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SUMMARY

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THE SALE OF A BUSINESS

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During its existence, a business can be subject to one or more sales, both through the sale of its shares or its assets. Although each sale of a business is unique, a certain procedure is generally followed, the main steps being the confidentiality agreement, the letter of intent, the due diligence review and the purchase agreement.

CONFIDENTIALITY AGREEMENT

During their discussions and negotiations, the parties shall ensure, before exchanging information, documents and other materials which are generally not publicly known **("Confidential Information")**, that such information will be kept confidential and that it will only be used to assess the advisability of entering into a transaction.

Keeping information confidential implies not disclosing Confidential Information to third parties, voluntarily or through negligence, not using it for one's benefit or that of a third party, taking the necessary measures to keep it confidential, returning or destroying it at the request of the disclosing party, not making or keeping a copy and promptly notifying the disclosing party if a court or government authority requires that the party receiving Confidential Information disclose it.

LETTER OF INTENT

The signing of a letter of intent (which the parties may call an agreement in principle, memorandum of understanding or a letter of offer) or the presentation of an offer to purchase may serve, among other things, to ensure that the other party is serious, to summarize the parties' understanding at a certain stage of the discussions, to secure the negotiating exclusivity, to obtain the required financing, to complete the transaction, or as a framework for the negotiations, to provide for a timeline and to describe what each party has to do.

The document signed by the parties may range from the expression of an interest, without any obligation to finalize the transaction covered by the letter of intent, to a firm commitment binding the

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parties. Note that certain terms found in a letter of intent will always be binding, such as the confidentiality and exclusivity clauses, the expiry date and the governing law clause.

DUE DILIGENCE REVIEW

A proper due diligence review is key to the successful sale of a business. Through such due diligence review, a potential purchaser can get an accurate picture of the target business, assess the risks of the transaction, evaluate the possible synergies between the businesses, establish an integration plan following the transaction closing, prepare a list of the deficiencies to be corrected prior to closing, prepare an offer to purchase which adequately reflects the situation, go ahead with a purchase agreement or otherwise withdraw from the negotiations.

The vendor will want to ensure to present its business in a positive way while disclosing all risk factors in order to limit any potential liability. A preliminary verification carried out by the vendor will allow it to achieve these goals more easily while maintaining its credibility vis- à-vis a potential purchaser.

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Beside the legal aspect of the due diligence review, a thorough due diligence review also includes accounting, transactional, technical and technological aspects which require input from a multidisciplinary team.

The documents normally reviewed by the purchaser's legal counsel are those relating to the corporate status of the vendor or the target business, its contracts, the property owned or rented by the business (both movables and immovables), insurance, employees and their employment conditions, intellectual property, ongoing or potential litigation, financing obtained and the permits, licences or authorizations needed to run the business.

The due diligence review to be performed may vary depending on the structure of the proposed transaction. For example, through a sale of shares, the prospective purchaser will want to conduct a complete review of the minute books of the target business whereas this is not necessary for a purchase of assets.

Lastly, other than the verification of the documents provided by the vendor, the potential purchaser may perform some independent verifications with government agencies and in various public records (Commission des normes du travail, Commission de la santé et de la sécurité du travail, Commission de l'équité salariale, the Canada Revenue Agency and the Agence du revenu du Québec, the ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques, municipalities, court files, the land registry, the Register of Personal and Moveable Real Rights, etc.).

PURCHASE AGREEMENT

A purchase agreement is the contract wherein the vendor assigns to the purchaser and the purchaser acquires from the vendor ownership of the business, whether through the acquisition of shares or the acquisition of assets.

The purchase agreement must describe the purpose of the transaction. For a sale of shares, the number and class of shares sold, the name of each vendor if there is more than one and an exact

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description of the shares sold by each of them. Where assets are purchased, the agreement may either indicate the general intention of the parties to proceed with the sale and purchase of all business' assets and specifically indicate what property is excluded from the transaction or, conversely, lists all the property sold in the agreement or schedules. An agreement for the purchase of assets must also clearly indicate what obligations and liabilities of the target business remain with the vendor and those assumed by the purchaser. The key element of this agreement is the list of representations and warranties given by the vendor and the relating indemnification undertakings (including the limits to those undertakings!).

ANCILLARY AGREEMENTS

Other than the purchase agreement, certain ancillary agreements may be entered into with respect to a business transfer, such as a service or employment agreement, a non-competition and non-solicitation agreement or a shareholders' agreement.

When a purchaser wants some individuals holding key positions in the vendor's business to remain in those positions for any length of time, he may choose to enter into a service agreement or an employment contract with them.

The type of agreement chosen depends on the type of service provided and the level of involvement in the business expected from the individual after the transaction closes.

Also, a prudent and diligent purchaser will generally require that the vendor and certain key employees of his business sign non-competition and non-solicitation undertakings. A non-competition undertaking is a promise not to carry on the activities described in the agreement. It must be for a specific length of time and apply to a defined area. A non-solicitation undertaking prevents the vendor from hiring the employees of the business sold and soliciting its clients to the detriment of the purchaser.

Lastly, the parties may wish to enter into a shareholders' agreement in the context of the purchase of a business, especially between the different shareholders of the purchaser or among the different purchasers, or between the vendor and the purchaser when the vendor does not sell the totality of his shares.

As we have seen, the sale of a business requires a lot of preparation, verification, time and involvement from the parties. It is therefore essential for both the vendor and the purchaser to be surrounded by a team capable of seeing the transaction through. This team may include, in addition to legal counsel responsible for the legal aspects of the transaction, members of management, some in-house counsels (human resources, information technology, individuals in charge of integration, etc.), a financial advisor or an outside accountant.

GETTING READY TO SELL YOUR BUSINESS : ENVIRONMENTAL ISSUES

Katia Opalka

Any real estate agent will tell you that there are some basic rules for selling a house. The same goes for a business. This article reviews the environmental issues you need to address before a potential purchaser comes knocking.

WHEN SHOULD I START GETTING READY?

When it comes to the environment, the golden rule is to always "be prepared". Your business should have an environmental management system that works well. This means that you have assessed

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the level of environmental risk associated with the business and have measures in place that ensure the risk is kept in check.

A purchaser who asks how your business manages environmental risk will have his answer right away: so and so is in charge of the environment; he or she reports to the board on needs in terms of staffing, training, materials, research and development, capital expenditures, insurance, etc. Here's his or her budget. Here are the pending files (non-compliance issues, neighbour complaints, voluntary environmental undertakings, etc.). (*Tip*: have an up-to-date certificate of location).

WHAT WILL A PURCHASER EXPECT IN TERMS OF ENVIRONMENTAL ISSUES?

A purchaser will want to know that management is aware of its legal duties involving the environment and that it is complying with them. Normally, the purchaser will also want to know whether the land owned by the business may be contaminated. If this is a possibility, the purchaser may want to have soil and groundwater tested and any contamination cleaned up as a condition of sale. This is because such a condition is likely attached to the purchaser's financing (lenders are not keen to take security on contaminated land).

Note that, far from reassuring the purchaser, the absence of information about environmental issues can make people worry. Take a factory owner who holds no environmental permits, has put no one in charge of environmental matters, and who answers "not applicable" to all the purchaser's questions about environmental compliance: not reassuring! It's important to be able to show that you've looked into the matter and that if in fact you don't need any environmental permits, you can explain why.

I'M AWARE OF A SITUATION THAT'S PROBABLY NON-COMPLIANT. WHAT SHOULD I DO?

When acquiring a business, a purchaser will normally be attracted by sales figures, innovative products or talent. As regards environmental issues, generally speaking, purchasers do not demand perfection. From a legal perspective, it's important to be honest and disclose any problems you're aware of, even if you're unsure of the nature or scope of the problem. That said, ideally, outstanding problems should be addressed before the "open house".

DOES MY BUSINESS HAVE ENVIRONMENTAL OBLIGATIONS TOWARD THIRD PARTIES?

If I plan to sell the shares of my business, the purchaser will be bound by my contractual undertakings. The purchaser will naturally want to know in advance what they are, what they represent in financial terms and what the associated risks are. An example is a business that has signed on to a sustainable development initiative launched by an industry association. The initiative may involve making commitments such as consulting the community on development projects, reducing greenhouse gas emissions, and so forth. The purchaser will want to know whether the seller has committed to going beyond what the law requires, how far beyond, and whether this gives rise to any increased costs or legal or financial risks.

MY BUSINESS DOESN'T POLLUTE. WHY WORRY ABOUT ENVIRONMENTAL RISK?

It's true that some sectors (heavy industry, exploration for and extraction of natural resources, waste management, infrastructure, etc.) have a larger environmental dimension than others. However, the following questions are relevant for any business: could the place or places where I carry on business be contaminated (groundwater, drinking water, soil, indoor air, etc.)? Do we have a system to manage hazardous products (cleaning products, gases, etc.) and waste? Are there environmental risks that could disrupt my supply chain or affect my brand? Are there environmental standards on the horizon in my export markets that will force me to change my inputs or processes? This may come as a surprise, but the purchaser sometimes asks the vendor to make a representation (a contractual promise) that there are none.

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I HAVE ENVIRONMENTAL PERMITS. DOES THE PURCHASER HAVE TO GET HIS OWN?

It depends on the permit. Each permit is subject to specific legal rules. Generally speaking, when assets are sold, the permit has to be transferred to the buyer whereas in a sale of shares, the purchaser steps into the vendor's shoes. Note that permits need to be up to date before they are transferred, and outstanding compliance issues need to be resolved (hence the importance of being prepared!). Also, keep in mind that updating permits, fixing compliance issues, and obtaining and transferring permits can take many months.

WHEN I BOUGHT THE LAND, I WAS GIVEN A PILE OF ENVIRONMENTAL REPORTS BUT I HAVEN'T READ THEM.

You can always hand them over to the purchaser, telling him exactly that: you were given these reports but you haven't read them. That way, no one can say that you hid something from the purchaser. That said, the purchaser may read the reports and then decide not to go ahead with the deal or ask for a price reduction. A better approach is to consult a lawyer who practices in this area and can advise you on what the reports mean, in practical and legal terms. This will allow you to decide on the best approach for dealing with the issues raised in the reports before the purchaser asks questions.

WE'VE RECEIVED COMPLAINTS FROM TIME TO TIME BUT THEY'RE UNFOUNDED.

The purchaser will want to know whether claims have been made against the business. Often, the word "complaint" is included in the definition of "claim" in the buy-sell agreement. You will be asked to declare any claim the business has received. When disclosing the complaint, it's best to stick to the facts (date and circumstances). If the purchaser wants to know more, he'll ask. You should answer the questions but avoid making assumptions. If you don't know the answer to a question, you have every right to say so.

WE HAD SOMEONE LOOKING AFTER HEALTH/SAFETY/ENVIRONMENT (HSE) BUT SHE LEFT TWO YEARS AGO AND WE HAVEN'T REPLACED HER.

The good news is that you had someone. At the same time, you will have to find a good explanation as to why the person hasn't been replaced two years later. You will also have to find someone to answer the purchaser's questions about HSE matters, or even reach out to your former employee (if he or she left on good terms).

WE HAVE TWO PLANTS NOW, ONE OF WHICH IS IN ONTARIO, AND A DISTRIBUTION CENTRE IN PLATTSBURGH...

A purchaser will be happy to learn that you've prepared a file for him that will quickly give him an idea of all the facilities the business owns (and has owned, in the case of a share purchase) or rents. The more facilities (and jurisdictions) are involved, the more important it is to gather and sort the information in order to make the purchaser's diligence easier. This approach will show the purchaser that you are serious and prepared, which will reflect well on the business.

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