

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Frigon v. Trout et al.*, 2005 YKSC 36

Date: 200500609
Docket No.: S.C. No. 04-A0125
Registry: Whitehorse

Between:

ALINE FRIGON

Plaintiff

And

**JOHN TROUT, THE EXECUTOR OF THE ESTATE OF JOHN TROUT,
ELIZABETH TROUT also known as LISE TROUT, DONALD TROUT also known
as DONNY TROUT, TERRI TROUT, JASON TROUT, THE PUBLIC ADMINISTRATOR
FOR THE YUKON, KWV LODGES LTD. and
RONALD EDINGER**

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Timothy J. Huntsman
Robert P. Pitzel

For the Plaintiff
For the Defendants Donald Trout,
Jason Trout, Terri Trout, Elizabeth Trout
and Ronald Edinger

REASONS FOR RULING

INTRODUCTION

[1] This application involves a shareholders' dispute in a Yukon company, KWV Lodges Ltd. (KWV), which owns a highway lodge (the lodge) located about 200 miles west of Whitehorse along the Alaska Highway. Aline Frigon is a shareholder of KWV who commenced an action on November 02, 2004, for relief which includes a declaration that she be the new president and sole director of KWV and that the family of

John Trout surrender vacant possession of the lodge to KWV. Aline Frigon brings this interim application based upon two separate notices of motion. The first notice of motion (January 26, 2005), seeks a declaration that Aline Frigon is entitled to purchase the common shares of KWV from the late John Trout and that Aline Frigon be the president and sole director of KWV. The second notice of motion (March 9, 2005), seeks a declaration that KWV be entitled to purchase the share of John Trout. Aline Frigon also seeks a change in the registered office from the present law firm to a new law firm chosen by Aline Frigon. Counsel for Aline Frigon stated that Aline Frigon does not seek to establish oppression under section 243 of the *Business Corporation Act*, R.S.Y. 2002 c. 20.

THE FACTS

[2] The lodge was purchased by John Trout and Joseph Frigon about 1975. John Trout ran the lodge and Joseph Frigon remained in Edmonton where he was a chartered accountant.

[3] The two partners incorporated KWV Lodges Ltd. on March 31, 1980. The shareholders on March 26, 1990 were John Trout and Joseph Frigon with 400 common shares each. John Jenkins had 100 shares and Ronald Edinger had 100 shares. John Trout and Joseph Frigon purchased John Jenkins' shares making their respective holdings 450 common shares of KWV. John Trout and Joseph Frigon were also the joint owners of 150 preferred shares.

[4] The lodge is now a substantial business earning an annual revenue in excess of \$1,000,000. Its payroll is in excess of \$200,000 annually. It consists of a restaurant, gas bar, car repair, motel and rental cabins. Electricity is supplied by diesel generators.

[5] The lodge has been operated by John Trout, his son Donald Trout and Ronald Edinger since approximately 1989. Ronald Edinger, a 10% shareholder, is a key employee as he keeps the generators running and operates the car repair and towing service. The maintenance of the water and sewer lines is also important.

[6] The lodge operated without apparent disagreement until Joseph Frigon passed away on January 6, 2001. At this point, Aline Frigon, his wife and beneficiary, became involved. She was unable to sell the shares held by Joseph Frigon to John Trout and consequently, the shares of Joseph Frigon were transferred to Aline Frigon on January 9, 2002.

[7] Since the death of Joseph Frigon, the lodge has been operated by John Trout, Donald Trout, Donald Trout's wife and Ronald Edinger. The lodge was apparently profitable before the death of Joseph Frigon but since his death has not produced a dividend return for Aline Frigon.

[8] John Trout was the sole director of KWV until his death on September 15, 2004. KWV has been without a director since then. Donald Trout and Ronald Edinger have continued to operate the lodge. Elizabeth Trout was appointed the Administratrix of the estate of John Trout on March 23, 2005.

[9] Aline Frigon wishes to take over the lodge business and have it run by her son. Ronald Edinger and Donald Trout are opposed to this, as they do not believe Aline Frigon's son can do the job. What is more pressing is the fact that an \$80,000 investment is required to install an approved sewage system prior to June 30, 2005, to ensure the continued operation of the lodge. Donald Trout also deposes that a total capital injection of \$240,000 will be required to maintain and repair the lodge.

[10] A substantial part of the affidavit evidence before me dealt with the issue of which family would be the best to operate the lodge pending the resolution of the ownership issue. I am not satisfied that there should be a change in the management of the business at this time. That issue could be revisited if the lodge does not continue to operate after June 30, 2005.

[11] The present dispute relates to the interpretation of a Shareholders Agreement executed in 1990. No one disputes the validity of the Shareholders Agreement.

[12] The essence of the Shareholders Agreement is that it provides for the option of the remaining shareholders to purchase the common shares of a shareholder who has died. This option is exercisable at any time but there is no mandatory purchase of the shares of a deceased shareholder.

[13] Initially, Aline Frigon gave a notice to sell (more accurately described as a notice that she wished to purchase) to the estate of John Trout. This notice to sell was never served or acted upon. Aline Frigon now wishes KWV to purchase the shares of the estate of John Trout. In order to achieve this objective, she must be in control of KWV. The estate of John Trout and John Edinger control a majority of the common shares of KWV.

ISSUES

[14] The following issues arise:

1. Should Aline Frigon be declared the new president and sole director of KWV?
2. Should a meeting of the shareholders of KWV be called?
3. Does the Administratrix of the estate of John Trout have the right to vote the Trout shares at a shareholders' meeting?

4. Should the registered office, records office and address for service of KWV be changed from the law firm of Campion, Macdonald?

Issue 1: Should Aline Frigon be declared the new president and sole director of KWV?

[15] As stated earlier, Aline Frigon does not seek an oppression remedy which would permit the appointment of a director if the court found the affairs of the corporation were conducted in an oppressive manner.

[16] Instead, her counsel asks the court to exercise its inherent jurisdiction to appoint her as a director of KWV. She alleges that the lodge is being operated carelessly and is in danger of being closed down. The latter has not occurred at this date and I am satisfied that the business is currently being operated in a satisfactory manner, particularly given the support of Ronald Edinger, the 10% shareholder, for the Trout family to continue operating the lodge.

[17] The Trout family should be aware that they are permitted to continue the operation of the lodge at this time but they do so with a fiduciary obligation to run the business for the benefit of KWV and not their own personal interests. Any breach of that fiduciary obligation may result in a claim against them personally.

[18] Counsel for Aline Frigon has not provided any authority for the court to appoint Aline Frigon as the president and sole director of KWV. I therefore decline to make such a ruling.

Issue 2: Should a meeting of the shareholders of KWV be called?

[19] Section 145 of the *Business Corporation Act* permits the court to order that a meeting of the shareholders of KWV be called, held and conducted as directed. Both

counsel agreed that it would be appropriate to call such a meeting. It also appears expedient to resolve the present dispute and appoint a director or directors.

[20] I therefore order that a meeting of the shareholders of KWV be called. The date, location and conduct of the meeting were not addressed by counsel and I will reserve on these details until counsel have an opportunity to address these issues by conference call.

Issue 3: Does the Administratrix of the estate of John Trout have the right to vote the Trout shares at a shareholders' meeting?

[21] Although the issue of who gets to vote at the shareholders meeting was not specifically before me in a notice of motion, both counsel addressed the issue. No objection was taken to my ruling on the matter.

[22] Counsel for Aline Frigon submits that it is an implied term of the Shareholders Agreement that the common share of a "Withdrawing Shareholder", which means a shareholder who has died, may not vote at a shareholders meeting until they have been transferred to the "Remaining Shareholders" or KWV, as the case may be.

[23] Counsel relies upon the principle in *Head v. Scott-Bathgate Ltd.* (1994), B.C.L.R. (2d) 319 (B.C.C.A.). In that case, Lambert J.A. stated at paragraph 11:

"Trying to avoid a conclusion that the clause is void for uncertainty, it is my opinion that it must incorporate implied terms to make it commercially rational in such a way that if it had been discussed by the parties at the very outset, at the instigation of an officious bystander, they would have resolved any ambiguity by unanimously agreeing about the interpretation of the clause. ..."

[24] Counsel submits that it is "commercially rational" to interpret the Shareholders Agreement as not permitting a "Withdrawing Shareholder" to be entitled to a vote at the shareholders meeting. I have a serious doubt that this principle is applicable in the

present circumstances as there does not appear to be any ambiguity in the agreement or possibility that a clause will be void for uncertainty.

[25] However, I do not agree with the interpretation of counsel for the plaintiff for the following reasons:

1. The Shareholders Agreement only provides an option to the “Remaining Shareholders” to purchase the shares of the “Withdrawing Shareholders”. In other words, the option may never be exercised and the “Remaining Shareholders” should not be deprived of their voting rights in the meantime.
2. The Shareholders Agreement also provides that the “Withdrawing Shareholder” may sell to a non-shareholder under certain circumstances. In my view, this is another reason for maintaining the voting right of the “Withdrawing Shareholder”.
3. The price of the shares to be purchased was not established by an annual fair market valuation. In the absence of that valuation, the Shareholders Agreement requires that the value of the shares shall be determined by arbitration. No time limit is set out for the arbitration and I conclude that the Shareholders Agreement should not be interpreted to deny voting rights to any shareholder in the meantime.
4. The Shareholders Agreement also provides for amendments to the agreement at a meeting of shareholders requiring a quorum of 50% and 69% of the votes cast to carry the amendments. I interpret this

clause as an indication that the parties prefer to deal with fundamental changes to the Shareholders Agreement by way of amendment.

5. The Shareholders Agreement also provides for a closing date on any purchase concluded with the “Withdrawing Shareholders”. In my view, the closing date would be the appropriate date for the “Withdrawing Shareholders” to lose their right to vote the shares at a meeting of shareholders.
6. Finally, KWV has always been operated as a partnership between Joseph Frigon and John Trout. It would not be in the spirit of this relationship to deny the right to vote to any share while the two families determine who will purchase the lodge and at what value.

[26] I conclude that the Administratrix of the estate of John Trout is entitled to vote the shares of John Trout at the court-ordered shareholders’ meeting.

[27] Counsel also referred to paragraphs 39(a), 41, 42(b) and 129 of the Articles of Association of KWV in support of their submissions. I prefer to rely upon section 51(2)(a) of the *Business Corporation Act*, which states:

Dealings with registered holders and transmission on death

...

51(2) Despite subsection (1), but subject to a unanimous shareholder agreement, a corporation whose articles restrict the right to transfer its securities shall, and any other corporation may, treat as a registered security holder entitled to exercise all the rights of the security holder they represent, any person who furnishes evidence as described in subsection 77(4) to the corporation that the person is

(a) the executor, administrator, heir or legal representative of the heirs of the estate of a deceased security holder;

...

Issue 4: Should the registered office, records office and address for service of KWV be changed from the law firm of Campion, Macdonald?

[28] Counsel for Aline Frigon submits that Campion, Macdonald should not be the registered office of KWV because of its history with the Trout family. Fortunately, both families have separate legal representation and I see no reason to change the registered office of KWV. I am satisfied that Campion, Macdonald understand the obligation to act in the interests of KWV and not favour either of the shareholders until the resolution of this dispute.

[29] Counsel may speak to costs, if necessary.

VEALE J.