Shareholders Disputes do not have to be “Autopsy” Litigation – You have Options

Author : Edward Feehan

Over the years we have represented quite a number of business owner-managers in shareholders disputes. Prevention is often worth a pound of cure, but what do you do when things have already gone off the rails?

The first thing to recognize is that commercial disputes are what we call “real-time litigation,” as opposed to autopsy litigation. For example, in a personal injury claim, an accident results in an injury that requires compensation. The litigation focuses on the facts that caused the accident. Those facts dictate liability and a further set of facts about the injuries and their impact dictate the amount of damages. The facts in these types of cases are set, there’s no changing them, and legal battles are fought over whether there is sufficient evidence to support these facts.

Commercial litigation is a different animal. Commercial disputes are “real time” in the sense that there is an opportunity to change the facts on an ongoing basis and thereby change the outcome of your case.

Changing the Facts in Shareholder’s Disputes

As an example, say you are fighting with another shareholder and the business is verging on insolvency. In this scenario, you can apply to put in a trustee, an inspector, a monitor or a receiver. This action changes the facts relevant to the business and your position in the dispute. Alternatively, you may have the resources to buy the position of one of the secured creditors that otherwise has nothing to do with your fight. If you go that route, you transform your position into that of a secured creditor. In short, you have opportunities to change the facts related to your position in that dispute and that change affects the ultimate outcome.

Another common scenario arises if a shareholder is also a senior or key employee in the business and there is a parting of the ways. If your employment is terminated, your post-termination fiduciary obligations to the company are far less than if you resign, which may grant you the option to set up in competition with your former corporation. If you are a key employee who was instrumental in the success of the business, this may well be an attractive option that you can leverage in buy-out negotiations. Even if you resign, that option may still be open, subject to any contractual obligations, e.g., non-solicitation or non-compete clauses in your employment contract and post-termination fiduciary obligations.

The situation will be different if you also wear a director’s hat because directors do have fiduciary obligations to the company. The point is that you may change your position from seeking notice or

compensation from the company to one where you are now a competitor and have a better bargaining position.

Another example might be where you are both a shareholder and the landlord of the premises where the company operates. One option that may be open to you is to terminate the lease and use that as leverage to get what you want in negotiations. The point being that in commercial litigation you can very easily change the factual matrix within which a dispute is operating, and that changes the tools at your disposal to leverage your position.

To help you review your options and strategies, talk to a commercial litigator with a wide range of experience. Our Commercial Litigation group has been working with Edmonton business owners for over a century and while every situation is unique, we have developed experience in just about every type of dispute that arises. This means we can help you identify the opportunities and the pitfalls. Contact us today to find out what your options are.

Ted Feehan