



## DOES YOUR BUSINESS NEED A PRE-NUP?

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According to Statistics Canada, about 38 percent of all marriages that took place in 2004 will have ended in divorce by 2035. Unable to ignore statistics like these, more and more couples are adding a much needed step to their pre-wedding to do list: the Pre-Nuptial Agreement (“Pre-Nup”). Pre-Nups, or marriage contracts as they are often called in Canada, are largely used to ensure certainty and protection, and are quickly becoming less of a “romance killer” and more of a business necessity. This is especially the case where one spouse may be a shareholder in a potentially lucrative business.

But what about that business? The protection and certainty offered by a Pre-Nup will only extend so far. One must never forget the other individuals who may be able to assert a negative effect on your business interests if things go sour: your business partners. Whether they are your friends, family or long-standing business associates, disputes between co-shareholders often lead to devastating consequences for everyone involved, including the corporation itself.

Not unlike a young couple newly in love, far too many people dive headfirst into business relationships without fully contemplating the ramifications if there is a breakdown in the relationship. Luckily, shareholders are not without their own options when it comes to protecting their interests.

Enter the Unanimous Shareholders’ Agreement (“USA”). Similar to a Pre-Nup, a USA is a contract between the shareholders of a corporation, which lays out the understanding between the parties with the ultimate goal of ensuring certainty and protection. Some of the key advantages of a good USA include:

### **Fettering of Directors’ Discretion**

Although it is the corporation’s shareholders who own the corporation, it is the directors that are charged with the management and supervision of the business. Under a USA, the shareholders have the ability to fetter this authority, gain greater control, and agree in advance as to how corporate operations are to be carried out. To do so, however, is not without its risks and, to the extent the USA restricts the powers of the directors to manage the business, will result in a transfer of liability from the directors to the shareholders.

### **Binding Future Shareholders**

Generally speaking, where a corporation is subject to a USA, any person who later buys into the business is deemed to be a party to the Agreement, regardless of whether they have expressly agreed to do so, or were even aware of the USA’s existence. In short, the USA will bind the hands of all transferees, including purchasers of the shares, trustees in bankruptcy, receivers, buyers upon seizure and sale, and heirs and executors.



## **Breaking the Bonds that Bind**

A typical USA often contains a buy-sell arrangement whereby one shareholder may be bought out by the other shareholders. The buy-sell provisions are useful where:

- (a) the parties have reached an impasse and someone has to go, or risk hurting the business;
- (b) one shareholder is looking to retire and wants a mechanism in place to facilitate the transaction; or
- (c) the shares, through bankruptcy, incapacity, death, seizure or divorce, fall into the hands of an unwanted third party, whom the original shareholders aim to buy-out.

Based on the specific needs of the shareholders, a number of different buy-sell options can be incorporated into the USA to assist in laying out a clear path for the shareholders to take in the event one of the above circumstances arise.

That said, one must never forget the tax man, and all USAs should be reviewed by someone with tax expertise prior to implementation.

When one considers the uncertainty of personal relationships and the devastating effects that litigation can have on a business, the question moves from “why have a USA?” to “how soon can we get it prepared?”.

Steven Spielberg and Amy Irving prepared their Pre-Nup on a napkin. After a nasty divorce action resulted in a \$100 million dollar settlement, Steven probably wishes he had taken the time to contact his lawyer prior to the marriage, or at least prior to it going down the tubes, to ensure his business interests were protected. Do not make the same mistake Mr. Spielberg made. Give us a call, we are more than happy to help you protect your business, and yourself, for years to come.