

## SHARE PURCHASE AND SALE PROCEDURE

### INTRODUCTION

This checklist is designed for use in conjunction with a sale and purchase of a business where shares, rather than assets, are being disposed of. While it is intended primarily for use by the purchaser's solicitor, it may also serve as a useful guide and checklist for the vendor's solicitor. The provisions suggested in this 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).

Babe, Jennifer E., *Sale of a Business: Reproduction of Title 9 of Canadian Forms & Precedents: Commercial Transactions*, 5th Ed. (Toronto: LexisNexis Butterworths, 2004).

Law Society of Alberta, *Loss Prevention Handbook*.

Law Society of British Columbia, *Practice Checklists Manual*.

Lekach, *Purchase and Sale of a Business* (2001), Saskatchewan Bar Admission Course (2003) materials.

Hood & Little (1994) updated and expanded by Lekach (2000), *Due Diligence in Asset and Share Transactions*, Buying and Selling a Business Seminar, Saskatchewan Legal Education Society Inc.

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.

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**CHECKLIST**

**A. INITIAL CONTACT**

1. Arrange initial interview.
2. Request that the client bring available financial and documentary information regarding the target business, the target corporation and/or vendor, including financial statements, annual reports, appraisals, valuations and material contracts.

**B. INITIAL INTERVIEW**

1. Discuss with the client the method of billing of legal account, method and timing of payment, and scope of retainer of the law firm. Clarify for whom the law firm is acting. It is recommended that this be set out in a retainer letter or agreement.
2. Determine whether the client has already reached agreement with the vendor concerning general terms of transaction. If not:
  - 2.1 Discuss with the client the advantages and disadvantages of sale of business assets as compared with sale of shares. Consider tax consequences of purchasing assets and purchasing shares.
  - 2.2 Consider signing confidentiality agreement to allow negotiations to commence.
  - 2.3 Consider applicability of sales taxes (including but not limited to Federal Goods and Services Tax (GST) and any applicable provincial sales taxes).
3. Determine the client's objectives. Determine what the client is attempting to achieve with the transaction.
4. Review financial statements and other information with the client, the client's accountants and any other appropriate advisors.
5. Clarify exactly what is being purchased, from whom and for how much. Also, clarify sources of the client's financing and determine whether there are any unusual restrictions or conditions that are important to the client. If there is any financing that will be provided by the vendor or other third parties, identify and review different options available. If acting for the vendor, and the vendor is providing financing, identify and review how to properly secure a purchase price.

Notes:

6. Discuss with the client the range of due diligence searches to be completed (including whether an environmental audit should be conducted).

**C. DUE DILIGENCE**

1. Confirm in writing the retainer and instructions from the client.
2. If the firm is acting for more than one party to the transaction, confirm compliance with the *Code of Professional Conduct* adopted by Law Society of Saskatchewan. If acting on behalf of a corporation or a group of persons, clarify from whom you may take instructions.
3. If the client has not reached a tentative agreement with the vendor, consider drafting a letter of intent or a memorandum of understanding outlining the transaction in simple terms. This should be reviewed with the client and, thereafter, forwarded to the vendor. Negotiations can then proceed to any extent necessary.
4. Finalize arrangements regarding financing, if so instructed.
5. Determine jurisdictions in which the vendor operates or holds property. If necessary, retain local agents to assist with due diligence and matters of local law.
6. Proceed with searches and due diligence investigations relevant to the vendor:
  - 6.1 Real Property
    - 6.1.1 Real property owned by the vendor or property to be acquired:
      - a. Civic address.
      - b. Legal description.
      - c. Topographical survey.
      - d. Engineering and soil tests (re environmental and other concerns).
      - e. Surveyor's certificate.
      - f. Title document.
      - g. Valuation and/or appraisals.
      - h. Liens and encumbrances.
      - i. Zoning.

Notes:

- j. As-built plans and specifications.
- k. Warranties for construction and suppliers of equipment.
- l. Search of the Saskatchewan Writ Registry.
- m. Municipality search:
  - (i) Outstanding utilities.
  - (ii) Building information abstract.
  - (iii) Tax Certificate (also ensure that there are no outstanding tax appeals).
  - (iv) Other pending levies (“off-site levies”).
- n. Where real property is leased to others, also review lease agreements, and determine existence of security deposits, prepaid rents and occupancy costs.
- o. If the land exists outside a city or town:
  - (i) Determine application of Part VI (farm ownership) of *The Saskatchewan Farm Security Act*.
  - (ii) If so, determine whether an exemption order can be obtained.
- p. SaskEnergy search to ensure that no buildings encroach on gas lines.
- q. Provincial and municipal heritage search can be done to ensure property has not been designated as a heritage site.
- r. Identify material financial costs in connection with the property.
- s. Determine the amount and the maturity of any indebtedness.
- t. Determine status of maintenance and repairs.
- u. Identify services provided to the property.
- v. Determine if local improvement levies are charged along with taxes.

Notes:

- 6.1.2 Leases of real property, if any:
  - a. Civic addresses and legal description.
  - b. Review of leases to determine:
    - (i) Name of other party.
    - (ii) Location, description and use.
    - (iii) Date, term and renewal rights.
    - (iv) Guarantees.
    - (v) Rent.
    - (vi) Assignability/change of control provisions.
  - c. Conduct Saskatchewan Land Titles Registry search for title or a copy of registered interest.
- 6.1.3 Access to real property:
  - a. Engage a surveying firm to take measurements and prepare surveys.
  - b. Engage an environmental engineering firm to conduct tests of structures and lands (for example, roof core samples, soil and ground water tests, bore holes, mechanical inspections).
  - c. Obtain independent consultants to provide a report as to the general state of repair of land and buildings.
  - d. Determine if rights of ingress and egress are adequate.
  - e. Determine if there is sufficient access to public roads.
- 6.1.4 Review of contracts:
  - a. Contracts, easements, agreements and commitments relating to real property (copies of registered instruments from the Saskatchewan Land Titles Registry should be requested and reviewed).
  - b. Contracts relating to the supply of services and the utilities to lands.

Notes:

- 6.1.5 Insurance policies:
  - a. Ability to continue adequate coverage or place new coverage.
- 6.2 Personal Property
  - 6.2.1 Personal property owned by the vendor:
    - a. Conduct a *Personal Property Security Act, 1993 (PPSA)* search or equivalent in all jurisdictions where personal property is located. Search to be conducted by name and serial number, where applicable.
  - 6.2.2 Personal property in which the vendor has security interest:
    - a. Conduct a *PPSA* search in all jurisdictions where personal property is located in which security interest has been granted therein to the vendor business. The search is to be conducted by name of the debtor and serial numbers where applicable.
    - b. Identify relative priority and life of registration.
  - 6.2.3 Plant, fixtures, equipment and vehicles:
    - a. Listing and location of equipment, fixtures, vehicles and other tangible personal property owned.
    - b. Listing of equipment, machinery, vehicles and equipment and other tangible personal property leased by the vendor business, including copies of lease contract and particulars.
    - c. Details of any security interest against personal property.
    - d. Include serial numbers where applicable.
    - e. Access to ledger and accounting records maintained for fixed assets. For depreciable assets, verify date of acquisition, adjusted cost base, etc.
    - f. Identification of personal property used in the vendor business but not owned or part of purchase.

Notes:

- g. Access to personal property and repair records to determine general state of repair (“kick the tires”).
- h. Identify property not in possession of the vendor.
- i. Confirm licensing, where appropriate, of vehicles.

6.2.4 Accounts receivable:

- a. Listing of accounts receivable showing amount, names and age.
- b. Access to accounts receivable file and invoices to verify accuracy and quality. Determine if accounts receivable were independently audited and if so by whom and the results.
- c. Review bad debt policy and prior period allowances and write-offs.
- d. Identify any receivable or payable transaction with principals of the vendor or parties who do not deal at arm’s length with the vendor.
- e. Determine if any accounts have arisen other than in the ordinary course of business.
- f. Identify security interest in accounts receivable.

6.2.5 Inventory:

- a. Do listing as of most recent date.
- b. Identify by whom, how and when inventory was counted and how it was priced.
- c. Identify and isolate obsolete and redundant inventory.
- d. Verify inventory costs against supplier’s invoices.
- e. Determine if inventory was independently audited and if so, by whom and the results.
- f. Identify location of all inventory.
- g. Identify inventory in possession of, but not owned by, the vendor nor included in purchase price.
- h. Identify security interest in inventory.

Notes:

- i. Identify inventory owned by the vendor but not in its possession.
  - j. Identify method of valuing inventory. Determine if it is lower of cost production, lower of cost, or net realizable value, and if cost, whether it is average cost, first in first out, or last in first out.
- 6.3 Intellectual Property
  - 6.3.1 List and identify all intellectual property (i.e., used, held or required for use in conduct of the vendor's business):
    - a. Copyrights, whether registered or unregistered.
    - b. Patent and industrial design registrations and any unpatented inventions.
    - c. Trademarks and trade names.
    - d. Business names, corporate names, brand names, trade names, trade styles and any other source of business identifier.
    - e. Software and source and object codes.
    - f. Trade secrets, confidential information and know-how proprietary technology.
    - g. Customer and supplier lists.
    - h. Design and construction specifications, if applicable.
    - i. Production, operating and quality control manuals.
  - 6.3.2 Searches to be conducted:
    - a. NUANS search of names. Determine if other provinces should be included in name search.
    - b. Searches at appropriate registry offices of copyrights, trademarks, patents, industrial designs and other intellectual property.
  - 6.3.3 Identify agreements with employees concerning inventions, trade secrets and confidentiality.
  - 6.3.4 Identify agreements held by the vendor with respect to use or licence of intellectual property owned by others.

Notes:

- 6.3.5 Identify agreements on intellectual property owned by the vendor but licenced to third parties.
- 6.4 Financial Statements
  - 6.4.1 Review annual financial statements of the vendor for prior years and most current financial statement. Have the client's accountant comment on financial statements and discuss accounting policy with the accountant who prepared financial statements for the vendor.
  - 6.4.2 Examine working papers of accountant who prepared the financial statements and any corporate tax returns.
  - 6.4.3 Determine if financial statements are audited.
  - 6.4.4 Determine if financial statements include the notes.
  - 6.4.5 Determine if auditors have expressed their opinion without qualification or reservation.
  - 6.4.6 Determine if financial statements have been prepared in accordance with generally accepted accounting principles.
  - 6.4.7 If statements are not audited, or if prepared by management for interim periods, determine if they disclose all liabilities that would require disclosure and if such statements had been prepared in accordance with generally accepted accounting principles.
- 6.5 Employment Matters
  - 6.5.1 Determine if employees of the vendor are members of a labour union or an employee association and whether there is any pending application for certification or if an application for certification was made in past. If certified, review collective bargaining agreement.
  - 6.5.2 Review all existing employment contracts whether verbal or in writing.
  - 6.5.3 Identify name of all employees, length of relationship, amount of pay and time of payment.

Notes:

- 6.5.4 Identify whether any employees are to be terminated by the vendor prior to the sale and deal with notices to employees.
- 6.5.5 Identify bonus plans, profit sharing plans, pension plans, fringe benefit plans (life insurance, short-term and long-term disability and dental plans). Identify all employee fringe benefits – expense accounts, cars, memberships, etc.
- 6.5.6 Identify particulars of any loan obligations by employees to the vendor.
- 6.5.7 Identify any unfunded employee benefit and pension plans and amount of liability. You may conduct a search at Canada Customs and Revenue Agency to see if such pension plans have been registered and terms of such plans.
- 6.5.8 Identify and quantify all ongoing obligations to employees including holiday pay.
- 6.5.9 Certificates to be obtained:
  - a. *The Workers' Compensation Act, 1979* clearance certificate, s. 155(1) (technically, will not receive a clearance certificate because this deals with assets, but will receive a letter from the Workers' Compensation Board informing you of the status of the vendor's account).
  - b. *The Labour Standards Act* directors certificate respecting outstanding wage claims under s. 60(1).
- 6.5.10 Determine if there are any changes in control payment agreements.
- 6.5.11 Determine if there are any threatened or pending union organizing activities involving employees.
- 6.5.12 Determine if any employees have, in the past, threatened to apply to be certified as a bargaining agent.
- 6.5.13 Determine compliance with all applicable legal and contractual requirements respecting employment, including pay equity, human rights, occupational health and safety, promotion, wages and other working conditions.
- 6.5.14 Determine if there has been any past, present, or threatened work stoppage.

Notes:

- 6.6 Officers and Directors and Key Shareholders'
  - 6.6.1 Confirm any requested resignations on closing and obtain releases from these individuals against the vendor as appropriate.
  - 6.6.2 Obtain particulars of any indebtedness to a corporation or any claim against the vendor.
  - 6.6.3 Determine whether any directors, officers or key shareholders' have interests in any material transactions or contracts with the vendor.
  - 6.6.4 Obtain non-competition agreements from key shareholders'.
- 6.7 Litigation Review
  - 6.7.1 Sheriff's Certificate from all Judicial Centres in which the vendor carries on business and/or a search of the Saskatchewan Writ Registry.
  - 6.7.2 Litigation search in Court of Queen's Bench in all relevant Judicial Centres and Court of Appeal re outstanding litigation involving the vendor.
  - 6.7.3 Ascertain whether the vendor or any of its properties are subject of any governmental (provincial, federal or municipal) investigation or inquiry or whether any such proceedings are threatened.
  - 6.7.4 Consider possibility of litigation in following areas:
    - a. Equal employment opportunities.
    - b. Occupational health and safety matters.
    - c. Real estate.
    - d. Product liability and warranty, personal injury.
    - e. Environmental, pollution control or hazardous or toxic substances.
    - f. Taxation.
    - g. Wrongful dismissal.
    - h. Human rights complaints.
  - 6.7.5 Consider conducting litigation searches in extra-provincial jurisdictions in which the vendor owns property or carries on a significant part of business.

Notes:

- 6.7.6 Determine whether there is any actual, pending or threatened involvement in quasi-judicial proceedings.
- 6.7.7 If the vendor has audited financial statements, review outside counsel audit letters covering prior years.
- 6.8 Health, Safety and Environmental Matters
  - 6.8.1 Fire Commissioner file search.
  - 6.8.2 Community health search (*The Public Health Act, 1994*).
  - 6.8.3 Occupational health search.
  - 6.8.4 Electrical defects search (*The Electrical Inspection Act, 1993*).
  - 6.8.5 Gas defects search (*The Gas Inspection Act, 1993*).
  - 6.8.6 Environment and Resource Management search (Saskatchewan).
  - 6.8.7 Environmental Protection (Environment Canada search re contravention).
  - 6.8.8 Saskatchewan Environment and Public Safety searches re contraventions under:
    - a. *The Boiler and Pressure Vessel Act*.
    - b. *The Passenger and Freight Elevator Act*.
    - c. *The Electrical Licensing Act*.
    - d. *The Gas Licensing Act*.
  - 6.8.9 Identify any outstanding work orders, violations and notice of claims of violation.
  - 6.8.10 Consider site history, possible contaminations, environmental audit and cleanup. Address urea-formaldehyde foam insulation (UFI), PCB, asbestos, radon, auto tire, underground storage tanks and other underground issues.
  - 6.8.11 Obtain copies of prior environmental assessments, if any. Consider requisitioning Phase I and Phase II environmental assessments.
- 6.9 Corporate Matters
  - 6.9.1 *The Business Corporations Act* (Saskatchewan) or other incorporating acts as applicable:

Notes:

- a. Annual returns.
  - b. Certificate of Good Standing.
  - c. Articles of Incorporation and amendments.
  - d. Certificate of Amalgamation.
  - e. Appointment of receiver manager (directors powers cease).
  - f. Existence of unanimous shareholders' agreement, s. 140(5).
  - g. Notices of change of directors.
  - h. Review minute books of the vendor corporation for existence of certain matters such as:
    - (i) Material contracts.
    - (ii) Director and shareholder resolutions.
    - (iii) Bylaws.
    - (iv) Validity of share issuances and transfers.
    - (v) Share registry.
    - (vi) Charter documents, including Articles of Incorporation, share rights, Articles of Amendment, Articles of Amalgamation and Bylaws.
  - i. Review authorized and issued share capital and an organization chart of the vendor.
  - j. Identify and review unanimous shareholders' agreements (USA) and buy/sell agreements. Consider the need to terminate USA prior to closing.
  - k. Identify residency of the vendor.
  - l. Identify restrictions on transfer of shares, if any.
- 6.9.2 Extra-provincial corporations:
- a. Copies of Extra-Provincial Certificates of Registration.

Notes:

- b. Annual returns and extra-provincial registered jurisdictions.
  - c. Review minute books of extra-provincial corporation for existence of certain matters such as:
    - (i) Material contracts.
    - (ii) Directors' and shareholders' resolutions.
    - (iii) Bylaws.
    - (iv) Validity of share issuances.
    - (v) Share registry.
    - (vi) Charter documents, including Articles of Incorporation, share rights, Articles of Amendment, Articles of Amalgamation and Bylaws.
  - d. Review authorized and issued share capital and organization chart for the corporation.
  - e. Identify and review unanimous shareholders' agreements (USA) and buy/sell agreements. Consider the need to terminate USA prior to closing.
  - f. Identify residency of corporation.
  - g. Identify restrictions on transfer of shares, if any.
- 6.9.3 Securities law matters. Ensure that sale of shares is in compliance with *The Securities Act, 1988* (Saskatchewan) and similar securities law in any other jurisdiction in which the vendor is a reporting issuer or in which shareholders of the vendor are resident. For instance, consider whether a takeover bid circular may be necessary. If securities form part of a purchase price, determine if any securities issues arise on issuance of such securities to the client. Also, review and/or complete, if applicable:
- a. Press releases.
  - b. Material change reports.
  - c. Insider trading reports.

Notes:

- d. Filing compliance.
- e. Review of public file.
- f. Cease trading orders.

The *Canada Business Corporations Act* also contains requirements, including takeover bid provisions and insider trading reports. Ensure compliance with the *Canada Business Corporations Act* if the vendor corporation has been incorporated under that *Act*.

As well, if the vendor is listed on the stock exchange, ensure compliance with exchange rules.

6.10 Other Public Searches

6.10.1 Bank of Canada regarding assignment of s. 427 of the *Bank Act* in all appropriate provincial registries.

6.10.2 Bankruptcy and Official Receiver's Office and, if applicable, provincial bankruptcy registries.

6.11 Licences

6.11.1 Identify and obtain copies of all licences granted to the corporation to do business. Confirm that such licences are current (e.g., in communication business, radio and television broadcasting licences granted by CRTC).

6.11.2 Confirm that such licences can be assigned, or in the case of share purchase, that change in control does not negate the licence.

6.11.3 Obtain regulatory approvals for all necessary licences.

6.12 Major Suppliers

6.12.1 Identify and review all major contracts and outstanding purchase orders for purchase of inventory, equipment and supplies.

6.12.2 Identify and review all contracts of commitment for utilities, including status of such accounts (gas, electricity, water, sewage, etc.).

6.12.3 Identify and review all franchise or royalty agreements.

Notes:

- 6.12.4 Determine major terms and assignability/change of control provisions and obtain consent where required.
- 6.12.5 Determine if any supplier has changed or threatened to change its operation or service in a way that will have a significant effect on the vendor.
- 6.13 Major Customers
  - 6.13.1 Identify sales agency, distributorship and brokerage agreements.
  - 6.13.2 Identify warehousing or consignment agreements.
  - 6.13.3 Locate and review all data, files, credit information and other documents relating to major customers, product warranty claims, returned goods or customer complaints.
  - 6.13.4 Identify customer list and credit or payment history for customer.
  - 6.13.5 Identify pricing practices and discount structures granted to customers.
  - 6.13.6 Review customer warranties and guarantees.
  - 6.13.7 Review degree of dependency, if any, on any particular customer.
    - a. Determine if any customer has threatened to terminate its relationship with the vendor.
  - 6.13.8 Determine major terms and assignability/change of control provisions and obtain consent where required.
- 6.14 Material Contracts
  - 6.14.1 Identify, review and understand material contracts entered into and determine assignability/change of control provisions and presence of onerous terms.
  - 6.14.2 Review any contracts proposed to be entered into by the vendor for acquisition, sale or lease of assets.
  - 6.14.3 Review all loan agreements or other contracts that may restrict activities of the vendor.

Notes:

6.14.4 Examples of contracts to look for are as follows:

- a. Real property lease agreements.
- b. Utility supply agreements.
- c. Non-competition agreements.
- d. Construction contracts.
- e. Purchase contracts.
- f. Sales contracts.
- g. Management agreements.
- h. Employee contracts.
- i. Contracts with non-arm's length parties.

6.14.5 Determine if any contract:

- a. Restricts ability to compete in any business or geographical area or against any other party.
- b. Contains provisions by which the vendor is liable for the acts or omissions of its shareholders.
- c. Involves a sharing of profit or relates to a partnership, joint venture, joint development or other teaming or collaboration.
- d. Provides for sale, by the vendor, of its products or services to any one customer in excess of a certain threshold, has a liquidated damages clause or repurchase obligation, or is for a term of more than three years.

6.15 Short-Term and Long-Term Debt

- 6.15.1 Obtain summary of principal holders, amounts, interest rates, securities, copy of loan agreements and particulars of all securities.
- 6.15.2 Identify any restrictions or acceleration clauses triggered as result of change of control or assumption of liability.
- 6.15.3 Determine method of obtaining necessary consents to transfer of obligations.

Notes:

- 6.15.4 Identify all documents and security granted with respect to these liabilities including guarantees, mortgages and indemnity.
- 6.15.5 Identify all other contingent liabilities outstanding such as guarantees, indemnities or letters of credit.
- 6.16 Accounts Payable and Other Current Liabilities
  - 6.16.1 Identify current liabilities including accounts payable by amount, when due and to whom.
  - 6.16.2 Reconcile these amounts to financial statements of the vendor and to the amount claimed to whom these monies are payable.
- 6.17 Banking Relations
  - 6.17.1 Identify location, account number and approximate balances of all accounts maintained by the vendor.
- 6.18 Investments
  - 6.18.1 Identify investments of the vendor in all other entities including public corporations, private corporations and partnerships.
  - 6.18.2 Identify cross shareholders, subsidiaries and affiliates.
- 6.19 The Business Generally
  - 6.19.1 Review any partnership, joint venture, joint operating or similar agreements relating to the vendor.
  - 6.19.2 Identify location and method of filing and storing all material business records of the vendor.
  - 6.19.3 Obtain description and understanding of all management and administrative services provided within the vendor and review the organizational chart.
  - 6.19.4 Obtain a copy of any operation manual.
  - 6.19.5 Determine degree of dependency of the vendor on any particular consultant or employee.
  - 6.19.6 Identify major contracts or business arrangements and the impact they have on the vendor.

Notes:

- 6.19.7 Obtain full legal names and home addresses of principal owner, employees, and management of the vendor.
- 6.19.8 Identify all jurisdictions in which the vendor carries on business, holds property and is extra-provincially registered, and agents for service in jurisdictions where extra-provincially registered.
- 6.19.9 Review budgets and business plan.
- 6.19.10 If the vendor is computerized, ensure that all operating manuals for equipment and software, and original software, is made available to the client. Ensure the client has working knowledge of how to access and run the system.
- 6.19.11 Review environmental condition of property and environmental policies of the vendor.
- 6.20 Change
  - 6.20.1 Identify, over the preceding period, the following:
    - a. Any change in business relations with suppliers, customers, etc.
    - b. Damage or loss not covered by insurance.
    - c. Transactions entered into in excess of a threshold or for an extended term.
    - d. The vendor disposing of any material property, including intellectual property rights.
    - e. Declarations or payments of cash or non-cash dividends.
    - f. Material changes in the method of accounting or business practice.
- 6.21 Other searches and due diligence investigations
  - 6.21.1 Consents
    - a. Identify the consents, approvals, authorizations, filing and notice requirements in connection with the consummation of the transaction (e.g., *Competition Act*, *Investment Canada Act*).

Notes:

6.21.2 Insurance

- a. Identify all insurance policies that are held and cover the vendor for its key managers, including name of insurer, type of risk covered, annual premium, deductible amount, coverage, limits and expiration date of each policy.

6.21.3 Absence of conflict

- a. Determine if proposed agreement(s) will give any person right to terminate, accelerate or renegotiate contracts with the vendor.
- b. Determine if proposed agreement will result in any violation of constating documents of company or law applicable to the vendor.

6.21.4 Condition of property

- a. Identify where assets of the property are located and whether such property is usable, adequate and sufficient for its use in the vendor's business.

6.21.5 Guarantees

- a. Identify if the vendor has directly or indirectly guaranteed any obligations not reflected in the financial statements.
- b. Identify all promissory notes, lines of credit, loan agreements, comfort letters, commitments to borrow money, letters of credit, performance bonds and other like agreements pursuant to which the vendor may become liable in connection with an obligation to any third party.

6.21.6 Environmental Matters

- a. List all environmental permits, licences, approvals or registrations held for environmental laws or involving hazardous substances.
- b. Identify all claims, orders, charges, investigations or other proceedings relating to past and present operations under environmental laws or involving hazardous substances.

Notes:

- c. Identify any violations or alleged violations of environmental laws.
- d. Identify above and underground storage tanks located on property owned, leased, controlled or used.
- e. Identify whether any hazardous substances have been disposed or released, whether any of the property under control or in use is contaminated with any hazardous substances, and whether there is any asbestos or urea-formaldehyde foam insulation (UFI) in any buildings or any PCBs used or stored on the property.

6.21.7 Product warranties

- a. Identify if any product warranties or guarantees are provided.
- b. Identify the statutory product warranties and guarantees.
- c. Determine if any warranties presently used are materially more burdensome than those granted in the past.
- d. Identify any product warranty or warranty related claims.
- e. Identify any product recall or material product defects

7. Tax Considerations

7.1 Corporate Tax Returns

- 7.1.1 Review corporate tax returns for prior periods.
- 7.1.2 Review Notices of Assessments and any reassessments issued or waivers filed.
- 7.1.3 Identify any unusual transactions that may give rise to income tax consequences, e.g., roll overs, corporate reorganizations, etc.
- 7.1.4 Identify any elections that have been filed or elections that are required to be filed.
- 7.1.5 Determine adjusted cost base of assets for tax purposes.

Notes:

- 7.1.6 Determine if the vendor has granted extensions of time for assessment or collection by any taxing authority.
- 7.1.7 Identify any notices of determination requested or issued.
- 7.2 GST, Provincial and Other Taxes
  - 7.2.1 Identify due, but unpaid taxes, penalties and/or interest re income taxes, sales taxes (including the GST and PST), capital taxes, source deductions, etc.
  - 7.2.2 Review all notices from governmental authorities in respect of taxes.
  - 7.2.3 Review copies of all GST returns and other Provincial tax returns such as Education & Health Tax.
  - 7.2.4 Identify GST registration numbers for vendor, the client and the target business.
  - 7.2.5 Section 51(2) of *The Revenue and Financial Services Act* certificate re taxes imposed under various Saskatchewan statutes (technically, will not receive a certificate, as this certificate relates to assets, but will receive a letter from Saskatchewan Finance advising on status of corporation's accounts).
- 7.3 The Target: The Corporation Being Acquired
  - 7.3.1 Acquisition of control:
    - a. Effect of acquisition of control:
      - (i) Fiscal year-end.
      - (ii) Accrued losses on inventory.
      - (iii) Accrued losses on accounts receivable.
      - (iv) Accrued losses on depreciable property.
      - (v) Accrued losses on eligible capital property.
      - (vi) Accrued losses on capital property.
      - (vii) Election to trigger accrued gains on capital property.

Notes:

- 7.3.2 Carry-over restrictions after an acquisition of control:
  - a. Non-capital losses.
  - b. Net capital losses.
  - c. Allowable business investment losses.
  - d. Scientific research and experimental development expenditures.
  - e. Investment tax credit carry-overs.
  - f. Resource expenditures.
- 7.3.3 Tax status of the vendor:
  - a. Public corporation.
  - b. Private corporation.
  - c. Taxable Canadian corporation.
  - d. Canadian-controlled private corporation.
- 7.3.4 Tax accounts:
  - a. Capital dividend account.
  - b. Loss accounts (see above).
  - c. Actual cost and adjusted cost base of capital properties.
  - d. Cumulative eligible capital.
  - e. Refundable dividend tax on hand.
  - f. Investment tax credits.
  - g. Undepreciated capital cost of depreciable assets.
  - h. Safe income.
  - i. Share capital:
    - (i) Stated capital.
    - (ii) Paid-up capital.
    - (iii) Price adjustment clauses affecting issued share capital.

Notes:

7.3.5 Tax disputes and litigation:

- a. Determine if all tax returns/elections have been filed in timely manner.
- b. Review of notices of assessment and reassessment.
- c. Review for evidence of existing tax disputes/litigation.

7.4 Vendor's Considerations

7.4.1 Income recognition:

- a. Business income (depending on nature of underlying assets of the vendor).
- b. Capital gains:
  - (i) Capital gains reserves.
  - (ii) Capital gains exemption:
    - The \$500,000 exemption.
    - Converting proprietorships.
  - (iii) Costs associated with the capital gains exemption:
    - Saskatchewan flat tax and deficit reduction tax.
    - Old age clawback.
    - Age credit clawback.
    - Alternative minimum tax.

7.4.2 Tax rulings.

7.4.3 Tax opinions.

7.5 Purchaser's Considerations

7.5.1 Due diligence investigations (see considerations in connection with the vendor).

7.5.2 Financing:

- a. Interest expense.
- b. Other costs.

Notes:

7.5.3 Structuring the purchase:

- a. Partnership.
- b. Joint venture.
- c. Corporation:
  - (i) Unemployment insurance.
  - (ii) “Large corporation” rules:
    - Large corporations tax.
    - Reduced accessibility to small business deduction.
  - (iii) “Association corporation” rules (access to small business deduction).

7.6 Joint Elections/Considerations

7.6.1 Property transfers [*Income Tax Act*, s. 85].

7.6.2 Non-arm’s length transactions:

- a. Price adjustment clause.
- b. Section 84.1 – conversion of capital gains into dividends [*Income Tax Act*, s.84.1].
- c. Farm sales (roll overs).

8. Consider the impact of other statutes, such as marital statutes, statutes restricting investment by nonresidents, competition act concerns, etc.

9. Consider the need for any pre-merger notification or investment requirement under the *Competition Act* or the *Investment Canada Act*.

**D. DRAFTING THE AGREEMENT**

1. Prepare an outline of the document. The checklist set out in this document may serve as basis for the agreement (see also the *Share Purchase Agreement Drafting Checklist* for a more complete discussion on this topic):

- 1.1 Identification of parties.
- 1.2 Recitals.
- 1.3 Interpretation.

Notes:

- 1.4 Securities being sold (acquired) and purchase (sale) price.
- 1.5 Security for vendor in vendor-financed transactions.
- 1.6 Representations and warranties.
- 1.7 Survival and limitations of representations and warranties.
- 1.8 Covenants.
- 1.9 Conditions.
- 1.10 Closing.
- 1.11 Indemnification.
- 1.12 General provisions.
- 1.13 Schedules.
2. Prepare a first draft; review it, with the client, to ensure it sets out the client's intentions and objectives. Review the first draft to ensure it is responsive to all elements of the business deal set out in any letter of intent.
3. Send the agreement to the vendor or the vendor's solicitor for comment and changes.
4. Keep track of changes that are made to the agreement during the course of negotiations.
5. When negotiations are concluded, prepare a final form of the agreement.
6. Arrange for signing of the agreement.

**E. PRIOR TO CLOSING**

1. Prepare a draft of the closing agenda.
2. Prepare and obtain necessary documentation including (if not already in the agreement):
  - 2.1 Assignment of intellectual property.
  - 2.2 Third party consents as may be required (e.g., franchises and leases).
  - 2.3 Releases of encumbrances not assumed by the client.

Notes:

- 2.4 Corporate resolutions as may be required to approve the agreement and purchase (or sale) of property. (Where vendor is a corporation, keep in mind that a special resolution of shareholders is required where there is sale of all or substantially all of the assets of a corporation. See s. 183(2) of *The Business Corporations Act* (Saskatchewan)).
- 2.5 Certificate of vendor's auditors (if applicable) determining net book value of receivables, inventories and prepaid expenses.
- 2.6 Obtain updated financial statements to closing date.
- 2.7 Certified copies of insurance policies.
- 2.8 Obtain updated certificate(s) of status compliance.
- 2.9 Application for transfer of any licences (may be needed in both changes of control or shareholdings of the vendor).
- 2.10 Statements of adjustments.
- 2.11 Certificate pursuant to s. 116 of the *Income Tax Act* (Canada), if vendor is nonresident.
- 2.12 Security documents (real and personal property), authorizing resolutions, Land Titles registrations and financing statements under *The Personal Property Security Act, 1993* (Saskatchewan) or other legislation as required.
- 2.13 Employment contracts or consulting agreements, if required.
- 2.14 Confidentiality agreements.
- 2.15 Non-competition agreements.
- 2.16 Banking forms, if accounts are to be transferred or if signing officers are to change.
- 2.17 Officers' certificates of the client and the vendor dated as of closing date, testing to accuracy of covenants, representations and warranties in agreement.
- 2.18 Opinion of vendor's solicitor that all necessary steps and corporate proceedings have been taken to allow for the transfer of shares, and that the solicitor know of no claims or actions affecting shares or corporation or ability of the vendor to transfer those shares to the client.

Notes:

- 2.19 Opinion of the client's solicitor that all necessary steps and corporate proceedings have been taken to allow for transfer of shares.
- 2.20 Regulatory consents (as required).
- 2.21 Tax election forms (as required).
- 2.22 Releases from officers, directors and key shareholders against the target corporation, where appropriate.
- 2.23 Obtain necessary resignations of directors, officers and other key employees.
- 2.24 Resolution approving new Board of Directors.
- 2.25 Consent to act as director for each new director.
- 2.26 Notice of Change of Directors.
- 2.27 Resolution approving new officers.
- 2.28 Indemnity Agreements for new directors and officers.
- 2.29 Documents under *The Securities Act, 1988*, the *Canada Business Corporations Act*, other provincial securities acts or stock exchanges as applicable, including:
  - 2.29.1 Insider report for each new insider.
  - 2.29.2 Material change report.
  - 2.29.3 Press release.
  - 2.29.4 Report of trade (including any pre-trade notices that may have to be filed).
3. Ensure that conditions of closing have been satisfied.
4. Complete financial arrangements.
5. Update searches for closing.

**F. CLOSING**

1. Ensure all conditions of closing are satisfied.
2. Execute all necessary documentation.
3. Obtain acknowledgment in writing from all parties that conditions of closing have been satisfied.
4. Obtain books and records of the vendor.
5. Obtain corporate seal.

Notes:

**G. POST CLOSING**

1. Register financing statements and/or security documents, as necessary.
2. File tax elections as necessary and/or applicable.
3. File any documents under *The Securities Act, 1988*, other provincial securities acts, the *Canada Business Corporations Act* or stock exchanges as applicable.
4. If applicable, file Notice of Investment by a non-Canadian under the *Investment Canada Act*.
5. File Notice of Change of Directors.
6. Prepare closing binder and prepare final letter and statement of account.

Notes:

Notes: