees) is to be factored into the overall consideration and cost of completing the purchase and sale.

G. CESSATION OF RIGHTS
Shareholders agreements will continue to have force and effect after a shareholder has left the corporation. For example, the remaining shareholders will want to ensure that the departing shareholder will remain bound to non-competition and confidentiality provisions and the departing shareholder will want to retain access to the rights and remedies that flow from the non-payment of the purchase price for the shares. Conversely, the remaining shareholders do not want to be left in a position where they must continue to provide the departed shareholder with sales notices.

As a result, the agreement should include a provision for the cessation of rights and obligations after a shareholder leaves the corporation. However, this clause must be carefully drafted so that the proper rights and obligations cease while others continue, as agreed to by the parties.

H. INTERPLAY OF RIGHTS
When a shareholder desires to sell his or her shares and takes steps under a soft ROFR provision, for example, to effect such sale, the notice will refer to his or her desire to sell shares and contain the purchase price he or she wishes to receive for such shares. If the agreement also contains a shotgun clause, the exercise notice will also refer to his or her desire to sell shares and contain the purchase price he or she wishes to receive for such shares and the two notices may appear similar. As a result, it is important that the shareholders agreement state that notices must refer to the right being exercised or the provision in the agreement that contains such right. Failure to include such a provision leads to confusion and uncertainty
and may leave it open for a person to defend against a shotgun by arguing they had actually exercised their rights under a ROFR.

I. SUSPENSION OF RIGHTS

Consideration should also be given to a provision that mandates the orderly exercise of rights under the agreement. For example, the provision should address and provide priority rules in a multi-party agreement if a shareholder could exercise a ROFR on one day and a different shareholder could exercise rights under a shotgun clause on the next day. In the absence of such clause, the extent of the rights possessed by any party to the agreement would be unclear. As a result, the provision could be drafted to provide for the suspension of rights that came to fruition under the subsequent notice until the rights under the first notice were exhausted. Conversely, the provision could be drafted to give priority to rights under a shotgun clause where notice is received within a specified time period after a ROFR notice was received.

In effect, there is essentially no limit as to how the priority rules may be established. It is important that in addition the establishing the substantive and procedural rights, consideration of various scenarios should be played out to ensure potential conflicts with respect to the priority of such rights are adequately addressed.

Sample "G" is an example of a basic Rights Suspension provision.

J. THE OPPRESSION REMEDY

The statutory oppression remedy contained in section 234 of The Business Corporations Act (Saskatchewan) may affect the operation of buy-sell agreements. Of note is the fact that notwithstanding any provision contained within a buy-sell agreement, it will be open for a court to, inter alia, alter any of the terms of the agreement. Regardless of how an agreement is drafted, there will always be the possibility of judicial intervention.
SAMPLE "A"
SHOTGUN BUY-SELL

1.01 Sale Notice: In the event that any Shareholder desires to terminate his association with the Corporation, the Shareholder wishing to so terminate (the "Offering Shareholder") shall notify all other Shareholders (the "Remaining Shareholders") by a notice in writing (the "Sale Notice") that the Offering Shareholder is prepared to acquire at the purchase price and on the terms described in the Sale Notice, all, but not less than all, the Shares held by the Remaining Shareholders.

1.02 Election Period: Within sixty (60) days after the receipt of the Sale Notice (the "Election Period"), each of the Remaining Shareholders shall inform the Offering Shareholder in writing that the Remaining Shareholder either elects to purchase all, but not less than all, of the Shares held by the Offering Shareholder on the terms and conditions contained in the Sale Notice or elects to sell all of the Shares held by the Remaining Shareholder to the Offering Shareholder on the terms and conditions contained in the Sale Notice. If any Remaining Shareholder fails to so inform the Offering Shareholder before the expiry of the Election Period, that Remaining Shareholder shall be conclusively deemed to have elected to sell to the Offering Shareholder the Shares held by the Remaining Shareholder on the terms and conditions specified in the Sale Notice.

1.03 Purchase and Sale of Shares: In the event that none of the Remaining Shareholders elect to purchase the Shares held by the Offering Shareholder, the Offering Shareholder shall purchase all of the Shares of the Remaining Shareholders. In the event that one or more of the Remaining Shareholders elect to purchase the Shares held by the Offering Shareholder, the Remaining Shareholders who elect to purchase the Shares held by the Offering Shareholder shall purchase the Shares held by the Offering Shareholder and shall also purchase all of the Shares held by the Remaining Shareholders who elect not to purchase the Shares of the Offering Shareholder, if any. In the event that more than one Remaining Shareholder elects to purchase the Shares held by the Offering Shareholder, all Shares purchased by the Remaining Shareholders shall be purchased in proportion to their holdings of Shares in the class of Shares.
offered by the Offering Shareholder *vis a vis* the other Remaining Shareholders who have elected to purchase the Shares of the Offering Shareholder.

1.04 **Closing Date:** The Closing Date of any purchase and sale of Shares pursuant to this Article shall be the day sixty (60) calendar days from the last day of the Election Period.
SAMPLE "B"
RIGHT OF FIRST REFUSAL

1.01 Notice: In the event that a Shareholder (the "Selling Shareholder"), at any time during the term of this Agreement, proposes to sell, assign or transfer any or all of the Shares owned by the Selling Shareholder to any person, the Selling Shareholder shall give notice in writing (the "Transfer Notice") to all of the other Shareholders (the "Remaining Shareholders") specifying the class and number of Shares to be sold, assigned or transferred (the "Offered Shares") and the price and terms upon which the proposed sale, assignment or transfer is to take place.

1.02 Option: The Remaining Shareholders shall for a period of sixty (60) days from the date on which the Transfer Notice is received by them (the "Option Period") have the option to purchase the Shares described in the Transfer Notice at and for the purchase price and upon the terms and conditions set forth in the Transfer Notice (the "Option").

1.03 Sale to Existing Shareholders: Remaining Shareholders who exercise the Option shall be entitled and obligated to purchase all of the Shares described in the Transfer Notice. In the event that more than one of the Remaining Shareholders exercises the Option, the Remaining Shareholders who have exercised the Option shall be entitled and obligated to purchase all of the Shares described in the Transfer Notice in proportion to their holdings of Shares of the class of the Offered Shares vis a vis the other Remaining Shareholders who have exercised the Option.

1.04 Sale to Third Parties: If the Remaining Shareholders do not exercise the Option, the Selling Shareholder may within a period of sixty (60) days from the expiration of the Option Period sell the Offered Shares to any person at the price and upon the terms set forth in the Transfer Notice. No such sale to a third party shall be made at a lower price or on different terms and conditions than those specified in the Transfer Notice or on more favourable terms as to the manner of payment of the purchase price of the Offered Shares without the Shares first being offered again to the Remaining Shareholders in accordance with this Article. If no sale is completed within the sixty (60) day period, no sale of Shares
shall be made by the Selling Shareholder without the Shares first being offered again to the remaining Shareholders.

1.05 **Closing Date:** The Closing Date of the purchase and sale of the Offered Shares pursuant to paragraph 1.03 shall be the day thirty (30) calendar days from the last day of the Option Period. The Closing Date of the purchase and sale of the Offered Shares pursuant to paragraph 1.04 shall be as agreed upon between the affected parties within the sixty (60) day period described in that paragraph.

1.06 **Third Parties to be Bound by Agreement:** Notwithstanding any of the provisions of this Agreement, it shall be a condition precedent of any sale of Shares pursuant to paragraph 1.04 that the third party or parties to whom any Shares are sold executes a counterpart of this Agreement in the same manner and to the same extent as though they had been a party hereto in the first instance. In the event that the Remaining Shareholders acquire Shares pursuant to paragraph 1.03, such Remaining Shareholders shall be bound by the provisions of this Agreement in respect of the newly acquired Shares.
SAMPLE "C"
TAG-ALONG PIGGYBACK

Subject always to the prior compliance by Shareholder A with the provisions of Section • (dealing with rights of first refusal), in the event that all or any portion of the Common Shares held by Shareholder A are to be sold by Shareholder A pursuant to a share purchase and sale transaction with a third party purchaser (such third party being a Person other than a Party hereto), then in such event Shareholder A shall not be entitled to complete the sale of Common Shares to the third party unless the third party also offers to purchase all of the Common Shares held by Shareholder B on the same terms and conditions as are being offered to Shareholder A (the "PiggyBack Offer"). The PiggyBack Offer shall be communicated by Shareholder A to Shareholder B in accordance with Section • (dealing with notice rules) hereof and shall be irrevocable and shall be open for acceptance by Shareholder B for thirty (30) days following receipt from Shareholder A of the PiggyBack Offer by such other Parties.
In addition to the other rights set forth in this Agreement, if Shareholders owning more than 50% percent of the Class A Shares wish to sell their Shares to the Offeror pursuant to Section dealing with right of first refusal) then such Shareholders may, by notice in writing to the other Shareholders, compel the other Shareholders to sell their Shares in accordance with the Offers referred to in Section. and the other Shareholders shall be deemed to have accepted the Offers and shall sell their Shares in accordance with such Offers and shall do all acts and things and execute all documents necessary or desirable to give effect to the transaction and each Shareholder hereby irrevocably appoints the Corporation as its true and lawful attorney for the purposes of accepting any such Offer and completing the sale of the Shares of the Shareholders in accordance with the terms of the Offer.
SAMPLE "E"
CALL RIGHT

(a) For a period of five (5) years commencing on • and ending on the fifth (5\textsuperscript{th}) anniversary of •, CallCo may, at anytime and from time to time, by delivering a notice (in substantially the form of that notice attached as Schedule "II" hereto) to all or any of the ReceiveCo and to the Corporation elect to purchase some or all of the Common Shares of the Corporation then held by CallCo.

(b) Delivery by CallCo of the aforesaid notice shall constitute the irrevocable election by CallCo to buy the number of Common Shares specified in the notice from ReceiveCo and, upon the giving of such notice, CallCo shall thereupon be obligated to purchase from ReceiveCo, and ReceiveCo shall be obligated to sell, all such Common Shares.

(c) The purchase price to be paid by CallCo for the purchase of Common Shares pursuant to this Section shall be payable in cash and shall be an amount per Common Share equal to •.

(d) The purchase and sale of Common Shares pursuant to this Section shall be completed on •.
SAMPLE "F"
PUT RIGHT

(a) For a period of five (5) years commencing on - and ending on the fifth (5th) anniversary of -, PutCo may, at anytime, or from time to time, by delivering a notice (in substantially the form of that notice attached as Schedule "I" hereto) to ReceiveCo and to the Corporation elect to sell to ReceiveCo some (or all) of the Common Shares of the Corporation then held by PutCo.

(b) Delivery by PutCo of the aforesaid notice shall constitute the irrevocable election by PutCo to sell the number of Common Shares specified in the notice and, upon the delivery of such notice, ReceiveCo shall thereupon be obligated to purchase from PutCo, and PutCo shall be obligated to sell, all such Common Shares.

(c) The purchase price to be paid by ReceiveCo for the purchase of Common Shares pursuant to this Section shall be payable in cash and shall be an amount per Common Share equal to -.

(d) The purchase and sale of Common Shares pursuant to this Section shall be completed on -. 
SAMPLE "G"
SUCCESSIVE NOTICES OR EVENTS

In the event of successive Triggering Events, or the provision of successive Transfer Notices, or any combination thereof, the operation of the Agreement in respect of the subsequent Triggering Events or provision of Transfer Notices, and the numbing of all time periods in respect thereof, shall be suspended until the periods of time or transactions in respect of the prior Triggering Event or provision of a Transfer Notice, as applicable, have expired or been completed in order that the transactions will occur sequentially notwithstanding title to Shares remains in the name of the Selling Shareholder or Withdrawing Shareholder, as applicable, pending completion those transactions contemplated by the prior Triggering Event or Transfer Notice.
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