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## INTRODUCTION

**Purpose and currency of checklist.** This checklist is designed to be used with the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1), CLIENT FILE OPENING AND CLOSING (A-2), and SHAREHOLDERS' AGREEMENT PROCEDURE (B-6) checklists. Both this checklist and the SHAREHOLDERS' AGREEMENT PROCEDURE (B-6) checklist are intended for a company governed by the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*BCA*"). The provisions suggested in this checklist must be considered in relation to the particular facts in the matter at hand, and augmented and revised as appropriate. This checklist is current to September 1, 2023.

A shareholders' agreement will change the dynamics among the shareholders of a company from those which exist under the basic corporate law. Majority shareholders should understand they will likely give up rights and powers they would have as the majority controlling the right to elect a majority of the board of directors. Minority shareholders will, in most cases, gain rights and powers they would not otherwise have as minority shareholders, provided that they too may give up or waive certain statutory rights that they would otherwise have. The majority should appreciate that their power as a majority could be effectively lost if, for example, they commit to allowing the board of directors to be composed of a majority of parties who do not comprise the majority of shareholders. Since the overall philosophy of a shareholders' agreement is to create a different balance of rights and obligations from that which would exist under the corporate law without such an agreement, the lawyers involved should carefully weigh the rights gained with those given up by their clients in such an agreement. Further, the business understanding among the shareholders should be thoroughly understood so that it is properly reflected in the agreement and in the relative shareholdings among the shareholders.

**New developments:**

- **Enhanced scrutiny under the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.).** On April 18, 2020, in response to COVID-19, the Minister of Innovation, Science and Industry (the "Minister") announced a new policy under which the Government of Canada will subject certain foreign investments to additional scrutiny. The policy targets foreign investments in Canadian businesses that are related to public health or involved in the supply of critical goods and services. On October 28, 2022, the Minister announced strategic policy surrounding foreign direct investment in Canadian Critical Mineral sectors in response to the Critical Minerals List announced on March 11, 2021. Under the *Investment Canada Act*, the Minister must approve proposed acquisitions of control from foreign investors, including state-owned entities, where the value of the Canadian business is above the defined threshold. An application by a foreign state-owned entity will only be approved on an exceptional basis. Furthermore, effective August 2, 2022, a new filing option gives non-Canadian investors the ability to obtain pre-implementation regulatory certainty with respect to a national security review of investments that do not require a filing under the Act. See the full policy statement and voluntary filing information.
- **Electronic meetings.** On May 20, 2021, the majority of the provisions of the *Finance Statutes Amendment Act (No. 2)*, 2021, S.B.C. 2021, c. 14 came into effect by royal assent. The Act amends the *BCA* as well as *Cooperative Association Act*, S.B.C. 1999, c. 28; *Financial Institutions Act*, R.S.B.C. 1996, c. 141; and *Societies Act*, S.B.C. 2015, c. 18 to expressly permit virtual AGMs and board meetings. The legislation now provides that, unless the memorandum or articles provide otherwise, a company may hold its AGM by telephone or other communications medium if all shareholders and proxy holders attending

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| the meeting are "able to participate in it". This replaces the previous requirement that shareholders and proxy holders be "able to communicate with each other". The rules further provide that if a company holds a meeting of shareholders that is an electronic meeting, the company must "permit and facilitate participation in the meeting". Companies should consider whether they may want to require in-person meetings (which will now require an explicit restriction on holding an AGM by telephone or other communications medium in the company's articles).<br>• **Removing oneself as a director.** Effective May 4, 2023, a person who claims not to be a director but who is recorded as a director in a company's notice of articles may, on notice to the company, apply to the registrar for the removal of their name and address from the company's notice of articles (*BCA*, s. 127.1, as amended by B.C. Reg. 114/2023). On application, the registrar must alter the company's notice of articles if the applicant provides satisfactory proof that they are not a director of the company, and the company failed to file a notice of change of directors with the registrar.<br>• **Revocability of a shotgun offer.** In *Blackmore Management Inc. v. Carmanah Management Corp.*, 2022 BCCA 117, the court applied the principles of contractual interpretation to a shotgun clause in a shareholders' agreement. The court reversed the trial decision and held that an offer made under a shotgun clause will not be irrevocable in the absence of express language in the agreement to the contrary. Revocability is an important consideration in the drafting of shotgun clauses. These clauses are typically included in shareholders' agreements to provide the parties with a dispute resolution mechanism that will result in one shareholder selling its shares to the other shareholder at a price that is determined under a construct that promotes fairness. This is achieved by the triggering party making two offers: one offer to buy the shares of the other shareholder at a specified price, and a second offer to sell the triggering party's shares to the other shareholder at the same price per share. To achieve the intended result of a shotgun mechanism, typically the offer must be irrevocable. Consistent with this notion, the Court of Appeal concluded that it would be inconsistent with the purpose of shotgun clauses if parties could revoke an offer they have come to regret. As a result of this recent decision, in the atypical situation where the parties intend for a shotgun offer to be revocable, this intention should be expressly set out in the agreement. In all other circumstances, it is best practice to expressly state that the offer is irrevocable. Note that the Court of Appeal granted a stay of its order pending an application for leave to the Supreme Court of Canada; counsel should stay apprised of further updates.<br>• ***Arbitration Act.*** The *Arbitration Act*, S.B.C. 2020, c. 2, came into force on September 1, 2020. It is strongly recommended that practitioners review the new legislation prior to drafting or revising arbitration clauses in agreements.<br>• **Transparency register.** The operative provisions of the *Business Corporations Amendment Act, 2019*, S.B.C. 2019, c. 15 came into force on October 1, 2020 (see B.C. Reg. 77/2020). The Act requires private companies incorporated under the *BCA* to create and maintain a "transparency register" of information about "significant individuals". Individuals will be considered "significant individuals" if: they directly or indirectly own, or indirectly control 25% or more of the issued shares of the company, or shares that carry 25% or more of the voting rights of the company; or they are able to exercise rights or influence, directly or indirectly, that would result in the election, appointment or removal of the majority of the company's directors. If two or more individuals meet the above criteria by jointly holding the prescribed interest or right, then each will be deemed a "significant individual". Similarly, two or more individuals who are acting in concert, or who meet the definition of "associate" in s. 192(1) of the *BCA*, must add their interests together. If the group meets the above criteria, the company must list every member of the group as significant individuals | |

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in its transparency register. The transparency register must contain the following information for each significant individual: full name, date of birth, and last known address; whether the individual is a Canadian citizen or permanent resident of Canada and, if not, a list of every country of which the individual is a citizen; whether the individual is a resident of Canada for tax purposes; the date on which the individual became or ceased to be a significant individual; a description of how the individual meets the definition of a significant individual; and any further information that may be required by regulation. Access more information at www2.gov.bc.ca/gov/content/employment-business/business/bc-companies/transparency-register. Bill 20, known as the *Business Corporations Amendment Act*, will introduce a new corporate transparency registry and requirements by 2025.

- **Benefit companies.** The legislation governing benefit companies came into force on June 30, 2020 with changes to the *BCA*. A benefit company is a for-profit company that conducts business in a sustainable and responsible manner, while promoting one or more public benefits. For more information on benefit companies, see Part 2.3 of the *BCA*.

- ***Canada Business Corporations Act.*** Amendments to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), which took effect August 31, 2022, require distributing corporations (generally only public companies which are governed under the *CBCA*) to comply with new requirements with respect to the election of directors. Note the amendments in s. 106 of the *CBCA*, with respect to "majority voting" and "individual election" requirements. Accordingly, if a *CBCA* company is being incorporated, and particularly if it may become a reporting issuer, particular attention should be given to the company's articles with respect to electing and appointing its directors. On June 23, 2022 *CBCA* amendments received royal assent that will require private *CBCA* corporations to report beneficial ownership information to Corporations Canada on a regular basis. Bill C-42 now presents a second series of amendments to the *CBCA*, proposing further corporate transparency and accountability by making certain information public within the individuals with significant control ("ISC") register. Under the proposed amendments, the name, residential address, date of birth, and citizenship of each ISC would require inclusion in the register.

- **MRAS.** The Multi-Jurisdictional Registry Access Service (the "MRAS") was introduced on June 29, 2020. The MRAS allows for the sharing of information under the New West Partnership Trade Agreement (the "NWPTA"). Extraprovincial registration (or cancellation thereof) under the NWPTA is no longer made through the home jurisdiction; it must now be made through each extraprovincial jurisdiction. For instance, prior to June 29, 2020, when a British Columbia company wanted to be extraprovincially registered in Alberta, the filing was made through BC Online. Now the extraprovincial filing must be made through the Alberta Corporate Registry.

- **Manitoba joins NWPTA.** Pursuant to the *Trade, Investment and Labour Mobility Agreement Implementation Act*, S.B.C. 2008, c. 39 (the "*TILMA Act*"), the Extraprovincial Companies and Foreign Entities from a Designated Province Regulation, B.C. Reg. 88/2009, and by operation of the NWPTA, an enterprise meeting the requirements of any of the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba are deemed to meet the requirements of the other participating provinces. This eliminates the requirement by British Columbia companies extraprovincially registered in those provinces to make separate filings there for annual returns or changes of directors (it does not eliminate the need for extraprovincial registration).For information about corporate registry procedures pursuant to the NWPTA, visit the NWPTA page on the Corporate Registry website at www.bcregistryservices.gov.bc.ca.

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| • ***Competition Act*.** Amendments to the *Competition Act*, R.S.C. 1985, c. C-34, effective June 23, 2023 include provisions prohibiting agreements for mutual conduct to not hire or solicit each other's employees.<br><br>**Of note:**<br><br>• **Aboriginal law.** Special considerations apply to businesses involving Indigenous persons and lands belonging to First Nations. While significant tax and other advantages may be available under the *Indian Act*, R.S.C. 1985, c. I-5, such advantages are affected by the following: the type of business; transaction nature; business entity (sole proprietorship, partnership, joint venture, trust, or incorporated company); location of business activity (either on or off First Nations lands); and the specific First Nation and its applicable governance. Effective May 11, 2023, the *Budget Measures Implementation Act, 2023* came into force, amending the *Treaty First Nation Taxation Act*, S.B.C 2007, c. 38, and the *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2. These legislative amendments allow taxing treaty First Nations and the Nisga'a nation, respectively, to implement tax exemptions for property on their lands. Businesses engaging in activities on First Nations lands, lands subject to treaty rights, or lands over which there are claims of Aboriginal rights or title are strongly encouraged to familiarize themselves with applicable laws and policies. Consider seeking the advice of a lawyer who has experience in Aboriginal law matters. Further information on Aboriginal law issues is available on the "Aboriginal Law" page on the "Practice Areas" section of the Continuing Legal Education Society of British Columbia website (www.cle.bc.ca) and in other CLEBC publications. See also *Negotiating & Structuring Business Transactions with First Nations 2011* (CLEBC, 2011) as well as M.J. MacDonald, "First Nations Partnerships", in *Working with Partnerships 2016* (CLEBC, 2016), available through CLEBC Courses on Demand.<br><br>• **Money laundering—companies, trusts, and other entities.** The prevalence of money laundering in British Columbia (particularly in the area of real estate) continues to be a concern. The provincial government established the Commission of Inquiry into Money Laundering in British Columbia, which was led by Austin Cullen J. as the commissioner. The Cullen Commission's final report was publicly released on June 15, 2022. For more information on the Cullen Commission, and the link to the full report, see LAW SOCIETY NOTABLE UPDATES LIST (A-3). In addition, consult the Law Society's resources related to anti-money laundering: https://www.lawsociety.bc.ca/priorities/anti-money-laundering/.<br><br>As a means of laundering money, criminals use ordinary legal instruments (such as shell and numbered companies, bare trusts, and nominees) in the attempt to disguise the true owners of real property, the beneficial owners. These efforts can be hard to detect. As such, lawyers must assess the facts and context of the proposed retainer and financial transactions. Lawyers should be aware of red flags, and if a lawyer has doubts or suspicions about whether they could be assisting in any dishonesty, crime, or fraud, they should make enough inquiries to determine whether it is appropriate to act (*BC Code* rules 3.2-7 and 3.2-8 and Law Society Rules 3-103(4), 3-109, and 3-110). See the resources on the Law Society's Client ID & Verification resources webpage such as the Source of Money FAQs, Risk Assessment Case Studies for the Legal Profession in the context of real estate, trusts, and companies, and the Red Flags Quick Reference Guide. Also see the Risk Advisories for the Legal Profession regarding real estate, shell corporations, private lending, trusts, and litigation; "Forming Companies and Other Structures—Managing the Risk" (*Benchers' Bulletin*, Spring 2021); and the Discipline Advisories including country/geographic risk and private lending. Lawyers may contact a Law Society practice advisor at practiceadvice@lsbc.org for a consultation about the applicable *BC Code* rules and Law Society Rules and obtain guidance. | |

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- **Tax alert.** As some aspects of a shareholders' agreement may have significant tax implications for the parties, it is recommended the parties seek advice from their respective tax advisors.
- **COVID-19 pandemic.** Counsel should keep apprised of developments related to COVID-19 (and response measures) that may affect transactions. Note that:
  - The Land Title Survey Authority will retire temporary COVID-19 practice changes under the *Land Title Act*, R.S.B.C. 1996, c. 250 on September 30, 2023. which include remote witnessing of affidavits for use in land title applications. Further information may be accessed at https://ltsa.ca/covid-19-resources/.
  - Counsel conducting due diligence searches must be mindful of the impact of the COVID-19 pandemic on the due diligence process. Response times for search requests may be delayed and, accordingly, such delays should be accounted for in the due diligence timeline. Counsel should be aware that search results may not disclose certain actions, fines, levies, or administrative penalties that have been delayed but are otherwise permitted to be filed or issued beyond the typical limitation period.
- **Additional resources.** For more information about shareholders' agreement content, see the *British Columbia Company Law Practice Manual*, 2nd ed. (CLEBC, 2003–), and in particular the Model Shareholders' Agreement.
- **Law Society of British Columbia.** For changes to the Law Society Rules and other Law Society updates and issues "of note", see LAW SOCIETY NOTABLE UPDATES LIST (A-3).

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## CHECKLIST

### 1. INITIAL CONTACT

1.1 Complete CLIENT FILE OPENING AND CLOSING the (A-2) and SHAREHOLDERS AGREEMENT PROCEDURE (B-6) checklists. Confirm compliance with Law Society Rules 3-98 to 3-110 for client identification and verification and the source of money for financial transactions and complete the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1) checklist. Consider periodic monitoring requirements (Law Society Rule 3-110).

### 2. EFFECTIVE DATE OF AGREEMENT

### 3. IDENTIFICATION OF PARTIES

3.1 Identify the shareholders (generally all, but not necessarily). See item 1.1 in this checklist.

3.2 Identify the company (especially if it will be obliged to purchase shares from a shareholder pursuant to the agreement).

3.3 Where a shareholder is a company, consider adding its shareholders (or the individuals who have ultimate control of the corporate shareholder) as parties to any covenant regarding control of the shareholder company.

3.4 Consider including a spouse who may have an interest in the shares and ensuring that a certificate of independent legal advice be obtained with respect to the execution of the agreement by the spouse. See *Code of Professional Conduct for British Columbia* (the "*BC Code*"), rule 7.2-9. Note the definition of "spouse" in the *Family Law Act*, S.B.C. 2011, c. 25.

### 4. RECITALS

4.1 Describe company particulars, such as:

.1 Business that will be carried on.

.2 Authorized capital, including a list of shares issued to each shareholder.

.3 A list of the shareholder loans owing from the company to the shareholders as of the date of the agreement, if any.

4.2 Include a general statement of the legal relationship between the parties.

4.3 Set out the reasons for entering into the agreement.

4.4 Make a statement relating the recitals to the rest of the agreement, whether they form part of the binding provisions of the agreement or not.

4.5 Consider reciting any particular reasonable expectations the parties may or may not have, or may expressly wish to exclude, as evidence in case of a dispute, including an oppression claim.

### 5. INTERPRETATION

5.1 Definitions:

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| .1 Include specific definitions (consider setting them out in a schedule).<br>.2 Include a general statement that accounting terms not defined will have the meaning ascribed to them in accordance with Generally Accepted Accounting Principles (GAAP), including any principles based on Accounting Standards for Private Enterprises (ASPE) or International Financial Reporting Standards (IFRS), as applicable.<br>5.2 Set out principles that govern the interpretation of the agreement (e.g., use of the masculine form, insertion of headings is for convenience only, use of the term "including").<br>5.3 Schedules, such as:<br>.1 Definitions (see item 5.1.1 in this checklist).<br>.2 Escrow agreement (see item 10.1.3 in this checklist, including the caution regarding Law Society Rule 3-58.1).<br>.3 Life insurance policies (see item 15.1 in this checklist).<br>.4 *Pro forma* budget (see item 8.17 in this checklist).<br>**6. REPRESENTATIONS**<br>6.1 As to ownership of shares or ownership and control of shares of any corporate shareholders.<br>6.2 Corporate status, power, and capacity of corporate shareholders.<br>6.3 If a transfer of shares is contemplated, a representation as to the power to sell, good title, and absence of liens.<br>**7. SCOPE AND NATURE OF SHAREHOLDERS' RELATIONSHIP**<br>7.1 Agreement governs dealings.<br>7.2 No partnership created.<br>7.3 No shareholder has power to bind any others except as expressly permitted.<br>**8. CONDUCT OF THE AFFAIRS OF THE COMPANY**<br>8.1 Include a statement that, except as provided in the agreement, the conduct of the company's business will be governed by the articles and that, in the event of a conflict, the agreement will govern. Consider whether a covenant to amend the articles, in the event of a conflict with the agreement, is required. Consider whether to transfer any management powers to others (e.g. the shareholders) as permitted under s. 137 of the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*BCA")*.<br>8.2 Directors:<br>.1 Number.<br>.2 Appointment process (e.g., each shareholder to appoint one or more nominees).<br>.3 Resignation.<br>.4 Filling vacancies. | |

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| .5 Removal (i.e., cause for removal, procedure, replacement).<br><br>.6 Right of director to appoint an alternate.<br><br>.7 Right of a nominee director to share information with their nominating shareholder (if applicable). Without consent by the company to such sharing of company information, a nominee director may be in breach of fiduciary duties by disclosing information to their nominating shareholder.<br><br>8.3 Quorum for the transaction of business:<br><br>.1 Number constituting a quorum, and whether a nominee for each shareholder is required to be present.<br><br>.2 What happens when there is not a quorum (e.g., adjournment, with whoever attends the meeting following the adjourned meeting constituting a quorum).<br><br>.3 Procedure, if any, for breaking a deadlock (such as a casting vote in the event of a tie, or "shotgun" provisions as discussed in item 11 in this checklist). Consider mandatory mediation, with appointment of a trusted third party.<br><br>8.4 Directors' meetings:<br><br>.1 Place and time. Consider including a requirement to hold meetings in Canada as a means of ensuring that factual residence of the company remains in Canada for tax purposes.<br><br>.2 Calling a meeting, including notice requirements.<br><br>.3 Meeting by telephone conference.<br><br>.4 Quorum and voting.<br><br>8.5 Shareholders' meetings:<br><br>.1 Place and time.<br><br>.2 Calling a meeting, including notice requirements.<br><br>.3 Quorum and voting.<br><br>8.6 Officers and employees:<br><br>.1 Positions.<br><br>.2 Duties.<br><br>.3 Compensation, where there is no separate employment contract. See item 8.8 in this checklist.<br><br>8.7 Major decisions requiring unanimous, extraordinary, or special approval of the directors or the shareholders, as the case may be, such as:<br><br>.1 Sale, lease, transfer, mortgage, pledge, or other disposition of the undertaking of the company or a subsidiary.<br><br>.2 Any amendment to the notice of articles or articles, or other charter documents of the company or a subsidiary.<br><br>.3 Increase or reduction in the capital of the company; issue of additional shares in the capital of the company. | |

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| .4 Consolidation, merger, or amalgamation of the company with any other legal entity. | |
| .5 Capital expenditures or commitments exceeding a specified amount or specified term. | |
| .6 Leases of company property having a capital value exceeding a specified amount. | |
| .7 Borrowing by the company or a subsidiary which would result in aggregate indebtedness exceeding a specified amount (consider whether refinancing an existing facility should be excluded). | |
| .8 Loans by the company or a subsidiary to a shareholder or affiliate. | |
| .9 Contracts between the company and a shareholder or affiliate. | |
| .10 Any transaction out of the ordinary course of business of the company, including changing the nature of the business. | |
| .11 Any change in the authorized signing officers in respect of legal documents or any financial institution. | |
| .12 Adoption or amendment of a budget. | |
| .13 Any agreement by the company restricting, or permitting any other party to accelerate or demand payment of company indebtedness upon the sale, transfer, or other disposition by a shareholder of their shares or loan. | |
| .14 Any amendment to any employment contract made between the company and one of the other parties to the agreement, or a representative of one of those other (corporate) parties. | |
| .15 Employment by the company of a shareholder's relative (or, for a corporate shareholder, its representative or a relative of that representative). | |
| .16 Waiver or appointment of an auditor. | |
| .17 Other decisions of particular importance having regard to the nature of the company business. | |
| .18 Any non-arm's-length transactions or transactions with shareholders. | |
| 8.8 Where the shareholders will be running the business, consider: | |
| .1 Including employment provisions in the shareholders' agreement (include provisions regarding expectations as to commitment of time and energy to the business of the company). | |
| .2 Having separate employment or management contracts tied to the shareholders' agreement so that a default by a shareholder under their employment contract would trigger a default under the shareholders' agreement. | |
| 8.9 Shareholder's duties to the company: | |
| .1 Duty not to compete (and what constitutes competition), during the time it is a shareholder and for a reasonable time thereafter, within a reasonable geographic area. | |
| .2 Methods for authorizing exceptions to the duty not to compete. | |
| .3 Duty of confidentiality. | |

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| .4 Duty not to solicit customers, suppliers, or employees of the company (noting the general prohibition on mutual employee non-solicitation clauses under the *Competition Act*). | |
| 8.10 Statement that each shareholder acknowledges that, by reason of their unique knowledge of and association with the business of the company, the covenants set out in item 8.9 in this checklist are reasonable and commensurate with the protection of the legitimate interests of the company, and that it is agreed that the covenants will be severable and subsist even if the rest of the agreement is terminated. | |
| 8.11 Consider including a covenant of the shareholders to, upon the request of the company, provide a waiver of the requirements under the *BCA* that the company produce financial statements and/or appoint an auditor (ss. 200 and 203). | |
| 8.12 The bank at which the company maintains its accounts. | |
| 8.13 Signing officers on bank accounts, and limitations on amounts, if any. | |
| 8.14 Auditor/accountant/legal counsel. | |
| 8.15 Books of account, financial statements, accounting principles, and provision of periodic financial statements. | |
| 8.16 Indemnification of directors and officers (subject to the restrictions set out in s. 163 of the *BCA*), and purchase of directors' and officers' insurance, if appropriate. | |
| 8.17 *Pro forma* budget (consider attaching it as a schedule and including a statement of intent). | |
| 8.18 Consider the application of the above provisions to subsidiaries. | |
| **9. FINANCING** | |
| 9.1 Initial financial contribution required from each shareholder, distinguishing between subscribed capital (equity) and shareholder loans. | |
| 9.2 Mechanisms by which the company may raise additional funds for working capital: | |
| .1 Borrowing from an institutional lender: | |
| (a) Whether the company is required to try to obtain funds in this manner before turning to the shareholders. | |
| (b) Whether the shareholders are required to enter into guarantees of indebtedness of the company (consider a provision that liabilities for guarantees will be shared pro rata, and that each shareholder will indemnify the others for their share of the amount guaranteed). | |
| .2 Borrowing from the shareholders: | |
| (a) Circumstances in which the company may do this, how the decision is made, and whether there is a maximum amount that may be demanded. | |
| (b) Contribution to be *pro rata*. | |
| (c) Notice requirements. | |
| (d) Shareholders' obligation (or option) to advance funds. | |

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(e) Where the shareholder is obliged to advance funds, a provision for failure to do so (e.g., default or a right granted to other shareholders to loan funds to the company on preferential terms, such as an increased interest rate, or a dilutive equity issuance).

9.3 Whether shareholder loans bear interest and whether they are to be secured (if so, include obligations as to granting priority to other borrowings).

9.4 Provisions regarding repayment of shareholder loans, including whether there is a right to demand repayment, whether the company can defer payment, or whether the company is required to repay shareholder loans pro rata based on the face value of the outstanding loans at the time of repayment.

9.5 Other contributions required of shareholders (e.g., premises, personnel, directing opportunities, trademarks, technology, know-how).

9.6 Distribution of net profit:

.1 Statement that distribution will occur except as prohibited by the terms of debt financing or other agreements, and to the extent permitted by law, after the board has provided (by resolution) for such reserves as are necessary.

.2 Frequency of distribution.

.3 Priorities (e.g., repayment of loans, dividends).

**10. RESTRICTIONS ON TRANSFER/RIGHT OF FIRST REFUSAL**

10.1 Right of first refusal to be offered to the company or the other shareholders or both, setting forth:

.1 The investment offered for sale, which may be required by the agreement to:

(a) include, proportionately, preference shares and loans outstanding.

(b) represent all or a specified minimum percentage of the shareholder's investment.

.2 The purchase price.

.3 The terms and conditions of the sale, including the method of payment, whether the price may be paid over time and, if so, provisions regarding interest on the unpaid balance, security on the unpaid balance (e.g., in the form of an escrow agreement annexed as a schedule), and whether prepayment can be made without penalty. In selecting an escrow agent, keep in mind Law Society Rule 3-58.1, which requires that, except as permitted by the *Legal Profession Act*, S.B.C. 1998, c. 9, or the Law Society Rules or otherwise required by law, a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm. For further discussion of Law Society Rule 3-58.1, see *The Trust Accounting Handbook* (at https://www.lawsociety.bc.ca/Website/media/Shared/docs/trust/trust-accounting-handbook.pdf.

.4 The prospective purchaser (where there is an offer from a third party). Consider whether it should be a pre-condition that a third-party offer has been obtained.

.5 Whether the offer may be accepted in part, or must be accepted in its entirety or not at all.

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| .6 The length of time the offer is open for acceptance (as set out in the agreement).<br><br>10.2 Where an offer is made to the company and the other shareholders as set out in item 10.1 of this checklist:<br><br>.1 The secretary will, upon receipt:<br><br>(a) Transmit the offer to each director and shareholder.<br><br>(b) Call a meeting of the board to consider the offer.<br><br>.2 If the company has first right to accept the offer and, to the extent that it does so, the shareholders agree to refuse any pro-rata offers required to be made by the company under the articles or the agreement.<br><br>.3 If the offer is not wholly accepted by the company within the time set out in the agreement (which is a shorter time than the time during which the offer is open for acceptance):<br><br>(a) The secretary will so advise the shareholders.<br><br>(b) The portion of the offer not accepted by the company may be accepted by the shareholders *pro rata* within the time set out in the agreement (which is a shorter time than the time during which the offer is open for acceptance).<br><br>(c) Acceptance by the shareholders will be by notice to the secretary, and a shareholder may by such acceptance specify any additional portion of the investment offered for sale that such shareholder is prepared to purchase, if the other shareholders fail to accept the offer.<br><br>(d) If any of the shareholders fail to accept the offer, any shareholder who has given notice of their preparedness to make an additional purchase may do so, on a pro-rata basis.<br><br>(e) At the expiry of the specified period, the secretary will advise the company of the extent to which the offer is still open.<br><br>.4 If the offer has not been wholly accepted by the shareholders by the end of the specified period, the company is again entitled to accept the offer with respect to the portion still available. If it does so, the shareholders agree to refuse any offers required to be made by the company under the articles or the agreement.<br><br>.5 Prior to the expiry of the period set out in the offer, the secretary will advise the offeror whether the offer has been accepted in its entirety, and, if so, by whom.<br><br>.6 If the offer has not been wholly accepted within the specified time period, the offeror has the right, for a specified period of time, to dispose of the investment to a third party (specify whether this may be to any third party, upon no better terms and conditions than were set out in the offer, or to a particular third party, where the terms and conditions offered have first been offered to the other shareholders and have not been taken up), provided that the third party has entered into an agreement with the company and the shareholders by which the third party is bound by the agreement.<br><br>.7 Provisions regarding completion of the sale and closing mechanics (including where, when, and how).<br><br>.8 Consider including a partial payment by way of set-off where the vendor is indebted to the company. | |

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| 10.3 Whether disposition to an affiliate or a related entity is authorized and, if so, under what conditions (e.g., that the affiliate will remain an affiliate so long as it holds the investment and, prior to ceasing to be an affiliate, will transfer the investment back to the shareholder; that the affiliate is bound by the agreement). | |
| 10.4 A defaulting shareholder is not entitled to dispose of its investment pursuant to the above provisions unless prior to or concurrently with the transfer it ceases to be a defaulting shareholder. | |
| 10.5 Except as provided in the agreement, no shareholder will dispose of their investment without meeting the requirements set out in the agreement (e.g., prior written consent of the other shareholders, or of any other party where such consent is required by an agreement between the company and that party; and that the transferee must agree to be bound by the agreement). | |
| 10.6 No shareholder will encumber their investment, except as may be permitted in the agreement. | |
| 10.7 Upon execution of the agreement, the shareholders will surrender to the company each share certificate, which will be stamped to indicate that transfer is subject to the agreement. Consider whether shares should be placed in escrow to be dealt with in accordance with the agreement. | |
| **11. DISPUTE RESOLUTION/COMPULSORY BUY-OUT ("SHOTGUN" CLAUSE)** | |
| 11.1 Consider including an obligation to negotiate, mediate, or arbitrate, or pursue other means of resolving disputes, such as the following shotgun clause. | |
| .1 A shareholder may make a compulsory offer to the other shareholders to either sell all of their investment (including all shares in the company and shareholders' loans held by that shareholder) or buy all of the other shareholders' investment at the price and on the terms and conditions set out in the offer. | |
| .2 Notice requirements and limitation periods are as set out in the agreement. | |
| .3 The shareholders to whom the offer is made have the option of buying (pro rata) or selling at the per share price set out in the offer, but failure to give notice of the election within the specified time period will be deemed to be an acceptance of the offer to sell. | |
| 11.2 Provide for a situation in which some shareholders elect to sell and some to buy. | |
| 11.3 Prescribe how the sale will be completed (including where, when, and how). | |
| 11.4 Consider including a set-off where the vendor is indebted to the company or the other shareholder(s). | |
| **12. OBLIGATION TO JOIN IN A SALE ("DRAG-ALONG") AND PIGGY-BACK RIGHTS** | |
| 12.1 A piggy-back, drag-along, or co-sale right is a right of a shareholder to participate in a sale to a third party where a majority shareholder has received an offer by that third party to purchase their shares. | |
| .1 A shareholder holding a specified percentage of shares in the company (e.g., 66 ⅔) may require the other shareholders to join in a sale of all of the shares of the company to a third party, by notifying them of an offer received. | |

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| .2 Notice requirements and limitation periods are as set out in the agreement. | |
| .3 The shareholders to whom the offer is made have the option of buying the investment of the shareholder who gave notice (*pro rata*) at the offered price, or of joining in the sale of all the investment to the third party. | |
| 12.2 Provide for a situation in which some shareholders elect to sell and some to buy. | |
| 12.3 Describe how the sale will be completed (including where, when, and how). | |
| 12.4 Consider including a payment by way of set-off where the vendor is indebted to the company or the other shareholder(s). | |
| 12.5 Consider whether the right of first refusal (item 10 in this checklist) should apply to a proposed transfer by a shareholder to a third party under the drag-along/piggy-back provisions. | |
| **13. OBLIGATION TO PURCHASE/OBLIGATION TO SELL** | |
| 13.1 A shareholder may require the company or the other shareholders to purchase, or the company and the other shareholders may have the right to purchase, their investment, in the circumstances set out in the agreement (e.g., upon retirement from the work force or from active involvement in the company's business). | |
| 13.2 Price, terms and conditions, and procedure are as set out in the agreement (refer, for example, to relevant portions of item 10 in this checklist). | |
| 13.3 If the company has non-Canadian resident shareholders, consider the effect that any rights to acquire shares in favour of the non-resident shareholder(s) will have on the company's Canadian-controlled private corporation status, if applicable. | |
| **14. INDEMNIFICATION AND DISCHARGE OF GUARANTEES** | |
| 14.1 Obligation of the shareholders and company, where a shareholder has disposed of all of their investment in compliance with the agreement, to use their reasonable efforts to have any guarantee or pledge issued or granted by the shareholder discharged or cancelled, and to indemnify the departing shareholder for liabilities arising with respect to such a guarantee or pledge subsequent to their departure. | |
| **15. INSURANCE POLICIES** | |
| **Note**: This section of the checklist is complex, and based on tax legislation that may change from time to time. It is strongly recommended that a tax expert be consulted before drafting these clauses. | |
| 15.1 Consider the means of funding the purchase price, including the obligation of the company to own and maintain life insurance policies of a specified value on all shareholders and representatives of corporate shareholders (such policies to be listed in a schedule to the agreement). Or, alternatively, there may be an obligation on the shareholders and representatives to own and maintain criss-cross life insurance policies. | |
| 15.2 Consider obligations of the shareholders to cooperate (e.g., by attending physical examinations). Where shareholders own policies, they may have obligations not to cancel, terminate, pledge, assign the policy, or change the beneficiary. | |
| 15.3 Set out the rights of the company with respect to the policies, such as: | |

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.1 To apply any policy dividends to payment of premiums.

.2 To collect death benefits.

.3 No right to modify or impair any rights or values of the policies, or exercise any rights of ownership, except as provided in the agreement or with the prior written consent of the shareholders.

15.4 Set out the rights of the shareholders with respect to the policies, such as:

.1 To obtain information from the insurer regarding the status of the policy on their life.

.2 To pay premiums where the company fails to do so, and to be reimbursed.

.3 To purchase the policy on their life, at the price set out in the agreement (e.g., cash surrender value), on the happening of specified events (e.g., termination of the agreement during the lifetime of the shareholder).

.4 Apply any dividends received on the policy to premiums.

15.5 Consider including un-insurability provisions.

15.6 An existing company may have existing life insurance policies that may qualify for favourable tax treatment; do not change or cancel such policies without considering this matter.

**16. SALE ON DEATH**

**Note**: This section of the checklist is complex, and based on tax legislation that may change from time to time. It is strongly recommended that a tax expert be consulted before drafting these clauses.

16.1 When a shareholder who is an individual dies, their personal representatives will sell the investment in the company held by the deceased. The company, the remaining shareholders, or a combination thereof (due to the application of the stop-loss or other rules contained in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)) will purchase the investment from the estate. Where the company is the purchaser and it has pre-existing company provisions, the remaining shareholders agree to refuse any offer required to be made by the company under its articles. If it is a British Columbia company with pre-existing company provisions, consider whether the pre-existing company provisions should be removed pursuant to s. 442.1(3) of the *BCA* to avoid having to make pro-rata offers.

16.2 When the representative of a corporate shareholder dies, the shareholder will sell, and the company or the remaining shareholders will purchase from the corporate shareholder, the investment held by it at the date of the representative's death. Where the company is the purchaser and it has pre-existing company provisions, the remaining shareholders agree to refuse any offer required to be made by the company under its articles.

16.3 The purchase price and terms and conditions of payment are as set out in the agreement.

16.4 Where the purchase is required to be made by the company, and the surplus and capital dividend account is insufficient to complete the purchase, the parties to the agreement agree to take the steps necessary to complete the purchase and to otherwise fund the purchase price.

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| 16.5 Where the purchase is required to be made by the remaining shareholders, it will be on a *pro-rata* basis. | |
| 16.6 The company will, upon the death of the shareholder or representative of a corporate shareholder, claim and collect the proceeds of any life insurance policy. The proceeds will be applied as set out in the agreement (e.g., to pay any indebtedness of the company to the deceased, to pay the purchase price, to pay the remaining shareholders who make the purchase). Consider appropriate disposition of excess insurance proceeds. | |
| 16.7 Provisions regarding completion of the sale, closing mechanics (including where, when, and how). | |
| 16.8 At the closing the following will occur, in the order set out in the agreement: | |
| .1 The purchasers will pay the purchase price, or a specified percentage thereof, to the vendor, and deliver any documents that may be required (e.g., promissory notes, escrow agreements). Note Law Society Rule 3-59 with respect to the restrictions on receiving cash and Rule 3-70 for records of cash transactions. | |
| .2 The unpaid balance, if any, will be paid and secured as set out in the agreement. Consider security for the unpaid balance. | |
| .3 The vendor, on receipt of the purchase price or the portion payable pursuant to item 16.3 of this checklist, will give to the purchasers all share certificates, instruments, conveyances, assignments, and releases as may be reasonably required to complete the sale and to transfer all of the investment. | |
| .4 Where the purchasers are the remaining shareholders, the company will pay to them a capital dividend equal to the lesser of the purchase price or the proceeds of any life insurance policy (and, in the latter case, the company will elect to have the dividends payable out of its life insurance capital dividend account pursuant to the provisions of the *Income Tax Act*). | |
| 16.9 Consider providing for a purchase-price adjustment to take into account the value of the investment as determined by Canada Revenue Agency. Generally, such a clause would be inappropriate in an arm's-length (as opposed to a non-arm's-length) situation, so consider carefully before including such a clause. | |
| 16.10 Provide that the agreement will have no application upon the death of the final shareholder or representative of a corporate shareholder, notwithstanding any other term of the agreement or if the shareholders die within a specified time (e.g., 60 days). | |
| **17. ALTER EGO TRUST** | |
| 17.1 If a party is at least 65 years old, consider the use of an alter ego or joint partner trust to avoid possible application of wills variation legislation. | |
| **18. DEFAULT** | |
| 18.1 Circumstances that constitute a default, such as: | |
| .1 Failure to carry out obligations under the agreement after the other shareholders have made a written demand that the failure be cured. | |
| .2 Failure to defend assiduously a proceeding affecting title, possession, or management of the shareholder's investment after the other shareholders have made a written demand that the failure be cured. | |

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| .3 Bankruptcy, commission of an act of bankruptcy, the appointment of a receiver or receiver-manager with respect to the shareholder's assets, or an assignment for the benefit of creditors or otherwise.<br><br>.4 Change in control of a corporate shareholder.<br><br>.5 Termination of employment of a shareholder, or a representative of a corporate shareholder, who was employed by the company.<br><br>.6 Incapacity (as defined in the agreement).<br><br>.7 Retirement (see also item 13 in this checklist).<br><br>.8 Failure by a shareholder to meet technical or administrative qualifications imposed by a regulatory body or association as a prerequisite to practice a particular profession as a shareholder/employee of the company.<br><br>18.2 Consequences of default (indicate if consequences differ for different types of default, and indicate alternatives), such as:<br><br>.1 Winding-up of the company under the articles or Part 10 of the *BCA*.<br><br>.2 Other parties may waive the specific default.<br><br>.3 Other parties may pursue any remedy available in law or equity (be mindful of the two-year basic limitation period under s. 6 of the *Limitation Act*, S.B.C. 2012, c. 13). Note also that for a one-year period during the COVID-19 pandemic, the *COVID-19 Related Measures Act*, S.B.C. 2020, c. 8 suspended the limitation period within which a civil or family action, proceeding, claim, or appeal had to be commenced; and gave statutory decision makers the discretion to waive, suspend, or extend time periods related to the exercise of their powers.<br><br>.4 Other parties may take such actions as may reasonably be required to cure the default, in which case expenses will be recoverable as provided in the agreement.<br><br>.5 Implementation of a buy-sell procedure, whereby:<br><br>(a) The defaulting shareholder is deemed to offer to sell all or a part of their investment to the company or the other shareholders.<br><br>(b) The purchase price is determined as set out in the agreement (e.g., a discounted value for specified types of default—but not a penalty).<br><br>(c) The terms and conditions and procedure are as set out in the agreement (refer, for example, to relevant portions of item 10 of this checklist).<br><br>.6 Where the default consists of failure to make a loan to the company as required under the agreement (see item 9.2.2 of this checklist), additional remedies may be provided to the non-defaulting shareholders, such as:<br><br>(a) Recovery of loans made to the company.<br><br>(b) Right to elect not to make the loan without being held to be in default.<br><br>(c) Right to make the loan on behalf of the defaulting shareholder and be entitled to reimbursement from the defaulting shareholder and from the company out of any funds owing to the defaulting shareholder; this may bring the defaulting shareholder out of default, if requirements set out in the agreement are met. | |

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| .7 Withholding payment—for so long as the shareholder remains in default—of all monies payable to that shareholder by the company by way of dividends, repayment of loans, or other distributions. | |
| **19. FAMILY LAW CONSIDERATIONS** | |
| 19.1 Consider whether an option should be granted to the shareholders or the company to buy shares held by a shareholder if an application is made for a claim or transfer of property under applicable family law legislation. If such an application is made then, regardless of its merits (or if the shareholder in respect of whom the application is made is unable to provide reasonable comfort to the other shareholders that the shares are not at risk), the option could be exercised and the shareholder could be compelled to sell their shares to the other shareholders on a pro rata basis. | |
| **20. MISCELLANEOUS AND GENERAL PROVISIONS** | |
| 20.1 If the addition of further shareholders is contemplated, consider annexing the form of agreement to be executed by new shareholders. | |
| 20.2 Set the interest rate on any funds required to be paid to other shareholders (except default loans under item 18.2.6 of this checklist). | |
| 20.3 Consider circumstances that will terminate the agreement, such as: | |
| .1 The company goes into bankruptcy, has a receiving order made against it, or makes a proposal to its creditors. | |
| .2 Written consent of the parties. | |
| .3 The company becomes a reporting issuer under securities laws. | |
| .4 There being only one remaining shareholder of the company. | |
| 20.4 If a shareholder disposes of all its interest in compliance with the agreement, then it is bound by only the rights and obligations which arose pursuant to the agreement prior to the disposition. | |
| 20.5 Further assurances. | |
| 20.6 Entire agreement. | |
| 20.7 Amendments may be made by unanimous written agreement or by a certain percentage of shareholdings. | |
| 20.8 Severability of invalid provisions. | |
| 20.9 Time is of the essence. | |
| 20.10 Failure to insist upon strict performance of any provision of the agreement will not prevent a subsequent violation of the agreement from having the effect of an original violation. | |
| 20.11 Notices: | |
| .1 Addresses for service. | |
| .2 Prepaid registered mail, email, or other arrangement. | |
| .3 Deemed date of receipt. | |

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| 20.12 Arbitration. An arbitration provision should be considered but may not be appropriate. Further, if one is included, consider whether the arbitration clause removes the court's jurisdiction with respect to statutory remedies such as the oppression remedy. See "New developments" in this checklist with regard to the new *Arbitration Act* effective September 1, 2020. | |
| 20.13 Choice of law. | |
| 20.14 Choice of forum or jurisdiction. Is it exclusive or not? | |
| 20.15 Execution and delivery in counterparts, and consider fax or email signatures, with originals to follow. | |
| 20.16 Binding on heirs and executors and assignment. | |
| 20.17 Titles (president, treasurer, chair, etc.). | |
| 20.18 Remedies are cumulative. | |
| 20.19 Consider including general provisions that would apply to any share transfer: standard representations and warranties (e.g., title, no encumbrances, residency of vendor for tax purposes), standard terms relating to closing arrangements, payment of purchase price, interest, security or escrow for purchase price paid over time, prepayment of purchase price, default on payment, indebtedness, resignations, releases, non-competition clauses, restrictive covenants, consents of third parties, etc. | |
| 20.20 Consider including a general provision restricting the application of provisions in the agreement respecting share transfer where a change in control of the company would require the consent of third parties (e.g., lease) or would trigger adverse tax implications, such as a deemed year-end, loss of Canadian-controlled private company status, etc. Alternatively, include provisions requiring the company to obtain such third-party approvals. | |
| 20.21 Legend on share certificates. | |
| 20.22 Acknowledgment of independent legal advice. | |
| 20.23 Schedules (if any). | |