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List of contributors

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LAW SOCIETY OF NEW BRUNSWICK

COMMERCIAL LAW

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THE LAW SOCIETY OF NEW BRUNSWICK

The Purchase And Sale Of A Business

Chapter 1

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The purchase and sale of a business

1. Introduction to the Sale of a Business

Frequently a lawyer will become involved in advising a client on the purchase and sale of a business. There are basically two methods used by a purchaser willing to acquire a business: (1) the acquisition of the underlying assets of that business; and (2) the purchase of the shares of the corporation that owns the assets and operates the business. There are a number of factors to consider in determining whether the purchase will be by way of assets or by way of shares. The purpose of this chapter is to review some of the considerations made in buying a business including the various aspects of both asset purchase transactions and share purchase transactions. This discussion presumes that the transaction is an arm's-length transaction. Many of the considerations would not apply if the transaction were on a non-arm's-length basis.

In most cases the choice as to whether or not the acquisition will be by way of assets or shares is a decision that is made through business considerations. The task of the lawyer is to advise the client as to the advantages and disadvantages of each method. Tax consequences are extremely important and the structure of the transaction will be influenced by those tax considerations. Lawyers should not hesitate to advise their clients to seek expert tax advice before structuring the purchase transaction.

2. Due Diligence Searches

One of the most useful functions that a lawyer can perform at the outset of a proposed transaction is to cause the normal corporate and due diligence searches to take place as soon as possible. These corporate and due diligence searches include a search of the corporate records (Corporate Affairs search and review minute book), security and lien searches (Personal Property Registry, *Bankruptcy and Insolvency Act*, *Bank Act*, WorkSafe NB, Canada Revenue, real property tax status (if applicable), real property registry (if applicable), litigation searches in the judicial districts the business operates or owns assets, etc.), obtaining lists of employees, details on employee benefit programs, reviewing copies of real property and personal property leases and title documents to real property, confirming regulatory compliance and obtaining copies of permits, licences and zoning confirmation(s). The results of these searches can impact the structure of the transaction and even determine whether it goes ahead at all. Attached hereto as Appendix 1 is a sample minute book review checklist. Attached hereto as Appendix 2 is a sample due diligence checklist. Attached as Appendix 3 is a checklist of various considerations and actions applicable throughout the purchase of a business.

3. Letters of Intent

In many transactions the purchaser and the vendor will execute a letter of intent. The purpose of the letter of intent is to set the ground rules between the parties and acknowledge that they are open to possibly entering into an agreement of purchase and sale in the future, subject to various conditions. A letter of intent is typically drafted in order to indicate an interest by a potential purchaser and open negotiations. In such circumstances a letter of intent would in fact be an "invitation to treat" and should be regarded as such by both sides.

This type of letter of intent can establish a framework for negotiations leading to an ultimate agreement of purchase and sale. Depending on the stage of negotiations, a letter of intent can be either binding or non-binding. Although the majority of letters of intent are drafted to be non-binding, there are many examples of letters of intent which were drafted in order to set out the general intention of the parties which have then subsequently been found by the courts to be binding contracts.

In the recent decision of the Ontario Court of Appeal in *Wallace v. Allen*, 2009 ONCA 36, a letter of intent was found to be binding between the parties.

The Court of Appeal held that a letter of intent prepared in connection with a share purchase transaction was binding due partly to the inclusion of clear and unambiguous clauses stating: “*This letter of intent must be reduced into a binding agreement of purchase and sale by the parties within the next 40 days*” and “*It is also agreed by the parties that there will be much legal work to be done upon acceptance by both sides and that the wording of this agreement may alter somewhat*”. These two clauses along with both parties actions during the due diligence period lead the Court of Appeal to overturn the trial decision and find that there was a binding contract based on the letter of intent and awarded damages and cost to the would-be purchaser.

Even if a letter of intent is intended to be non-binding certain clauses such as those related to exclusivity, confidentiality and non-solicitation of employees during the due diligence period are often stated to be binding. These clauses should be considered for inclusion in all letters of intent. If the purpose of a letter of intent is to merely set forth the intention of the parties in the future then the letter of intent should express that thought clearly. A suggested term to include in a letter of intent to state its non-binding intent would read as follows:

The parties agree that, apart from those provisions included in paragraphs [insert paragraphs which are to specifically be binding, if any], this letter of intent is non-binding and no legal obligations shall be formed until such time a [share/asset] purchase agreement has been executed by all parties.

Also, the letter of intent should be limited for a specified period and a timeline should be included in the letter so as to avoid confusion as to when the relationship ends between the parties.

4. Deciding: Shares or Assets?

Before proceeding to discuss the various methods of acquiring a business, the factors which may influence the selection of one method over another are extremely important. The factors which influence a share purchase versus an asset purchase can be the same for both the purchaser and the vendor and in many circumstances there may be an advantage to one side that is not present for the other. These decisions are often corporate or tax based.

5. Corporate Considerations of Assets vs. Shares

The following is a summary of the general corporate considerations of the advantages and disadvantages between share and asset purchase transactions.

5.1 Choice of Assets

In an asset transaction the purchaser is able to select only those assets which the purchaser wishes to acquire as well as the accompanying liabilities. Remaining liabilities and, in particular, unknown liabilities, will, unless expressly assumed, remain the responsibility of the vendor. By contrast, in a share acquisition, by virtue of acquiring shares of a corporation, the purchaser acquires the corporation with all of its assets together with all of its liabilities, both known and unknown (often said to be “warts and all”). While it is difficult to conclude a fixed rule, a vendor will often wish to sell the shares of a corporation so as to avoid being left with unwanted assets or liabilities. Whereas a vendor generally prefers to treat the business as one complete package leaving the purchaser having to make determinations as to which assets it ultimately wishes to keep and those which it wishes to dispose of at a later date.

5.2 Simplicity

In a share transaction there is simplicity of documentation in that the only “assets” which one really purchases are the shares themselves.

All of the other assets and liabilities flow automatically by virtue of acquiring the shares. In an asset transaction each individual asset must be conveyed in the appropriate manner to transfer title. A number of investigations must be performed with respect to a share purchase transaction including a review of the minute books and other corporate records of the corporation. Before purchasing shares, most purchasers will do an in-depth review of the corporation and its underlying assets in order to determine value. One has to question whether or not, by the time that the detailed review of a corporation's assets is complete for the purposes of a share transaction, there is really less complexity than in an asset transaction. In fact, from a legal cost point of view, there is usually very little difference in the amount of work required in either of the share or asset transactions.

5.3 Employees

While a share purchase transaction results in no change in the status of the employment relationship between employees and the corporation, an asset transaction results in more complications. Contracts for employment cannot automatically be assigned to the purchaser. There are a number of implications under the *Industrial Relations Act*, R.S.N.B. 1973, c. I-4 if employees are unionized. The *Employment Standards Act*, S.N.B. 1982, c. E-7.2 also deems continuous employment under many circumstances even where assets are purchased. These issues are discussed in more detail in Chapter 2.

5.4 Third Party Consents

Under some circumstances a corporation will own a number of assets which do not automatically transfer in the event that the business is sold by way of an asset transaction. Frequently the consent of a third party will be required in order for the asset to be conveyed to the purchaser. If such assets exist and they are important, rather than go by way of an asset transaction, it may be necessary to go by way of a share purchase transaction so as to automatically acquire such assets without a transfer of title.

Caution should nonetheless be exercised even in a share purchase transaction because some assets (for example a lease) may indicate that upon a change in control of ownership of the corporation, certain results flow such as forfeiture of the lease.

5.5 Corporate Structure

It is possible that a corporation operates in segregated divisions. If it is intended to purchase only some of the assets of a division or the division itself then it will be necessary to purchase assets because the purchaser does not want to acquire, or the vendor does not want to sell, the entire corporation and the other non-division assets at the same time.

5.6 Pension and Benefits

While there will be no disturbance of existing plans where shares are transferred, on an asset purchase transaction, where employees are offered continued employment, often the establishment of new plans will be required.

6. Tax Considerations of Assets vs. Shares

In buying or selling a business, a vendor will want to maximize the proceeds and the purchaser will want to minimize the cost. The vendor's proceeds and the purchaser's cost should be considered on an after-tax basis.

More often than not, tax considerations would lead a vendor to prefer selling shares and a purchaser to prefer buying assets.

The parties should determine whether an asset sale or a share sale results in the least amount of tax to both parties.

If an asset sale gives the least amount of corporate tax, the transactions may be structured as an asset sale with the purchaser paying an increased purchase price to compensate the vendor in whole or in part for the greater taxes that will have to be paid to distribute the net corporate cash to the individual shareholder(s).

If a share sale results in the least amount of tax, the purchase price could similarly be reduced to compensate the purchaser and reflect the additional risk to a purchaser in a share purchase.

It was noted above that usually a share sale is most advantageous from a tax point of view to the vendor and an asset sale is most advantageous to a purchaser. This is not always the case and for this reason it is important to consider fully the tax implications to the vendor and purchaser. The following is a list of some of the more usual tax factors that can influence the decision to buy assets or shares.

6.1 Tax Considerations Relevant to the Vendor

- a) The biggest advantage to a vendor of selling shares rather than assets is that the gain will be treated as a capital gain and taxed at more favourable income tax rates. If a corporation sells assets, there is usually some element of ordinary income, notably, recapture of capital cost allowance on the sale of depreciable property.

This factor is even more important when the vendor is an individual entitled to the capital gains exemption because in this case the sale of shares may be entirely exempt from tax. This exemption is only available to individuals and accordingly is not available when a corporation sells assets.

- b) Another advantage of a share sale to a vendor which can be quite significant depending on the circumstances is that an asset sale involves two levels of taxation, once when the corporation sells the assets and secondly, when the corporation distributes the after-tax proceeds to its shareholders. A share sale avoids the two levels of tax as the proceeds are paid directly to the shareholder.
- c) If a corporation has tax losses which it can carry over to future years, it should be considered how to best utilize such losses. If the vendor can make use of such losses, a sale of assets may be preferred so that the vendor retains the corporation and makes use of such losses in future years. If the vendor has no use for the losses, consideration should be given to selling shares and having the purchaser pay a greater purchase price for benefit of the use of such losses.

6.2 Tax Considerations Relevant to the Purchaser

- a) The main reason why a purchaser may prefer to buy assets is that there will generally be tax deductions for the cost of the assets acquired. This can be a significant advantage if there are depreciable assets being acquired.
- b) Another advantage to buying assets where the acquisition is being financed by debt is that it is often desirable that the interest expense reduce the income of the business. When shares are acquired, the interest will be an expense of the shareholder and accordingly will not reduce the income from the business.

In other circumstances, the business being acquired may be expected to generate losses so that the interest expense cannot be used at the corporate level. In this case a share purchase may be advisable so that the shareholder could use the interest deduction against other income sources.

- c) One of the disadvantages of an asset acquisition to the purchaser is that land transfer tax will be applicable on the sale of real property and HST may be payable on an asset purchase if it is not the entire business being purchased. These taxes are avoided in a share sale.
- d) If the corporation has losses, the purchaser may want to acquire shares so as to utilize these losses, although there are restrictions on the corporation's use of losses after a change in control.

As a final note, if a share sale is desirable but only a division or part of the corporation's assets are being sold, it may be possible to remove or "spin-off" these assets to another corporation owned by the vendor so that the shares of this new corporation can be sold. The "spin-off" transaction can often be accomplished on a tax-free basis but advice from a tax specialist should be obtained as there are many tax issues associated therewith.

7. Investment Canada Act

The following is a summary only for the purposes of considering the impact of the *Investment Canada Act*, S.C. 1984-85, C.20 on the purchase and sale of assets or shares of a business.

7.1 General

In simplified terms the *Investment Canada Act* applies to the establishment of a new business in Canada or the acquisition of an existing business in Canada by non-Canadians. An individual who is neither a Canadian citizen nor a permanent resident of Canada will be considered a non-Canadian for the purposes of the *Investment Canada Act*, while a corporation is considered to be a non-Canadian if more than 50% of its shares are controlled or held by a person or corporation that is non-Canadian. All such transactions by non-Canadians are "notifiable transactions" in that they must be reported to Investment Canada but only certain types of transactions will then be reviewable by Investment Canada. Thresholds have been established for review as follows:

- a) the direct acquisition of control (by way of acquisition of shares or assets) by a non-Canadian of a business in Canada with an enterprise value of \$5 million or more;
- b) the indirect acquisition of control over a Canadian business (through the acquisition of its parent company outside of Canada) with an enterprise value \$50 million or more, or \$5 million or more if the Canadian business represents over 50% of the enterprise value of the foreign parent company being acquired;
- c) the acquisition of an existing business, or the establishment of a new or related business in a culturally sensitive sector such as publishing, film and music, regardless of its size; or
- d) any investment which would be injurious to national security.

7.2 Notification of Investments

Section 12 of the *Investment Canada Act* requires a foreign investor to provide notice to Investment Canada at any time prior to the implementation of an investment or within 30 days thereafter unless an exemption would otherwise apply:

- a) to establish a new Canadian business, or
- b) to acquire a control of a Canadian business which falls below the threshold levels described above.

Once a complete notice has been filed Investment Canada is required to issue a receipt bearing a certificate to the foreign investor. The receipt of Investment Canada will advise the foreign investor either that the investment proposal is unconditionally non-reviewable or that the proposal will not be reviewed as long as Investment Canada does not subsequently issue a notice of review within 21 days of the date certified under the receipt.

The federal cabinet has the authority, in certain circumstances, to order a review of prescribed investments that are related to Canada's cultural heritage or national identity.

7.3 Reviewable Transactions

Under section 17 of the *Investment Canada Act* an acquisition of control of a Canadian business by a non-Canadian is reviewable if the transaction exceeds the threshold amounts described above. Unlike notifiable transactions, where an investment is reviewable the non-Canadian investor is required to submit an application to Investment Canada prior to the implementation date of the investment. Once a complete application has been filed Investment Canada is required to issue a receipt to the applicant certifying the date on which it is received. The Minister then notifies the investor under subsection 21(1) that the Minister:

- a) is satisfied that the investment is likely to be of net benefit to Canada;
- b) is unable to complete the review, in which case the Minister has an additional 30 days to complete a review unless the applicant agrees to a longer period; or
- c) is not satisfied that the investment is likely to be of net benefit to Canada.

In conducting the review, the *Investment Canada Act* (section 20) requires that the following factors be taken into account:

- a) the effect on the level and nature of economic activity in Canada, including the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;
- b) the degree and significance of participation by Canadians in the business;
- c) the effect on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- d) the effect on competition within any industry in Canada;
- e) compatibility with national industrial, economic, and cultural policies; and
- f) the contribution to Canada's ability to compete in world markets.

There are several exemptions from the application of the *Investment Canada Act*, including certain types of corporate reorganizations and securities transactions, certain financing transactions, and certain transactions within the insurance industry.

8. Competition Act

8.1 General Merger Provisions

The *Competition Act*, R. S. 1985, c. C-34 contains a regime for mergers. Merger is defined very broadly in section 91 of the *Competition Act* as:

"the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person."

This definition catches all mergers and acquisitions, whether directly or indirectly by acquisition of shares or assets, and clearly applies to joint ventures by virtue of the words "or by combination". Where, on application by the Commissioner, the Competition Tribunal (a quasi-judicial body established under the *Competition Tribunal Act*, R. S., 1985, c. 19 (2nd Supp) to adjudicate the non-criminal provisions of the *Competition Act*) finds that a merger or proposed merger prevents or lessens competition substantially, or is likely to do so, subsection 92(1) provides that the Competition Tribunal may order, in the case of completed merger:

- a) the dissolution of the merger;
- b) the disposal of designated assets or shares; or
- c) in addition to or in lieu of (a) or (b) and with the consent of the person against whom the order is directed and the Commissioner, any other action.

Or, in the case of a proposed merger:

- e) the merger not to proceed;
- f) part of the merger not to be proceeded with; or
- g) in addition to or in lieu of (d) and (e) certain acts or things not to take place in the event the merger is completed or, with the consent of the person against whom the order is directed and the Commissioner, any other action.

No application may be made more than one year after a merger has been substantially completed (section 97). There is a mechanism for the issuance of interim orders by the Competition Tribunal to delay or enjoin a proposed merger where an application opposing a merger has been made by the Commissioner (section 100).

The *Competition Act* provides (section 93) that, in determining whether or not a merger is likely to prevent or lessen competition substantially, the Competition Tribunal may consider a number of factors including:

- a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition;
- b) whether the business or part of the business of a party to the merger has failed or is likely to fail;
- c) the extent to which acceptable substitutes for the products supplied by the parties to the merger are likely to be available;
- d) any barriers to entry into a market and the effect of the merger on such barriers, with specific reference to tariff and non-tariff barriers to international trade, inter-provincial barriers to trade and regulatory controls over entry;
- e) the extent to which effective competition remains or would remain in a market that would be affected by the merger;
- f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;
- g) the nature and extent of change and innovation in a relevant market; and
- h) any other factor that is relevant to competition in a market that is or would be affected by the merger.

The merger provisions contain a specific direction to the Competition Tribunal that it shall not find that a merger prevents or lessens competition substantially solely on the basis of evidence of concentration or market share (subsection 92(2)). This is intended to ensure that in assessing the impact of a merger on competition, the Competition Tribunal looks at the real effect on competition in the relevant market rather than relying on a mathematical standard of market share. Similarly, section 95 provides an exception for joint ventures and section 96 provides an exception where there will be gains in efficiency that will be greater than, and will offset the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger.

The *Competition Act* contains an advance ruling mechanism which allows a party to a proposed merger to apply for a binding advance ruling from the Commissioner with respect to a contemplated merger (section 102). The Commissioner is obliged to consider a request for such a certificate as expeditiously as possible, but the *Competition Act* sets no mandatory time period.

Once the Commissioner has issued an advance ruling certificate in respect of a transaction which is substantially completed in one year, the Commissioner is not permitted to apply to the Competition Tribunal for a review of the transaction on the basis of the same or substantially the same information as that on which the certificate was based (section 103).

8.2 Notifiable Transactions

Sections 108 to 124 of the *Competition Act* deal with notifiable transactions. The rationale for these provisions is that in the case of large, complex transactions, it is important to have an opportunity to examine the competitive impact before a merger is completed. Section 114 of the *Competition Act* requires that persons proposing a transaction which exceeds the thresholds set out in sections 109 and 110 must notify the Commissioner in advance of the completion of the transaction.

There are two threshold levels relating to the notifiable transactions provisions. First, the parties to the transaction, together with their affiliates, must have assets or annual gross revenues from sales in, from or into Canada that exceed \$400 million. The second threshold varies depending upon the nature of the transaction. The Commissioner must be notified in cases where:

- a) in respect of a proposed acquisition of assets of an operating business (defined in subsection 108(1) as a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work), the value of the assets or the annual gross revenues from sales in or from Canada generated from those assets would exceed \$35 million;
- b) in respect of a proposed acquisition of voting shares of a corporation carrying on an operating business, the value of the assets of the acquired corporation or the annual gross revenues from sales in or from Canada generated from those assets would exceed \$35 million, and the persons acquiring the shares would acquire an interest in the corporation exceeding either 20% in the case of a public corporation or 35% in the case of a private corporation. If the parties already surpass the 20% or the 35% threshold, and make a subsequent share purchase which results in their owning more than a 50% interest, then the subsequent transaction also requires notification;
- c) in the case of a corporate amalgamation, where one or more of the corporations carries on an operating business, the value of the assets of the continuing corporation or the annual gross revenues sales in or from Canada generated from those assets would exceed \$70 million; and
- d) in the case of a proposed combination, the value of the assets of the continuing business or the annual gross revenues from sales in or from Canada generated from those assets would exceed \$35 million.

Section 113 sets out general exemptions from the requirement to prenotify in the case of transactions between affiliates, those for which the Commissioner has issued an advance ruling certificate pursuant to section 102 and those pursuant to an agreement entered into before the coming into force of the pre-notification provisions (July 15, 1987) which are substantially completed within one year from that date.

Once notification is given, the parties to the merger are required pursuant to section 123 to wait, depending on the type of transaction, from 7 to 212 days before completing the merger. This period can be shortened if the Commissioner informs the parties that he does not intend to make an application to the Competition Tribunal in respect of the proposed transaction. After the expiration of the waiting period the parties are free to complete the transaction unless, as a result of a request by the Commissioner, the Competition Tribunal has issued an interim order preventing completion of the transaction.

All mergers, whether or not they exceed the prenotification thresholds, are subject to examination by the Commissioner to determine if they have, or are likely to have, the effect of preventing or lessening substantially, competition in a definable market. The assessment of the competitive effects of a merger is made with reference to the factors identified under section 93 of the *Competition Act*. Subsection 114(1) requires the person or persons proposing a notifiable transaction to notify the Commissioner and supply the relevant information before completing the transaction.

However, subsection 114(4) allows one person to supply information on behalf of or in lieu of the others. The obligation to notify arises before the transaction is completed and therefore in cases where notification is required, it is essential that that information be supplied prior to the transfer of the ownership of assets or voting shares or the effective date of articles of amalgamation or the contribution of assets to a combination.

9. Registrations and Filings

Upon the closing of either an asset purchase or a share purchase there are a number of registrations required. In addition to the registration of transfers, bills of sale, assignment of leases, assignment of book debts, security documents and discharges of previous security, the following registrations may be required:

9.1 Corporate Filings

- a) notice of change of directors;
- b) notice of change of registered office;
- c) registration or withdrawal of business names;
- d) articles of amendment changing the name of the vendor or purchaser (if required pursuant to the agreement);

9.2 Income Tax Filings

- a) elections under section 22 of the *Income Tax Act* with respect to accounts receivable;
- b) elections pursuant to section 85 of the *Income Tax Act* with respect to rollovers.

9.3 Trade Mark Registrations

Consideration should be given to the filing of any registered user agreements or assignments of trademarks.

Appendix 1

MINUTE BOOK REVIEW

Date Reviewed: _____

Reviewer: _____

CORPORATION INFORMATION

	Information found:	Deficiencies Noted:
Corporate Name:		
Date of Incorporation:		
Place of Incorporation:		
Corporation Number:		
Business Name Registration(s) & Status:		
Head Office Address:		
Date and Method of Formation (Incorporated, Continued or Amalgamated): Original Certificate of Incorporation, Continuance or Amalgamation in MB: Original Certificate of Registration and/or Reinstatement in MB: Status (Active, Revoked for Non-Payment or Struck):		
Jurisdiction of Formation: Extra-Provincial Registrations (Jurisdiction(s), Date(s) & Status):		
Registered Office Address: (If Changed, Authorizing Resolution Passed?)		
Articles and Other Provisions of Incorporation in MB: Amendments: Authorized Capital (Note - Key share conditions. – ie. non-voting, dividend payments): Total Issued Capital: Share Transfer Restrictions: Number of Directors Fixed:		
Organizing Resolutions Complete (Yes/No): Fiscal Year End: Auditors Appointed (Name) or Waived:		

Special Resolutions: General Signing Officers: Bank and Branch:		
Current Shareholders: Shareholders' Register Prepared: Original Share Certificates in MB:		
Current Directors: Register of Directors Prepared:		
Current Officers and Recognized Agent: List of Officers Prepared:		
Shareholders' Agreement: Management Provisions: Share Transfer Restrictions:		

SHAREHOLDERS

Shareholder Name	No. & Class of Shares	Certificate No.	Amount/Fully Paid?	Obtained How?		Where are the shares now?		
				Issued by Co. on: Director's Resolution, Subscription, etc.	Acquired on: Transferor, Resolution, cancelled certificate	Still Held? ***	Pledged? *** Directors' Resolution, Pledge Agreement, etc.	Transferred? *** Who is the transferee or back to the co? date?

DIRECTORS

Name	Date Appointed *** SH's Resolution (or Director's Resolution if Replacement Director)	Consent to Act ***	Date Re-Appointed	Date Ceased to Act *** (Resignation and SH Resolution Accepting Resignation or Special Resolution if Removed)

OFFICERS AND RECOGNIZED AGENT

Office Held	Name	Date Appointed *** Director(s) Resolution Passed	Date Re-Appointed	Date Ceased to Act *** (D's Resolution acknowledging Resignation or Removal)

ANNUAL RESOLUTIONS IN LIEU OF ANNUAL MEETINGS OR MINUTES OF ANNUAL MEETINGS

Date	Shareholders				Directors			
	Approve Financial Statements and Auditor's Report for Year	Appoint, Confirm, Ratify Directors	Appoint Auditors	Confirm and Ratify Past Acts of Directors	Consent to Act as Director	Appoint Confirm Ratify Officers	Approve Financial Statements and Auditor's Report for Year ____	Confirm and Ratify Past Acts of Officers

OTHER RESOLUTIONS

- Name Change
- Redeem Shares
- Borrow Money & Issue Security
- Acquisitions / Divestitures
- Declare Dividends
- Issue Guarantee
- Material Contracts
- Replace Lost Share Certificate
- Change Authorized Capital

Type and Date of Resolution	Description

Appendix 2

Sample Due Diligence Checklist

SEARCH ON ASSET PURCHASE WHERE ASSETS PURCHASED INCLUDE LANDS, CHATTELS, INVENTORY AND ACCOUNTS RECEIVABLE:

1. REGISTRY LAND TITLES OFFICE IN THE COUNTY:

- a) Where the lands and chattels are located
- b) Where the head or principal office of the Vendor company is located

CHECK THE FOLLOWING INDICES

- a) Land
 - b) Judgments and Liens
 - c) Personal Property Registry
2. Registry office for the County of York where Vendor Company has no office, registered or principal, in New Brunswick.
 3. Offices of manufacturers who have offices within the Province whose name may be plainly printed or inscribed on the asset being purchased.
 4. Bank of Canada - section 427 *Bank Act* security
 5. Property assessment office. Obtain property account number and confirm property tax status.
 6. Check assessments for local improvements under the *Municipalities Act*.
 7. Check local water and sewage assessments.
 8. Check zoning with local municipality. Also check conformity with municipal plan
 9. Check levy under *Business Improvement Areas Act*.
 10. Check fire Marshall's office for orders under section 12(1) *Fire Prevention Act*.
 11. Check with office of chief electrical inspector, department of Public Safety for orders under s. 6(3) *Electrical Installations and Inspection Act*.
 12. Check with office of chief plumbing inspector, department of Public Safety for orders under s. 18 of regulation 84-187 under the *Plumbing Installation and Inspection Act*.
 13. Check with office of chief boiler inspector, department of Public Safety for inspection certificates under section 19 *Boiler and Pressure Vessel Act*.
 14. Check with office of chief inspector, *Elevators and Lifts Inspection Act*, department of Public Safety for certificates under section 7.
 15. Check with corporate services office in Fredericton to obtain certificate of good standing.

- 16.** Check WorkSafeNB to confirm that employer is registered and in good standing.
- 17.** Check to ensure that a trustee in bankruptcy (superintendent's office - Halifax) or a receiver (Department of Justice - Fredericton) has not been appointed.
- 18.** Obtain details of trade marks, patents and other intellectual property and conduct searches to determine ownership and other types of assignments, registered user agreements etc.

Appendix 3

CHECKLIST - PURCHASE OF A BUSINESS

1. INFORMATION ON BUSINESS TO BE ACQUIRED

- i.** History of Business
- ii.** Organization of Business
- iii.** Share Purchase or Asset Purchase Consideration
- iv.** Description of Shares Being Acquired
- v.** Confirmation Shares Being Acquired are all the shares issued and outstanding
- vi.** Nature of Business and Details of Competitors
- vii.** Sales and Management Records of Business
- viii.** Contractual Obligations of Business
 - Supply Agreements
 - Customer Agreements
 - Leases of Premises and Equipment
- ix.** Legal Problems affecting Business, the Products or Services
- x.** Financial Records of Business for current and previous years
- xi.** Details of assets and liabilities of Business
- xii.** Details of Management and Operating Policies
- xiii.** Personnel Records, legal, accounting, advertising and public relations records of Business
- xiv.** Customer Lists
- xv.** Supplier Lists
- xvi.** Details of public services available to premises
- xvii.** Details of governmental regulation or restrictions on operation of Business
- xviii.** Valuation of Business
- xix.** Details of Tax
 - Outstanding Amounts Unpaid
 - Copies of latest Assessment, Reassessments, Notices of Objections
 - Details of Instalments Paid.

2. IS LETTER OF INTENT TO BE USED?

3. OBTAIN INFORMATION FOR AGREEMENT

- i.** Description of Organization of Business and description of owners, directors, officers and key employees;
- ii.** Provisions for immediate and continuing access to books, records, contracts, inventories and other assets for inspection by the Purchaser;
- iii.** for asset purchase, detailed description of assets:
 - a)** detailed inventory of property and equipment;
 - b)** list of inventory;
 - c)** verify existence of accounts receivable;
 - d)** outstanding contracts and leases;
 - e)** goodwill including trade style and client lists;

- a) the names and addresses of, and number and type of shares held by, the directors, officers and shareholders and whether those shares are held by such persons as beneficial owners, free of any mortgages, liens, charges or claims;
 - b) whether any person has any right, privilege or option to acquire the shares or require allotment or issuance of unissued shares;
 - c) whether the transaction would breach any contract or commitment of the corporation;
 - d) whether the vendor is a resident Canadian within the meaning of the Income Tax Act (Canada);
 - e) whether the corporation has filed all necessary Federal and Provincial Income Tax, harmonized sales tax returns; and
 - f) whether the articles of the corporation allow for this type of transaction and whether the directors of the corporation will give their approval of the transaction.
- xx.** With respect to employees of the business:
- a) determine the existence or non-existence of a collective bargaining agreement pursuant to provincial legislation;
 - b) obtain any employment agreements with key employees;
 - c) make inquiries respecting pension plans and worker's compensation; and
 - d) determine whether releases will be obtained from non-key employees with respect to claims for wrongful dismissal, breach of contract or non-compliance with provincial employment standards legislation and the Canada Labour Code;
- xxi.** Determine what opinion from counsel will be required.
- xxii.** Determine what warranties and certificates from the officers or directors of the vendor will be required.

4. AFTER DRAWING UP AGREEMENT

- i. In an asset purchase, carry out property searches for premises (in a share purchase you may want to confirm title to real property, review existing title opinions or you may be required to provide opinions to a bank financing the transaction).
- ii. In an asset purchase, if there is a lease, prepare an assignment of lease, obtain the consent of the landlord, if required, and consider whether the lease and assignment should be registered.
- iii. Obtain any certificate required from the province, certifying that all provincial taxes have been collected and remitted to the province.
- iv. With respect to any bills of sale, list separately amounts paid for inventory, equipment, accounts receivable, goodwill, etc., and consider the necessity for registration.
- v. If there is a chattel mortgages (or bill of sale by way of mortgage) check that it complies strictly with the provisions of the provincial legislation.

If the purchaser is a non-resident, ensure that the provisions of the Investment Canada Act have been complied with.

- vi. Obtain certificates of mechanical fitness for all motor vehicles purchased and transfer registrations.

- vii.** Obtain transfers of public vehicle licences for any public vehicles (buses, charter vehicles) and obtain transfers of licences for any public commercial vehicles (trucks, etc., for hire).
- viii.** Register any transfer of boats under the Canada Shipping Act.
- ix.** Register security interests.
- x.** If a business name is to be assigned, have it assigned specifically to the purchaser and consider if a dissolution of partnership or sole proprietorship should be effected and registered by the vendor and if a new partnership or sole proprietorship declaration should be made and registered by the purchaser, if he is not to trade under his own name, or as a corporation.
- xi.** Ascertain whether there are any arrears of taxes.
- xii.** If the vendor or the directors or shareholders of a corporation have given personal guarantees, arrange for the release of those personal guarantees or draw an agreement for indemnity by the purchaser, as appropriate.
- xiii.** Draw a statement of adjustments pertaining to the transaction.
- xiv.** Prepare appropriate corporate resolutions, and certificate of incumbency.
- xv.** Prepare opinions.
- xvi.** Prepare documentation called for under agreement

THE LAW SOCIETY OF NEW BRUNSWICK

Asset Purchase Transactions

Chapter 2

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Asset purchase transactions

1. Asset Purchase Considerations

In an asset sale the purchaser can pick and choose the assets to be purchased and the liabilities to be assumed, each type of asset and any liabilities must be specifically dealt with and in particular any exemptions or exclusions must be addressed. The transfer considerations appear complex in an asset transaction as there are generally requirements to register documents, to obtain consents from interested parties such as lenders, landlords, regulatory authorities etc. and notices must be given to customers, employees, tenants and others. However, many of the same considerations will apply to a share transaction.

In order to structure any asset transaction it will be necessary to have up to date information about the corporation in terms of its financial and business affairs and from the results produced from the standard searches that turn up any difficulties with respect to the assets.

At the outset it is important to determine which assets are to be acquired by the purchaser and which are to be excluded. A purchaser will not want to acquire assets which represent non-arm's-length transactions between the vendor and other persons (for example, inter-company indebtedness within a related group of companies). As well, a purchaser will not normally wish to retain and pay for "key man" insurance on the vendor, even if the vendor is being retained as an employee or consultant.

The allocation of the purchase price among the various assets of the business is one of the most important tax considerations in an asset purchase. The vendor and the purchaser will often have conflicting interests and the allocation of purchase price may require negotiation. It is for this reason that Canada Revenue Agency will typically accept the allocation reached by the parties provided that there is evidence that the transaction is a negotiated one. Typically an asset purchase agreement will provide that each of the parties to the agreement accepts the reasonableness of the allocation (which is included as a schedule to the agreement) and agrees to file their respective income tax returns using the agreed allocation.

2. Contents of an Asset Purchase Agreement

The typical contents of an asset purchase agreement ("APA") include the following:

- a) The purchase and sale provisions consisting of a description of the property being sold (which may reference schedules to the agreement) and the closing date;
- b) The purchase price and allocation of the purchase price to the various assets being sold (see section 2.04(1) of this chapter);
- c) The mechanics of the transaction such as closing procedures, interim investigations, confidentiality, etc.;
- d) Representations and Warranties of the Vendor: including such statements as capacity to sell, authority to sell, no options or agreements with another to sell, conformity with laws and no outstanding litigation or liens that would affect the marketability of the assets;
- e) Covenants of Vendor;
- f) Representations and warranties of the Purchaser;
- g) Covenants of the Purchaser;
- h) Survival and Limitations of Representations, Warranties and Covenants of the Parties;
- i) Closing Requirements/Conditions Precedent which specifies those matters which must be completed or circumstances which must exist in order for the parties to be obligated to complete the transaction;
- j) Risk of Loss and Indemnity Provisions (see 2.04(2) of this chapter);
- k) General legal provisions more specifically dealt with in Chapter 3 at Appendix 1; and
- l) Schedules to APA.

3. Assets to be acquired

The types of assets that may be acquired in an APA include the following:

3.1 Inventories

Inventory may be described as either products held for sale or material which the business processes, manufacturers or assembles into products for sale. By its nature, inventory changes in quality and amount on an on-going basis. It is therefore often difficult to calculate and agree upon a value for the inventory in a purchase transaction, let alone to allocate a value to specific items of inventory being acquired. Accordingly, the APA may occasionally value the inventory (ascribing a conservative value) or, more usually, will provide a method or formula by which the value of the inventory may be objectively determined at a date specifically chosen after the closing of the transaction. In either case there is usually the establishment of an arbitration procedure to submit any dispute as to the subsequently determined value to an independent arbitrator. Frequently the auditors of the parties can be engaged to perform the valuation of the inventory.

In order to avoid the difficulty of valuing assets like inventory or other items which may fluctuate continuously in value at a fixed point in time, it is common in APAs to establish both a closing date and a post-closing adjustment date on which the balance of a purchase price is paid after the valuation process has been completed. The price paid at closing takes into account those items which are easily valued along with an estimate of the value of the inventory and other floating assets. A valuation then takes place shortly after and any additional amounts are paid to the Vendor or returned to the Purchaser. Alternatively, funds can be deposited with a third party to be released upon the determination of appropriate inventory levels.

To avoid complicating the purchase agreement assets are often described in schedules rather than in the body of the APA, which then permits the schedules to be amended right up to the time of closing without adjusting the body of the agreement.

In the negotiation of an APA the purchaser should avoid paying for inventory which is obsolete or of little value. Usually the APA will provide that the purchase price paid and allocated to inventory will be adjusted to exclude these items or as an alternative, a clause will be included by which the purchaser is entitled to sell back to the vendor any obsolete or useless inventory within a specified time from the date of closing.

Representations and warranties given by the vendor to the purchaser can help deal with the question of obsolete inventories. In any event the purchaser should physically check the inventory in order to be satisfied prior to closing.

It is quite usual that inventory be sold at book value and accordingly any income tax consequences are minimal. Since inventory is normally purchased for resale, it is usually exempt from provincial sales tax in those provinces where sales tax is applicable. There may, however, be HST payable by the purchaser. The *Excise Tax Act*, requires a registered vendor of assets of a business to collect HST on the sale price of all finished goods' inventory of its manufacture, other than exempt or zero rated goods. Purchasers of the assets to be used or consumed in a commercial business will therefore be entitled to an input tax credit provided they have become a HST registrant.

There is an exemption from HST where a purchaser is buying significantly all of the assets used in a business or part of a business. To obtain this exemption an election form needs to be filed.

3.2 Land and Buildings

In many purchases, land is one of the most valuable assets involved in the transaction. To be certain that the vendor owns the land and that the purchaser is acquiring good title to all of the land, the purchaser's lawyer must search title in the appropriate Registry or Land Titles Office. Issues such as easements, *Community Planning Act*, R.S.N.B. 1973, c. C-12 violations and zoning by-laws must be settled before the transaction is closed and the purchaser becomes the owner of the property.

From a tax point of view, capital properties are divided between depreciable (i.e., buildings, equipment, etc.) and non-depreciable (i.e., land) assets. In the sale of depreciable assets, the purchaser is able to deduct the cost of the asset over a period of time.

Land transfer tax will be payable on the portion of the purchase price allocated to real property (both land and buildings).

The *Excise Tax Act* will also impose HST on most sales of land and buildings, except where special elections or exemptions are available.

3.3 Machinery and Other Depreciable Property

In any business there are numerous "miscellaneous" pieces of machinery and equipment that are used to operate the business. This is particularly true of a manufacturing or processing business where there may be thousands of individual pieces of machinery, equipment, tools, cars, trucks, fork-lifts, desks, chairs, office equipment, etc. For the lawyer involved in an asset sale the challenge will be the conveyance to the purchaser of each item. The actual conveyance is typically achieved through a bill of sale or general conveyance document by the vendor to the purchaser in order to transfer title of the assets; however the assets should be specifically listed in a schedule to the APA as well, with their serial number (if applicable). Clearly this can be a time consuming job and in many large transactions a more generic description of the assets and their location may be used in the APA.

For income tax purposes, depreciable assets are a type of capital asset whose cost may be deducted over time. Depreciable assets are listed in different classes or pools in Schedule II to the Income Tax Regulations. The assets may be depreciated at different rates depending on their class.

Machinery and equipment are types of depreciable assets common to asset purchases. The rate of depreciation for machinery varies but typically manufacturing machinery can be fully written off on a declining balance basis. Other examples of depreciable assets typical to an asset purchase are: transportation equipment (cars, trucks); patents, franchises, leaseholds (various rates) office equipment; computer hardware; and software.

While the disposition of a non-depreciable capital asset such as land only results in a capital gain or loss to the vendor, the tax consequences of a disposition of depreciable assets are more complicated and an accountant's expertise should be consulted in the allocation of the purchase price to various depreciable assets.

A vendor may prefer to allocate the sale proceeds to non-depreciable capital assets rather than allocating proceeds to depreciable assets above their undepreciated capital cost. On the other hand, a purchaser would rather allocate the purchase price to depreciable assets so that the cost may be deducted over time. The purchaser may also prefer to allocate the purchase price to assets that may be depreciated at a faster rate.

Since the vendor and the purchaser often have competing interests as to allocation, the allocation finally settled on is often reasonable and will be accepted by Canada Revenue Agency.

If it is not within the bounds of reasonableness, the parties' allocation could be adjusted by Canada Revenue Agency. This is more likely if the parties report differing allocations in their tax returns and for this reason it is important to provide an allocation in the APA. It is often desirable to include a clause in the agreement requiring each party to use this allocation in their tax returns. Many depreciable assets are subject to provincial sales tax (where applicable) and HST on the sale.

3.4 Accounts Receivable

Generally speaking the vendor of a business would like to take the position that the purchaser pay full value for all receivables, less any provisions for bad debts, and be responsible for collecting those receivables. The vendor is motivated by the fact that once the business is sold, the vendor no longer has an efficient method of collecting the receivables and can no longer take advantage of the on-going business relationship as a form of moral (or even legal) persuasion to force the payment.

The purchaser is concerned about the collectability of the accounts since the purchaser has no history with them, does not generally know the vendor's sale and collection policies or the impact of the sale on the bad debt experience. Accordingly, the purchaser will normally propose that there will be no purchase of the accounts but rather the purchaser collect them on the vendor's behalf and at its expense and account to the vendor for any amount collected. The issues pertaining to the transfer of accounts receivable are who will pay the collection costs and who will run the risk of non-collection. If the purchaser pays the full value for the receivables the purchaser will want to have recourse against the vendor for those accounts that are not collected.

If one of the foregoing methods is not acceptable, then the parties generally agree upon one of the following accommodations:

- a) either the purchaser will purchase the receivables at a sufficient discount from book value to protect the purchaser and then the purchaser will assume sole responsibility for the collection of those receivables; or
- b) the purchaser will purchase the receivables, again possibly at a discount, and collect the receivables for a period of time. If at the end of that time the purchaser has not recovered the payment, the remaining accounts will be turned over to the vendor to pursue through whatever remedy it feels appropriate. In this case there is often a holdback and the purchaser will retain from the holdback any difference between the amount collected and the purchase price for the receivables.

Under general tax principles, a sale of accounts receivable in the course of selling a business would give rise to a capital gain or capital loss depending on whether the purchase price was greater or less than the face amount of the receivables. The *Income Tax Act* provides in section 22 that in the purchase and sale of a business, the vendor and the purchaser can make a joint election which essentially has the effect of treating the transaction as giving rise to ordinary income or loss. The election is made by filing with Canada Revenue Agency form T2022 signed by both the vendor and purchaser. The *Income Tax Act* does not provide a time limit for making the election. As a matter of practice, the section 22 election is routinely filed in most cases when accounts receivable are sold as part of the sale of business assets.

The section 22 election may only be made when a vendor is selling all or substantially all of the assets of a business. When the vendor is selling the assets of a particular division, the question arises whether the election is available. If the division constitutes a business separate from the other business of the vendor, the election may be made. The administrative position of Canada Revenue Agency as to the tests to be applied in determining whether a division constitutes a separate business are set forth in Interpretation Bulletin IT-206R.

3.5 Prepaid Expenses

On a sale of assets the vendor will want to be paid for any expenses which relate to the post-sale period but which were paid for prior to the date of closing. As a result, these amounts, covering items such as rent, insurance premiums and advances on royalties to patent owners, are normally adjusted to the closing date. A purchaser would normally agree to reimburse the vendor for these expenses unless the purchaser is not going to obtain the benefit of the prepayment as would be the case where the purchaser makes arrangements for its own insurance. If the purchaser is compensating the vendor for these prepayments, counsel should ensure that the underlying asset is properly transferred to the purchaser - for example that the insurance has been assigned and the purchaser has been named as the new insured party.

3.6 Intellectual Property

Corporate names, trade names, licences, patents and other intellectual or industrial property which the purchaser is acquiring require special considerations. The principal issue is to ensure that the property in question is properly identified and the appropriate steps taken in the documentation to ensure that it is effectively transferred to the purchaser.

In a situation in which the purchaser must obtain use of the property but the vendor cannot deliver title (for example, a trade name or patent used by a Canadian subsidiary of a foreign parent which will continue to use the property outside Canada) appropriate registered user agreements or licence agreements must be prepared and registered under appropriate legislation such as the *Trade-marks Act*, R.S.C. 1985, c. T-13.

Certain types of intellectual property are depreciable property as they are listed in the capital cost allowance classes in the Income Tax Regulations, such as patents and licences. Intellectual property which is not depreciable property is generally eligible capital property (discussed below under Goodwill and Related Assets).

Generally, HST does not apply to intangible property which is all or substantially all of the intangible property necessary to carry on a business or part of a business.

3.7 Goodwill and Related Assets

Goodwill is generally described as the basket of intangible assets which adds value to a business. Examples of goodwill include the location of the business, its mailing list, its trade names and generally the reputation built up as a result of years of carrying on business. It is the price over and above the specific tangible assets which a purchaser is prepared to pay in order to acquire a business.

Goodwill and other intangible assets connected with a business and which are not listed in one of the capital cost allowance classes are generally classified under the *Income Tax Act* as "eligible capital property" (section 14). Other examples of eligible capital property are legal costs of incorporation, licenses for an unlimited period and payment for non-competition clauses. The tax treatment of eligible capital property is similar to depreciable property, but there are some differences. For example, although 100% of the cost of depreciable property can be deducted over time, only three quarters of the cost of eligible capital property may be deducted. Whereas depreciable property when disposed of may be subject to recapture and capital gains, the proceeds of eligible capital property are not usually treated as capital gains.

3.8 Assumed Liabilities

When a business is acquired by way of an asset purchase the purchaser is in the position of determining which liabilities, if any, are to be assumed.

The value of the liabilities assumed by the purchaser become part of the purchase price to be allocated among the assets acquired. For example:

Assume a purchaser has agreed to buy the assets of a business for \$100,000 and assume liabilities worth \$20,000. He agrees to pay \$80,000 cash for the "net" assets. In this case the total consideration of \$100,000 should be allocated to the assets acquired.

As a matter of law, an obligation to perform is not relieved if the obligation is assigned to a third party (i.e., the purchaser), and then that party fails to perform the obligation. For example, indebtedness owed by the vendor to a chartered bank cannot be assumed by the purchaser with the vendor thereafter no longer being liable for the debt unless the bank consents to the assumption. Even then, the vendor will want assurance that the vendor is released from the obligation if the purchaser subsequently defaults. Accordingly, in an asset transaction, the vendor is concerned that the purchaser has the ability to perform the obligations which have been assumed. If there is any question in this connection the vendor will insist on a share transaction because the liabilities of the business reside with the corporation being sold and not with the vendor.

Persons to whom the obligations are owed are not required to accept the performance of a third party where the services are in any way unique. The most usual example is a personal services contract such as an employment or consulting contract. The consultant or employee cannot assign these obligations to perform to someone else without the consent of the other party to the contract.

In a typical APA a number of obligations may be assumed by the purchaser, including the following:

3.8.1 Accounts payable

Generally the purchaser will be agreeable to assume the accounts payable because by utilizing the vendor's trade terms, the purchaser may have the opportunity to defer payment of part of the purchase price into the future. If the purchaser does not assume the accounts payable this fact will be reflected in the purchase price and the vendor will have the benefit of prepayment from the purchaser. In many instances payables are owed to persons such as landlords or ongoing suppliers of the business and the purchaser will want to assume these payments in order to ensure the persons on whose goodwill the purchaser depends are paid in the ordinary course and will continue to deal with the purchaser.

3.8.2 Sales orders

If the vendor is going out of business the vendor will want the purchaser to assume all of the unfilled sale orders. To the extent that these orders are profitable the purchaser may want to take advantage of them and to the extent that they are unprofitable the purchaser will likely want to be aware of them so that this fact can be reflected in the purchase price.

3.8.3 Indebtedness for borrowed money

Typically indebtedness for borrowed money is an obligation not assumed by a purchaser because the purchaser will assume the responsibilities for arranging financing in connection with financing the transaction. However, it is possible that some forms of financing may be advantageous or profitable to a purchaser and the purchaser will be prepared to assume them provided that the party to whom such obligations are owed, for example, the bank, is prepared to have the obligation assigned and the purchaser assume payment thereof.

3.8.4 Warranty claims

While the purchaser will normally complete unfilled sales orders and unperformed service obligations, the vendor will also want the purchaser to satisfy warranty and other claims by customers of the business under those transactions of purchase and sale which occurred prior to the date of the business being purchased. The vendor will be motivated by the fact that he is no longer in the business and is unable to perform warranty claims. While under normal circumstances the purchaser may be prepared to accommodate this desire because once again it is in the purchaser's interests to preserve the goodwill of the business, there are often disputes as to who will pay and on what basis with respect to such warranty claims.

3.8.5 Liabilities not ordinarily assumed

Would include insurance and non-arm's-length transactions.

3.8.6 Third party contracts and approvals

Long term contracts with landlords, lessors, suppliers and customers may be either an important asset to a business or a significant liability. Typically the agreement of purchase and sale for assets will provide that the vendor must deliver copies of all contracts, agreements, leases, licences and franchises which the vendor has entered into with third parties relating to the business and provide the purchaser a reasonable opportunity to review such contracts etc. and determine which the purchaser wishes to assume.

In many cases the purchaser will wish to take advantage of some long term arrangements but caution should be exercised in order to determine which of those contracts that the purchaser is prepared to take advantage of, and in fact pay for. Even if the purchaser wants to take over some contracts, that action may require approvals from third parties such as landlords for any premises leased by the vendor, owners of equipment leased by the vendor and regulatory authorities having jurisdiction over the business of the vendor, in order to allow the purchaser to acquire the assets and operate the business.

The purchaser should confirm that the various regulatory authorities will, or legislation does in fact, permit the assignment of certain licences and permits as the purchaser may have to re-apply for those permits or approvals. Generally the vendor will, on a best efforts basis, cooperate with the purchaser in order to transfer such permits or approvals.

3.9 Product Warranties and Product Liabilities

Although the purchaser of assets has an advantage over the purchaser of shares in that it may choose not to assume the vendor's responsibilities with respect to product warranty (products failing to meet express or implied warranties) or product liability (product causing loss or damage to persons or property), as a practical matter the purchaser will be very concerned over how these matters are handled.

In the absence of an agreement between the parties, on general contract and tort principles, the purchaser will not be liable for product warranty or liability claims with respect to products manufactured and sold before the purchaser acquired the assets and took control of the business.

A purchaser is not liable in contract as the purchaser did not manufacture and sell the particular product and the purchaser will not be liable in tort as any personal injury or economic loss caused by defective product has not been caused by any negligence on the part of the purchaser. The more difficult problem arises, however, in the case of a defective product manufactured by the vendor prior to the closing but consequently sold by the purchaser out of inventory acquired by that purchaser on closing. In such cases the purchaser may be liable to the customer for breach of any express or implied warranty to the customer for any product liability type claims.

Whether the purchaser would have a claim over against the vendor who manufactured the product for any loss or expense will depend upon the agreement between the parties and it is for this reason that this issue must be addressed.

In connection with product warranties, a manufacturer of a product will typically express to customers that the product is free from defects in workmanship or materials for a certain period of time. If that product does not then meet the warranty it is the obligation of the person manufacturing that product and making the claim to repair or replace the product. A purchaser of assets who will likely extend warranties similar to those of the vendor is most likely in the better position to honour the vendor's warranty. Having purchased the facilities of the vendor and having the capability to service in the event that such claims arise, both the vendor and the purchaser have a vested interest in having the purchaser complete such work. Accordingly, it is typical for the purchaser of assets of a manufacturing business to agree to assume the warranty obligations of the vendor. However, a number of investigations should be made in terms of how many claims should be made and what amounts prior to agreeing to such a term. As well there will have to be compensation for such an assumption of responsibility and either the purchase price reduced accordingly (to reflect the additional costs and risk) or appropriate indemnifications backed up with a pool of funds available to satisfy such indemnity considered.

In the case of product liability, although the purchaser may be willing to assume the obligation to repair or replace defective products it will not, in most cases, be willing to accept liability for personal injury or property damage caused by a defective product. In today's litigation environment these costs could be very high.

4. Payment of Purchase Price and Other Considerations

4.1 Payment of the Purchase Price

There are three choices and various combinations thereof available in connection with the payment of the purchase price:

- a) All cash;
- b) Cash together with a promise to pay the balance of the proceeds after the sale; and
- c) Cash plus a promise to possibly pay additional amounts based on earnout provision.

4.1.1 Cash

There are really no special considerations applicable to an "all cash" transaction. The purchase price is determined and allocated among the various assets and at closing the purchaser pays to the vendor, by certified cheque, bank draft or wire transfer, the amount agreed upon.

4.1.2 Cash plus a promise to pay

There are several considerations that apply to the promise to pay the balance of the purchase price in the future. Usually, a promissory note is given for the balance of the purchase price. An additional issue which arises is security for the payment of that purchase price in the future. The vendor will want to ensure that the purchaser has the ability to pay that amount in the future in accordance with the promissory note and accordingly will often take security over the assets which have just been sold in order to ensure that payment takes place.

This could be done by virtue of a security agreement or debenture and typically there is an agreement that the security to the vendor will rank behind the purchaser's banker in connection with the assets. An alternative would be a letter of credit from a reputable financial institution backing up the purchaser's promise to pay.

Section 43 of the *Business Corporations Act*, S.N.B. 1981, c. B-9.1 concerning financial assistance may be relevant and should be considered. Because the financial assistance provisions of the *Business Corporations Act* are more often a problem where security is taken over the assets of a corporation to secure the unpaid purchase price of the shares of that corporation, this issue is discussed in more detail in Chapter 3.

A number of tax considerations may arise when payment of part (or all) of the purchase price is deferred, for example:

- a) **Reserves:** From a policy point of view, the *Income Tax Act* recognizes that it would be unfair to require a vendor to pay the entire tax in the year of sale where the vendor has not yet received the sale proceeds. The *Income Tax Act* therefore permits a limited deferral of tax when part of the sale proceeds is received after the year of sale. The deferral provisions, known as a "reserve" for tax purposes, are contained in subsection 40(1) of the *Income Tax Act*. The amount of the deferral is a proportion of sale proceeds not yet due. Similar reserve provisions apply to non-capital property in paragraph 20(1) (n) and subsection 20(8) of the *Income Tax Act*.
- b) **Interest:** Where the sale proceeds are deferred, the agreement may or may not provide for the payment of interest on the unpaid balance. Generally any interest paid will be deductible to the purchaser and must be included in the income of the vendor. Where a deferred payout does not provide for the payment of interest, or where the interest payable is below market rates, the vendor may be required to include in income that part of the sale proceeds which may normally be considered as interest (subsection 16(1) of the *Income Tax Act*). .
- c) **Bad Debts:** Where part or the entire purchase price owing by a purchaser is not paid and it can be established by the vendor to be uncollectible tax relief is provided to the vendor by section 50 and paragraph 20(4) of the *Income Tax Act*. Generally, the vendor will realize a capital loss in the year the debt becomes uncollectible and may deduct any capital cost allowance or goodwill amounts previously included in income.

4.1.3 Cash and earn out

An earn out is usually a purchase price adjustment mechanism which is based on the actual earning achievement of the acquired business in the period following closing and will often represent a compromise between the ability of the purchaser to pay a higher amount for the business than the person thinks it is worth and the ability of the business to in fact record earnings in the future of the amount contemplated by the vendor. Under the earn out provision, if the business earns a particular level of earnings in the future, then an increased purchase price will be paid based on those earnings. Alternatively, an earn out is a deferred payment mechanism.

In structuring an earn out great care should be taken to ensure that the provision is compatible with the accounting procedures to be used in the future and that, particularly on an asset transaction, the income attributable to the particular assets purchased and sold is identifiable.

In a reverse earn out, the sale price is set at a fixed amount with the provision that it will be reduced if future earnings do not reach specified levels.

Paragraph 12(1) (g) of the *Income Tax Act* provides that, on the sale of property, any part of the purchase price payable in instalments but depending on the revenues or profits derived by the purchaser from the property is received by the vendor as income and not as capital gain. Because future payments in an earn out are based on the earnings generated by the property acquired by the purchaser, paragraph 12(1) (g) of the *Income Tax Act* may cause payment to be income when received by the vendor even if the property that was sold was a capital property and the payments represent the sale price of the property.

To avoid the operation of paragraph 12(1) (g) of the *Income Tax Act* the purchase price should be paid by fixed amount instalments. That is, the purchase agreement must call for the payment of a definite amount on a fixed date.

4.2 Risk of Loss

The APA should clearly provide whether it will be the vendor or the purchaser who carries the risk of damage to the assets prior to closing and what options are open to the purchaser if damage occurs. Usually, risk remains with the vendor and the purchaser has the option of not completing the transaction, completing the transaction with an abatement in the purchase price or completing the transaction and receiving any insurance proceeds which otherwise would be payable to the vendor. As the assets become the property of the purchaser at closing, the purchaser should make appropriate arrangements for insurance coverage to be effective on the closing date. It is arguable that the purchaser has an insurable interest in the assets by virtue of the purchase agreement and accordingly may wish to place insurance on the assets prior to closing.

4.3 Non-competition Agreement and Consulting Agreements

Usually a purchaser intends to operate the business formerly carried on by the vendor. To be successful in doing so the purchaser will want to retain the customers and contracts of the vendor. To achieve this, the purchaser may require that the vendor and its principal shareholders covenant not to compete with the business. While the courts generally view a covenant not to compete as a restraint of trade such a covenant will be enforced if it is carefully drawn as to the length of time in which it operates and the geographic area in which it operates.

Great care should be taken as the case law in this area suggests that the courts are much more likely to enforce a non-competition agreement which is tied to a purchase agreement than one related to an employment agreement. If consideration is paid for the covenant, this will enhance its enforceability.

The purchaser may request that the vendor remain with the business for a period of time either on a part-time or consulting basis after closing. In such cases a consulting agreement would be appropriate. The consulting agreement approach is often used even where the vendor will not have that active a role in the "new" business in order to defer payment of the purchase price. Such a deferral has the advantage to the purchaser of reducing the initial payment and the advantage to the vendor of deferring receipt. The payment of consulting fees is deductible by the purchaser when paid and taxable by the vendor as received. Care must be taken in drafting a consulting agreement to ensure that the duties of the consultant are specified and that the fee for such duties will not, in the eyes of Canada Revenue Agency, be considered unreasonable. In return, the consultant must realistically be available for the performance of the duties if requested to perform them.

It is common to tie a non-competition agreement into a consulting agreement by requiring a vendor to enter into both documents and by having each run for a similar term. The advantage to the purchaser in this type of approach is that a payment under a consulting agreement is fully deductible from income and the time frame of the non-competition agreement can be usually lengthened.

These agreements should be set up as free standing agreements separate from the APA so as to ensure their survival after closing.

4.4 Personal Property Security Act (“PPSA”)

The PPSA applies to every transaction that creates a security interest without regard to its form and without regard to the person who has title to the collateral (s. 3(1) of the New Brunswick PPSA).

This clearly has the effect of levelling out the playing field in terms of the forms of competing security interests and would appear to nullify any advantage that title retention may have provided in the past. For this reason, personal property security registry searches are very important to the purchase to ensure that full and clear title is being transferred.

4.5 *Harmonized Sales Tax Act*

The *Harmonized Sales Tax Act*, S.N.B. 1997, c.H-1.01 (the "HST Act") imposes a tax of 13% on the supply of goods and services in New Brunswick. The tax is imposed only on the ultimate consumer or user. Although the tax is imposed on the purchaser, generally the HST Act requires the supplier to collect the taxes. A "supplier" means the person providing the property in any manner, including sale, which in the case of the sale of a business, would be the vendor of the assets of the business. Often when all or substantially all of the assets of a business are sold to one purchaser, the vendor and the purchaser enter a joint election regarding the payment of HST.

The tax is imposed at each point during the distribution chain and is recoverable to the extent the tax relates to consumption or use in "commercial activities" as that term is defined in the *Excise Tax Act*. Recovery of the Harmonized Sales Tax ("HST") is not available to ultimate consumers or users including persons who use the taxable goods or services in non-commercial (exempt) activities.

Section 167 and 167.1 of the *Excise Tax Act* relate to the purchase and sale of business assets and provide an exemption from the HST in the circumstances contemplated in these sections. Absent the exemption, HST applies. The HST status of all purchase and sale transactions should be addressed as HST will apply to most commercial transactions.

4.6 *Land Transfer Tax*

Pursuant to the *Real Property Transfer Tax Act*, the transfer of real property in New Brunswick will attract transfer tax payable by the purchaser unless otherwise exempt under the *Real Property Transfer Tax Act* or its Regulations.

4.7 *Non-Resident Vendors*

Pursuant to the *Income Tax Act*, non-residents are taxable on their gains from the disposition of taxable Canadian property. Taxable property includes the shares of a corporation resident in Canada as well as real or immovable property (including Canadian resource property and timber resource property) that is situated in Canada, as well as certain shares and other partnership and trust interests the value of which is, or within the previous 60 months, derived principally from real or immovable property.

It is generally the purchaser's obligation to withhold tax from the amount paid for the property unless the non-resident has obtained a clearance certificate from Canada Revenue Agency under section 116 of the *Income Tax Act*.

The definition of taxable Canadian property was recently narrowed under the 2010 federal budget to exclude from the definition shares of corporations, and other entity interests, that do not derive their value principally from real or immovable property situated in Canada, Canadian resource property or timber resource property. As a result, dispositions by non-residents of such property after March 4, 2010 are no longer taxable nor subject to the section 116 clearance certificate requirements.

4.8 *Business Corporation Act (New Brunswick) ("NBBCA")*

Section 130(1) of the NBBCA provides that a sale, lease or exchange of all or substantially all of the property of a corporation other than in the ordinary course of business of the corporation requires the approval of the shareholders of the corporation.

As well, subsection 130(5) provides that where the sale would affect a particular class or a series of shares in a manner different from another class or series of shares of the corporation which are entitled to vote on the sale, then the class of shares which is so affected, even if it is not ordinarily entitled to the right to vote, is nonetheless entitled to a right to vote. Similar provisions are found under the *Canada Business Corporations Act*.

Shareholders, who dissent on the resolution to sell, lease or exchange all or substantially all of the corporation's properties are entitled to avail themselves of the remedies set forth under section 131 of the NBBCA, namely the right to have their shares purchased by the corporation. In addition minority shareholders would be entitled to avail themselves of the other provisions of the NBBCA dealing with the minority shareholders such as the oppression remedy. For these reasons great care is exercised where opposition to a purchase of this nature is present.

Purchaser's counsel will be satisfied that the requirements of section 130 of the NBBCA have been met by seeking a certified copy of the resolution passed by the shareholders of the vendor at closing as well as an opinion of vendor's counsel.

4.9 Employees

There are often substantial employee related costs inherent in the purchase of a business. If employment is to be reduced, the cost of the reduction and who bears it must be specifically addressed in the APA and dealt with prior to closing.

4.9.1 Common Law Position

The position at common law is that upon the purchase of the assets of a business each of the employees is considered dismissed. Continuing with that approach, an employee has a duty to mitigate and seek alternative employment. During the negotiation of the purchase agreement, employment becomes a key provision to be addressed in the agreement. Often the purchaser's due diligence will include a review of all employees, along with their wages, benefits, terms of employment etc. The purchaser should include in the APA a confirmation of all employees (if any) that it will offer employment to after the purchase of the business and require that the vendor terminate employment of all employees prior to the closing date.

Those employees who are terminated by the vendor prior to closing are the responsibility of the vendor for the costs of such termination. The APA may provide that the purchaser will offer employment to all employees upon closing but that the purchaser will have a period of time following closing to operate the business and determine whether or not the purchaser in fact requires all of those employees. If the purchaser then subsequently determines that some of the employees are not required in the business then the purchaser will terminate such employees and will have a claim back against the vendor for the costs associated therewith. This method is particularly useful where a purchaser is blending the purchased business with another already operated by that purchaser and may require a period of time in which to determine employee requirements. If this method is used the purchaser should bear in mind that the costs associated with terminating that employee relate to the entire period of employment with both the vendor and the purchaser and not just for the time period with the purchaser. The obligation for payment rests with the purchaser and accordingly the purchaser should be satisfied that the purchaser has the ability to claim such amounts back from the vendor in the event that the agreement provides for such a claim being made.

4.9.2 Termination under the *Employment Standards Act*

Under the *Employment Standards Act*, S.N.B. 1982, c. E-7.2, if an employer sells the business to a purchaser who employs an employee of the employer, then the employment of that employee shall not be terminated by the sale and the period of employment with the employer shall be deemed to have been employment with the purchaser for the purposes of certain provisions of the *Employment Standards Act*,

such as pay and work on public holidays, vacation pay, maternity/paternity leave and termination of employment. Where a vendor sells the business and the purchaser does not then offer employment to an employee of that vendor then the vendor, as an employer, must comply with the *Employment Standards Act*, dealing with termination of employment.

4.9.3 Position under the *Industrial Relations Act*

Pursuant to subsection 60(2) of the *Industrial Relations Act*, R.S.N.B. 1973, c. I-4 the purchaser of a business is, until the Labour and Employment Board otherwise declares, bound by any collective agreement by which the vendor is bound and a party to any pending application for certification or termination of bargaining rights before the Board to which the vendor was a party. Subsection 60(3) protects the position of the trade union or council of trade unions, certified as bargaining agent for the employees of the vendor, as the bargaining agent for the employees of the purchaser. It should be noted that these provisions are broader than those under the *Employment Standards Act* and apply whether or not the purchaser offers employment to the vendor's employees.

4.9.4 Canada Pension Plan

In an asset purchase the purchaser will be considered a new employer for the purposes of the Canada Pension Plan and the contributions required thereunder. Accordingly, the purchaser will be required to withhold and match all required Canada Pension Plan contributions notwithstanding the fact that all payments and deductions for the year may have been made by the vendor prior to closing. While an employee can recover any overpayment in Canada Pension Plan contributions when filing a tax return, the employer cannot. Consideration should be given to the time of the closing of a transaction involving substantial employees in order to avoid double payments.

4.9.5 Other Pension Plan Contributions

In today's environment one of the most important employee related considerations is the status of pension plans and similar agreements. There are many issues surrounding this topic including on-going concerns about private versus public benefit plans, portability, early vesting, etc. In addition there may be concerns with unfunded liabilities, underfunded pension funds, or the overfunding of plans, especially given the uncertainty of investment performance in our current economic climate. Actuarial assistance will be required to advise in the question of overfunding or underfunding as well as equally complex matters such as plan splitting if the sale affects only some of the planned beneficiaries and not others.

5. Closing Agenda and Closing Deliverables

During the course of the negotiating, drafting and finalizing the asset purchase, one of the most useful tools for the lawyers and their clients is a closing agenda or closing checklist. This checklist is developed based on the terms of the deal, but usually follows a similar format in most asset purchase transactions. The closing agenda is used to track the progress of the transaction and is signed off by counsel for all parties on closing once all deliverables are made between the parties. Often included in the closing agenda are any undertakings to be provided by counsel post-closing (i.e. registration of discharges of security).

The closing agenda is moulded by the terms of the APA and provides a list of each action and deliverable under the agreement ranging from conditions precedent, to closing deliverables and payment of purchase price, to the post-closing matters. Attached hereto as Appendix 1 is a sample closing agenda (note: not all items on this list would be required in each asset purchase agreement, and, depending on the transaction, other items not listed may be necessary).

5.1 Deliverables of the vendor at closing include:

- a) Signed agreement of purchase and sale – this may actually be exchanged earlier when the date of the agreement and the closing date are not the same. Often the agreement will be signed in advance of closing as it will set out the pre-conditions to closing;
- b) All separate conveyance documents necessary to transfer title from vendor to purchaser – includes transfers of real property, assignment of leases/licences, bills of sale;
- c) Motor Vehicle registrations endorsed for transfer;
- d) Keys, passwords, operation manuals, etc. necessary to use, access or operate the assets transferred;
- e) Vendor's certificate regarding representations and warranties (sample included in Chapter 3);
- f) Vendor's solicitor's opinion regarding due authorization, execution and delivery of the documents by the vendor. In order to provide such an opinion the vendor's solicitor will have to rely on a certificate of an officer or director of the vendor corporation stating the corporate authority to enter into the agreement and sell the assets;
- g) Discharges of security on sold assets or undertaking to obtain and register from Vendor/Vendor's solicitor;
- h) Joint Election pursuant to s.167 of Part IX of the *Excise Tax Act* (Canada) (if applicable).

5.2 Deliverables of the purchaser at closing include:

- a) Signed agreement of purchase and sale – this may actually be exchanged earlier when the date of the agreement and the closing date are not the same. Often the agreement will be signed in advance of closing as it will set out the pre-conditions to closing;
- b) Purchaser's certificate regarding representations and warranties (similar to above);
- c) Payment of purchase price as indicated in the agreement of purchase and sale – may include cash/certified cheque;
- d) Promissory note if applicable, along with security documents under the promissory note in favour of the vendor;
- e) Purchaser's solicitor's legal opinion (if requested by the vendor); and
- f) Joint Election pursuant to s.167 of Part IX of the *Excise Tax Act* (Canada) (if applicable).

Appendix 1

CLOSING AGENDA

ASSET SALE BY SELLER CO. LTD. TO BUYER CO. LTD.

CLOSING: [DATE AND TIME OF CLOSING]

ESCROW: All documents called for below for Closing will be tabled in escrow and (in the absence of any special escrow agreement reached between the parties) are not to be considered as delivered until such time as the legal representatives referred to herein shall have indicated their agreement hereunder that all the terms and conditions relating to the Closing (including the execution of all documents, searches and registration or filing of documents where appropriate) have been fulfilled. Any solicitor's undertakings shall be deemed to survive Closing.

UNDERTAKING: It is expressly understood and agreed that the commencement, continuation and/or adjournment of the Closing and/or the execution of one or more of the documents referred to in this agenda by any of the parties thereto shall not be construed:

- (i) as reflecting agreement by such parties as to any of the terms and provisions thereof;
- (ii) as affecting any of their existing rights and obligations; or
- (iii) as constituting a commitment to continue with or complete the closing.

unless and until such time as the undersigned legal representatives shall have indicated their agreement that all of the terms and conditions relating to the closing have been fulfilled and completed as aforesaid.

LEGEND:

“PL”	[Purchaser Lawyer]
“Purchaser”	Buyer Co. Ltd.
“Vendor”	Seller Co. Ltd.
“VL”	[Vendor Lawyer]

The Vendor and the Purchaser are collectively the **“Parties”**.

“Standard Delivery” or “SD” means one (1) original copy to the Vendor and one (1) original copy to the Purchaser.

Except where otherwise defined herein, capitalized words shall have the same meaning as ascribed to them in the Asset Purchase Agreement between the Vendor and the Purchaser dated as of [DATE]. All references to days shall refer to calendar days except as otherwise stipulated.

LEGAL REPRESENTATION :	[LAWYER NAME]	[LAWYER NAME]
	[FIRM NAME]	[FIRM NAME]
	Counsel for the Vendor	Counsel for the Purchaser

A. CONDITIONS PRECEDENT

Item No.	Document/ Matter	Agreement/ Reference	Execution No.	Executed/ Tabled By	Delivered To
1.	Resolution of Directors Vendor approving asset purchase agreement (certified copy)	-	1	Directors of Vendor	Purchaser
2.	Resolution of Directors of Purchaser approving asset purchase agreement (certified copy)	-	1	Directors of Purchaser	Vendor
3.	Confirmation of completion of due diligence searches			Purchaser	Vendor

B. CLOSING

Item No.	Document/ Matter	Agreement/ Reference	Execution No.	Executed/ Tabled By	Delivered To
	Asset Purchase Agreement		SD	Parties	SD
	(a) Schedule Real Property		-		
	(b) Schedule Permits and Licenses		-		
	(c) Schedule List of Equipment/ Machinery		-		
	(d) Schedule Motor vehicles				
	(e) Schedule Inventory				
	(f) Schedule Intellectual Property				
	(g) Schedule Assumed Contracts				
	(h) Schedule Trademarks				
	(i) Schedule Allocation of Purchase Price				
4.	[any ancillary agreements negotiated in connection with the asset purchase agreement - i.e., supply, service, employment or, non-competition agreements]	-	SD	Vendor & Purchaser	Vendor, & Purchaser
5.	Transfer(s) of real property (E-Submission) from Vendor to Purchaser (a) Transfer (b) Affidavit of Corporate Execution (d) Affidavit of value		SD	Vendor	Purchaser
6.	Bill of Sale Absolute by Vendor including a list of all motor vehicles being transferred		1	Vendor	Purchaser
7.	Assignment of Approval & Licenses		SD	Vendor	Purchaser
8.	Assignment of Trademarks		SD	Vendor	Purchaser
9.	Transfer and Consent to use business name(s) and goodwill		1	Vendor	Purchaser

10.	Promissory Note (paying purchase in installments) along with any security to be provided in connection with the promissory note (i.e., collateral mortgage)		1	Purchaser	Vendor
11.	Delivery of endorsed transfer of registration(s) of motor vehicle(s)		1	Vendor	Purchaser
12.	Delivery of Keys to Real Property and Purchased Assets		-	Vendor	Purchaser
13.	Certificate of Purchaser re Reps and Warranties		SD	Purchaser	Vendor
14.	Certificate of Vendor re Reps and Warranties		SD	Vendor	Purchaser
15.	Declaration of Officer of Purchaser Re HST		1	Purchaser	Vendor
16.	Officer Certificate – Vendor for opinion		SD	Vendor	Purchaser
17.	Officer Certificate –Purchaser for opinion		SD	Purchaser	Vendor
18.	Statement of Adjustments		SD	Parties	SD
19.	Payment of Balance Due at Closing via certified cheque or bank draft			Purchaser	Vendor
20.	Opinion of Vendor’s Legal Counsel		SD	VL	PL and Purchaser
21.	Opinion of Purchaser’s Legal Counsel		SD	PL	VL and Vendor
22.	Certificate of Status – Vendor			Vendor	
23.	Certificate of Status – Purchaser			Purchaser	
24.	Joint Election pursuant to s.167 of Part IX of the <i>Excise Tax Act (Canada)</i>			Parties	

C. POST-CLOSING

Item No.	Document/ Matter	Agreement/ Reference	Execution No.	Executed/ Tabled By	Delivered To
	Installment payments pursuant to Promissory Note		-	Purchaser	Vendor
	Adjustments to Purchase Price (if required)			Parties	Parties

D. UNDERTAKINGS

The Vendor's solicitor hereby undertakes to obtain and register discharges of the following encumbrances on the Real Property:

- (a) Collateral Mortgage in favour of [Bank] registered as document number [#] in [county] County on [date].

The undersigned counsel respectively confirms that all terms and conditions relating to the above have been fulfilled and completed.

Dated this [date]

Counsel for Vendor

Counsel for Purchaser

THE LAW SOCIETY OF NEW BRUNSWICK

Share Purchase Transaction

Chapter 3

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Share purchase transactions

1. Share Purchase Considerations

The sale of shares owned in the capital of a corporation (“Target Corporation”) generally tends to be a more attractive route from the vendor's point of view when selling a business as the gain realized on the sale of shares will usually be treated as capital gain for income tax purposes. By comparison, the purchaser normally prefers to acquire a business through asset purchase because, on a share purchase, the after tax cost is higher as the cost of shares cannot be depreciated and the purchaser will be subject to all of the undisclosed liabilities of the vendor's business. Factors which may make a share purchase more attractive to a purchaser include: sales and transfer taxes would not be payable on share transactions; transactions of assets often appear more complex; the assets of the business may only be acquired by buying shares in some cases (for example non-assignable contracts and governmental licences); or the nature of the business is such that there is no tax advantage to proceed by asset purchase.

2. Contents of a Share Purchase Agreement

There are a number of matters addressed in most share purchase agreements (“SPA”), including:

- a) The actual purchase and sale provisions consisting of the mutual covenants of the vendor and the purchaser to sell and to purchase shares of the target corporation;
- b) The purchase price, which may be either fixed or based on a formula such as net book value as determined from audited financial statements provided at closing;
- c) The mechanics of the transaction such as the closing procedure, interim investigations, confidentiality, etc.;
- d) Representations and warranties of the vendor and purchaser which contain, for the benefit of the other, a certification of certain facts about the parties or the corporation;
- e) Survival and limitation of representations and warranties;
- f) Covenants of the vendor, the purchaser and the target corporation;
- g) Closing conditions, which specify those matters which must be completed or circumstances which must exist in order for the parties to be obligated to complete the transaction;
- h) General legal provisions such as assignability, legal form, notice, etc. (See Appendix 1 for some sample provisions that may be included in the “General Terms” of a SPA. Note that these terms vary depending on the form of SPA negotiated); and
- i) Schedules to the SPA.

In the normal course the purchaser's lawyer assures responsibility for drafting the SPA. In drafting the SPA the purchaser is looking for the vendor to disclose certain facts which will give the purchaser a fair picture of the business being purchased. These disclosures are tied to the representations and warranties (discussed below) and are often included in schedules to the SPA (see Appendix 2 attached hereto for a list of suggested schedules for disclosure by the vendor). Note that these terms vary depending on the form of SPA negotiated and the nature of the business being acquired.

2.1 Representations and Warranties

The following representations and warranties are typically included in a SPA, all of which are aimed at eliciting certain information with respect to the target corporation:

2.1.1 Representations and Warranties of Corporation and/or Vendor:

- a) that the corporation has been validly incorporated and is subsisting under the laws of the jurisdiction in which it was incorporated;
- b) stating both the authorized and issued capital of the target corporation, that there are no outstanding options and that the vendor is the beneficial owner of the shares free and clear of all liens, charges and encumbrances;
- c) that the latest audited financial statements and similar statements for one or more previous years have been prepared in accordance with generally accepted accounting principles applied on a consistent basis with those of the previous years and represent fairly the assets and liabilities of the target corporation as at a certain date;
- d) that the earnings of the target corporation during the period covered by the financial statements are not less than those set out in the financial statements;
- e) that the unaudited financial statements of the target corporation subsequent to the last audited financial statements accurately reflect the financial position of the target corporation as of the date to which they are made;
- f) that the valuation of the accounts receivable was accurate;
- g) that the amount of salaries, bonuses and other money paid to the selling shareholders and their associates is, or does not exceed, the stated amount. Accompanying this warranty should be a covenant that the amount of the remuneration which will be paid to the shareholders prior to closing will not exceed a certain amount;
- h) that no bank accounts exist other than those listed in the SPA;
- i) that all deferred compensation agreements, group life insurance agreements, pension plans and service agreements are as described in a schedule to the SPA;
- j) that all employee benefit plans, pension commitments, etc. are listed in the SPA and have been disclosed;
- k) that no contract exists involving forward commitments that will extend beyond closing for a specified period;
- l) the status of lawsuits and proceedings involving the target corporation;
- m) that the target corporation is not in default under any agreement to which it is a party; and
- n) the target corporation will have good title to its assets and will not be subject to any encumbrances other than those as specifically disclosed.

2.1.2 Representations and Warranties of Purchaser:

- a) that the purchaser has been validly incorporated and is subsisting under the laws of the jurisdiction in which it was incorporated;
- b) the purchaser's status under the *Investment Canada Act* (if applicable);
- c) the purchaser's right to purchase the shares in the target corporation;
- d) that there is no conflict with constating documents such as articles of incorporation to purchase the shares of the target corporation;
- e) that there is no conflict with any agreement to which the purchaser is party;
- f) that no third party consents are required to purchase shares in the target corporation; and
- g) that the purchaser has been authorized by all necessary corporate action to enter into the SPA.

Typically a legal opinion will be required of the vendor's solicitor as to a number of matters involving the target corporation such as its incorporation, status, issued and outstanding shares, authorization and execution of the SPA. As a matter of practice, the purchaser's solicitor should require a certificate at closing from the vendor that all representations and warranties remain accurate as of closing. Attached hereto as Appendix 3 is a sample of such a certificate (sometimes referred to as a "Bring down Certificate"). A similar certificate may be requested by the vendor from the purchaser at closing.

2.2 Third Party Contracts and Approvals

Agreements and other contracts will often contain a "change of control" clause which requires the approval of the other parties to the agreement if control of the target corporation changes by way of a sale of shares or otherwise. In these cases the approval of the necessary third parties must be obtained if the target corporation is to retain the benefit of contracts. Moreover, if the business is a regulated one, the applicable legislation may also provide that upon a change of control the approval of the regulatory authority must be obtained.

2.3 Non-Competition Clauses

As is the case in asset purchase agreements, it is essential to have a non-competition agreement if the purchaser does not wish to merely finance a new competitor. The non-competition agreement should be in favour of both the purchaser and the target corporation, as in most cases, the vendor would be competing with the business which has been sold rather than directly against the purchaser.

2.4 Conditions Precedent

The SPA will contain a number of conditions which if not satisfied will give the purchaser the right terminate the transaction. Such conditions may include obtaining consents and approvals, a restructuring of share capital or satisfactory due diligence.

2.5 Price Clauses

The vendor and purchaser may reach an agreement with respect to the purchase and sale of the business in a letter of intent prior to the SPA. If this happens, for example, on January 1, the parties may allow a reasonable period; say three months, for the searches and paperwork to be completed so that the closing and the payment of the purchase price occurs on March 31.

The amount of the purchase price is often fixed in the letter of intent (in this case January 1) and the profits or losses of the business in the three month interval will be for the account of the purchaser. The purchaser has therefore effectively acquired the business as of January 1 although the purchaser did not pay for or acquire title to the shares until March 31 and in this situation it is very important for the share purchase agreement to contain covenants as to the preservation of the business and the assets and profits of the business during the period pending closing. The vendor may be concerned with the method of price determination and may insist on a post-closing adjustment based on the financial position of the corporation at closing. In this case the parties are really agreeing on a prospective price determination when they enter into the letter of intent on January 1 because they are agreeing to buy and sell the shares of the corporation on March 31 at a price to be determined on March 31 based on facts which exist in fact on that day.

The considerations discussed under asset purchase transactions in Chapter 2 are relevant in determining whether the purchase price is payable in cash, cash plus a promise to pay or on an earn out basis. The most obvious security for the unpaid purchase price in a share purchase transaction is a pledge of the purchased shares. Whether or not the agreement takes the form of a pledge or an escrow (a provision by which the entire transaction is placed "on hold" until the occurrence of specified events), possession of the share certificates representing the shares should be taken to perfect the security interest.

A first charge against the purchased shares may not be available if third party financing is being used by the purchaser to make the acquisition and the vendor may consider a second charge on the purchased shares to be inadequate to secure the portion of the purchase price which remains unpaid after closing. Undoubtedly the assets of the target corporation will likely be subject to a prior charge in favour of a third party lender which leaves very few alternatives.

A second charge behind a third party lender should not be rejected automatically, although there may be little residual value in the case of the realization of the security.

The purchaser may be in a position to provide the vendor with security on other assets of the purchaser or may be able to provide a letter of credit from a bank or third party guarantee. The bank letter of credit is a very useful and effective means of providing security for the unpaid purchase price.

In certain cases the parties will want to secure the unpaid portion of the purchase price with the assets of the target corporation. Section 43(2) of the NBBCA prohibits a corporation or any of its affiliates from making a loan to any person that is secured by a share of the corporation, or giving financial assistance to any person for the purpose of or in connection with the purchase of a share of the corporation, other than as specifically permitted by subsection 43(3). That subsection permits a corporation to give financial assistance to a holding body corporate if the corporation is a wholly owned subsidiary of the holding body corporate or to a subsidiary body corporate. In any event, careful consideration must be given to the provisions of the NBBCA when a corporation is giving assistance of any kind in connection with the purchase of its shares.

3. *Securities Act* Considerations

If a corporation is a reporting issuer for securities law purposes (including, i.e., if its shares are listed on a stock exchange) or in certain specific circumstances (depending on a number of factors as illustrated in the *Securities Act*) the sale of shares may constitute a take-over bid, and the provisions of the *Securities Act*, S.N.B. 2004, c. S-5.5 should be reviewed.

4. NBBCA – Take-Over Bids

Where an offer is made for all the shares of a class of shares of a target corporation, a shareholder of shares in that class who does not accept the offer is a dissenting offeree and may fall subject to the provisions for take-over bids under the NBBCA (section 133).

If within 120 days after the date of an offer to purchase shares the offer is accepted by the holders of not less than 90% of the shares of any class of shares to which the offer relates, other than shares held at the date of the offer by or on behalf of the offeror or an affiliate or associate of the offeror, the offeror is entitled, upon complying with the NBBCA, to acquire the shares held by the dissenting offeree(s).

The offeror may acquire the shares in the target corporation held by a dissenting offeree by sending notice in accordance with s.133 (3) of the NBBCA to each dissenting offeree and to the Director stating that:

- a) the offerees holding more than 90% of the shares to which the offer relates accepted the offer;
- b) the offeror is bound to take up and pay for or has taken up and paid for the shares of the offerees who accepted the offer;
- c) a dissenting offeree is required to elect
 - i. to transfer his shares to the offeror on the terms on which the offeror acquired the shares of the offerees who accepted the offer, or
 - ii. to demand payment of the fair value of his shares in accordance with subsections 133(9) to (16) of the NBBCA by notifying the offeror within 20 days after he receives the offeror's notice;
- d) a dissenting offeree who does not notify the offeror in accordance with subparagraph 133(3)(c)(ii) is deemed to have elected to transfer his shares to the offeror on the same terms that the offeror acquired the shares from the offerees who accepted the offer; and
- e) a dissenting offeree must send his shares to which the offer relates to the target corporation within 20 days after he receives the offeror's notice.

Concurrently with sending the notice to a dissenting offeree, the offeror must send to the target corporation a copy of the notice, which will constitute a demand under subsection 88(1) of the *Securities Transfer Act* that the target corporation not register a transfer with respect to each share held by a dissenting offeree.

A dissenting offeree who receives the offeror's notice must, within 20 days after receipt of the notice, send his share certificates of the class of shares to which the offer relates to the target corporation and, within 20 days after the offeror sends the notice, the offeror must pay or transfer to the target corporation the amount of money that the offeror would have had to pay or transfer to a dissenting offeree if the dissenting offeree had elected to transfer his shares on the terms on which the offeror acquired the shares of the offerees who accepted the original offer.

Upon receipt of funds from the offeror, the target corporation is deemed to hold the funds in trust for the dissenting shareholders. Within 30 days after the offeror sends notice under subsection 133(3) of the NBBCA, the target corporation shall issue to the offeror a share certificate for the shares that were held by dissenting offeree(s); and give to each dissenting offeree who elects to transfer his shares under subparagraph 133(3)(c)(i) and who sends his share certificates as required, the money he is entitled; and send to each dissenting shareholder who has not sent his share certificates as required under subsection 133(5) a notice stating that:

- i. his shares have been cancelled;
- ii. the target corporation or some designated person holds in trust for him the money to which he is entitled as payment for or in exchange for his shares; and
- iii. the target corporation will, subject to subsections 133(9) to (16) of the NBBCA, send that money or other consideration to him upon receiving his shares.

If a dissenting offeree elects to demand payment of the fair value of his shares, the offeror or the offeree may apply to the Court to fix the fair value of the shares of that dissenting offeree. Upon application to the Court, all dissenting offerees whose shares have not yet been acquired by the offeror are joined as parties and are bound by the decision of the Court.

The offeror must notify each affected dissenting offeree of the date, place and consequences of the application and of his right to appear and be heard in the application either in person or by counsel.

In determining the fair market value, the Court may use its discretion to appoint an appraiser(s) to assist in fixing the value of the shares. The final order of the Court is made against the offeror in favour of each dissenting offeree for the amount for his shares as fixed by the Court and may include a rate of interest on the amount payable to each dissenting offeree from the date he sends or delivers his share certificates until the date of payment.

5. Income Tax Issues and Considerations in a Share Purchase Transaction

5.1 Overview

In general terms, the sale of shares by a vendor will usually result in a capital gain, 50% of which gain will be required to be included in the income of the vendor as a taxable capital gain.

If the vendor is an individual, a part or all of this gain may be exempt from tax under the lifetime cumulative capital gains exemption.

The maximum amount of gain which may be exempt is \$500,000 and this amount is dependent upon a number of tax attributes of the vendor including:

- a) prior capital gains exemption claimed; and

- b) cumulative investment activities.

As well, the shares sold must be shares in a qualifying small business corporation.

Generally, a small business corporation is a Canadian-controlled private corporation substantially all of whose assets are used in carrying on an active business in Canada or is a holding corporation for this type of corporation at the time of sale.

Further tests are applied in the 24 months prior to sale:

- a) Generally, if the company is an operating company owned by individuals, more than 50% of the gross value of its assets must be attributable to assets used in a Canadian active business throughout the 24 month period;
- b) A holding company, operating company situation involves complex tests which should be carried out by a tax specialist;
- c) Certain prior non-arm's-length transactions and business transfers use a holding period test less than 24 months.

5.2 Reserves

Where a portion of the purchase price is to be paid over a period of time, the vendor is entitled to the reserve discussed in Chapter 2.

If the proceeds are dependent on the earnings of the corporation, Canada Revenue Agency has taken the administrative position in IT-426R, "Shares Sold Subject to an Earnout Agreement", that they will not apply the income inclusion provisions of paragraph 12(1) (g) if the following conditions apply:

- a) the vendor and purchaser are dealing with each other at arm's length;
- b) the gain or loss on the sale is clearly of a capital nature;
- c) it is reasonable to assume that the earnout feature relates to goodwill the value of which cannot reasonably be expected to be agreed upon by the vendor and purchaser at the date of the sale;
- d) the duration of the sale agreement does not exceed five years; and
- e) the vendor submits, with the return of income for the year in which the shares were disposed of, a copy of the sale agreement. The vendor also submits with that return a letter requesting the application of the cost recovery method to the sale, and an undertaking to follow the procedure of reporting the gain or loss on the sale under the cost recovery method as outlined in the Bulletin.

5.3 Bad Debts

If the vendor can establish all or a portion of the sale proceeds to be uncollectible, a claim for a capital loss under section 50 of the *Income Tax Act* may be made.

5.4 Tax Returns

Tax legislation requires separate federal income tax returns to be filed on a change of control of a corporation for the period ending on the effective date of the change of control. The *Income Tax Act* contains no definition of "change of control" but case law has generally held it to mean the acquisition of more than fifty percent of the voting shares of a corporation. Accordingly, there will be a change of control in most transactions involving the purchase and sale of a business. There is an exception to this requirement if the change of control occurs within 7 days of the corporation's normal fiscal year end.

5.5 Losses

If a corporation suffers a loss from a business in a year, that loss can be used to reduce any other source of income of the corporation for the year in which the loss was incurred.

If the corporation does not have sufficient other income to utilize the entire loss in the year it was incurred, the loss can be carried back to reduce the income of the corporation in the prior three taxation years and in the seven years following the year the loss is incurred. For example, if the loss was incurred in 2007, the loss could be used to reduce the income of the corporation for any of the years 2004 to 2014. Similar rules apply to losses incurred on the disposition of capital assets but in this case, the loss can only be used to reduce capital gains (not business income) and the carry over period is three years back and forward indefinitely.

For many years, tax policy has attempted to restrict the use of losses incurred by a corporation to the corporation which actually incurred the loss or related corporations.

It was perceived that this policy could be abused if the control of a corporation changed. A typical example would be where a purchaser acquires all the shares of a corporation with losses and the purchaser then amalgamates the loss company with another profitable company owned by the purchaser. Subject to certain restrictions in the *Income Tax Act*, the losses of the acquired company could be used to reduce the income of the profitable company after the amalgamation. In order to prevent this "trading in tax losses", the *Income Tax Act* contains a number of complicated restrictions on the use of losses in the event of a change of control. It is important that these provisions be considered when acting for a purchaser on a share transaction.

The restriction on use of business losses (defined as "non-capital losses" in the *Income Tax Act*) are contained in subsection 111(5) of the *Income Tax Act*. Generally, these rules provide that after a change of control, losses will only be deductible against profits of the corporation in the later year:

- a) if the business which produced the loss was carried on with a reasonable expectation of profit;
and
- b) the loss can only be used to reduce income arising from the same or a similar business as that which produced the loss.

It would be advisable to identify which business the losses relate to in case there is more than one business or in case the business in which the losses arose is no longer being carried on.

The restriction in respect to capital losses is even more stringent. Under subsection 111(4) of the *Income Tax Act*, capital losses simply cannot be carried forward after a change of control.

5.6 Tax Liabilities of Target Corporation

The purchaser should always investigate the target corporation's tax position and the extent of its tax liabilities prior to entering into the SPA with the vendor. Depending on the circumstances, this could involve a review of the target corporation's federal and provincial tax returns and all assessments and reassessments. In addition, the purchaser will typically seek to protect itself by requiring that the vendor provide appropriate representations, warranties and indemnities in the SPA relating to the various significant tax matters and liabilities.

5.7 Associated Company Rules

If the purchaser is a corporation it must calculate the effect on its small business deduction or on the small business deduction of the target corporation, as a result of the purchase.

6. Closing Agenda and Closing Deliverables

In completing the share purchase transaction, the closing will include more than delivery of purchase price in exchange for the share certificates (see Appendix 5 for a sample share purchase Closing Agenda).

The following is a summary of the actions and deliverables typically made in a share purchase transaction:

- a) Original Share Certificate duly endorsed for transfer (or with appropriate instrument of transfer);
- b) Releases - it is prudent to obtain from the shareholders, directors and officers of the target corporation comprehensive releases of claims that they may have in any of their respective capacities against the target corporation and the purchaser (attached as Appendix 4 is a sample release);
- c) New share certificates in purchaser's name;
- d) Resignations of officers and directors (and releases, if required by vendor or purchaser or both). Consents to act and appointments of new directors and officers;
- e) Delivery of books, records, and corporate seal for target corporation;
- f) Minutes of directors' meetings or unanimous directors' resolutions in writing authorizing transfer of shares and the transaction by the target corporation. Consider similar resolutions for corporate vendor, together with shareholders' resolution (if applicable);
- g) Delivery of title documents for target corporation's assets;
- h) Certificates of accuracy of representations and warranties by vendor, purchaser and target corporation;
- i) Certificate under s. 116(2) or (4) of the *Income Tax Act* (non-resident vendor only);
- j) Discharges of security (if applicable) or undertakings regarding same;
- k) Opinions of solicitors;
- l) Evidence of compliance with *Investment Canada Act*, *Competition Act*, and other statutes, as required;
- m) Any additional contracts contemplated in the SPA;
- n) Consents and approvals, as required;
- o) All other documents required by purchaser; and
- p) Payment of purchase price.

7. Post-Closing Matters

Upon closing the share purchase, certain filings which may be required include:

- a) File tax election as necessary and/or applicable;
- b) File documents under the *Securities Act* (if applicable);
- c) Notice of investment by non-canadian under the *Investment Canada Act* (if applicable); and
- d) Notice of Change of Directors and Notice of Change of Registered Office (if applicable) to Corporate Affairs.

Appendix 1

GENERAL TERMS

1. Gender and Number - Words importing the singular include the plural and vice versa; words importing gender include both genders.
2. Entire Agreement - This Agreement, including the Schedules hereto, together with the agreements and other documents to be delivered contemporaneously herewith or pursuant hereto, constitute the entire agreement between the Parties pertaining to the subject matter hereof and supersede all prior agreements, understandings, negotiations and discussions, whether oral or written, of the Parties and there are no warranties, representations or other agreements between the Parties in connection with the subject matter hereof except as specifically set forth herein and therein.
3. Waivers, etc. - No supplement, modification, waiver or termination of this Agreement shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Agreement, in whole or in part, shall be deemed or shall constitute a waiver of any other provisions hereof (whether or not similar), nor shall such waiver constitute a continuing waiver unless otherwise expressly provided.
4. Headings - The Article and Section headings contained herein are included solely for convenience of reference, are not intended to be full or accurate descriptions of the content thereof and shall not be considered part of this Agreement.
5. Applicable Law - This Agreement and the rights, obligations and relations of the Parties shall be governed by and construed in accordance with the laws of the Province of New Brunswick and the courts of New Brunswick shall have exclusive jurisdiction to entertain any action in connection with this Agreement.
6. Currency - Unless otherwise specified, all references to currency herein are deemed to mean lawful money of Canada, and all amounts to be paid or calculated pursuant to this Agreement are to be paid or calculated in lawful money of Canada.
7. Accounting Terms - All accounting terms shall have the meanings ascribed to them in accordance with generally accepted accounting principle, and all references to “generally accepted accounting principles” shall be deemed to be, unless otherwise specified, reference to accounting principles which are generally accepted in Canada.
8. Expenses - Except as otherwise provided herein, all costs and expenses (including, without limitation, the fees and disbursements of legal counsel) incurred in connection with this Agreement and the transactions contemplated hereby shall be paid by the Party incurring such expenses.
9. Time - Time shall be of the essence hereof.
10. Any notices, direction or other document required or permitted to be given hereunder or for the purposes hereof (hereinafter in this Section called a “notice”) to any Party shall be in writing and shall be sufficiently given if delivered personally, or if sent by prepaid registered mail or if transmitted by telex, facsimile or other form of recorded communication tested prior to transmission to such Party with a copy sent by mail:
 - a) In the case of a notice to the Vendor at:

{ Address }
 { Fax number }
 { Email }

b) In the case of a notice to the Purchaser at:

{ Address }
 { Fax number }
 { Email }

Or at such other address as the Party to whom such writing is given shall have last notified the Party giving the same in the manner provided in this Section. Any notice delivered to the Party to whom it is addressed as herein before provided shall be deemed to have been given and received on the day it is so delivered at such address, provided that if such day is not a Business Day then the notice shall be deemed to have been given and received on the first Business Day next following such day. Any notice mailed as aforesaid shall be deemed to have been given and received on the fifth Business Day following the date of its mailing, provided that in the event of a disruption to the postal service the notice will only be effective if delivered in person or sent by telex, facsimile or other form of recorded communication. Any notice transmitted by telex, facsimile or other form of recorded communication shall be deemed given and received on the first Business Day after its transmission.

- 11. Assignment** - Neither this Agreement nor any rights or obligations hereunder shall be assignable by any Party without the prior written consent of the other Parties hereto. Subject to the foregoing provision of this Section, this Agreement shall enure to the benefit of and be binding upon the Parties and their respective heirs, executors, administrators and successors and permitted assigns.
- 12. Further Assurances** - The Parties hereto shall with reasonable diligence do all such things and provide all such reasonable assurances as may be required to consummate the transactions contemplated hereby, and each Party shall provide such further documents or instruments required by any other Party as may be reasonably necessary or desirable to effect the purpose of this Agreement and carry out its provisions, whether before or after the Closing.
- 13. Severability** - If any covenant or provision of this Agreement is prohibited in whole or in part in any jurisdiction, such covenant or provision shall, as to such jurisdiction, be ineffective to the extent of such prohibition without invalidating the remaining covenants and provisions hereof and shall, as to such jurisdiction, be deemed to be severed from the Agreement to the extent of such prohibition.
- 14. Counterparts** - This Agreement may be executed by the Parties in separate counterparts each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute one and the same instrument.
- 15. Disclosure** – The parties hereby covenant and agree to keep the existence and the terms and conditions of this Agreement strictly confidential and not to disclose the existence of this Agreement or its terms or the nature of the transaction contemplated by the parties including, without limitation, any information concerning negotiations and price, except to their respective financial, tax, legal and other advisers, bankers or other Persons whose consent is herein required or required by law. No public announcement regarding the transaction contemplated by this Agreement shall be made unless the content of such announcement is consented to and approved by the Vendors and the Purchaser. Notwithstanding anything else contained herein, this clause shall survive the termination of this Agreement and any acquisition or sale contemplated by the parties and shall remain in full force and effect to the greatest extent permitted by law for the benefit of the Purchaser and the Vendor.

- 16. Facsimile Documents** - The Parties agree that the transmission of documents and agreements incidental or supplemental hereto by facsimile transmission with the signature of a Party appearing thereon shall constitute due execution and delivery by that Party of the document or agreement to the Party receiving the transmission if the transmission is acknowledged by the recipient by facsimile transmission.

Appendix 2

<u>Schedule</u>	<u>Contents of Schedule</u>
Authorized and Issued Capital	Full list of all authorized and issued capital of the Target Corporation along with the name(s) of shareholder(s) and each one's holdings in the Corporation.
Financial Statements	Depending on the transaction, the purchaser/purchaser's accountant will want to review past financial statements of the Target Corporation (audited and/or unaudited).
Liabilities Not Disclosed in Financial Statements	Include anything that is not caught in the disclosed financial statement that would be a liability of the Target Corporation.
Equipment and Other Personal Property Leases	Information/details of personal property leases including lessor name, the term of the lease and amount, the property it relates to etc.
Legal Description of Real Property Owned	All real property owned by the Target Corporation.
Leased Real Property	All real property leased by the Target Corporation.
Consents	Identify the consents, approvals, authorizations, filing and notice requirements in connection with the consummation of the share purchase transaction.
Supplier Contracts	Identify: all major contracts and outstanding purchase orders for purchase of inventory, equipment and supplies; all contracts of commitment for utilities, including status of such accounts (gas, electricity, water, sewage, etc.); and all franchise or royalty agreements. 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 Target Corporation.
Material Contracts	Identify material contracts entered into and determine assignability/change of control provisions and presence of onerous terms. Includes any contracts proposed to be entered into by the corporation for acquisition, sale or lease of assets. Review all loan agreements or other contracts that may restrict activities of the Target Corporation. Examples of material contracts: 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.
Pension Plan	Includes pension and benefit plans and incentive agreements.
Litigation	All litigation matters, whether current or threatened which involves or may involve the Target Corporation.
Directors, Officers and Employees	List of all directors, officers and employees.
Bank Accounts	List of all the Target Corporation's accounts, often includes branch address, account number and signing officers for each account.
Particulars of Insurance Policies	Information on all insurance policies covering the Target Corporation. Identify all insurance policies that are held and cover the Target Corporation

<u>Schedule</u>	<u>Contents of Schedule</u>
	for its key managers, including name of insurer, type of risk covered, annual premium, deductible amount, coverage, limits and expiration date of each policy.
Equipment	List of all owned equipment and assets of the Target Corporation and may include location of the items where multiple places of business are used by the Target Corporation.
Environmental Matters	Disclosure of claims, matters or concerns of an environmental nature and under environmental laws. List all environmental permits, licences, approvals or registrations held for environmental laws or involving hazardous substances. Identify all claims, orders, charges, investigations or other proceedings relating to past and present operations under environmental laws or involving hazardous substances. Identify any violations or alleged violations of environmental laws. Identify above and underground storage tanks located on property owned, leased, controlled or used. 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 (UFFI) in any buildings or any PCBs used or stored on the property owned or occupied by the Target Corporation.
Intellectual Property	Information regarding the intellectual property owned or leased or authorised for use by the Target Corporation.
Non-Arms Length Transactions	Any related company/party transactions including loans and supply contracts involving the Target Corporation.
Consents/Approvals	Identify all licences granted to the Target Corporation to do business. (confirming that such licences are current and such licences can be assigned, or in the case of share purchase, that change in control does not negate the licence). Identify all regulatory approvals for all necessary licences.

Note: This is not an exhaustive list. The schedules and disclosures required in each transaction will depend on the circumstances, nature of the business and the knowledge of the parties involved.

Appendix 3

BRING DOWN CERTIFICATE – VENDOR

TO: *[name of purchaser]* (the “Purchaser”)

RE: Share Purchase Agreement dated as of *[DATE OF ORIGINAL AGREEMENT]* between the Purchaser, and the undersigned (the “Share Purchase Agreement”)

This certificate is being delivered pursuant to Article *[Insert paragraph reference in the Share Purchase Agreement of the provisions dealing with Vendor representations and warranties]* of the Share Purchase Agreement. Capitalized terms used herein and not defined have the meanings assigned to them in the Share Purchase Agreement.

The undersigned hereby certifies that the representations and warranties of the Vendor contained in the Share Purchase Agreement are true and correct as of the date hereof and that the Vendor has complied with or performed all of the terms, covenants and conditions required to be complied with or performed by them thereunder.

IN WITNESS WHEREOF, the undersigned has executed this certificate as of the *[DATE OF CLOSING]*.

Appendix 4

RELEASE

TO: [Corporation] (the “**Releasee**”)

IN CONSIDERATION of the sum of One Dollar (\$1.00) of lawful money of Canada now paid to each of them by the Releasee, the receipt and sufficiency of which is hereby acknowledged by each of the Releasors, each of the Releasors does hereby for itself and its respective heirs, executors, administrators, successors and assigns release, remise and forever discharge the Releasee and its successors and assigns of and from all manner of actions, causes of actions, suits, debts, dues, accounts, bonds, covenants, contracts and claims and demands for damages, indemnity, costs, interest or loss of every nature and kind whatsoever and howsoever arising, either at law or in equity, that the Releasors ever had, now have or may or hereafter have or that its heirs, executors, administrators, successors or assigns or any of them hereafter can, shall or may have against the Releasee for or by reason of or in any way connected with any cause, matter, thing or obligation whatsoever relating to the business and affairs of the Releasee including for greater certainty, but without in any way limiting the generality of the foregoing, any and all claims for salary, wages, bonuses, expenses, stock options, retirement or pension allowances, participation in profits, earnings or other remuneration, or any other cause, matter, thing or obligation arising as a result of or in respect of or in consequence of the Releasors having been a director, officer, agent, shareholder, independent contractor and/or employee of the Releasee.

AND FOR THE SAID CONSIDERATION the Releasors further agree not to make any claim or take or participate in any proceedings either alone or with any other person against any person in which any claim could arise against the Releasee for contribution or indemnity or any other relief over in respect of any matters released hereunder.

Where used in this Release the term “person” means any individual partnership, limited partnership, joint venture, syndicate, sole proprietorship, company or corporation with or without share capital, unincorporated association, trust, trustee, executor, administrator or other legal, personal representative, regulatory body or agent, government or governmental agency, authority or entity, howsoever designated or constituted.

Appendix 5

CLOSING AGENDA
SHARE PURCHASE
 of
[TARGET CORPORATION] (the “Corporation”)
 BY
[BUYER CORPORATION] (the “Purchaser”)

CLOSING: [DATE AND TIME OF CLOSING]

ESCROW: All documents called for below for Closing will be tabled in escrow and (in the absence of any special escrow agreement reached between the parties) are not to be considered as delivered until such time as the legal representatives referred to herein shall have indicated their agreement hereunder that all the terms and conditions relating to the Closing (including the execution of all documents, searches and registration or filing of documents where appropriate) have been fulfilled. Any solicitor’s undertakings shall be deemed to survive Closing.

UNDERTAKING: It is expressly understood and agreed that the commencement, continuation and/or adjournment of the Closing and/or the execution of one or more of the documents referred to in this agenda by any of the parties thereto shall not be construed:

- (i) as reflecting agreement by such parties as to any of the terms and provisions thereof;
- (ii) as affecting any of their existing rights and obligations; or
- (iii) as constituting a commitment to continue with or complete the closing.

unless and until such time as the undersigned legal representatives shall have indicated their agreement that all of the terms and conditions relating to the closing have been fulfilled and completed as aforesaid.

DEFINITIONS: The Vendor and the Purchaser are collectively the **“Parties”**.

“Standard Delivery” or “SD” means one (1) original copy to the Vendor and one (1) original copy to the Purchaser.

Except where otherwise defined herein, capitalized words shall have the same meaning as ascribed to them in the Share Purchase Agreement between the Vendor and the Purchaser dated [DATE]. All references to days shall refer to calendar days except as otherwise stipulated.

LEGAL REPRESENTATION :	[LAWYER NAME] [FIRM NAME] Counsel for the Purchaser	[LAWYER NAME] [FIRM NAME] Counsel for the Vendor(s) and the Corporation
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A. CONDITIONS PRECEDENT

Item No.	Document/ Matter	Agreement/ Reference	Execution No.	Executed/ Tabled By	Delivered To
1.	Completion of Purchaser's due diligence			Purchaser	n/a
2.	Notice of Termination of Pension Plan by the Corporation		-	Vendor/Corporation	Purchaser
3.	Satisfactory review by Purchaser of Corporation's restructuring			Vendor/Corporation	Purchaser

B. CLOSING DOCUMENTS & MATTERS

Item No.	Document/ Matter	Agreement/ Reference	Execution No.	Executed/ Tabled By	Delivered To
	Certified Directors' Resolution of the Vendor approving Share Purchase Agreement		1	Vendor	Purchaser
4.	Share Purchase Agreement			Parties	SD
	(a) Schedule – Allocation of Purchase Price			Vendor	
	(b) Schedule – Related Party Debts			Vendor	
	(c) Schedule – Authorized and Issued Capital			Vendor	
	(d) Schedule – Financial Statements			Vendor	
	(e) Schedule – Liabilities Not Disclosed in Financial Statements			Vendor	
	(f) Schedule - Restructuring Plan			Vendor	
	(g) Schedule - Payment of Dividends or Disbursements			Vendor	
	(h) Schedule - Liens, Charges and Encumbrances			Vendor	
	(i) Schedule - Equipment and other Personal Property Leases			Vendor	
	(j) Schedule - Legal Description of Real Property Owned			Vendor	
	(k) Schedule - Contracts to Supply			Vendor	
	(l) Schedule - Contracts to Purchase			Vendor	
	(m) Schedule - Other Material Contracts			Vendor	

Item No.	Document/ Matter	Agreement/ Reference	Execution No.	Executed/ Tabled By	Delivered To
	(n) Schedule - Pension Plan			Vendor	
	(o) Schedule – Litigation			Vendor	
	(p) Schedule - Directors, Officers and Employees, etc.			Vendor	
	(q) Schedule - Bank Accounts, etc.			Vendor	
	(r) Schedule - Particulars of Insurance Policies			Vendor	
	(s) Schedule - Vehicular Equipment			Vendor	
	(t) Schedule - Environmental Matters			Vendor	
	(u) Schedule - Intellectual Property			Vendor	
	(v) Schedule - Non-Arms Length Transactions			Vendor	
	(w) Schedule - Form of Opinion of Vendor’s Counsel			Purchaser’s Counsel to prepare	
	(x) Schedule - Release				
	(y) Schedule – Non-Competition Agreement			Vendor	
5.	Resolution of directors of Corporation authorizing share transfer			Directors of Corporation	Purchaser
6.	Surrender & cancellation of Share Certificate No. ● [common share] with Stock Power of Attorney for transfer to Purchaser from Vendor			Vendor	Corporation
7.	Issuance of Certificate No. ● for [● common shares] in Corporation to Purchaser			Corporation	Purchaser
8.	Release of Corporation by Vendor			Vendor	Corporation
9.	Resignations of following individuals as officers/directors of Corporation: [names]			Individual(s)	Corporation
10.	Directors' Resolution of Corporation accepting resignations of old officers, appointing new officers, appointing new recognized agent and changing registered office address			Vendor	

Item No.	Document/ Matter	Agreement/ Reference	Execution No.	Executed/ Tabled By	Delivered To
11.	Shareholder's Resolution of Corporation accepting resignations of old directors and appointing new directors			Purchaser	n/a
12.	Non-Competition Agreement from Vendor			Vendor	
13.	[Other Agreements as contemplated in SPA]				
14.	Payment of Purchase Price via certified cheque or wire transfer		n/a	Purchaser	Vendor
15.	Delivery of Books and Records of Acquired Corporation			Vendor	Purchaser
16.	Opinion of Vendor's Legal Counsel		2	Vendors' counsel	Purchaser's Counsel

C. POST-CLOSING

Item No.	Document/ Matter	Agreement/ Reference	Execution No.	Executed/ Tabled By	Delivered To
	Closing Working Capital Calculation or other Post-Closing Adjustment required				
	Payment of Post-Closing Adjustments				
	Accounts Receivable Adjustment			Parties	
	File Notice of Change of Directors			Corporation	
	File Notice of Change of Registered Office			Corporation	
	Update Shareholders Register, Directors Register & List of Officers			Corporation	

The undersigned counsel respectively confirm that all terms and conditions relating to the above have been fulfilled and completed.

Dated [DATE].

[Lawyer Name]
Counsel for Purchaser

[Lawyer Name]
Counsel for Vendor and Corporation