

Give it your best shot(gun): Lessons from B.C. Court of Appeal decision on the irrevocability of ‘shotgun offers’

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Take care when triggering a shotgun clause. Take even greater care when agreeing to extend an election period under such a clause. As *Blackmore Management Inc. v. Carmanah Management Corporation*, [2022 BCCA 117](#) illustrates, the initiating party will be hard pressed to revoke its offer, even if the market shifts after the offer is made.

Facts

In Blackmore, two shareholders initiated a compulsory buy-sell offer under a shareholders' agreement (commonly referred to as a "shotgun" clause). The recipient shareholder, Blackmore, had 60 days to elect whether to sell its shares or buy those of the initiating shareholders.

Shortly before the election period expired, Blackmore applied for an injunction to obtain further financial disclosure and to suspend the election period. The initiating shareholders agreed to extend Blackmore's election period until a court heard the matter. Days later, on March 19, 2020, B.C. courts suspended in-person operations due to the COVID-19 pandemic.

By June 2020, the injunction had not yet been heard. However, the company's shares had significantly increased in value. The initiating shareholders claimed to revoke their offer. A month later, Blackmore purported to elect to buy the initiating shareholders' shares. The dispute went before a petition judge.

The decisions below

The petition judge held that the initiating shareholders had successfully revoked their offer. The shareholders' agreement did not state that an offer was irrevocable, and the judge ruled that there was no basis to imply a term to that effect. Blackmore appealed.

The B.C. Court of Appeal allowed Blackmore's appeal. The Court held that the plain meaning of the shotgun clause, when read in its commercial context, led to the conclusion that the offer was irrevocable. By agreeing to keep the election period open pending a hearing, the initiating shareholders had accordingly bound themselves to keep their offer on the table until that occurred. The delay caused by the COVID-19 pandemic was not a basis for altering the agreement. The Court would not "rescue [the initiating shareholders] from a bargain they now regret."

The irrevocable nature of shotgun offers

The Court of Appeal emphasized that the commercial purpose of shotgun clauses depends on the irrevocability of the offer. Shotgun clauses aim to terminate a shareholder

relationship on fair terms. The instigator does not know whether it will ultimately need to buy or sell, and so the initiating party has an incentive to make an offer as close to market value as possible.

The Court of Appeal reasoned that it would be inconsistent with the purpose of shotgun clauses and their incentive mechanism if parties could revoke an offer that they had come to regret. Accordingly, shotgun clauses should be interpreted as rendering offers made under them irrevocable, absent clear agreement to the contrary. The Court held that sophisticated parties triggering a shotgun clause can be assumed to have considered the commercial risks in doing so.

Takeaways

Blackmore illustrates the risks of a lengthy election period in a shotgun clause. The longer the recipient has to consider the offer, the greater the risk that market forces will change the attractiveness of the offer. It can add additional uncertainty to the process. Given the irrevocable nature of a shotgun offer, the initiating party is exposed to all this risk. The recipient, by contrast, benefits from any change in value (or further information as to value) during the election period.

Blackmore also illustrates the difficulty of litigating a contentious exercise of a shotgun clause. The petition judge had remarked that in agreeing to the extension, the initiating shareholders had tried to address their commercial dispute “in a reasonable fashion during exceptionally unreasonable and uncertain times.” However, in doing so, they nonetheless exposed themselves to significant risk. Parties negotiating any extension to an election period may wish to instead, as the Court of Appeal suggested, adopt a fixed date extension or specify a date upon which the shotgun offer can be re-considered.

Finally, parties may consider whether to expressly state that a shotgun offer can be revoked, and specify under what circumstances and timelines that can be done. The Court’s comments about the general nature of shotgun clauses suggest it may be difficult to convince a court that a party had the right to revoke an offer made under a shotgun clause, absent clear wording to that effect.