

ASSET PURCHASE AGREEMENT DRAFTING

INTRODUCTION

This checklist is intended for use with the *Asset Purchase and Sale – Procedure* checklist (CC-1). The provisions suggested in this *Asset Purchase Agreement Drafting* checklist must be considered in relation to the particular facts in the matter at hand and augmented and revised as appropriate.

LIST OF AUTHORITIES

Please also refer to the following resources:

Aird & Berlis, *Business Acquisition Agreement: An Annotated Guide* (Aurora: Canada Law Book Inc., 1992)

Beaubier, *The Purchase and Sale of a Business: A Review of the Tax Issues* (2000), Buying and Selling a Business Seminar, Saskatchewan Legal Education Society Inc.

Beke, Q.C. & McNeill, *Purchase and Sale of a Business* (1995), Saskatchewan Bar Admission Course

Hood & Little, *Due Diligence in Asset and Share Transactions* (1994), Buying and Selling a Business Seminar, Saskatchewan Legal Education Society Inc.

Law Society of Alberta, *Loss Prevention Handbook*

Law Society of British Columbia, *Practice Checklists Manual*

Lekach, *Due Diligence in Asset and Share Transactions* (2000), Buying and Selling a Business Seminar, Saskatchewan Legal Education Society Inc.

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Notes:

CHECKLIST

A. IDENTIFICATION OF PARTIES

1. If the vendor is a limited company, the principal(s) should be added as a covenantor.

B. RECITALS

1. General statement of business carried on by the vendor.
2. General statement of desire of the vendor to sell and the purchaser to purchase the assets comprising the business.
3. Statement, if the vendor is a limited company, that principal(s) control the vendor.

C. INTERPRETATION

1. Define words that have specific meaning in the agreement.
2. If phrase "best of knowledge" is being used, define what comprises the vendor's or the principal(s) best of knowledge.
3. Incorporate schedules into the agreement.
4. Indicate that dollar amounts are lawful money of Canada.
5. Indicate choice of law and attornment.
6. Indicate that interpretation is not affected by headings or party drafting.
7. Indicate number and gender.
8. Time is of essence.
9. If the vendor or principal(s) are more than one person, indicate that obligations are joint and several.

D. PURCHASE AND SALE

1. Assets of business to be sold, which may include (or may not include as applicable):
 - 1.1 Cash and bank balances.
 - 1.2 Accounts receivable.
 - 1.3 Inventories.

Notes:

- 1.4 Prepaid expenses.
- 1.5 Machinery, equipment and furniture.
- 1.6 Leased equipment and vehicles.
- 1.7 Computer equipment.
- 1.8 Real property.
- 1.9 Leased premises and leasehold improvements.
- 1.10 Customer lists and information.
- 1.11 Customer contracts.
- 1.12 Business records.
- 1.13 Good will, name, etc.
- 1.14 Technology, intellectual property and software.
- 1.15 Licence rights.
- 1.16 Regulatory licences.
- 1.17 Insurance benefits.
- 1.18 Supply contracts.
- 1.19 Warranty rights and maintenance contracts.
- 1.20 Other agreements.
2. Unassignable contracts. If any contracts are not capable of being assigned, then a statement should be inserted that the vendor will hold benefits of such contracts in trust for purchaser.
3. Excluded assets (as applicable):
 - 3.1 Cash and bank balances.
 - 3.2 Income tax refunds.
 - 3.3 Life insurance.
 - 3.4 Describe any other excluded assets.
4. Assumed liabilities:
 - 4.1 Trade accounts payable and accrued liabilities to trade creditors.
 - 4.2 Liabilities and obligations under any assumed contracts.
 - 4.3 Describe any other assumed liabilities.

Notes:

5. Statement of what the purchaser will not assume and will not be liable for and that the vendor will indemnify purchaser from all claims against the vendor relating to business with exception of assumed liabilities. Retained liabilities of the vendor may include the following:
 - 5.1 All liabilities in respect of all indebtedness of the vendor to other persons (other than assumed liabilities mentioned above).
 - 5.2 All product liability claims and liability for warranty relating to products sold prior to closing date.
 - 5.3 All liabilities for all taxes, duties, levies, etc. payable to any level of government, authority, agency, etc.
 - 5.4 All liabilities for salary, bonus, vacation pay, etc.
 - 5.5 All liabilities for all severance payments, damages for wrongful dismissal, etc.
 - 5.6 All liabilities for injury, disability or death related to employment.
 - 5.7 All environmental liability claims and liability relating to real property being purchased or leased due to events prior to closing date.
6. Purchase price:
 - 6.1 Fixed sum; or
 - 6.2 Sum arrived at by way of formula.
7. Payment of purchase price:
 - 7.1 Time of payment:
 - 7.1.1 On execution of contract (deposit). Also, deal with what happens to deposit if sale does not close. Consider an interest bearing account.
 - 7.1.2 On closing.
 - 7.1.3 Payment by installments (deferred payments):
 - a. Acceleration clause.
 - b. Prepayment and prepayment penalty.
 - c. Interest:
 - (i) Interest rate on default (note restrictions in *Interest Act* (Canada).
 - (ii) Application of payments to the interest due and then to the principal.

Notes:

- 7.1.4 A holdback or escrow of agreement.
- 7.2 Manner of payment:
 - 7.2.1 Assumed liabilities.
 - 7.2.2 Balance:
 - a. Certified cheque.
 - b. Bankers draft.
 - c. Solicitors trust cheque.
 - d. Other.
- 7.3 Adjustments according to formula.
- 7.4 The vendor or third party financing.
- 8. Allocation of purchase price:
 - 8.1 Consideration of allocation of purchase price among the following (Note: *Income Tax Act* (Canada), s.68):
 - 8.1.1 Land.
 - 8.1.2 Buildings and improvements.
 - 8.1.3 Leasehold interest.
 - 8.1.4 Machinery, equipment and vehicles.
 - 8.1.5 Pre-paid expenses.
 - 8.1.6 Inventory.
 - 8.1.7 Accounts receivable (consider warranty and reduction in price if receivables are not paid within a certain time).
 - 8.1.8 Intangible property and material contracts.
 - 8.1.9 Goodwill.
 - 8.1.10 Restrictive Covenant
- 9. Election under s.22 of the *Income Tax Act* (Canada) re accounts receivable
- 10. Payment of taxes:
 - 10.1 Pay for all taxes applicable with transfer of assets (other than income taxes of the vendor).
- 11. Goods and Services Tax exemption:
 - 11.1 Consider filing election under s.167(1) of the *Excise Tax Act* (Canada).

Notes:

12. Accounts receivable:
 - 12.1 Purchaser to use all reasonable efforts to collect accounts receivables.
 - 12.2 Uncollected accounts receivables to be transferred back to the vendor at their book value (consider tying this into holdback provisions).

E. SECURITY FOR THE VENDOR IN VENDOR-FINANCED TRANSACTIONS

1. Security agreement(s):
 - 1.1 Amount.
 - 1.2 Collateral.
 - 1.3 Acceleration.
 - 1.4 Interest on default.
 - 1.5 Application to payments to interest due and then to principal.
 - 1.6 Compliance with *Interest Act* (Canada), s. 4.
2. Mortgages on real estate:
 - 2.1 Amount.
 - 2.2 Property covered.
 - 2.3 Acceleration clause.
 - 2.4 Provision for interest including interest on default (note restriction of *Interest Act* (Canada), s. 8(1)).
 - 2.5 Application of payment to interest due and then to principal.
 - 2.6 Blended payments: Compliance with *Interest Act* (Canada), s. 6.
 - 2.7 Will payments include property taxes and require a separate agreement.
3. Guarantees by third parties:
 - 3.1 Right of the vendor to impair security (e.g., through election to sue or through seizure and sale).
 - 3.2 Guarantor to maintain net worth.
 - 3.3 Guarantor to postpone claims.
 - 3.4 Security for guarantee.

Notes:

4. Waiver of *The Limitation of Civil Rights Act* and *The Land Contracts (Actions) Act* if dealing with a corporation.
5. Also, consider application of *The Cost of Credit Disclosure Act, 2002*.
6. Other security arrangements, including the hypothecation of shares of purchaser if purchaser is a corporation and if appropriate (physical possession of share certificates is recommended, *The Personal Property Security Act, 1993*, s. 31(4) compliant).
7. Consider the following covenants to be given by purchaser until payment in full of purchase price has been made:
 - 7.1 Business to continue operations as separate business.
 - 7.2 Prohibitions against non-arm's length management fees.
 - 7.3 Prohibitions on other non-arm's length transactions.
 - 7.4 No distributions.
 - 7.5 No sale, encumbrance or gift of business assets.
 - 7.6 Right to inspect books and records as well as business premises.
 - 7.7 Right of vendor to receive financial statements.
 - 7.8 Business to comply with all relevant laws in jurisdiction where business is carried on.
 - 7.9 The vendor to be notified forthwith upon release of hazardous substances into environment.
 - 7.10 Business to maintain adequate insurance coverage.
 - 7.11 Business to make no commitments (by loan or guarantee) increasing business's debt beyond specified amount.
 - 7.12 Restriction on salaries and bonuses.
 - 7.13 Limitation on capital expenditures or commitments in excess of specified amount.

F. REPRESENTATIONS AND WARRANTIES

1. The following are areas that may be the subject of representation and warranty by both the vendor and the principal(s):
 - 1.1 Corporation validity existing, corporate authority and binding obligation.
 - 1.2 No other purchase agreements.

Notes:

- 1.3 Contractual and regulatory approval.
- 1.4 Status and governmental licences.
- 1.5 Compliance with constating documents, agreements and laws.
- 1.6 Financial statements.
- 1.7 Financial records.
- 1.8 Liabilities.
- 1.9 Absence of certain changes or events.
- 1.10 Tax matters.
- 1.11 Litigation.
- 1.12 Environmental matters.
- 1.13 Title to assets.
- 1.14 Accounts receivable.
- 1.15 Inventory.
- 1.16 Real properties (serviced, no hazards, etc.).
- 1.17 Leased premises.
- 1.18 Work orders and deficiencies.
- 1.19 Condition of properties and equipment.
- 1.20 Leases of personal property.
- 1.21 Intellectual property.
- 1.22 Affiliates.
- 1.23 Partnerships or joint ventures.
- 1.24 Customers.
- 1.25 Restrictions on doing business.
- 1.26 Warranties and discounts.
- 1.27 Licences, agency and distributorship agreements.
- 1.28 Outstanding agreements.
- 1.29 Good standing of agreements.
- 1.30 Employees.
- 1.31 Employment agreements.

Notes:

- 1.32 Labour matters and employment standards.
 - 1.33 Employee benefit and pension plans.
 - 1.34 Insurance.
 - 1.35 Non-arm's length matters.
 - 1.36 Government assistance.
 - 1.37 Compliance with laws.
 - 1.38 Complete conveyance.
 - 1.39 The vendor's residency.
 - 1.40 The vendor not bankrupt or insolvent
 - 1.41 Copies of documents.
 - 1.42 Disclosure of all relevant facts.
 - 1.43 All representations and warranties to be considered covenants.
2. The following are areas which may be subject of representation and warranty by purchaser:
- 2.1 Corporation validly, existing corporate authority and binding obligation.
 - 2.2 Contractual and regulatory approval.
 - 2.3 Compliance with constating documents, agreements and laws.
 - 2.4 *Investment Canada Act* (not a "Non-Canadian").
 - 2.5 Purchaser not bankrupt or insolvent
 - 2.6 All representations and warranties to be considered covenants.
- G. SURVIVAL AND LIMITATIONS OF REPRESENTATIONS AND WARRANTIES**
1. Survival of warranties by the vendor and the principal(s):
- 1.1 Representations and warranties to survive closing.
 - 1.2 Consider a sunset date after which warranty claims cannot be made.

Notes:

- 1.3 If using a sunset date, consider not having it apply to items such as title to purchased assets or intentional misrepresentation or fraud.
2. Survival of warranties by purchaser:
 - 2.1 Representations and warranties to survive closing.
 - 2.2 Consider sunset date after which warranty claims cannot be made.
 - 2.3 If using sunset date, consider not having it apply to items such as intentional misrepresentation or fraud.
3. Limitation and warranty claims:
 - 3.1 Consider limiting the purchaser or the vendor from making warranty claim if the purchaser or the vendor had been advised in writing or had actual knowledge prior to closing of breach of warranty and the purchaser or the vendor completes the transaction notwithstanding such breach.
 - 3.2 Consider reducing any warranty claim by insurance proceeds that are available to purchaser or by any tax benefits realized as a result of such warranty claim.
 - 3.3 Consider allowing warranty claims only after claim exceeds certain minimum amount.
 - 3.4 Consider limiting warranty claim to maximum amount.

H. COVENANTS

1. Covenants by the vendor and the principal(s):
 - 1.1 Allow access to the purchaser for investigation of business and examination of documents and provide such information and documents to the purchaser.
 - 1.2 Conduct business in ordinary course until closing.
 - 1.3 Transfer purchased assets.
 - 1.4 Provide general conveyance of any purchased assets.
 - 1.5 Deliver clearance certificate pursuant to *The Revenue and Financial Services Act*.
 - 1.6 Deliver clearance certificate pursuant to *The Workers' Compensation Act, 1979*.
 - 1.7 Transfer all assumed contracts.

Notes:

- 1.8 If applicable, execute a non-competition agreement.
- 1.9 If applicable, terminate all or certain employees.
2. Covenants by the purchaser:
 - 2.1 To maintain confidentiality relating to business being purchased.
 - 2.2 If applicable, offer employment to all or certain employees.
 - 2.3 If applicable, if payment of purchase price depends on certain financial performances, provide access to the vendor to books and records of business after closing date.
3. Assignment of pension plan.

I. CONDITIONS

1. Conditions to obligations of purchaser:
 - 1.1 Accuracy of representations and warranties and performance of covenants.
 - 1.2 No material adverse changes.
 - 1.3 No restraining proceedings.
 - 1.4 Consents obtained.
 - 1.5 Estoppel Certificates from landlords.
 - 1.6 Employees have accepted offer of employment (if applicable).
 - 1.7 Delivery of opinion of the vendor's counsel.
2. Waiver or termination by purchaser:
 - 2.1 That above conditions contained in para. I. 1 are for exclusive benefit of purchaser and may be waived by purchaser or, if any of the conditions are not fulfilled, purchaser may terminate.
3. Conditions to the obligations of the vendor:
 - 3.1 Accuracy of representations and warranties and performance of covenants.
 - 3.2 No restraining proceedings.
 - 3.3 Consents obtained.
 - 3.4 Delivery of opinion of purchaser's counsel.

Notes:

4. Waiver or termination by the vendor and the principal(s):
 - 4.1 That the above conditions contained in para. I. 3 are for exclusive benefit of the vendor and may be waived by the vendor or, if any conditions are not fulfilled, the vendor may terminate.

J. CLOSING

1. Closing arrangements.
2. Documents to be delivered.

K. INDEMNIFICATION AND SET-OFF

1. Grant of indemnity by the vendor and principal(s).
2. Grant of indemnity by purchaser.
3. Mechanics of settling indemnity claims.
4. Right of set-off:
 - 4.1 Consider whether or not there shall be right of set-off. This is particularly important in vendor-financing situations.

L. GENERAL PROVISIONS

1. Further assurances.
2. Remedies cumulative.
3. Notice provisions.
4. Execution in counterparts.
5. Expenses of parties.
6. Brokerage and finders fees.
7. Announcements.
8. Assignability.
9. Successors and assigns bound.
10. Entire agreement between parties.
11. Waiver.
12. Amendments only in writing.
13. Arbitration.

Notes:

M. SCHEDULES

1. Removal of the following schedules, with the possible insertion of other schedules (or both), may be required, depending on particular circumstances:
 - 1.1 Audited financial statements.
 - 1.2 Customer contracts.
 - 1.3 Interim financial statements.
 - 1.4 Leased premises.
 - 1.5 Licence rights.
 - 1.6 Real properties.
 - 1.7 Machinery, equipment and furniture.
 - 1.8 Leased equipment and vehicles.
 - 1.9 Computer equipment.
 - 1.10 Technology, intellectual property and software.
 - 1.11 Escrow agreement.
 - 1.12 Allocation of purchase price.
 - 1.13 The vendor's contractual and regulatory approvals.
 - 1.14 Licences, registrations and qualifications.
 - 1.15 Litigation.
 - 1.16 Environmental matters.
 - 1.17 Encumbrances.
 - 1.18 Warranties and discounts.
 - 1.19 Material contracts.
 - 1.20 Employees.
 - 1.21 Employee benefit and pension plans.
 - 1.22 Insurance policies.
 - 1.23 Governmental assistance programs.
 - 1.24 Purchaser's contractual and regulatory approvals.
 - 1.25 Non-competition agreement.
 - 1.26 The vendor's confirming certificate.

Notes:

- 1.27 Estoppel Certificate.
- 1.28 Opinion of counsel to the vendor and the principal(s).
- 1.29 Purchaser's confirming certificate.
- 1.30 Opinion of counsel to purchaser.