



**Law Society**  
of Ontario

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de l'Ontario

# Buying or Selling a Business 2024

## CO-CHAIRS

**Ryan Done**

*Miller Thomson LLP (London Office)*

**Anna Naud**

*True North Law*

March 19, 2024







**Law Society**  
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# Buying or Selling a Business 2024



CO-CHAIRS: **Ryan Done**, *Miller Thomson LLP (London Office)*

**Anna Naud**, *True North Law*

**March 19, 2024**

**9:00 a.m. to 12:00 p.m.**

**Total CPD Hours = 2 h 30 m Substantive + 30 m Professionalism P**

**Webcast Only**

**SKU CLE24-00307**

## **Agenda**

**9:00 a.m. – 9:05 a.m.**

**Welcome**

*Ryan Done, Miller Thomson LLP (London Office)*

*Anna Naud, True North Law P.C.*



<b>9:05 a.m. – 9:30 a.m.</b>	<b>Intellectual Property Law Issues in a Transaction</b>  Kathleen Lemieux, <i>Borden Ladner Gervais LLP (Ottawa Office)</i>  Chandimal Nicholas, <i>Cassels Brock &amp; Blackwell LLP</i>
<b>9:30 a.m. – 9:50 a.m.</b>	<b>Mock Negotiation of Indemnities in a Sale Transaction</b>  Jennifer Prieto, <i>Davies Ward Phillips &amp; Vineberg LLP</i>  Ghaith Sibai, <i>Davies Ward Phillips &amp; Vineberg LLP</i>
<b>9:50 a.m. – 10:10 a.m.</b>	<b>Labour and Employment Law Issues in a Transaction</b>  Kelly O’Ferrall, <i>Osler, Hoskin &amp; Harcourt LLP</i>  Joel Smith, <i>Williams HR Law LLP</i>
<b>10:10 a.m. – 10:20 a.m.</b>	<b>Question and Answer Session</b>
<b>10:20 a.m. – 10:40 a.m.</b>	<b>Break</b>
<b>10:40 a.m. – 11:00 a.m.</b>	<b>Tax Law Issues in a Transaction</b>  Kenneth Saddington, <i>Goodmans LLP</i>  Simon Thang, <i>Thang Tax Law</i>
<b>11:00 a.m. – 11:30 a.m.</b>	<b>When I Find Myself in Times of Trouble: Professionalism Issues in Transactions for Business and In-House Lawyers (30 m )</b>  Sarah Mansour, General Counsel, <i>Mazda Canada Inc.</i>  Ian Palm, <i>Fasken Martineau DuMoulin LLP</i>  Jeffrey Simpson, <i>Torkin Manes LLP</i>



**11:30 a.m. – 11:50 a.m.**

**Tips and Tricks in Running a Sales Process**

Grant Buchan-Terrell, Principal, *gbtlaw*

Joanna Gibbons, *PwC Canada*

**11:50 a.m. – 12:00 p.m.**

**Question and Answer Session**

**12:00 p.m.**

**Program Ends**





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\*One Homewood Health e-learning course is eligible for the credit on a yearly basis.



# Buying or Selling a Business 2024

March 19, 2024

SKU CLE24-00307

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Grant Buchan-Terrell, *gbtnlaw*





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## TAB 1

# Buying or Selling a Business 2024

What Business Lawyers Need to Know About  
Intellectual Property Law (PowerPoint)

Sample Intellectual Property (IP) Due Diligence  
Checklist

**Chandimal Nicholas**

*Cassels Brock & Blackwell LLP*

**Kathleen Lemieux**

*Borden Ladner Gervais LLP (Ottawa Office)*

Intellectual Property Law Issues in a  
Transaction - Questions & Answer

**Kathleen Lemieux**

*Borden Ladner Gervais LLP (Ottawa Office)*

**Chandimal Nicholas**

*Cassels Brock & Blackwell LLP*

March 19, 2024







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# Buying or Selling a Business 2024

**WHAT BUSINESS LAWYERS  
NEED TO KNOW ABOUT  
INTELLECTUAL PROPERTY  
LAW**

March 19, 2024

Chandimal Nicholas

Kathleen Lemieux



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Participants should obtain independent legal and other advice from their legal and/or accounting advisers, as applicable.





# General Considerations

- Who are you acting for?
- What type of transaction?
  - Asset vs Share Purchase
    - Asset: Buyer only purchases the assets that it wants to buy
      - Due diligence investigations important to determine which business assets are required to operate the business. IP often described in terms of IP required to operate the business.
    - Share: Whole entity is purchased with all existing assets and liabilities
      - Due diligence crucial to ensure all assets required to conduct the business (including IP) are owned by vendor and that all liabilities are identified and addressed.
- Deal structure (private/public, financial/strategic, insurance, indemnity)
- Key clauses: Definitions and representations and warranties (including ownership)
  - Representations/warranties (ownership, title, scope)
  - Definitions (scope)



# Intellectual Property Being Sold

- Defining “Intellectual Property”
  - Broadly for buyers
  - Accuracy for sellers
- Definitions Impact other Issues
  - Scope of representations and warranties
  - Disclosure schedules
  - Due diligence
  - Indemnification
- Use of Reps/Warranty Insurance (RWI) on deals
  - Can lead to more reasonable terms
  - Diligence has to satisfy the insurer





# “Types” of IP: Official Marks

- Official Marks have special status under the *Trademarks Act*
  - Official Marks are published, cover all goods/services in all classes, and are considered advantageous because they can be descriptive and not distinctive (9 number)
  - Catch: They can only be owned by a public authority and cannot be assigned (except to another public authority – such as hospitals, post secondary institutions, etc.)
  - Arises more often when Vendor is a public authority
- Asset Transaction
  - Official Marks cannot be treated like other trademarks
  - May need to be excluded from the transaction
    - Purchaser should secure Vendor’s consent (if needed) as a condition for closing
  - Purchaser can still acquire common law rights owned in a mark that is the subject of Official Marks (with consent)





# IP Specific Issues: Ownership

- Representations/Warranties
  - Ownership of IP
  - Waiver of Moral Rights - Moral rights cannot be assigned in Canada
- Due Diligence
  - Copyright - Rights automatically convey under *Copyright Act* for employees but not Independent Contractors
    - Independent contractor copyright will need to be assigned
  - Review employment contracts for IP rights
    - Assignment of Rights (Patents or any other IP)
    - Waiver of moral rights for Copyright
  - Other consequences?





# IP Specific Issues: Protection and Enforcement

- Review of representations and warranties to confirm rights of the target
  - Often subject to what is disclosed in a Disclosure Schedule
  - Consideration of “Owned IP” versus “Licensed IP” and material IP Agreements
  - Consideration of Field of use or any restrictions on permitted use, exclusivity, licenses, etc.
  - Watch for unqualified warranties (if you are representing the vendor) or overly qualified warranties if you are the purchaser
- To assist with your Due Diligence review:
  - Conduct searches of public IP registries (Canada? World?);
  - Review websites and social media pages (including terms of use and relevant policies);
  - Request ownership information of domain name registrations (registrant information is not public);
  - Review license agreements and any other IP agreements that are material to the conduct of the business.



# Licensing Issues

- Due Diligence - review all material license agreements with third parties and any related companies
  - Obligations or Risks to be concerned about?
    - Monetary or other requirements; Quality control provisions
    - Termination or Amendment rights
- Transitional terms - Approvals for transfer (asset purchases)
  - Is the licensor's consent needed?
    - If refused the risk of additional consideration in exchange for consent
- Change of control risks (share purchases)
  - Any provisions that may terminate the agreement on a change of control





# Software Issues

- Software is used in every business across industries and deals should always address related agreements as part of the diligence process
  - Off-the-Shelf Software Licenses often treated differently (excluded)
  - Does Target own proprietary software? Does Target license in customized software?
  - Is there any third-party software that is material to the business?
    - Review license agreements,
    - Consider whether any are subject to open-source terms,
    - Consider maintenance and support obligations for software licensed-in
    - Consider whether any software is licensed-out and whether there are any royalties due to the seller or payable by the seller
  - In some instances, the Target's policies and procedures for monitoring compliance with license agreements may be relevant



# Other Issues

- Post Closing Matters – CIPO filings
- Is the transaction or the target regulated?
  - Government approvals, Compliance Reps/Warranties
  - Licenses/Permits – transferrable or are new applications required?
  - Foreign buyers are subject to government approvals under the *Investment Canada Act*
  - Requirement under competition laws?
- Penalties and change of control risks
- Privacy and data security issues – Personal or Health Information
  - Privacy policies, history of compliance, audits
  - Previous data security breaches or unauthorized use





# Role of a Specialist

- Every transaction is different
  - The need for an IP specialist is related to the significance of the IP acquired and the complexity of the issues
  - The greater the significance of the IP for the operation of the business, the greater the need for, and benefit of, a comprehensive IP due diligence with the assistance/guidance of a specialist
- Based on the structure of the deal, specialists should be involved to advise on areas that require specific expertise
  - patents, software, or licensed IP (whether licensed in or licensed out)





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# Final IP Checklist

**KEY TAKEAWAYS**





# Deal Checklist

- ☐ Asset vs. share purchase?
  - Asset: Approvals for transfers
  - Share: Change of control provisions
- ☐ Review of representations and warranties and RWI expectations, if applicable
  - Buyer (strong) vs. Seller (minimal)
- ☐ Review of Definitions
  - Buyer (broad) vs. Seller (narrow)
- ☐ Review of employment contracts including any waivers of moral rights
  - Employees vs. independent contractor rights
- ☐ Conduct applicable searches
  - IP registries, clearance searches, public records, websites, social media, internal policies, approach to protection, past unauthorized disclosure or disputes
- ☐ Review of material license and software agreements
- ☐ Review of regulatory risks, potential penalties, privacy issues, and data issues
- ☐ Consider whether other specialists should be involved
- ☐ Address closing and post closing considerations
  - Transfers, assignments, recordals, security interests, etc.



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# Questions



# Further Questions? We're Here to Help!

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## Buying or Selling a Business 2024

### WHAT BUSINESS LAWYERS NEED TO KNOW ABOUT INTELLECTUAL PROPERTY LAW

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# Sample Intellectual Property (IP) Due Diligence CHECK LIST

March 19, 2024

Items / Information Requested	Received [Date]	Not Yet Received
<b>1. Type of Transaction and Target</b>		
Identify the type of transaction – Asset Purchase or Share Purchase or Other (e.g., Carve Out – which is the sale of a subsidiary, division or other part of a larger business - Restructuring/Bankruptcy sale, etc.)		
Description of the business, assets, and services		
For each product and service of the Target, identify the Target's patents, patent applications, trademarks (registered, unregistered and any Official Marks), industrial designs, trade secrets, data and/or any agreements that relate to that product or service		
Assess the materiality of the IP to the Target's business (to help determine the level of detail and the areas of focus for the IP due diligence review)		
Determine whether the parties have insurance (Representation and Warranty insurance)		
<b>2. Patents</b>		
Obtain a list of patents and inventions owned by or licensed to the Target and any related documentation:		
- Issued patents (Canada, US, PCT, foreign)		
- Patent applications (Canada, US, PCT, foreign)		
- Invention disclosures for any inventions not covered by issued patents or pending applications		



- Inventions for which a decision was made to not seek patent protection (if relevant) but protect as trade secrets		
Note that in some countries like Canada and the US, patent applications are not made public until 18 months after their filing date. Since not all patent applications will be revealed in a search conducted before the applications are made available publicly, the disclosure schedule provided by Target should include this information		
Further Note that provisional patent applications in the United States are never made public. Since provisional applications will not be revealed in a search, the disclosure schedule provided by Target must include this information.		
Obtain a description of the patent portfolio that corresponds to the Target's products and services		
Obtain copies of any patent assignment agreements from the Target to third parties (relating to the Target's patents) and any patent assignment agreements from third parties (such as inventors) to the Target		
Check upcoming deadlines for payment (e.g. maintenance fees) or steps required for a reasonable period after closing (90 to 180 days, for example)		
While copies of patent searches, freedom to operate opinions, infringement opinions or any other opinions may be useful for the Buyer, they are difficult to obtain and could cause a waiver of attorney-client privilege.		
<b>3. Trademarks</b>		
Obtain a list of the following – that are owned or licensed to the Target and obtain copies of supporting documentation for each:		
- Trademark registrations (Canada, US, others)		
- Trademark applications (Canada, US, others)		
- Unregistered (common law) trademarks		
- Any Official Marks		
While copies of trademark searches, opinions, infringement opinions or any other opinions may be useful for the Buyer, they are difficult to obtain and could cause a waiver of attorney-client privilege.		
Check upcoming deadlines for renewals or other actions for a reasonable period after closing (90 to 180 days, for example)		
Obtain copies of brand development plans		



Obtain copies of any trademark assignment agreements from the Target to third parties (relating to the Target's trademarks) and any trademark assignment agreements from third parties to the Target		
<b>4. Copyright</b>		
Obtain a list of copyrighted works (registered and material unregistered) owned by or licensed to the Target and obtain a brief description of each work		
Obtain copies of any copyright registrations and/or applications owned by the Target. S most copyrighted works are not registered in Canada, the list of material unregistered copyright is important. It is more common to register copyright in the United States.		
Software is often a literary work (separate IT-related considerations can separately apply in due diligence)		
Obtain copies of any copyright assignment agreements from the Target to third parties (relating to the Target's works) including waivers of moral rights and copies of any copyright assignment agreements from third parties to the Target		
Be aware that the version of the <i>Copyright Act</i> (Canada) that applies to a work at the time it was created may be different than the Act that applies today		
<b>5. Domain Names and Social Media</b>		
Obtain a list of all domain names owned, used, and being transferred to Purchaser		
Ensure that renewal fees are paid and that registrations are up to date through the closing date		
If available, obtain information on the Registrant's particulars [Registrant information typically is not publicly available on any domain name Registries – can be protected under privacy laws at Registrant's own discretion]		
Request information and documents to evaluate the Target's use of websites and social media, including social media accounts and where relevant, copies of internet and social media policies		
Inquire about any agreements relating to the Target's websites and social media accounts including content development (and who owns the copyright in the content)		
<b>6. Trade Secrets</b>		
Obtain a list of any material trade secrets owned by the Target, with a general description (trade secrets, proprietary know-how and technology or processes)		



Obtain copies of confidentiality agreements, non-disclosure agreements and any other agreements that pertain to keeping information secret or confidential		
Obtain a list of the measures employed by Target to maintain the secrecy of their trade secrets		
<b>7. IP Related Agreements</b>		
Obtain copies of any agreements with the Target's employees and confirm that all past and present Target employees have signed appropriate employment agreements to assign all IP to the Target and have waived moral rights as relevant.		
Obtain copies of employee invention assignments		
Obtain copies of any agreements with the Target's independent contractors and any non-disclosure or confidentiality agreements to ensure contractors have assigned all IP to the Target and waived all required moral rights		
Obtain copies of any joint venture, development or collaboration agreements pursuant to which IP may be jointly owned or owned by one party or the other		
Obtain copies of any IP settlement agreements and trademark co-existence agreements (or any consents to use), releases and covenants not to sue		
Obtain copies of IP license agreements such as patent licenses and trademark licenses, both to and from the Target; in the case of licenses of the Target's trademarks, check for inter-corporate licenses		
Obtain copies of any other agreements that involve any IP rights of the Target, including distribution agreements, reseller agreements, customer agreements, end user agreements, supplier agreements, etc.		
If the transaction is share purchase, be aware that some agreements may include contractual provisions that terminate the agreement on a change of control if consent is not first obtained		
If the transaction is an asset purchase, be aware of agreements that include clauses that preclude assignment		
<b>8. IP Related Enforcements and Protection</b>		
Request information and documents regarding the target's approach to IP protection and enforcement.		
Identify any past, current and proposed enforcement efforts by the Target regarding any IP the Target owns or in which the Target has rights (including demand letters, cease and desist letters, claims, arbitration or mediation)		



Identify any enforcement actions taken or threatened by another entity or person against the Target, including threatened and actual litigation, arbitration, mediation, or any administration proceedings.		
Identify any actions taken that are threatening the validity of the Target's IP (such as impeachment or cancellation proceedings)		
Consider consulting IP litigation specialists for any material pending or threatened disputes involving IP		
<b>9. Miscellaneous</b>		
Identify liens, encumbrances, or any other right any other Person may have in any of the Target's IP assets		
Obtain copies of any documents granting any person a security interest in any asset of the Target [remember to consider applicable PPSA registrations or floating charges]		
If transaction is a carve-out, inquire whether any IP is provided by or shared with the Target or any affiliate of the Target that remains with the seller		
Review relevant policies (such as IP and Invention Policies) where applicable		
<b>10. Reviewing IP Search Reports</b>		
Confirm the accuracy and completeness of the disclosed information through independent searches when possible		
Determine whether there are any gaps in the chain of title for each asset; if gaps in chain of title or unreleased security interests are uncovered, request copies of appropriate documentation and confirm that such documentation will be recorded with the appropriate registry on or prior to closing to ensure the Buyer acquires the IP with a clear chain of title, without encumbrances		
Confirm the status of each IP asset along with expiration dates and upcoming deadlines for taking steps (e.g. responding to an office action) or paying fees		

By

Kathleen Lemieux

Expertise

Intellectual Property, Trademarks, Copyright related commercial transactions

Chandimal Nicholas

Expertise

Intellectual Property, Patents, Trademarks, Commercial IP.



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## Intellectual Property Law Issues in a Transaction

### Pre-Recorded Presentation By:

Kathleen Lemieux, *Borden Ladner Gervais LLP (Ottawa Office)*  
Chandimal Nicholas, *Cassels Brock & Blackwell LLP*

Note the **blue text** indicates the written answer provided by the program's speakers, Kathleen Lemieux and Chandimal Nicholas.

### Questions:

1. Can you provide a brief explanation of "moral rights"?
2. What are moral rights?

### Answer:

Moral rights exist to protect the integrity of a work and an author's association with a work. "Integrity" in this context refers to the author's right to preserve and protect their work from destruction or alteration that detracts from the intended meaning of the work. Infringement on integrity arises where the work is subject to derogatory treatment which is prejudicial to the author's reputation by way of (a) distortion or other modification, or (b) association with a product, service, cause or institution.

Moral rights are owned by the author of the work, rather than the owner of the copyright (unless they are the same). As such, for example, moral rights will remain with the author of a work even if the copyright is owned by the employer (in the context of a work made in the course of employment). Unlike traditional forms of copyright, moral rights cannot be transferred and instead may only be waived. Such waiver must be explicit, and an assignment of copyright would not automatically constitute or include a waiver of moral rights attached to the work. It is also worthwhile to mention that moral rights in Canada apply to all types of works whereas in the United States, only artistic works are afforded moral rights protection.





**Law Society**  
of Ontario

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de l'Ontario

## **TAB 2**

# **Buying or Selling a Business 2024**

Project Quantum Leap: Sale of Quantum Computing  
Business (Negotiation of Indemnities)

Schedule A

Revised Spa – Indemnities Rider  
(Seller's Revised Draft)

Schedule B

Blackline Against Buyer's Initial Draft

**Jennifer Prieto**

*Davies Ward Phillips & Vineberg LLP*

**Ghaith Sibai**

*Davies Ward Phillips & Vineberg LLP*

March 19, 2024





## **PROJECT QUANTUM LEAP: SALE OF QUANTUM COMPUTING BUSINESS (NEGOTIATION OF INDEMNITIES)**

### **Fact Pattern**

Northern Star Technologies (“**Northern Star**” or the “**Buyer**”) is set to acquire Quantum Innovations Inc. (“**Quantum**” or the “**Seller**”). The transaction is structured as a purchase by Northern Star of all the shares of Quantum pursuant to a share purchase agreement (“**SPA**”) with an agreed-upon purchase price of \$5,000,000. The initial draft of the SPA was prepared by Northern Star and has been largely settled except for the indemnities section. This fact pattern is focused solely on the indemnities section of the SPA, including limitations of liability, survival periods, and the indemnity escrow. The transaction does not contemplate representation and warranty insurance.

### **Background of Northern Star**

Northern Star, a well-established entity in the Canadian tech industry, specializes in developing innovative security software for the financial sector, including cybersecurity solutions. With over a decade of market presence, Northern Star has built a reputable brand and maintained a robust compliance record. Northern Star is particularly interested in entering the quantum computing space as its primary clientele comprise large banks and financial institutions who are increasingly seeking advanced solutions like quantum computing to bolster their security frameworks and protect against cybercrime. This strategic move is expected to position Northern Star at the forefront of next-generation cybersecurity technologies, catering to the growing demand for sophisticated defense mechanisms in the financial sector.

### **The Target - Quantum Innovations Inc.**

Quantum is recognized for its cutting-edge research and development in quantum computing, aiming to revolutionize data processing speeds, security and encryption. By acquiring Quantum, Northern Star aims to enhance its technological offerings and penetrate the lucrative financial technology market, leveraging Quantum's innovative quantum computing solutions and research capabilities with Northern Star's expertise in the financial industry.

### **Pre-Negotiation Business Landscape**

Northern Star's due diligence has revealed Quantum to be a company free from significant legal or financial burdens. However, subtle indications of potential undisclosed liabilities have prompted Northern Star to approach the final negotiation with a degree of caution. In the draft SPA, the standard representations and warranties provided by Quantum cover the usual aspects such as legal compliance, accuracy of financial statements and the absence of undisclosed liabilities. However, the indemnity provisions are currently broad and undefined, requiring refinement to ensure a balanced risk allocation post-acquisition.

### **Scenario Setting**

Northern Star, led by its founder and CEO Elena Rodriguez, has shown resilience and innovation in navigating the fast-evolving tech landscape. Meanwhile, Quantum, under the pioneering leadership of CEO Maxwell Qubit, has been identified as a critical piece in Northern Star's strategic expansion into quantum computing. The draft SPA is mostly settled, save for the indemnities section. Counsel to each party have scheduled a lawyer-only call to discuss the remaining open points on the indemnity provisions, which remain largely in flux.

### ***[Lawyer-only call takes place]***



### **Following the Lawyer-Only Call**

The call went well and the lawyers have settled the remaining legal points. Following the call, the Seller's counsel circulates a revised draft of the indemnities section (and related definitions) to the Buyer's counsel, together with a blackline against the Buyer's initial draft. See Schedule A for the revised draft of the indemnities section and Schedule B for the blackline showing the Seller's changes.



**SCHEDULE A  
REVISED SPA – INDEMNITIES RIDER  
(SELLER’S REVISED DRAFT)**

See attached



## RIDER TO THE SPA – INDEMNITIES

### ARTICLE I Definitions

**Section 1.01 Definitions.** The following terms have the meanings specified or referred to in this Section 1.01:

"**Affiliate**" when used to indicate a relationship with a specified Person, means a Person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such specified Person and a Person shall be deemed to be controlled by another Person if controlled in any manner whatsoever that results in control in fact by that other Person (or that other Person and any Person or Persons with whom that other Person is acting jointly or in concert), whether directly or indirectly. For the purposes of this definition, "control", when used with respect to any specified Person, means the power to direct the management and policies of that Person directly or indirectly, whether through ownership of securities, by trust, by contract or otherwise; and the term "controlled" has a corresponding meaning; *provided that*, in any event, any Person that owns directly, indirectly or beneficially 50% or more of the securities having voting power for the election of directors or other governing body of a corporation or 50% or more of the partnership interests or other ownership interests of any other Person will be deemed to control that Person.

"**Basket**" has the meaning set forth in Section 7.04(a).

"**Business Day**" means any day except Saturday, Sunday or any other day on which banks located in Toronto, Ontario are authorized or required by Law to be closed for business.

"**Cap**" has the meaning set forth in Section 7.04(a).

"**Closing Date**" means April 1, 2024 or such later date as agreed between the Purchaser and the Vendor in writing.

"**Closing Time**" means 10:00 a.m. (Toronto time) on the Closing Date or such other time on the Closing Date as the parties agree in writing that the Closing shall take place.

"**Corporation**" means Quantum Innovations Inc.

"**Direct Claim**" has the meaning set forth in Section 7.05(c).

"**Dollars**" or "\$" means the lawful currency of Canada.

"**Fundamental Representations**" means, collectively, the Fundamental Purchaser Representations and the Fundamental Vendor Representations.

"**Fundamental Purchaser Representations**" means the representations and warranties in Section 4.01 [*Corporate Status and Authorization of Purchaser*] and Section 4.03 [*Brokers – Purchaser*].



**“Fundamental Vendor Representations”** the representations and warranties in 3.01 [*Corporate Status and Authorization of Vendor*], Section 3.03 [*Capitalization*] and Section 3.25 [*Brokers - Vendor*].

**"Governmental Authority"** means: (a) any court, tribunal, judicial body or arbitral body or arbitrator; (b) any domestic or foreign government or supranational body or authority whether multinational, national, federal, provincial, territorial, state, municipal or local and any governmental agency, governmental authority, governmental body, governmental bureau, governmental department, governmental tribunal or governmental commission of any kind whatsoever; (c) any subdivision or authority of any of the foregoing; (d) any quasi-governmental or private body or public body exercising any regulatory, administrative, expropriation or taxing authority under or for the account of the foregoing; (e) any stock or securities exchange; and (f) any public utility authority.

**"Indemnified Party"** has the meaning set forth in Section 7.05.

**"Indemnifying Party"** has the meaning set forth in Section 7.05.

**“Indemnity Escrow Amount”** means \$250,000. <sup>1</sup>

**"Law"** means any statute, law, ordinance, regulation, rule, instrument, code, order, constitution, treaty, common law, judgment, decree, other requirement or rule of law of any Governmental Authority.

**"Losses"** means actual out-of-pocket losses, damages, liabilities, costs or expenses, including reasonable legal fees; *provided that* "Losses" shall not include punitive or exemplary damages, except in the case of fraud or to the extent actually awarded to a Governmental Authority or other third party.

**"Material Adverse Effect"** means any event, occurrence, fact, condition or change that is, or could reasonably be expected to become, individually or in the aggregate, materially adverse to: (a) the business, results of operations, condition (financial or otherwise) or assets of the Corporation; or (b) the ability of Vendor to consummate the transactions contemplated hereby on a timely basis; *provided that*: (i) "Material Adverse Effect" shall not include any event, occurrence, fact, condition or change, directly or indirectly, arising out of or attributable to: (A) general economic or political conditions; (B) conditions generally affecting the industries in which the Corporation operates; (C) any changes in financial or securities markets in general; (D) acts of war (whether or not declared), armed hostilities or terrorism, or the escalation or worsening thereof; (E) general outbreaks of illness (including the COVID-19 pandemic); (F) any action required or permitted by this Agreement; (G) any changes in applicable Laws or

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<sup>1</sup> Note to Draft: To update the SPA to reflect payment of the Indemnity Escrow to the Escrow Agent. Proposed language is set out below (to be added to the “Closing Payments” section):

“Purchaser shall pay the Indemnity Escrow Amount to ■ (the “**Escrow Agent**”), in trust, to be held in escrow and distributed in accordance with the provisions of an escrow agreement (the “**Escrow Agreement**”) to be entered into by Purchaser, Vendor and the Escrow Agent on the Closing Date.”



accounting rules or principles, including GAAP; or (H) the public announcement, pendency or completion of the transactions contemplated by this Agreement; and (ii) any event, occurrence, fact, condition or change referred to in clauses (A) through (E) shall be taken into account in determining whether a Material Adverse Effect has occurred or could reasonably be expected to occur to the extent that such event, occurrence, fact, condition or change has a disproportionate effect on the Corporation compared to other participants in the industries in which the Corporation conducts its businesses.

**"Person"** means an individual, corporation, company, limited liability company, body corporate, partnership, joint venture, Governmental Authority, unincorporated organization, trust, association or other entity.

**"Purchaser"** means Northern Star Technologies Inc.

**"Representative"** means, with respect to any Person, any, and all, directors, officers, employees, consultants, financial advisors, lawyers, accountants and other agents of such Person.

**"Tax" or "Taxes"** means all taxes, surtaxes, duties, levies, imposts, fees, assessments, reassessments, withholdings, dues and other charges of any nature, imposed or collected by any Governmental Authority, whether disputed or not, including federal, provincial, territorial, state, municipal and local, foreign and other income, franchise, capital, real property, personal property, withholding, payroll, health, transfer, value added, alternative, or add on minimum tax including HST and/or GST, sales, use, consumption, excise, customs, anti-dumping, countervail, net worth, stamp, registration, franchise, payroll, employment, education, business, school, local improvement, development and occupation taxes, duties, levies, imposts, fees, assessments and withholdings and Canada Pension Plan and Québec Pension Plan contributions, employment insurance premiums and all other taxes and similar governmental charges, levies or assessments of any kind whatsoever imposed by any Governmental Authority including any installment payments, interest, penalties or other additions associated therewith, whether or not disputed.

**"Third-Party Claim"** has the meaning set forth in [Section 7.05\(a\)](#).

**"Unresolved Claims"** means the aggregate amount of all Claims for indemnifiable Losses that have been made by the Purchaser in accordance with the provisions of Article VII but not resolved on the first anniversary of the Closing Date.

**"Vendor"** means Maxwell Qubit.

## ARTICLE II [N/A]

## ARTICLE III [N/A]

## ARTICLE IV [N/A]



**ARTICLE V**  
**[N/A]**

**ARTICLE VI**  
**[N/A]**

**ARTICLE VII**  
**Indemnification**

**Section 7.01 Survival.** All representations, warranties, covenants, indemnifications and other obligations contained in this Agreement (other than the conditions of closing set out in Article III that are not waived) shall survive the Closing and shall not merge; provided that: <sup>2</sup>

- (a) Vendor shall not be required to indemnify or save harmless the Purchaser pursuant to **Section 7.02** unless Purchaser has provided to the Vendor a notice of claim within the following time limits:
  - (i) with respect to the Fundamental Vendor Representations, at any time after Closing;
  - (ii) with respect to the representations and warranties set out in Section 3.30 [*Taxes*], not later than 90 days after the expiry of the last applicable limitation period under any applicable Tax legislation with respect to any taxation period to which these matters relate;
  - (iii) with respect to the representations and warranties set out in Section 3.32 [*Environmental*], not later than the fifth anniversary of the Closing Date;
  - (iv) with respect to a claim for breach of any of the representations and warranties contained in this Agreement involving fraud on the part of the Vendor, at any time after Closing; and
  - (v) with respect to all other representations and warranties, not later than the first anniversary of the Closing Date.
- (b) Purchaser shall not be required to indemnify or save harmless the Vendor pursuant to **Section 7.03** unless Vendor has provided to Purchaser a notice of claim within the following time limits:
  - (i) with respect to the Fundamental Purchaser Representations, at any time after Closing; and

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<sup>2</sup> **Note to Purchaser:** We revised this section to ensure that all representations, warranties, covenants and indemnifications survive closing, but added time limits for the specific claims as discussed on our call. As discussed, we also removed from the definition of "Fundamental Vendor Representations" and "Fundamental Purchaser Representations" the representations relating to "No Violation".



- (ii) with respect to all other representations and warranties, not later than the first anniversary of the Closing Date.
- (c) Notwithstanding the provisions of the *Limitations Act*, 2002 (Ontario) or any other statute, the period within which an Indemnified Party may commence a proceeding in respect of a claim for which a notice of claim is required to be, and has been, given in accordance with this Section 7.01, shall be two years from the last date upon which such notice of claim is permitted to be delivered thereunder, and any applicable limitation period is hereby so extended to the fullest extent permitted by Law.

**Section 7.02 Indemnification by Vendor.** Subject to the other terms and conditions of this Article VII, Vendor shall indemnify and defend the Purchaser against, and shall hold it harmless from and against, and shall pay and reimburse it for, any and all Losses incurred or sustained by, or imposed upon, the Purchaser based upon, arising out of, with respect to or by reason of:<sup>3</sup>

- (a) any inaccuracy in or breach of any of the representations or warranties of Vendor set out in this Agreement or in any certificate or instrument delivered by or on behalf of Vendor under this Agreement, as of the date such representation or warranty was made or as if such representation or warranty was made on and as of the Closing Date (except for representations and warranties that expressly relate to a specified date, the inaccuracy in or breach of which will be determined with reference to such specified date); or
- (b) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Vendor under this Agreement.

**Section 7.03 Indemnification by Purchaser.** Subject to the other terms and conditions of this Article VII, Purchaser shall indemnify and defend the Vendor against, and shall hold the Vendor harmless from and against, and shall pay and reimburse the Vendor for, any and all Losses incurred or sustained by, or imposed upon, the Vendor based upon, arising out of, with respect to or by reason of:

- (a) any inaccuracy in or breach of any of the representations or warranties of Purchaser contained in this Agreement or in any certificate or instrument delivered by or on behalf of Purchaser under this Agreement, as of the date such representation or warranty was made or as if such representation or warranty was made on and as of the Closing Date (except for representations and warranties that expressly relate to a specified date, the inaccuracy in or breach of which will be determined with reference to such specified date); or
- (b) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Purchaser under this Agreement.

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<sup>3</sup>

**Note to Purchaser:** We should not be liable to the Purchaser's Affiliates and Representatives.



**Section 7.04 Payment of Claims; Limitation of Liability; Effect of Materiality Qualifiers; Indemnity Escrow Amount.** The indemnifications provided for in **Section 7.02** and **Section 7.03** shall be subject to the following limitations:

- (a) Vendor shall not be liable to the Purchaser for indemnification under Section 7.02(a) until the aggregate amount of all Losses in respect of indemnification under Section 7.02(a) exceeds \$50,000 (the "**Basket**"), in which event Vendor shall be required to pay or be liable for all such Losses from the first dollar. Notwithstanding the foregoing, the aggregate amount of all Losses for which Vendor shall be liable under Section 7.02(a) shall not exceed \$500,000<sup>4</sup> (the "**Cap**"). Once the Basket has been exceeded, such claim shall be paid:
  - (i) first, from the Indemnity Escrow Amount until such time as it is depleted; and
  - (ii) second, by payment by the Vendor, which payment shall be made by wire transfer of immediately available funds to the Purchaser.
- (b) Purchaser shall not be liable to the Vendor Indemnitees for indemnification under Section 7.03(a) until the aggregate amount of all Losses in respect of indemnification under Section 7.03(a) exceeds the Basket, in which event Purchaser shall be required to pay or be liable for all such Losses from the first dollar. The aggregate amount of all Losses for which Purchaser shall be liable under Section 7.03(a) shall not exceed the Cap. Once the Basket has been exceeded, such claim shall be satisfied by payment by the Purchaser to the Vendor by wire transfer of immediately available funds to the Vendor.
- (c) Notwithstanding the provisions of **Section 7.04(a)** and Section 7.04(b), any claim that is for breach of a covenant, agreement or undertaking, fraud or a Fundamental Representation, shall not be subject to any of the limitations in **Section 7.04(a)** or Section 7.04(b), provided that maximum aggregate liability of each party under this Article VII shall be equal to the Purchase Price.
- (d) For purposes of this Article VII, any inaccuracy in or breach of any representation or warranty shall be determined without regard to any materiality, Material Adverse Effect or other similar qualification contained in or otherwise applicable to such representation or warranty.
- (e) Notwithstanding any other provision of this Agreement to the contrary, no Indemnifying Party will have any liability for, or obligation with respect to, any punitive or aggravated damages, except in the case of fraud or to the extent actually awarded to a Governmental Authority or other third party.
- (f) On the first anniversary of the Closing Date, the Vendor and the Purchaser shall jointly instruct the Escrow Agent to pay the remaining Indemnity Escrow

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<sup>4</sup> **Note to Draft:** This represents 10% of the Purchase Price.



Amount, if any, less the amount of any Unresolved Claims, to the Vendor. Any portion of the Indemnity Escrow Amount retained in respect of an Unresolved Claim shall be retained in the indemnity escrow account and not released until the final resolution of the Unresolved Claim in accordance with this Agreement and the Escrow Agreement.

**Section 7.05 Indemnification Procedures.** The party making a claim under this Article VII is referred to as the "**Indemnified Party**", and the party against whom such claims are asserted under this Article VII is referred to as the "**Indemnifying Party**".

- (a) **Third-Party Claims.** If any Indemnified Party receives notice of the assertion or commencement of any action, claim or other legal proceeding made or brought by any Person who is not a party to this Agreement or an Affiliate of a party to this Agreement or a Representative of the foregoing (a "**Third-Party Claim**") against such Indemnified Party with respect to which the Indemnifying Party is obligated to provide indemnification under this Agreement, the Indemnified Party shall give the Indemnifying Party prompt written notice thereof, but in any event not later than 10 calendar days after receipt of notice of such Third-Party Claim. The failure to give such prompt written notice shall not, however, relieve the Indemnifying Party of its indemnification obligations, except and only to the extent that the Indemnifying Party forfeits rights or defences by reason of such failure. Such notice by the Indemnified Party shall describe the Third-Party Claim in reasonable detail, shall include copies of all material written evidence thereof and shall indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained by the Indemnified Party. The Indemnifying Party shall have the right to participate in, or by giving written notice to the Indemnified Party, to assume the defence of any Third-Party Claim at the Indemnifying Party's expense and by the Indemnifying Party's own counsel, and the Indemnified Party shall cooperate in good faith in such defence. If the Indemnifying Party assumes the defence of any Third-Party Claim, subject to **Section 7.05(b)**, it shall have the right to take such action as it deems necessary to avoid, dispute, defend, appeal or make counter-claims pertaining to any such Third-Party Claim in the name and on behalf of the Indemnified Party. The Indemnified Party shall have the right, at its own cost and expense,<sup>5</sup> to participate in the defence of any Third-Party Claim with counsel selected by it subject to the Indemnifying Party's right to control the defence thereof. If the Indemnifying Party elects not to compromise or defend such Third-Party Claim or fails to promptly notify the Indemnified Party in writing of its election to defend as provided in this Agreement, the Indemnified Party may, subject to **Section 7.05(b)**, pay, compromise, defend such Third-Party Claim and seek indemnification for any and all Losses based upon, arising from or relating to such Third-Party Claim. Vendor and Purchaser shall cooperate with each other in all reasonable respects in connection with the defence of any Third-Party Claim, including making available (subject to the provisions of Section 5.06 [*Confidentiality*]) records relating to such Third-Party Claim and furnishing,

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<sup>5</sup> **Note to Purchaser:** If the Purchaser wishes to participate in the defence of a Third-Party Claim where the Seller is the Indemnifying Party, it should have to bear the costs of defending such claim.



without expense (other than reimbursement of actual out-of-pocket expenses) to the defending party, management employees of the non-defending party as may be reasonably necessary for the preparation of the defence of such Third-Party Claim.

- (b) **Settlement of Third-Party Claims.** Notwithstanding any other provision of this Agreement, the Indemnifying Party shall not enter into settlement of any Third-Party Claim without the prior written consent of the Indemnified Party, except as provided in this Section 7.05(b). If an unconditional offer is made to settle a Third-Party Claim without leading to liability or the creation of a financial or other obligation on the part of the Indemnified Party and provides, in customary form, for the unconditional release of each Indemnified Party from all liabilities and obligations in connection with such Third-Party Claim and the Indemnifying Party desires to accept and agree to such offer, the Indemnifying Party shall give written notice to that effect to the Indemnified Party. If the Indemnified Party fails to consent to such offer within 10 days after its receipt of such notice, the Indemnified Party may continue to contest or defend such Third-Party Claim and, in such event, the maximum liability of the Indemnifying Party as to such Third-Party Claim shall not exceed the amount of such settlement offer. If the Indemnified Party fails to consent to such offer and also fails to assume the defence of such Third-Party Claim, the Indemnifying Party may settle the Third-Party Claim upon the terms set forth in the offer to settle such Third-Party Claim. If the Indemnified Party has assumed the defence under Section 7.05(a), it shall not agree to any settlement without the written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).
- (c) **Direct Claims.** Any claim by an Indemnified Party on account of a Loss which does not result from a Third-Party Claim (each, a "**Direct Claim**") shall be asserted by the Indemnified Party giving the Indemnifying Party prompt written notice thereof, but in any event not later than 10 days after the Indemnified Party becomes aware of such Direct Claim. The failure to give such prompt written notice shall not, however, relieve the Indemnifying Party of its indemnification obligations, except and only to the extent that the Indemnifying Party forfeits rights or defences by reason of such failure. Such notice by the Indemnified Party shall (i) describe the Direct Claim in reasonable detail, (ii) include copies of all material written evidence thereof and (iii) indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained by the Indemnified Party. The Indemnifying Party shall have 30 calendar days after its receipt of such notice to respond in writing to such Direct Claim. During such 30-day period, the Indemnified Party shall allow the Indemnifying Party and its professional advisors to investigate the matter or circumstance alleged to give rise to the Direct Claim, and whether and to what extent any amount is payable in respect of the Direct Claim, and the Indemnified Party shall assist the Indemnifying Party's investigation by giving such information and assistance (including access to the Corporation's premises and personnel and the right to examine and copy any accounts, documents or records) as the Indemnifying Party or any of its professional advisors may reasonably request. If the Indemnifying



Party does not so respond within such 30 day period, the Indemnifying Party shall be deemed to have rejected such claim, in which case the Indemnified Party shall be free to pursue such remedies as may be available to the Indemnified Party on the terms and subject to the provisions of this Agreement.

**Section 7.06 Tax Treatment of Indemnification Payments.** All indemnification payments made under this Agreement shall be treated by the parties as an adjustment to the Purchase Price for Tax purposes, unless otherwise required by Law.

**Section 7.07 Exclusive Remedies.** Subject to Section 9.06 [*Specific Performance*], the parties acknowledge and agree that their sole and exclusive remedy with respect to any and all claims (other than claims arising from fraud on the part of a party hereto in connection with the transactions contemplated by this Agreement) for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement, shall be under the indemnification provisions set forth in this Article VII. In furtherance of the foregoing, each party hereby waives, to the fullest extent permitted under Law, any and all rights, claims and causes of action for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement it may have against the other party hereto and its Affiliates and each of their respective Representatives arising under or based upon any Law, except under the indemnification provisions set forth in this Article VII. Nothing in this **Section 7.07** shall limit any Person's right to seek and obtain any equitable relief to which any Person shall be entitled or to seek any remedy on account of fraud by any party hereto.



**SCHEDULE B**  
**BLACKLINE AGAINST BUYER'S INITIAL DRAFT**

See attached



## RIDER TO THE SPA – INDEMNITIES

### ARTICLE I Definitions

**Section 1.01 Definitions.** The following terms have the meanings specified or referred to in this Section 1.01:

~~"Action" means any claim, action, cause of action, demand, lawsuit, arbitration, inquiry, audit, notice of violation, proceeding, litigation, citation, summons, subpoena, notice of assessment, notice or reassessment or investigation of any nature, civil, criminal, administrative, investigative, regulatory or otherwise, whether at law or in equity.~~

"Affiliate" when used to indicate a relationship with a specified Person, means a Person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such specified Person and a Person shall be deemed to be controlled by another Person if controlled in any manner whatsoever that results in control in fact by that other Person (or that other Person and any Person or Persons with whom that other Person is acting jointly or in concert), whether directly or indirectly. For the purposes of this definition, "control", when used with respect to any specified Person, means the power to direct the management and policies of that Person directly or indirectly, whether through ownership of securities, by trust, by contract or otherwise; and the term "controlled" has a corresponding meaning; *provided that*, in any event, any Person that owns directly, indirectly or beneficially 50% or more of the securities having voting power for the election of directors or other governing body of a corporation or 50% or more of the partnership interests or other ownership interests of any other Person will be deemed to control that Person.

"Basket" has the meaning set forth in Section 7.04(a).

"Business Day" means any day except Saturday, Sunday or any other day on which banks located in Toronto, Ontario are authorized or required by Law to be closed for business.

"Cap" has the meaning set forth in Section 7.04(a).

"Closing Date" means April 1, 2024 or such later date as agreed between the Purchaser and the Vendor in writing.

"Closing Time" means 10:00 a.m. (Toronto time) on the Closing Date or such other time on the Closing Date as the parties agree in writing that the Closing shall take place.

"Corporation" means Quantum Innovations Inc.

"Direct Claim" has the meaning set forth in **Section 7.05(c)**.

"Dollars" or "\$" means the lawful currency of Canada.

"Fundamental Representations" means, collectively, the Fundamental Purchaser Representations and the Fundamental Vendor Representations.



**“Fundamental Purchaser Representations”** means the representations and warranties in Section 4.01 [Corporate Status and Authorization of Purchaser] and Section 4.03 [Brokers – Purchaser].

**“Fundamental Vendor Representations”** the representations and warranties in 3.01 [Corporate Status and Authorization of Vendor], Section 3.03 [Capitalization] and Section 3.25 [Brokers – Vendor].

**"Governmental Authority"** means: (a) any court, tribunal, judicial body or arbitral body or arbitrator; (b) any domestic or foreign government or supranational body or authority whether multinational, national, federal, provincial, territorial, state, municipal or local and any governmental agency, governmental authority, governmental body, governmental bureau, governmental department, governmental tribunal or governmental commission of any kind whatsoever; (c) any subdivision or authority of any of the foregoing; (d) any quasi-governmental or private body or public body exercising any regulatory, administrative, expropriation or taxing authority under or for the account of the foregoing; (e) any stock or securities exchange; and (f) any public utility authority.

**"Indemnified Party"** has the meaning set forth in Section 7.05.

**"Indemnifying Party"** has the meaning set forth in Section 7.05.

**“Indemnity Escrow Amount”** means \$250,000. <sup>1</sup>

**"Law"** means any statute, law, ordinance, regulation, rule, instrument, code, order, constitution, treaty, common law, judgment, decree, other requirement or rule of law of any Governmental Authority.

**"Losses"** means actual out-of-pocket losses, damages, liabilities, ~~deficiencies, Actions, judgments, interest, awards, penalties, fines,~~ costs or expenses ~~of whatever kind~~, including legal fees, disbursements and charges on a substantial indemnity basis and the cost of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers reasonable legal fees; *provided that* "Losses" shall not include punitive or exemplary damages, except in the case of fraud or to the extent actually awarded to a Governmental Authority or other third party.

**"Material Adverse Effect"** means any event, occurrence, fact, condition or change that is, or could reasonably be expected to become, individually or in the aggregate, materially adverse to: (a) the business, results of operations, condition (financial or otherwise) or assets of the Corporation; or (b) the ability of Vendor to consummate the transactions contemplated hereby on a timely basis; *provided that*: (i) "Material Adverse Effect" shall not include any event,

<sup>1</sup> Note to Draft: To update the SPA to reflect payment of the Indemnity Escrow to the Escrow Agent. Proposed language is set out below (to be added to the “Closing Payments” section):

“Purchaser shall pay the Indemnity Escrow Amount to ■ (the “**Escrow Agent**”), in trust, to be held in escrow and distributed in accordance with the provisions of an escrow agreement (the “**Escrow Agreement**”) to be entered into by Purchaser, Vendor and the Escrow Agent on the Closing Date.”



occurrence, fact, condition or change, directly or indirectly, arising out of or attributable to: (A) general economic or political conditions; (B) conditions generally affecting the industries in which the Corporation operates; (C) any changes in financial or securities markets in general; (D) acts of war (whether or not declared), armed hostilities or terrorism, or the escalation or worsening thereof; (E) general outbreaks of illness (including the COVID-19 pandemic); (F) any action required or permitted by this Agreement; (G) any changes in applicable Laws or accounting rules or principles, including GAAP; or (H) the public announcement, pendency or completion of the transactions contemplated by this Agreement; and (ii) any event, occurrence, fact, condition or change referred to in clauses (A) through (E) shall be taken into account in determining whether a Material Adverse Effect has occurred or could reasonably be expected to occur to the extent that such event, occurrence, fact, condition or change has a disproportionate effect on the Corporation compared to other participants in the industries in which the Corporation conducts its businesses.

**"Person"** means an individual, corporation, company, limited liability company, body corporate, partnership, joint venture, Governmental Authority, unincorporated organization, trust, association or other entity.

**"Purchaser"** means Northern Star Technologies Inc.

~~**"Purchaser Indemnitees"** has the meaning set forth in Section 7.02.~~

**"Representative"** means, with respect to any Person, any, and all, directors, officers, employees, consultants, financial advisors, lawyers, accountants and other agents of such Person.

**"Tax"** or **"Taxes"** means all taxes, surtaxes, duties, levies, imposts, fees, assessments, reassessments, withholdings, dues and other charges of any nature, imposed or collected by any Governmental Authority, whether disputed or not, including federal, provincial, territorial, state, municipal and local, foreign and other income, franchise, capital, real property, personal property, withholding, payroll, health, transfer, value added, alternative, or add on minimum tax including HST and/or GST, sales, use, consumption, excise, customs, anti-dumping, countervail, net worth, stamp, registration, franchise, payroll, employment, education, business, school, local improvement, development and occupation taxes, duties, levies, imposts, fees, assessments and withholdings and Canada Pension Plan and Québec Pension Plan contributions, employment insurance premiums and all other taxes and similar governmental charges, levies or assessments of any kind whatsoever imposed by any Governmental Authority including any installment payments, interest, penalties or other additions associated therewith, whether or not disputed.

**"Third-Party Claim"** has the meaning set forth in Section 7.05(a).

**"Unresolved Claims"** means the aggregate amount of all Claims for indemnifiable Losses that have been made by the Purchaser in accordance with the provisions of Article VII but not resolved on the first anniversary of the Closing Date.

**"Vendor"** means Maxwell Qubit.



ARTICLE II  
[N/A]

ARTICLE III  
[N/A]

ARTICLE IV  
[N/A]

ARTICLE V  
[N/A]

ARTICLE VI  
[N/A]

ARTICLE VII  
Indemnification

~~Section 7.1 Survival. Subject to the limitations and other provisions of this Agreement, the representations and warranties set out herein shall survive the Closing and shall remain in full force and effect until the date that is 24 months from the Closing Date; provided that the representations and warranties in 3.01 [Corporate Status and Authorization of Vendor], Section 3.03 [Capitalization], Section 3.25 [Brokers—Vendor], Section 4.01 [Corporate Status and Authorization of Purchaser] and Section 4.03 [Brokers—Purchaser] (collectively, the “Fundamental Representations”) shall survive indefinitely. All covenants and agreements of the parties set out herein shall survive the Closing indefinitely or for the period explicitly specified therein. Notwithstanding the foregoing, any claims asserted in good faith with reasonable specificity (to the extent known at such time) and in writing by notice from the non-breaching party to the breaching party before the expiration date of the applicable survival period shall not thereafter be barred by the expiration of the relevant representation or warranty and such claims shall survive until finally resolved or the expiry of the limitation period under applicable Law, whichever is sooner.~~

Section 7.01 Survival. All representations, warranties, covenants, indemnifications and other obligations contained in this Agreement (other than the conditions of closing set out in Article III that are not waived) shall survive the Closing and shall not merge; provided that:<sup>2</sup>

- (a) Vendor shall not be required to indemnify or save harmless the Purchaser pursuant to Section 7.02 unless Purchaser has provided to the Vendor a notice of claim within the following time limits:

<sup>2</sup> Note to Purchaser: We revised this section to ensure that all representations, warranties, covenants and indemnifications survive closing, but added time limits for the specific claims as discussed on our call. As discussed, we also removed from the definition of “Fundamental Vendor Representations” and “Fundamental Purchaser Representations” the representations relating to “No Violation”.



- (i) with respect to the Fundamental Vendor Representations, at any time after Closing;
  - (ii) with respect to the representations and warranties set out in Section 3.30 [Taxes], not later than 90 days after the expiry of the last applicable limitation period under any applicable Tax legislation with respect to any taxation period to which these matters relate;
  - (iii) with respect to the representations and warranties set out in Section 3.32 [Environmental], not later than the fifth anniversary of the Closing Date;
  - (iv) with respect to a claim for breach of any of the representations and warranties contained in this Agreement involving fraud on the part of the Vendor, at any time after Closing; and
  - (v) with respect to all other representations and warranties, not later than the first anniversary of the Closing Date.
- (b) Purchaser shall not be required to indemnify or save harmless the Vendor pursuant to Section 7.03 unless Vendor has provided to Purchaser a notice of claim within the following time limits:
- (i) with respect to the Fundamental Purchaser Representations, at any time after Closing; and
  - (ii) with respect to all other representations and warranties, not later than the first anniversary of the Closing Date.
- (c) Notwithstanding the provisions of the *Limitations Act*, 2002 (Ontario) or any other statute, the period within which an Indemnified Party may commence a proceeding in respect of a claim for which a notice of claim is required to be, and has been, given in accordance with this Section 7.01, shall be two years from the last date upon which such notice of claim is permitted to be delivered thereunder, and any applicable limitation period is hereby so extended to the fullest extent permitted by Law.

**Section 7.02 Indemnification by Vendor.** Subject to the other terms and conditions of this Article VII, Vendor shall indemnify and defend ~~each of Purchaser and its Affiliates (including the Corporation) and their respective Representatives (collectively, the "Purchaser Indemnitees")~~ the Purchaser against, and shall hold ~~each of them~~ it harmless from and against, and shall pay and reimburse ~~each of them~~ it for, any and all Losses incurred or sustained by, or imposed upon, the Purchaser ~~Indemnitees~~ based upon, arising out of, with respect to or by reason of:<sup>3</sup>

- (a) any inaccuracy in or breach of any of the representations or warranties of Vendor set out in this Agreement or in any certificate or instrument delivered by or on

<sup>3</sup> Note to Purchaser: We should not be liable to the Purchaser's Affiliates and Representatives.



behalf of Vendor under this Agreement, as of the date such representation or warranty was made or as if such representation or warranty was made on and as of the Closing Date (except for representations and warranties that expressly relate to a specified date, the inaccuracy in or breach of which will be determined with reference to such specified date); or

- (b) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Vendor under this Agreement.

**Section 7.03 Indemnification by Purchaser.** Subject to the other terms and conditions of this Article VII, Purchaser shall indemnify and defend the Vendor against, and shall hold the Vendor harmless from and against, and shall pay and reimburse the Vendor for, any and all Losses incurred or sustained by, or imposed upon, the Vendor based upon, arising out of, with respect to or by reason of:

- (a) any inaccuracy in or breach of any of the representations or warranties of Purchaser contained in this Agreement or in any certificate or instrument delivered by or on behalf of Purchaser under this Agreement, as of the date such representation or warranty was made or as if such representation or warranty was made on and as of the Closing Date (except for representations and warranties that expressly relate to a specified date, the inaccuracy in or breach of which will be determined with reference to such specified date); or
- (b) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Purchaser under this Agreement.

**Section 7.04 Payment of Claims; Limitation of Liability; Effect of Materiality Qualifiers; Indemnity Escrow Amount.** The indemnifications provided for in Section 7.02 and Section 7.03 shall be subject to the following limitations:

- (a) Vendor shall not be liable to the Purchaser for indemnification under Section 7.02(a) until the aggregate amount of all Losses in respect of indemnification under Section 7.02(a) exceeds \$50,000 (the "Basket"), in which event Vendor shall be required to pay or be liable for all such Losses from the first dollar. Notwithstanding the foregoing, the aggregate amount of all Losses for which Vendor shall be liable under Section 7.02(a) shall not exceed \$500,000<sup>4</sup> (the "Cap"). Once the Basket has been exceeded, such claim shall be paid:
  - (i) first, from the Indemnity Escrow Amount until such time as it is depleted; and
  - (ii) second, by payment by the Vendor, which payment shall be made by wire transfer of immediately available funds to the Purchaser.
- (b) Purchaser shall not be liable to the Vendor Indemnitees for indemnification under Section 7.03(a) until the aggregate amount of all Losses in respect of

<sup>4</sup> Note to Draft: This represents 10% of the Purchase Price.



indemnification under Section 7.03(a) exceeds the Basket, in which event Purchaser shall be required to pay or be liable for all such Losses from the first dollar. The aggregate amount of all Losses for which Purchaser shall be liable under Section 7.03(a) shall not exceed the Cap. Once the Basket has been exceeded, such claim shall be satisfied by payment by the Purchaser to the Vendor by wire transfer of immediately available funds to the Vendor.

- (c) **Materiality** Notwithstanding the provisions of Section 7.04(a) and Section 7.04(b), any claim that is for breach of a covenant, agreement or undertaking, fraud or a Fundamental Representation, shall not be subject to any of the limitations in Section 7.04(a) or Section 7.04(b), provided that maximum aggregate liability of each party under this Article VII shall be equal to the Purchase Price.
- (d) **Section 7.4** For purposes of this Article VII, any inaccuracy in or breach of any representation or warranty shall be determined without regard to any materiality, Material Adverse Effect or other similar qualification contained in or otherwise applicable to such representation or warranty.
- (e) Notwithstanding any other provision of this Agreement to the contrary, no Indemnifying Party will have any liability for, or obligation with respect to, any punitive or aggravated damages, except in the case of fraud or to the extent actually awarded to a Governmental Authority or other third party.
- (f) On the first anniversary of the Closing Date, the Vendor and the Purchaser shall jointly instruct the Escrow Agent to pay the remaining Indemnity Escrow Amount, if any, less the amount of any Unresolved Claims, to the Vendor. Any portion of the Indemnity Escrow Amount retained in respect of an Unresolved Claim shall be retained in the indemnity escrow account and not released until the final resolution of the Unresolved Claim in accordance with this Agreement and the Escrow Agreement.

**Section 7.05 Indemnification Procedures.** The party making a claim under this Article VII is referred to as the "**Indemnified Party**", and the party against whom such claims are asserted under this Article VII is referred to as the "**Indemnifying Party**".

- (a) **Third-Party Claims.** If any Indemnified Party receives notice of the assertion or commencement of any ~~Action~~ action, claim or other legal proceeding made or brought by any Person who is not a party to this Agreement or an Affiliate of a party to this Agreement or a Representative of the foregoing (a "**Third-Party Claim**") against such Indemnified Party with respect to which the Indemnifying Party is obligated to provide indemnification under this Agreement, the Indemnified Party shall give the Indemnifying Party prompt written notice thereof, but in any event not later than ~~30~~ 10 calendar days after receipt of ~~such~~ notice of such Third-Party Claim. The failure to give such prompt written notice shall not, however, relieve the Indemnifying Party of its indemnification obligations, except and only to the extent that the Indemnifying Party forfeits



rights or defences by reason of such failure. Such notice by the Indemnified Party shall describe the Third-Party Claim in reasonable detail, shall include copies of all material written evidence thereof and shall indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained by the Indemnified Party. The Indemnifying Party shall have the right to participate in, or by giving written notice to the Indemnified Party, to assume the defence of any Third-Party Claim at the Indemnifying Party's expense and by the Indemnifying Party's own counsel, and the Indemnified Party shall cooperate in good faith in such defence. If the Indemnifying Party assumes the defence of any Third-Party Claim, subject to [Section 7.05\(b\)](#), it shall have the right to take such action as it deems necessary to avoid, dispute, defend, appeal or make counter-claims pertaining to any such Third-Party Claim in the name and on behalf of the Indemnified Party. The Indemnified Party shall have the right, [at its own cost and expense,<sup>5</sup>](#) to participate in the defence of any Third-Party Claim with counsel selected by it subject to the Indemnifying Party's right to control the defence thereof. ~~The fees and disbursements of such counsel shall be at the expense of the Indemnified Party; provided that, if in the reasonable opinion of counsel to the Indemnified Party, (A) there are legal defences available to an Indemnified Party that are different from or additional to those available to the Indemnifying Party, or (B) there exists a conflict of interest between the Indemnifying Party and the Indemnified Party that cannot be waived, the Indemnifying Party shall be liable for the reasonable fees and expenses of counsel to the Indemnified Party in each jurisdiction for which the Indemnified Party determines counsel is required.~~ If the Indemnifying Party elects not to compromise or defend such Third-Party Claim, [or](#) fails to promptly notify the Indemnified Party in writing of its election to defend as provided in this Agreement ~~or fails to diligently prosecute the defence of such Third-Party Claim~~, the Indemnified Party may, subject to [Section 7.05\(b\)](#), pay, compromise, defend such Third-Party Claim and seek indemnification for any and all Losses based upon, arising from or relating to such Third-Party Claim. Vendor and Purchaser shall cooperate with each other in all reasonable respects in connection with the defence of any Third-Party Claim, including making available (subject to the provisions of [Section 5.06 \[Confidentiality\]](#)) records relating to such Third-Party Claim and furnishing, without expense (other than reimbursement of actual out-of-pocket expenses) to the defending party, management employees of the non-defending party as may be reasonably necessary for the preparation of the defence of such Third-Party Claim.

- (b) **Settlement of Third-Party Claims.** Notwithstanding any other provision of this Agreement, the Indemnifying Party shall not enter into settlement of any Third-Party Claim without the prior written consent of the Indemnified Party, except as provided in this [Section 7.05\(b\)](#). If ~~a firm~~ [an unconditional](#) offer is made to settle a Third-Party Claim without leading to liability or the creation of a financial or other obligation on the part of the Indemnified Party and provides, in customary form, for the unconditional release of each Indemnified Party from all liabilities

<sup>5</sup> [Note to Purchaser: If the Purchaser wishes to participate in the defence of a Third-Party Claim where the Seller is the Indemnifying Party, it should have to bear the costs of defending such claim.](#)



and obligations in connection with such Third-Party Claim and the Indemnifying Party desires to accept and agree to such offer, the Indemnifying Party shall give written notice to that effect to the Indemnified Party. If the Indemnified Party fails to consent to such ~~firm~~ offer within 10 days after its receipt of such notice, the Indemnified Party may continue to contest or defend such Third-Party Claim and, in such event, the maximum liability of the Indemnifying Party as to such Third-Party Claim shall not exceed the amount of such settlement offer. If the Indemnified Party fails to consent to such ~~firm~~ offer and also fails to assume the defence of such Third-Party Claim, the Indemnifying Party may settle the Third-Party Claim upon the terms set forth in ~~such firm~~ the offer to settle such Third-Party Claim. If the Indemnified Party has assumed the defence under **Section 7.05(a)**, it shall not agree to any settlement without the written consent of the Indemnifying Party (which consent shall not be unreasonably withheld or delayed).

- (c) **Direct Claims.** Any ~~Action~~ claim by an Indemnified Party on account of a Loss which does not result from a Third-Party Claim (each, a "**Direct Claim**") shall be asserted by the Indemnified Party giving the Indemnifying Party ~~reasonably~~ prompt written notice thereof, but in any event not later than ~~30~~ 10 days after the Indemnified Party becomes aware of such Direct Claim. The failure to give such prompt written notice shall not, however, relieve the Indemnifying Party of its indemnification obligations, except and only to the extent that the Indemnifying Party forfeits rights or defences by reason of such failure. Such notice by the Indemnified Party shall (i) describe the Direct Claim in reasonable detail, ~~shall~~ (ii) include copies of all material written evidence thereof and ~~shall~~ (iii) indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained by the Indemnified Party. The Indemnifying Party shall have 30 calendar days after its receipt of such notice to respond in writing to such Direct Claim. ~~The~~ During such 30-day period, the Indemnified Party shall allow the Indemnifying Party and its professional advisors to investigate the matter or circumstance alleged to give rise to the Direct Claim, and whether and to what extent any amount is payable in respect of the Direct Claim, and the Indemnified Party shall assist the Indemnifying Party's investigation by giving such information and assistance (including access to the Corporation's premises and personnel and the right to examine and copy any accounts, documents or records) as the Indemnifying Party or any of its professional advisors may reasonably request. If the Indemnifying Party does not so respond within such 30 day period, the Indemnifying Party shall be deemed to have rejected such claim, in which case the Indemnified Party shall be free to pursue such remedies as may be available to the Indemnified Party on the terms and subject to the provisions of this Agreement.

~~**Section 7.6 Payments.** Once a Loss is agreed to by the Indemnifying Party or finally adjudicated to be payable under this Article VII, the Indemnifying Party shall satisfy its obligations within 15 Business Days of such final, non-appealable adjudication by wire transfer of immediately available funds. The parties agree that, if the Indemnifying Party does not make full payment of any such obligations within such 15 Business Day period, any amount payable shall accrue~~



~~interest from and including the date of agreement of the Indemnifying Party or final, non-appealable adjudication to and including the date such payment has been made at a rate per annum equal to 5%. Such interest shall be calculated daily on the basis of a 365 day year and the actual number of days elapsed.~~

**Section 7.06 ~~Section 7.7~~ Tax Treatment of Indemnification Payments.** All indemnification payments made under this Agreement shall be treated by the parties as an adjustment to the Purchase Price for Tax purposes, unless otherwise required by Law.

**Section 7.07 ~~Section 7.8~~ Exclusive Remedies.** Subject to Section 9.06 [*Specific Performance*], the parties acknowledge and agree that their sole and exclusive remedy with respect to any and all claims (other than claims arising from fraud, ~~criminal activity or wilful misconduct~~ on the part of a party hereto in connection with the transactions contemplated by this Agreement) for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement, shall be under the indemnification provisions set forth in this Article VII. In furtherance of the foregoing, each party hereby waives, to the fullest extent permitted under Law, any and all rights, claims and causes of action for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement it may have against the other ~~parties~~ party hereto and ~~their~~ its Affiliates and each of their respective Representatives arising under or based upon any Law, except under the indemnification provisions set forth in this Article VII. Nothing in this ~~Section 7.08~~ 7.07 shall limit any Person's right to seek and obtain any equitable relief to which any Person shall be entitled or to seek any remedy on account of fraud by any party's ~~fraudulent, criminal or wilful misconduct~~ hereto.





**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

## **TAB 3**

# **Buying or Selling a Business 2024**

Employment Issues in Corporate Transactions  
(PowerPoint)

Asset Purchase Due Diligence Checklist

**Joel Smith**

*Williams HR Law LLP*

**Kelly O'Ferrall**

*Osler, Hoskin & Harcourt LLP*

March 19, 2024





# Employment Issues in Corporate Transactions

LAW SOCIETY OF ONTARIO PROGRAM, BUYING OR SELLING A BUSINESS 2024

Joel Smith, Partner, WILLIAMS HR LAW LLP

Kelly O’Ferrall, Partner, OSLER, HOSKIN & HARCOURT LLP



March 19, 2024



## Share Purchase

- Employer stays the same
- Terms and conditions of employment are inherited
- Purchaser assumes all obligations (subject to the commercial terms)

## Asset Purchase

- Employer changes
- New terms and conditions of employment can be offered to non-union employees
- Purchaser does not automatically assume all obligations (but some obligations will flow through – e.g., continuity of employment provisions in employment standards legislation; collective agreements; OHSA; WSIB)
- For unionized workers, obligations are typically inherited



## Whether to offer employment (or not)

- Is it an asset or a share deal?
- Are employees represented by a union?
- Does the purchaser want to implement new terms and conditions of employment?
- Are there concerns about retention to be addressed?
- Is the purchaser willing to inherit employees' service (and related severance obligations)?
- Who will be responsible for severance costs?



## Top 5 Diligence Issues

- 1) Contractor Classification
- 2) Vacation and Overtime
- 3) Pay Equity
- 4) Health, Safety and Worker's Compensation
- 5) Claims



## 1) Contractor Classification

- Often, workers who are treated as independent contractors are actually employees or “dependent contractors” at law
- Risks:
  - Non-compliance with employment standards and workers compensation legislation
  - Reasonable notice of termination
  - Tax liabilities
- How to address through diligence:
  - Review agreements
  - Consider contractors’ roles against indicia of a true independent contractor relationship



## 2) Vacation and Overtime

- Non-compliance with vacation pay and overtime pay rules are very common
- Risks:
  - Claims for historic unpaid overtime pay and accrued but unpaid vacation pay (including collective claims or class actions)
- How to address this through diligence:
  - Review overtime policies and practices
  - Review vacation pay policies and practices
  - Request a record of vacation pay and overtime pay accruals/unpaid amounts
  - Trick: ask about overtime eligibility



### 3) Pay Equity and Employment Equity

- Most employers in Ontario and Quebec with 10 or more employees are required to undertake a pay equity analysis and establish and maintain pay equity among male and female jobs classes
  - Note: Federally regulated employers have different obligations
- Risk:
  - Failure to comply with applicable pay equity legislation could result in fines and an employer can be required to make retroactive pay adjustments to current and prior employees' wages if a pay discrepancy is found
  - The transaction may trigger the requirement to conduct a pay equity assessment
- How to address through diligence:
  - Ask for pay equity plan and documentation regarding the target's pay equity analysis, and any complaints, investigations, orders or audits regarding pay equity
  - Nil response generally indicates non-compliance



## 4) Health, Safety and Workers' Compensation

- Most employers are required to register with and pay premiums to the applicable workers' compensation board
- All employers are required to comply with occupational health and safety legislation (and any orders, etc. issued thereunder)
- Risks:
  - Purchaser can be held responsible for any amounts owed by the target pursuant to applicable workers' compensation / workplace safety insurance programs (even on an asset deal)
  - Health and safety orders applying to the target's business may flow through to purchaser (even on an asset deal)
- How to address through diligence:
  - Review premium and experience rating information
  - Get confirmation that the target is in good standing (e.g. through requesting a purchase certificate)



## 5) Claims

- Wrongful dismissal, human rights, employment standards, etc.
- Risks:
  - Purchaser may become liable for litigation costs and any orders flowing from the claims (particularly in share purchases)
- How to address through diligence:
  - Request information regarding employees terminated in the last 2 years
  - Request copies of all documentation related to demands, disputes, claims, grievances and complaints



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**Osler, Hoskin & Harcourt** LLP  
**Williams HR Law** LLP

**WHRL** | WILLIAMS  
HR LAW LLP

**OSLER**



## **Asset Purchase Due Diligence Checklist**

### General Information

- a) Review the number of full-time employees working for the Vendor.
- b) Review the number of part-time employees working for the Vendor.
- c) Obtain a complete employee list of the entire company setting out names, job titles, addresses, age (where available), salary and length of service.
- d) Obtain an organizational chart including functions, headcount and reporting responsibilities.
- e) Obtain a list of officers and directors.
- f) Obtain the current number of employees, turnover, absentee history and remuneration details of employees on disability.
- g) Obtain any insurance policies.
- h) Identify what contractors are engaged on an ongoing basis including:
  - a. Copies of contracts
  - b. Terms of contractor arrangement, including hours and compensation

### Employment Contracts

- a) Establish whether any employees have received letters confirming employment. If so, obtain copies.
- b) Determine how many employees have employment contracts.
- c) Analyze written employment contracts with respect to:
  - i. Name of employee
  - ii. Description of position
  - iii. Terms of agreement
  - iv. Salary
  - v. Benefits
  - vi. Special benefits
  - vii. Severance obligations of the employer
  - viii. Location of work and hybrid/remote work arrangements
- d) Establish how an employee is notified if his/her terms of employment are changed.
- e) Determine whether anything is signed by the employee at that time.
- f) Obtain copies of any agreements which employees are required to sign including:
  - i. Confidentiality agreements
  - ii. Invention assignment agreements
  - iii. Conflict of interest declarations
  - iv. Non-competition agreements
  - v. Non-solicitation agreements
  - vi. Bonus plans, including any short- and long-term incentive plans
  - vii. Stock option/share ownership plans



### Senior Management/Directors

- a) Obtain the names of the directors and senior management employees and their remuneration.
- b) Obtain any retention or succession plans for these employees.
- c) Obtain any loans and guarantees by the Vendor or its directing mind to directors, officers or employees.
- d) Determine details of indebtedness of directors or officers to the Vendor.

### Personnel Policies

- a) General
  - i. Obtain copies of all personnel policies
  - ii. Obtain copies of all employee handbooks
- b) Hiring
  - i. Analyse how hiring decisions are made (Are they cleared through one person or one department? Who conducts personnel interviews?).
  - ii. Obtain sample employment applications and job postings.
  - iii. Obtain copies of forms used for evaluation of applicants including written instructions to all persons who interview applicants.
  - iv. Confirm whether background checks are conducted in compliance with applicable law.
- c) Confidentiality/IP
  - i. Determine whether the Vendor's employees have access to confidential information concerning products, trade secrets, customer lists or any other matter.
  - ii. Establish whether any employees are involved in research and development that could result in inventions or discoveries.
  - iii. Determine whether there is potential for any important employees joining a competitor and soliciting business from customers or suppliers. If so, obtain details.
  - iv. Establish whether any significant defections from management or the Board are imminent and assess their effect on competitiveness.
- d) Terms and Conditions of Employment
  - i. Obtain summary of current:
    - A. Vacation plans, including relevant policies and records related to vacation pay eligibility and accruals
    - B. Paid holidays
    - C. Bonus plans
    - D. Commission payment plans
    - E. Overtime and lieu time entitlements, including records related to overtime eligibility and accruals
    - F. Shift differentials
    - G. Sick pay
    - H. Personal days
    - I. Paid funeral and bereavement leave
    - J. Housing arrangements
    - K. Hybrid/Remote working arrangements



- L. Vaccination requirements
  - M. Other fringe benefits and perquisites
- ii. Obtain summary of the employee health and welfare plan, and determine whether it is insured or uninsured.
- e) Benefits
  - i. Obtain a copy of each of the following, to the extent that they exist:
    - A. Deferred profit sharing plans
    - B. Registered Retirement Savings Plans
    - C. Pension plans (Determine if pension plans are defined benefit plans or defined contribution plans)
      - 1. Obtain advice related to any pension plans from experts
    - D. Consulting Agreements
    - E. Retirement Incentive/compensation plans
    - F. Outline of any oral communications of benefits
    - G. Benefit booklets
    - H. Employee automobile plans or leases
    - I. Administrative policies regarding pensions
    - J. Profit sharing and/or stock option plans
- f) Termination
  - i. Establish how decisions are made to terminate employees. (Are they cleared through one person or department? Are exit interviews conducted?)
  - ii. Determine what, if anything, is given to an employee as severance pay or otherwise upon his or her termination.
  - iii. Ascertain whether employees are provided with benefit continuance at the time of their termination.
  - iv. Confirm whether or not there is a formal or an informal severance policy.
  - v. Identify any employees who have been dismissed in the past two years. Determine circumstances of all terminations, including compensation that was provided upon termination and whether the dismissed employees signed releases.
  - vi. Establish whether the Vendor has closed down any locations in the past two years. If so, obtain a written explanation of the circumstances and information about what benefits were given to workers at that time.

### Legal Claims and Proceedings

- a) Review with auditors and with officers of the Vendor any current, pending or threatened lawsuits, litigation or regulatory actions by or against the Vendor or any subsidiary, parent or holding Companies.
- b) Obtain and review the following:
  - i. A list of all litigation and administrative proceedings (active, pending and closed) during the past three years and counsel handling same.
  - ii. Copies of consent orders and applicable injunctions
  - iii. A description of all threatened claims and proceedings
  - iv. Copies of all regulatory compliance correspondence
  - v. Lists of any audits or proceedings conducted by Canada Revenue Agency
- c) Obtain copies of any claims for wrongful dismissal



## Legal and Regulatory Compliance

### a) General

- i. Determine whether in the past 24 months, the Vendor has received or responded to any inquiries, notices, complaints or citations from any of the organizations below. If so, obtain the status of the matter and copies of all relevant correspondence with:
  - A. Ontario Ministry of Labour
  - B. Ontario Labour Relations Board
  - C. Ontario Human Rights Tribunal
  - D. Workplace Safety and Insurance Board
  - E. Ministry of Finance (Employer Health Tax Branch)
  - F. Any other administrative agency or governmental authority
- ii. Obtain copies of any complaints, proceedings or orders.
- iii. Establish whether the Vendor has ever received notice of any current or past violation of law (under e.g. *Occupational Health and Safety Act*, *Labour Relations Act*, *Human Rights Code*, *Pay Equity Act*, *Employment Standards Act, 2000*, *Workplace Safety and Insurance Act, 1997* or its predecessor *Workers' Compensation Act*)? Whether or not it has received such notice, determine whether Vendor is in violation.
- iv. Determine if and when any representatives of the Ministry of Labour Employment Standards Branch, Workplace Safety and Insurance Board or Pay Equity Commission visited the Vendor. Obtain details of the visit.

### b) *Employment Standards Act, 2000*

- i. Obtain copies of all policies required under the *Employment Standards Act, 2000* (including, if applicable, disconnecting from work and electronic monitoring).

### c) *Occupational Health and Safety Act*

- i. Obtain copies of health and safety policies and workplace harassment and violence policies and procedures.
- ii. Obtain copies of material safety sheets obtained in connection with occupational health and safety regulations.
- iii. Obtain sample copies of educational material distributed to employees in compliance with occupational health and safety legislation and regulations.
- iv. Obtain copies of reports filed pursuant to the *Occupational Health and Safety Act* and regulations.
- v. Determine whether the Vendor provides notice required under the *Occupational Health and Safety Act*.

### d) *Workplace Safety and Insurance Act, 1997*

- i. Obtain copies of documentation related to premiums and experience rating.
- ii. Obtain copies of all WSIB compensation claims in the last 72 months.
- iii. Ultimately, obtain a Purchase Certificate.

### e) *Pay Equity Act*

- i. Obtain copies of pay equity plan, if any.
- ii. Obtain details/copies of pay equity analysis.
- iii. Obtain copies of any complaints, investigations, proceedings, audits or orders under applicable pay equity legislation.

### f) *Human Rights Code*

- i. Obtain copies of accommodation policies and procedures



- ii. Determine whether the Vendor has received any complaints of discrimination or any other violation of the *Human Rights Code* in the past five years.
- iii. Obtain copies of any outstanding complaints under the *Human Rights Code*.

### Labour Relations

- a) Determine whether any employees are represented by a union.
  - a. If so, obtain copies of relevant collective agreements and review to understand relevant entitlements and obligations including:
    - i. Scope of management rights
    - ii. Scope of the bargaining unit
    - iii. Dispute resolution procedures
    - iv. Scope and extent of seniority rights
    - v. Layoff and recall rights
    - vi. Job classifications
    - vii. Wage increases
    - viii. Vacation and leave entitlements
    - ix. Benefits
    - x. Pension plans
    - xi. Bargaining timelines
- b) Ascertain whether the Vendor is aware of any current efforts to form a union or whether there have been any such efforts in the past five years.
- c) Determine if there are any grievances against the Vendor.





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**TAB 4**

## **Buying or Selling a Business 2024**

Tax Considerations in Buying or Selling a Business  
(PowerPoint)

**Kenneth Saddington**  
*Goodmans LLP*

**Simon Thang**  
*Thang Tax Law*

March 19, 2024





# Tax Considerations in Buying or Selling a Business

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March 19, 2024

KEN SADDINGTON & SIMON THANG



# Key Planning Considerations

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- Nature of participants
  - resident vs. non-resident
- Transaction financing
  - ensure interest is deductible and matched with income
- Form of consideration
  - cash vs. shares
  - availability of (and desire for) a rollover
- Timing of payment – all at closing vs. deferred/earn-out payment
- Consequences of acquisition of control on tax attributes of target
- Transfer taxes: GST/HST, provincial sales tax and land transfer tax



# Asset vs. Share Purchase

---

- Sellers *generally* prefer to sell shares, subject to the following:
  - Seller has substantial tax attributes and/or high tax cost in its assets it can use to offset income/gains arising from the sale
  - Seller has high paid-up capital or capital dividend account, such that tax on the distribution of proceeds is minimized
  - Generally, any historic tax liabilities will go with the shares, subject to negotiated indemnities
- Buyers *generally* prefer to buy assets, subject to the following:
  - Target company has significant tax attributes that will be available following closing (subject to loss restriction event rules)
  - Commercial considerations. For example, where the value of Target is in non-transferrable assets (i.e., government licenses)



# Asset Purchase

## Advantages to Buyer

---

- Step up in cost base (and UCC, if depreciable assets) to Buyer of assets to fair market value
- Generally tax liabilities do not follow assets
- Can allocate purchase price to assets in a manner negotiated with Seller
- Can amortize the cost of goodwill



# Asset Purchase

## Disadvantages to Buyer

---

- Loss of tax attributes of the business
- Buyer generally liable for transfer taxes
  - GST/HST
  - provincial sales tax (B.C., Manitoba and Saskatchewan)
  - land transfer tax, if there is a real estate component



# Asset Purchase

## GST/HST

---

### GST/HST

- Sale of assets is potentially subject to GST/HST, depending on:
  - Extent the assets were acquired or used for commercial activities; and
  - Nature of assets (e.g., used residential)
- Examples: medical practice, insurance brokerage, residential rental



# Asset Purchase

## GST/HST - Registration

---

- Recipient (Buyer) may be eligible to claim input tax credits on GST/HST payable
- Must generally be registrant at time tax becomes payable
- Risk losing ITCs if recipient is not registrant at the required time
- Register on time!
  - Back-dated registration?



# Asset Purchase

## GST/HST – Elections and Other Relief

---

- Election where sale of business and all or substantially assets (section 167)
  - No GST/HST payable on most supplies
  - Not available where supplier is registrant but recipient is not
  - Must cover sufficient assets (>90%)
  - Must be filed by recipient by due date for return covering the reporting period
- Specific relief for goodwill (section 167.1)
- Other elections, e.g. closely related group



# Asset Purchase

## Disadvantages to Seller

---

- Immediate realization at fair market value of assets by Seller
- May trigger recapture of previously claimed depreciation (taxed as ordinary income)
- Potential double tax on sale at Seller and shareholder level
  - May be mitigated if shareholders have high paid-up capital and/or capital dividend account to facilitate distributions



# Share Purchase

## Advantages to Buyer

---

- Sale of shares is generally GST/HST-exempt
- Buyer may be able to retain tax attributes of Target corporation, subject to the loss restriction event rules



# Share Purchase

## Disadvantages to Buyer

---

- Acquisition of control will trigger loss restriction event rules, with the following consequences:
  - Deemed year-end of Target
  - Expiry of net capital losses and non-capital property losses
  - Limitations on carry-forward of non-capital business losses: can only be used if the loss business continues to be carried on with a reasonable expectation of profit, and only to shelter income from the loss business or a similar business
  - Deemed realization of all accrued losses and foreign exchange losses
- Buyer generally inherits tax position of Target
  - Generally, no step up in basis for depreciable and non-capital assets
  - Cannot amortize any goodwill premium



# Share Purchase

## Advantages to Seller

---

- Tax-deferred rollover potentially available where shares of a Canadian corporation are issued in consideration for sale:
  - Elective rollover under section 85
  - Automatic rollover under section 85.1 – cannot have any non-share consideration
- Capital gain to Seller may be reduced by safe income planning
- Reserve
  - Potential for a 5-year reserve for unpaid balance of share purchase amount
- Earn-outs
  - Payment based upon future goodwill
  - CRA policy re: cost recovery basis
  - May need to structure as reverse earn-out to ensure tax benefits
- Use of Lifetime Capital Gains Exemption



# Questions?

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- Simon B. Thang, LL.B, LL.M
  - (416) 601-1645
  - [simon@thangtaxlaw.com](mailto:simon@thangtaxlaw.com)
- Ken Saddington
  - (416) 597-4233
  - [ksaddington@Goodmans.ca](mailto:ksaddington@Goodmans.ca)





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## **TAB 5**

# **Buying or Selling a Business 2024**

When I Find Myself in Times of Trouble:  
Professionalism Issues in Transactions for  
Business Lawyers and In-House Lawyers  
(PowerPoint)

**Jeffrey Simpson**

*Torkin Manes LL*

**Ian Palm**

*Fasken Martineau DuMoulin LLP*

**Sarah Mansour, General Counsel**

*Mazda Canada Inc.*

March 19, 2024







# WHEN I FIND MYSELF IN TIMES OF TROUBLE: PROFESSIONALISM ISSUES IN TRANSACTIONS FOR BUSINESS LAWYERS AND IN-HOUSE LAWYERS

Buying or Selling a Business 2024

Law Society of Ontario Continuing Professional Development

March 19, 2024

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## THE FACTS

- **Mother Mary Productions Inc. (“MMP”)** is an Ontario corporation, founded long ago by four friends.
- **MMP** was once a leading producer of music and some films too. In recent decades, it pivoted to focus on technology development. It is now a leading provider of enterprise hardware and software for the health and wellness sector around the globe.
- The company has close to 300 employees. It operates primarily out of its headquarters in Smith Falls, Ontario where it develops and manufactures most of its products. Some sales and support staff are based in the US, UK and five other countries.
- Only two of the founders still have an interest in the business, with each holding 35 percent of the voting shares. Of the remaining 30 percent, children of the remaining founders together hold 20 percent and 10 percent is in the form of an equity incentive plan for members of management.





## THE FACTS

- **There are five directors. Each of remaining founders is on the board, as are two representatives of the next generation. The CEO, not a family member, is the fifth director.**
- **Despite its recent financial success in recent years, governance practices at MMP are not what they should be at present. There is shareholders agreement, but it is long out of date and corporate records have been somewhat disorganized.**
- **Management has recently hired a general counsel who has brought in an eager team of experienced in-house counsel to support the business and upgrade its governance and risk management practices.**





## THE FACTS

- **MMP has both non-arm's length and third-party debt outstanding.**
- **A major Canadian bank has a significant credit facility outstanding with MMP and holds senior security over all assets of the business. Some shareholders have pledged their shares as security and the bank also has security over certain personal real estate holdings of the two remaining founders.**
- **Some of the younger generation shareholders (not all), including one who is not a director of the company, hold secured shareholder loans, subordinate to the bank.**





## THE DEAL

- The remaining founders are now well past 64. It has been a great run, but after a long and winding road they are eager to explore more of the world while they still can. They have been searching for source of capital to support their exit.
- The younger generation and the management shareholders envision lots of future growth for the business. They would be interested in some liquidity, but also want to roll-over part of their equity.
- After running a process organized by MMP's accounting firm, Now and Then Equity Partners has surfaced as the ideal candidate to refinance the business.
- For various reasons, the parties have decided on an asset sale.





## THE DEAL

- **Now and Then will purchase substantially all of the assets of MMP on closing, with a material deposit payable on signing of the purchase agreement.**
- **The balance of the purchase price will be paid in cash on closing, subject to a 15 per cent hold back, and 10 per cent earn out.**
- **Remaining shareholders, including management, will roll over 20 per cent of their proceeds into the newly recapitalized business post-closing.**
- **Despite pressure from Now and Then, the founding shareholders have so far refused to agree to vendor take-back financing.**





## YOUR RETAINER

- The parties have worked out very little of the details, although they have a mid-sized accounting firm giving them advice on various business-related issues.
- Your firm already does some legal work with MMP. They also work with other law firms too. You have a good relationship with the general counsel and the in-house counsel team.
- The general counsel was consulted briefly when a draft letter of intent was being discussed.
- Two of the shareholders, both directors of the company, approach you for Help! They want you to act for MMP on the sale transaction. The two directors want you to “do the deal” for them.





## QUESTIONS: PRELIMINARY STAGE

- **Who is your client in these circumstances? The company? All of the shareholders? The company and the shareholders? Only the particular shareholders who initially consulted you?**
- **How would you answer those questions differently from the standpoint of in-house counsel as compared to external counsel?**
- **If the company is established as the client, do you only owe duties to, and safeguard the interests of, the company? Do you owe any duty at all to the shareholders? Is it really accurate to say that the shareholders aren't really your clients?**





## QUESTIONS: NEGOTIATING THE DEAL

- Part way through the process you learn a family member (also a shareholder) who leading the due diligence process is incompetent to the point that it could have a detrimental impact on the deal and could give rise to future claims.
  - How would you address this if you are in house?
  - How might external counsel approach this differently from in house counsel?
- What if you think the entire deal is being structured in such a way as to favour the interests of one or more particular stakeholders to the potential detriment of other stakeholders or the company?





## QUESTIONS: NEGOTIATING THE DEAL

- How can you continue to act if you form the view that the transaction, as it is unfolding, is detrimental to some stakeholders?
- If you are in house counsel engaged on the transaction, how do you address this?
- If you are external counsel, what if raising the standard “get your own counsel” position will surely lead to accusations and may even endanger the current transaction (which is not in the company’s best interests)?





## QUESTIONS: CLOSING THE DEAL

- Is it ever appropriate to withdraw from representing the client at a critical time in the deal?
- Can a conflict between the stakeholders ever become so intractable that you simply cannot continue to effectively represent the company without everyone obtaining their own counsel?
- Faced with this kind of a dilemma as in house counsel, how do you address it? What can you do proactively in advance if you anticipate this kind of conflict is possible?





## AVAILABLE RESOURCES FROM LAWPRO

- **Managing Conflict of Interests Situations**  
<https://www.practicepro.ca/practice-aids/managing-booklets/managing-conflict-of-interest-situations/>
- **Tips for Corporate Commercial Lawyers**  
<https://www.practicepro.ca/2022/07/tips-for-corporate-commercial-lawyers-november-3/>
- **Corporate Commercial Malpractice Claims Fact Sheet**  
<https://www.practicepro.ca/practice-aids/claims-fact-sheets/corporatecommercial-malpractice-claims-fact-sheet/>
- **Corporate Commercial Transactions Checklist**  
<https://www.practicepro.ca/practice-aids/checklists/commercial-transactions-checklist/>
- **Investigation Tips**  
<https://www.practicepro.ca/wp-content/uploads/2020/10/Investigation-Tips-AODA.pdf>



# ROADMAP AND TIPS FOR IN-HOUSE COUNSEL

- **In-House Counsel is key part of “Deal Team”**
  - Help define strategy and actively participate in the process
- **Role of In House: Before, During and After Transaction**

Preparation	Execution	Post-Closing
Negotiate the engagement letter as well as others for related due diligence services	Coordination and analysis of due diligence	Monitoring representations and warranties
Selection of external counsel	Review and negotiation of all agreements necessary to conclude the transaction	Purchase price adjustments settlement (working capital, escrow, earn-out adjustments)
Review of the teaser, confidential information memorandum and other marketing materials	Preparation of board presentation	
Preparation or review of nondisclosure agreement	Filing with security exchange and other regulatory authorities	
Perform sale side due diligence i.e. review of all existing contracts and agreements to be supplied to buyer	Addressing all governance issues	
Participate at meetings and visits, either with potential buyers or with seller in the case of an acquisition	Press releases and public disclosures	





## KEY TAKEAWAYS FOR IN-HOUSE COUNSEL

- Translate legal concepts in layman's terms for all the parties involved, and likewise, ensure that the business terms are accurately reflected in the legal documents
- Bridge the corporate culture between various outside stakeholders (banking and financial partners, outside advisors such as legal, tax, auditors, environmental) and the organization
- Act as a mentor to the deal sponsor
- Guide outside counsel who are drafting contracts on the key business issue around the industry or the organization
- Help to keep the deal momentum going, especially with outside advisors
- Help identify the major topics that should be covered extensively by representations and warranties
- Always Remember who your client is = the Organization!





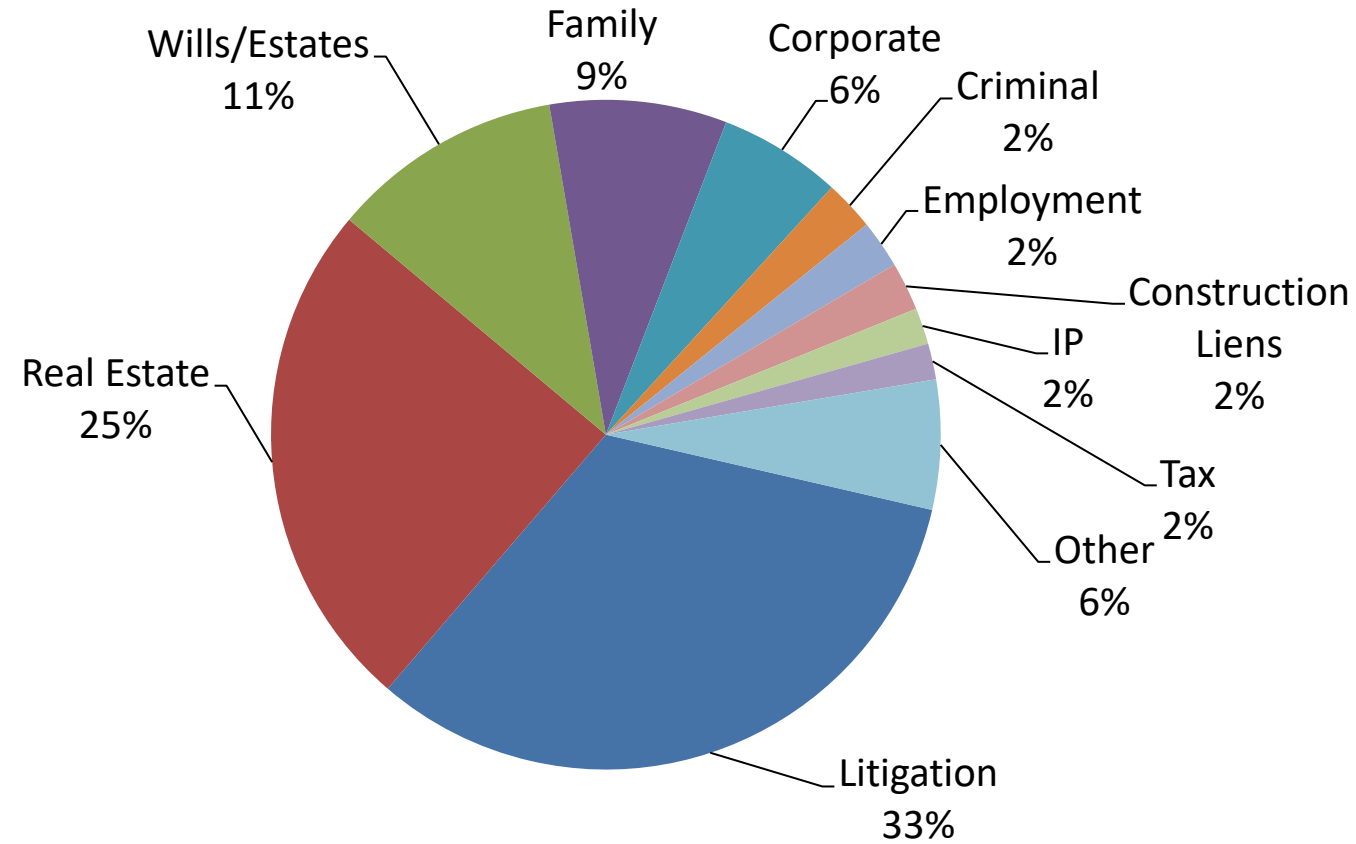
## LAWPRO TIPS TO PRACTICE SAFE LAW

1. **LAWPRO's Golden Rule – Document, Document, Document**
2. **Verify ID – it is NOT a copy and file exercise!**
3. **Verify good funds – Get the PCRN – Payment Confirmation Reference Number (LVTs+9numbers)**
4. **Call before you click – verify banking details independently before sending a wire**
5. **Get all the facts – Ask questions / Seek experts**





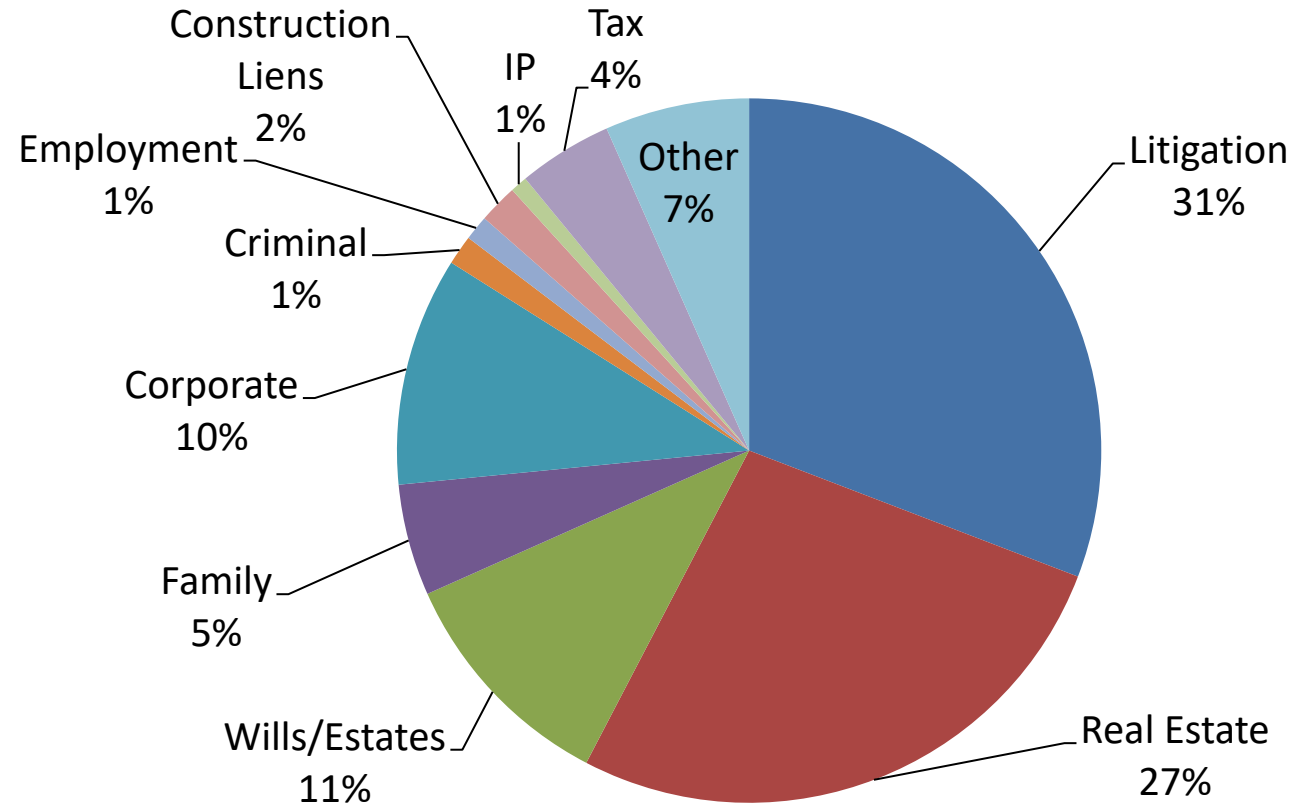
# LAWPRO STATS - CLAIMS BY AREA OF LAW (COUNT 2012-2022)







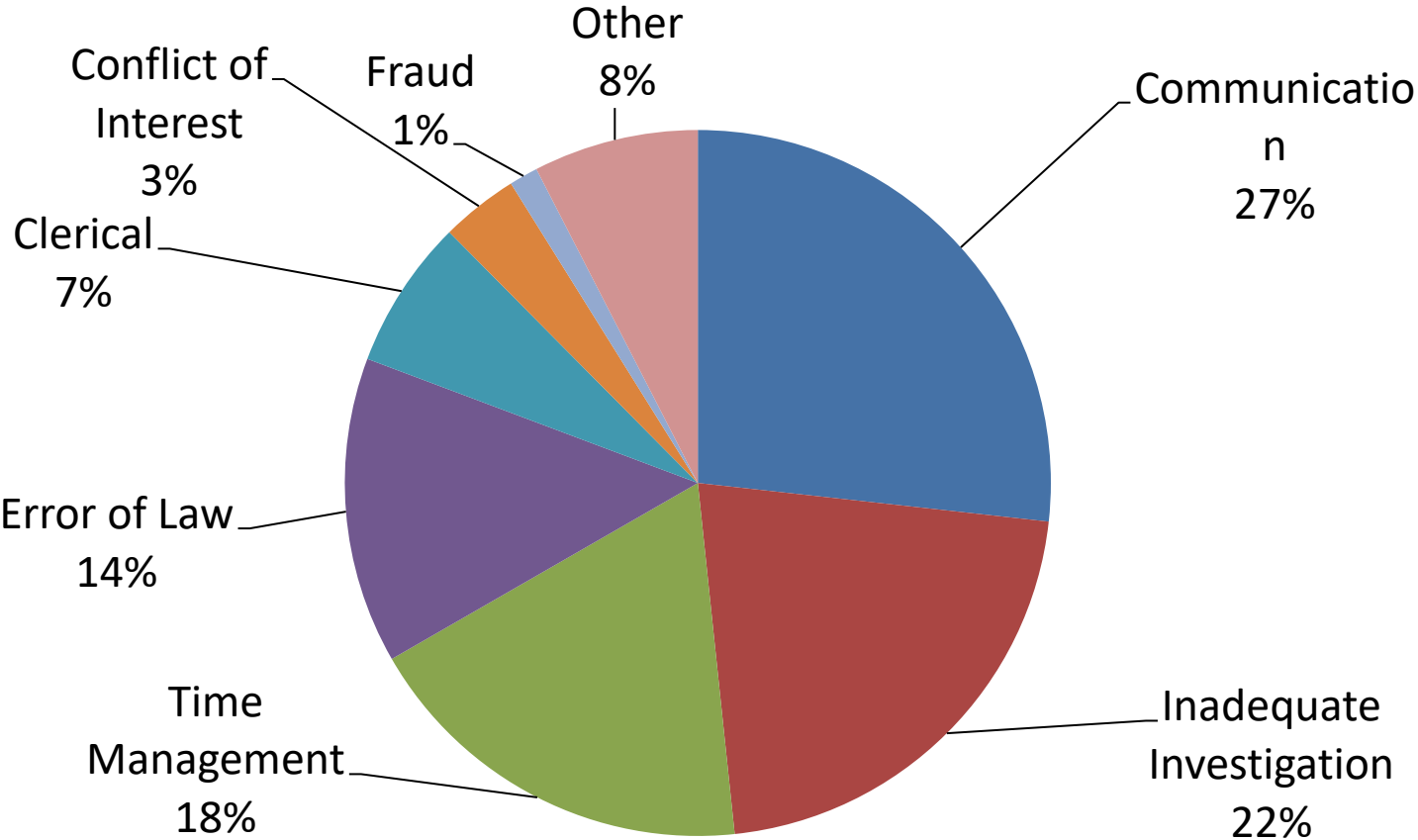
# LAWPRO STATS - CLAIMS BY AREA OF LAW (COST 2012-2022)







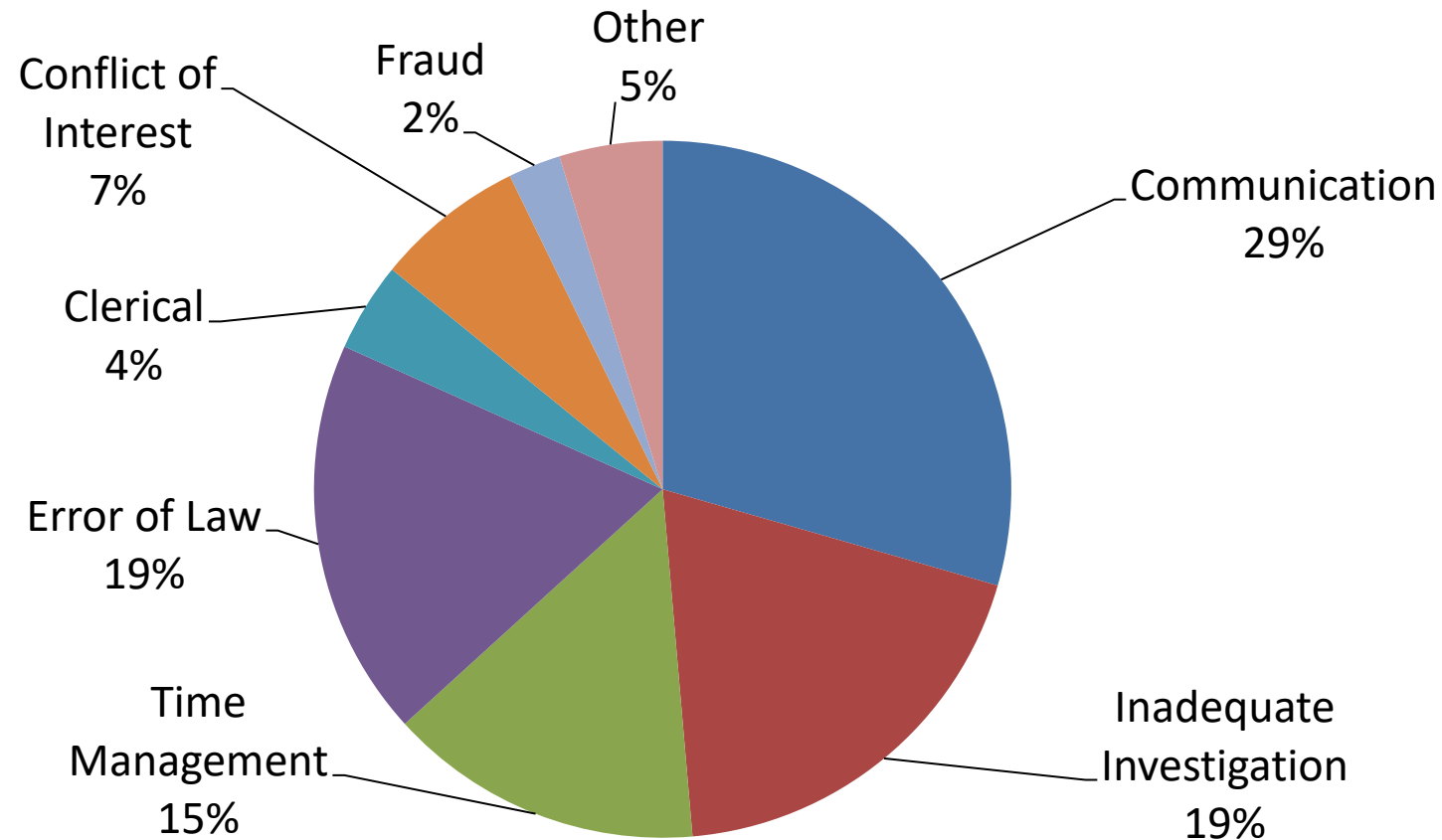
# LAWPRO STATS - ‘GLOBAL’ DESCRIPTIONS OF LOSS (COUNT 2012-2022)







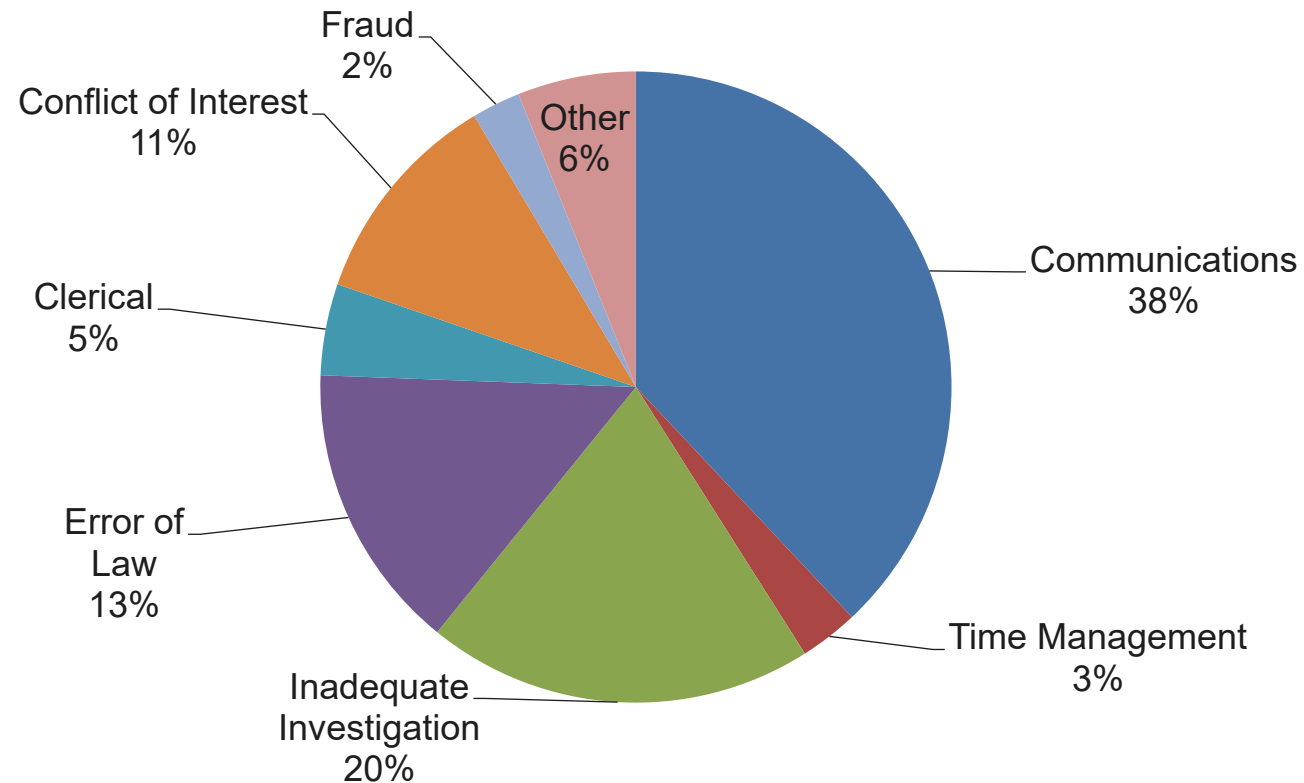
# LAWPRO STATS - 'GLOBAL' DESCRIPTIONS OF LOSS (2012-22 BY COST)







# LAWPRO STATS - CORPORATE/COMMERCIAL CLAIMS (2012 TO 2022)







## SELECT RULES OF PROFESSIONAL CONDUCT

- **Commentary [2] and [3] to the definition of “client” in Rule 1.1-1:**
- **[2] When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing.**
- **[3] For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established.**





## SELECT RULES OF PROFESSIONAL CONDUCT

- **Rule 3.2-3 (plus commentary):** Notwithstanding that the instructions may be received from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising the lawyer's duties and in providing professional services, the lawyer shall act for the organization.\*





## SELECT RULES OF PROFESSIONAL CONDUCT

- **Rule 3.2-8 (plus commentary):** A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally, shall do the following, in addition to their obligations under rule 3.2-7: (a), (b) and (c).\*
- **Rule 3.3-3 (plus commentary):** A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.\*





## SELECT RULES OF PROFESSIONAL CONDUCT

- **Rule 3.4-1 (plus commentary):** A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.+\*
- **Rule 3.4-2 (plus commentary):** A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is consent, which must be fully informed and voluntary after disclosure, from all affected clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.





## SELECT RULES OF PROFESSIONAL CONDUCT

- **Rule 3.4-5 (plus commentary):** Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that
  - a) the lawyer has been asked to act for both or all of them;
  - b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
  - c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.
- **N.B.** While lawyers in private practice can accept joint retainers in some cases, in-house counsel are generally not insured to act for anyone but the corporation and are generally prevented by duty of loyalty to the corporation from acting for other parties.\*





## SELECT RULES OF PROFESSIONAL CONDUCT

- **Rule 3.4-8: Except as provided by Rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer, the lawyer shall not advise either of them on the contentious issue and the following rules apply:**
  - a) **The lawyer shall**
    - i. **refer the clients to other lawyers for that purpose; or**
    - ii. **if no legal advice is required and the clients are sophisticated, advise them that they have the option to settle the contentious issue by direct negotiation in which the lawyer does not participate.**
  - b) **If the contentious issue is not resolved, the lawyer shall withdraw from the joint representation.**





**QUESTIONS?**





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## **TAB 6**

# **Buying or Selling a Business 2024**

Tips and Tricks in Running a Sales Process  
Discussion Materials (PowerPoint)

**Joanna Gibbons**  
*PwC Canada*

**Grant Buchan-Terrell**  
*gbtlaw*

Checklist for Acquisition of Assets or Shares

Joint Retainer Acknowledgement

Schedule A - Shareholder

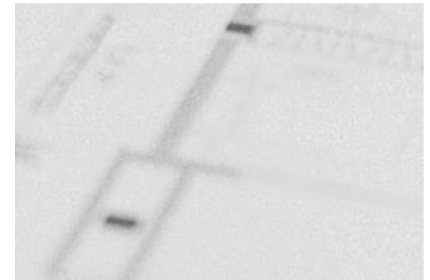
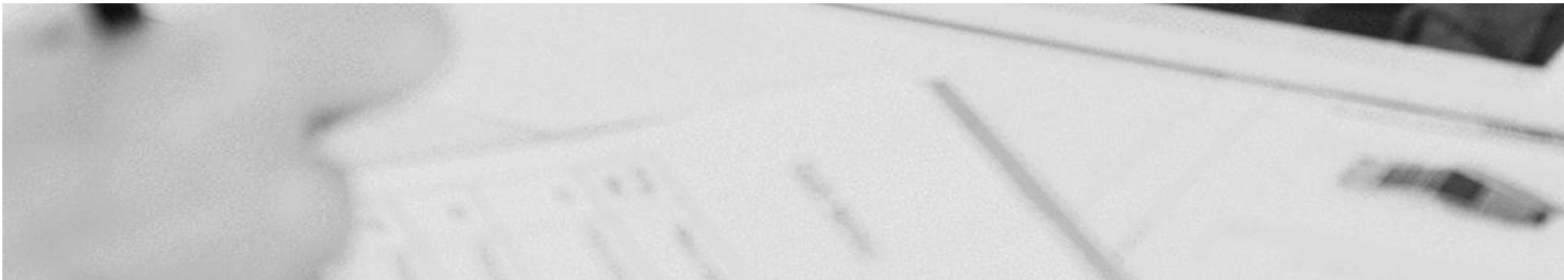
Acknowledgment & Waiver  
Re: Independent Legal Advice

**Grant Buchan-Terrell**  
*gbtlaw*

March 19, 2024







## TIPS AND TRICKS IN RUNNING A SALES PROCESS DISCUSSION MATERIALS

March 19, 2024

STRICTLY CONFIDENTIAL





## QUESTIONS TO BE ADDRESSED AT THE BEGINNING

**The following are questions that should be addressed at the beginning of exploring a potential sale. They are based on experience and are recurring issues when selling a small business:**

1. Who is the client? Joint retainer? Unrepresented buyers or sellers? Potential or actual conflicts?
2. Who is the other side? Is there qualified counsel? (this is a huge factor that determines if the deal will be easy or hard to complete)
3. What is the deal? (in business terms, what are expectations?)
4. Is there a term sheet outlining material terms? An LOI?
5. Does the deal, as described by the business people, make sense?
6. Who is quarterbacking the deal? Who is drafting paper?
7. Who does what to whom, where, when and why? W5
8. Who will I be dealing with day to day? Broker, advisor, principal?
9. What are my retainer terms? Upfront retainer? Ongoing retainers? Monthly billing?
10. What are the unique aspects / terms / facts of this deal that we should discuss now?
11. Use of evergreen or rolling checklists – buyer to seller, lawyer to client on each side; constantly updating
12. What are crucial deadlines vs target dates?



## ILLUSTRATIVE SELL-SIDE PROCESS AND TIMELINE

Deal Preparation		Phase 1		Phase 2		Completion
Refine Marketing Approach & Preparation	Draft CIM & Buyer List	Formal Marketing to Selected Parties	Obtain Initial Offers	Buyer Due Diligence	Selection of Final Offer	Final Negotiation & Closing
<ul style="list-style-type: none"> <li>• Perform analysis on the company and determine the go-to-market strategy</li> <li>• Refine list of potential buyers in collaboration with the stakeholders</li> <li>• Obtain market and financial information on each of the identified buyers to ascertain financial wherewithal</li> </ul>	<ul style="list-style-type: none"> <li>• Compile industry / company information</li> <li>• Prepare teaser and Confidential Information Memorandum ("CIM")</li> <li>• Finalize buyer list / outreach strategy</li> <li>• Initial preparation of data room and management presentation</li> </ul>	<ul style="list-style-type: none"> <li>• Contact prospective buyers and distribute teasers</li> <li>• Assess degree of interest and execute Confidentiality Agreements</li> <li>• Distribute CIMs</li> </ul>	<ul style="list-style-type: none"> <li>• Obtain initial offers ("Indications of Interest")</li> <li>• Respond to clarification queries and requests for additional information</li> <li>• Evaluate offers in the context of stakeholder objectives</li> <li>• Select parties to include in Phase Two</li> </ul>	<ul style="list-style-type: none"> <li>• Provide access to a virtual data room</li> <li>• Coordinate management presentations</li> <li>• Arrange site visits (if necessary)</li> <li>• Respond to diligence questions and requests for additional information</li> </ul>	<ul style="list-style-type: none"> <li>• Obtain final offers (Letters of Intent)</li> <li>• Negotiate any necessary terms included in the Letters of Intent</li> <li>• Select preferred acquiror based on stakeholders' objectives</li> </ul>	<ul style="list-style-type: none"> <li>• Draft legal documentation (Sale &amp; Purchase Agreement, Management Contracts etc.)</li> <li>• Conduct final negotiations</li> <li>• Prepare closing schedules and other transaction documentation</li> <li>• Complete transaction</li> </ul>
6 – 8 weeks		6 - 8 weeks		6 - 8 weeks		6 – 12 weeks

A typical transaction process will take 6 to 9 months from start to finish



# KEY FACTORS TO A SUCCESSFUL PROCESS OUTCOME

## Ensuring a Successful Transaction



### Why do processes fail?

1. Poor preparation, including lack of key information
2. Aggressive price guidance
3. Unexplained business underperformance
4. Inconsistent messaging

## Mitigating Factors

1

### PLAN AHEAD



- Be realistic about the number of final bids that are expected to be received
- Set a realistic and achievable timeline
- Identify potential friction points
- Details matter
- Anticipate potential questions ahead of time

2

### DEAL WITH FRICTION POINTS UP FRONT



- Potential management incentives
- Financing documents
- Sensitive information
- Tax planning
- Due diligence readiness (e.g.: Quality of Earnings)

3

### MANAGE BUYER EXPECTATIONS



- No exclusivity
- Rapid conclusions
- Minimize time between final bids and signing

4

### PRECISE & COORDINATED COMMUNICATION



- Scripted calls
- Project strength however do not overdo it
- Close backchannels except as part of a planned strategy
- Key team member focus through every stage of the process is critical
- Extensive communication and transparent decision-making between advisors, shareholders and buyers



# CONTACTS

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***W. Grant Buchan-Terrell, Barrister & Solicitor***  
*Gblaw*

**Checklist for Acquisition of Assets or Shares**

**1. Obtain general information as to business being acquired.**

- (a) Description of shares or assets being acquired, past history of the business, background of the owners, directors, officers and key employees and copies of any organization charts, sales, service or policy manuals or catalogues.
- (b) Details of patents, trade-marks, industrial property, etc., of the business and its main competitors and any protection for corporate or divisional names and details of all outstanding contracts and legal problems affecting the corporation or its products, including all items listed under 2 below required to draft agreement for purchase and sale.
- (c) Copies of complete financial statements (and/or tax returns for proprietorships) for a number of past years and projections for the future, details of property and equipment (owned or leased), inventory (including method of valuation), prepaid expenses, intangibles, contingent liabilities, taxes, indebtedness (including restrictions contained in any loan document) and any special items referred to in financial statements.
- (d) Policies of vendor as to capital expenditures, financing, budgeting, dividends, labour relations, sales organization, research, etc.
- (e) Details of personnel (including management, sales, engineering, research, labour) and their salaries, length of service, age, number, sex, union affiliations, fringe benefits, and any employee benefit plans and the funding of such plans and availability of seasonal employees - as well as details as to legal, auditing, advertising and public relations consultants; requirements of pension legislation and *Employment Standards Acts*, and surplus or deficits in pension plans and entitlement thereto.
- (f) Description of customers (domestic and foreign) and of all competitors, their manufacturing and sales methods, advantages and disadvantages of their products -and methods, percentage of market held by competitors as compared to vendor, penetration of Canadian market by foreign competitors and potential competition.
- (g) Availability of public services (power, gas, water, transportation and disposal facilities), raw materials, suppliers, subcontractors, market, unused plant capacity, etc.
- (h) Local laws and regulations affecting business, including labour laws, zoning and building by-laws, restrictions near highways, rights of access, tax laws, customs and excise duties, sales taxes, import and export restrictions, and similar trading restrictions.
- (i) Independent valuations.
- (j) conduct all local and national public (gov't) office and third party searches, including Corporate Profile, PPSA, executions against land, judgments in court, WSIB, PST, GST, CRA, Bulk Sales Act, Bank of Canada, litigation, supplier, customer, specialized such as Canada



Shipping Act, CRTC, MOT, in all appropriate jurisdictions, and review search results against due diligence results.

## **2. Prepare Agreement of Purchase and Sale.**

- (a) List the shareholders (if acquiring shares) and shares held by them.
- (b) Describe the shares or business and assets being acquired, including in the latter case patents, trademarks, trade and business names, goodwill, accounts receivable, know-how, industrial designs, distinguishing guises, copyright, secret processes, rebate claims, plant and equipment by describing them in the agreement or in a schedule. Specify agreements relating to the purchase or sale of computer hardware or software.
- (c) Specify price and terms of payment, subject to adjustments and provision for apportionment of price among different classes of assets.
- (d) Warranties and representations on asset acquisition to the effect that:
  - (i) the corporation is duly incorporated with specified authorized, issued and fully paid capital;
  - (ii) the corporation's books and specified financial statements for the past few years (attached as a schedule) fairly present the financial position in accordance with generally accepted accounting principles;
  - (iii) nothing out of the ordinary course of business has occurred since the date of the financial statement;
  - (iv) no commitments or material changes in the financial position will be made between the agreement date and closing without approval;
  - (v) there are no undisclosed liabilities, guarantees, writs, actions, claims, goods and services or sales or incometax liabilities or arrears;
  - (vi) only specified dividends or other distributions have been made since the date of the financial statement or will be made before closing;
  - (vii) vendor has good and marketable title to all assets or shares subject only to specified liens, encumbrances or other interests or that the shares are properly issued, fully paid and non-assessable; vendor owns all of its intellectual property, free and clear of any claims, royalties, encumbrances or charges;
  - (viii) key executives have not had any recent unusual salary increases and have executed or will execute continued employment contracts including non-competition covenants;
  - (ix) the corporation is in good standing with governmental agencies, its returns and licences are in order and its existence and right to carry on business are unimpaired;
  - (x) the corporation is in compliance with all environmental laws (including its operations in federal, provincial and municipal jurisdictions, as well as foreign jurisdictions) and the vendor will indemnify the purchasers for the cost of all clean-up orders, remedial orders and abatement orders and for all civil liability;
  - (xi) there are no compensation agreements, pension plans, or employment contracts or obligations arising from them other than those disclosed in the attached



- schedule, and all employee benefit plans are fully funded, and the vendor will give termination notices and assume severance obligations;
- (xii) no contract exists involving forward commitments extending for periods specified beyond the closing date;
  - (xiii) the vendor is not in default under any agreement to which it is a party or bound and all material agreements are in good standing and the corporation is entitled to all benefits under them;
  - (xiv) the agreement does not violate the by-laws, constating instruments or any agreements with third parties and has been duly authorized by all corporate proceedings of directors and shareholders where required.
- (e) In addition to the warranties and representations set forth in paragraph (d), on a share acquisition additional representations should be required concerning:
- (i) the names and addresses of any classes of shares held by directors, officers and shareholders and any agreement to buy out their shares and terminate their employment at specified times;
  - (ii) the purchased shares are owned by the vendor as beneficial owner free of any mortgages, liens, charges, security interests or adverse claims of any kind;
  - (iii) no person has a right, privilege or option to acquire the shares;
  - (iv) no person has a right, privilege or option to require allotment or issuance of unissued shares;
  - (v) the sale does not breach any contract of commitment to which the vendor corporation is a party and is in compliance with the constating documents of the vendor corporation;
  - (vi) the vendor is a resident of Canada within the meaning of section 116 of the *Income Tax Act*;
  - (vii) the corporation has filed all necessary tax returns, the corporation has received assessments on stated dates and the tax authorities have made their last audits on specified dates;
  - (viii) inter-corporate approvals required to transfer the shares have been complied with, e.g., directors' approval;
  - (ix) insurance is in place covering all assets;
  - (x) the representations and warranties are equally true and applicable for any subsidiaries or affiliates of the vendor covered by the transaction.
- (f) The closing should be conditional on favourable rulings being obtained from the Department of National Revenue, from the Director under the *Competition Act*, and under the *Investment Canada Act*, if applicable; the material or important representations and warranties being effective and true as of the closing; the closing documentation being adequate for the purposes of transferring the shares or assets to the purchaser; all third party consents, including those of governanents, holders of security and landlords, being obtained; the vendor having performed all of its obligations under the agreement; the delivery of documents effective after the closing, such as escrow agreements; the appropriate opinion of counsel to the vendor concerning such matters as the due



incorporation and standing of the vendor; and, in a share transaction, all releases and resignations from directors and offices having been obtained.

- (g) List and describe obligations and executory contracts which are to be assumed involving more than a certain amount and not itemized in the financial statement, including sales commitments, agreements with selling agents and suppliers, commitments for machinery and inventories.
- (h) List and describe employment, consulting/IC and agency contracts to be assumed, including incentive programs, security and pension' plans, and union contracts, and specify amount by which any pension or incentive plan is under-funded.
- (i) Provide that vendor will pay by way of reduction in purchase price any amount that the corporation is called on to pay for breach of warranty or undisclosed liability.
- (k) Provide for assumption of disclosed accounts payable, book debts and liabilities and indemnification of vendor from them'.
- (l) Provide for immediate and continued access to books, records, contracts, inventories and other assets for inspection. as well as to auditors and their working papers for previous two years.
- (m) Provide for obtaining any requisite consents to assignments of executory contracts including book debts, chattel mortgages, conditional sales agreements and those mentioned in (g) and (h).
- (n) Provide that the agreement is conditional on obtaining of licences to carry on business and compliance with municipal restrictions and zoning by-laws.
- (o) Recite term, rent and renewability and assignability of leases - vendor should agree to procure necessary consent to assignment or court order as to unreasonable withholding of it.
- (p) Provide that the assets and business are at the risk of the vendor pending closing and the purchaser can terminate the agreement if substantial destruction or change occurs.
- (q) Insert usual provisions as to requisitions on title of real property.
- (r) Provide that the purchaser is entitled to use of vendor's name and that the vendor must undertake to wind up or change name (if assets).
- (s) Insert restrictions against competition by vendor or senior officers.
- (t) List of persons to be employed by purchaser and covenant by vendor not to solicit for employment nor employ any personnel of business.
- (u) Provide for delivery by the vendor of resignations and releases by employees and directors of vendor.
- (v) Require all corporate proceedings to facilitate installation of new management, including special resolution under section 184(3) CBCA (if assets) or transfer of shares and approval of the transfer (if shares).
- (w) Provide for notice to customers, suppliers, etc.
- (x) Specify effective date of sale and disposition of interim profits.
- (y) Specify date and place of closing and persons on whom tender may be made.
- (z) Specify that time is of the essence.
- (aa) State whether the agreement is to be merged in closing and any time limitation on actions on warranties in the agreement.



- (bb) State addresses for notice to parties.
- (cc) Specify governing law.
- (dd) Covenant for further assurances.

Exclude oral warranties, etc.

- 3. Check if agent's commission is conditional on completion of the transaction.
- 4. Comply with provincial statutes such as the *Real Estate and Business Brokers Act (Ontario)*; *Labour Relations Act*; *Employment Standards Act*; pension legislation; *Bulk Sales Act* (or obtain indemnity from vendor); *Liquor Permit Act*; *Transport Act*, and with applicable professional SRO requirements for change of control or assignment of assets, etc.
- 5. Comply with applicable federal statutes such as *Competition Act*; *Broadcasting Act*; *National Broadcast Act*; *National Energy Act*; *Bank Act*; *Trust Companies Act*; *Loan Companies Act*, etc.
- 5B. Comply with applicable *Securities Acts* and the Canada or Ontario *Business Corporations Act* and provincial corporation legislation requirements as to timely disclosure rules, trading by insiders of the corporation, and as to take-over bids). Also comply with requirements of any Stock Exchange on which securities are listed, including its timely disclosure rules.
- 6. Transfer fire, motor vehicle and other insurance and check adequacy.
- 7. Obtain assignments of patents, trade marks, leases, executory contracts, etc., with consents where required (see 1(m), 2(g) and 2(i)).
- 8. Obtain conveyances, including a general conveyance with covenants for further assurances.
- 9. Verify valuations, amount of designated surplus, undistributed income and capital cost allowances for income tax purposes, trend of profits (up or down) over past few years, accuracy of employee income-tax deductions and remittances of sales taxes and goods and services taxes. In order to measure risk of acquisition, consider price at which assets could be resold and consider requiring vendor to buy back overvalued or questionable assets.
- 10. Have an environmental audit performed as to requirements and liabilities under numerous federal and provincial laws as well as regional and municipal by-laws. Reserve the right to terminate the agreement if serious environmental problems appear. Also perform due diligence searches of public records, lawsuits, corporate searches, including permits, approvals and administrative orders. Inspect properties and check aerial photos.



11. Ascertain status of Corporation as associated' for tax purposes, whether previous business losses can be "carried forward' against future profits and ascertain status of any pending appeals against assessments.
12. Obtain any appropriate clearance letters and certificates from Tax Department.
13. Obtain clearance certificate relating to provincial retail sales tax and federal goods and services tax.
14. Obtain consent of Corporation's banker to the release of guarantees or loans given by former shareholders.
15. Some special considerations where purchaser is a non-resident of Canada:
  - (a) Comply with *Investment Canada Act*.
  - (b) Check restrictions and prohibitions contained in special statutes dealing with certain types of business such as financial intermediaries, publishers, communications, aviation, real estate.
  - (c) Comply with provisions in charter documents and by-laws if the corporation is a "restricted share' corporation
  - (d) Does acquisition contravene provisions of the *Competition Act*?
  - (e) Special tax considerations under federal and provincial tax laws and international tax conventions between Canada and country of purchaser - operation by branch or subsidiary - local tax incentives - off-share corporations.
  - (f) Importation of goods to Canada, including restrictions on imports, labelling and bilingual requirements, safety laws, customs and dumping duties.
  - (g) Tax treatment of foreign nationals in Canada as officers and employees, including estate and gift taxes, withholding taxes and tax on leaving Canada.
  - (h) Immigration laws, including such matters as visas for foreign personnel, and foreigners wishing to become permanent Canadian residents.
  - (i) Licensing and qualification requirements (see the tab "Licences and Registration).
  - (j) Patent, trade mark and copyright laws and international treaties.
  - (k) Extension of employee benefit plans to cover Canadian and other employees on similar basis.
16. Conduct requisite searches for real property, bills of sale, chattel mortgages, conditional sales contracts, hen notes, assignments of book debts, corporate securities under provincial or federal statutes such as the *Personal Property Security Acts*, security under the *Bank Act*, *Business Corporations Act* (Ontario), the *Canada Business Corporations Act*, executions, taxes, (business income, etc.), bankruptcy and workers' compensation payments and vacation pay accruals.



17. Check compliance with all terms of Agreement prior to closing.
18. Compile list of post-closing items and attend to completion and follow-up.

You should feel free ask any question relevant to the business or the deal. Any hesitancy of the Vendor to answer information requests after an LOI and NDA are signed and Deposit is paid is a **big red flag**.

Remember, the key to due diligence is obtaining **independent** verification of information (orally or in writing) received from the Vendor or its agent/lawyer/accountant. Be skeptical and persistent. Search everywhere, ask everyone, see for your own eyes, then get it in writing.

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## Joint Retainer Acknowledgement

[as early as possible] , 2024

Dear Shareholder of XYZ Inc.:

**Re: Joint Retainer Acknowledgment and Consent –**  
**Proposed Sale of Your Shares in XYZ Inc.**

You have asked our law firm to act as your legal counsel in the proposed sale of all of your shares in XYZ Inc. (the "**Corporation**") to Engulf & Devour Inc., and related and incidental matters (the "**Transaction**").

As you know, our firm acts as legal counsel for the Corporation for several years, and we have been asked to act as legal counsel to the Corporation and to all of the other shareholders of the Corporation as set out in Schedule A attached hereto (together, the "**Shareholders**") in the Transaction. The Corporation and each of the Shareholders are to be separate parties to the share purchase agreement proposed to be entered into for the Transaction.

The Law Society of Ontario requires that a lawyer that represents more than one party in a matter shall follow the requirements of what is called a "Joint Retainer" in order to address potential conflicts of interest among parties in a Joint Retainer. Therefore, we ask you to confirm your acceptance of the Joint Retainer Rules:

1. in acting for more than one party, no information received in connection with the matter from one party can be treated as confidential so far as any of the others are concerned;



2. you are aware that we act regularly for and have a continuous relationship with the Corporation and that we have recommended that you obtain independent legal advice about the joint retainer prior to retaining us;
3. there is no conflict now between you and the Corporation or any other Shareholder; and
4. if a contentious issue or conflict of interest arises or is imminent as between you and the Corporation or any other Shareholder(s), we may continue to advise the Corporation about the contentious matter, but we will be required to refer you and all of the other Shareholders to another lawyer or firm.

If you still wish us to act on your behalf in the above matter on a Joint Retainer basis, please confirm your instructions by signing and returning a signed counterpart of this letter.

This letter may be executed in any number of counterparts, each of which is deemed an original, and all of which taken together constitute one and the same agreement. Counterparts may be delivered by e-mail or other electronic means.

Yours truly,

**W. Grant Buchan-Terrell**

Barrister & Solicitor

I hereby acknowledge that I have read and understood the above Joint Retainer Acknowledgement. I consent to W. Grant Buchan-Terrell acting on my behalf in accordance with the Joint Retainer Rules.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2024.

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**Shareholder**



(Please sign two copies, return one to Grant Buchan-Terrell)



## Schedule A

### Shareholders

1. [list each name separately]



**ACKNOWLEDGMENT & WAIVER  
RE: INDEPENDENT LEGAL ADVICE**

**TO: W. Grant Buchan-Terrell, Barrister & Solicitor**

**AND TO: [buyer name]**

**RE: XY&Z purchase for cancellation of shares in the capital stock of the Corporation from ABC pursuant to a Share Purchase Agreement (“SPA”) dated [2024].**

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I, the undersigned, hereby acknowledge that W. Grant Buchan-Terrell has recommended to me that I should obtain independent legal representation to advise me of my legal rights and obligations that arise from my execution of the documents concerning the above mentioned transaction.

Notwithstanding such advice, I declare that I do not wish to seek independent legal advice and expressly acknowledge that I hereby waive my right to seek independent legal advice as to how such rights and obligations may be affected by my execution of the documents concerning the above mentioned transaction. I declare that in arriving at the decision not to seek independent legal advice, I acknowledge that I have read and understand the contents of the documents concerning the above mentioned transaction. I further acknowledge that W. Grant Buchan-Terrell has advised me that he acts solely for XYZ and that he has not provided me with any legal advice (and I do not rely on him for any advice) with respect to my rights and obligations in the this matter, nor has any person used any compulsion, threat, or otherwise exercised undue influence against me.

And I further acknowledge and that W. Grant Buchan-Terrell and XYZ, or any one of them, may rely on this document herein in any subsequent legal proceeding relating to or arising from the referenced matter.

And I further acknowledge that W. Grant Buchan-Terrell has prepared this acknowledgement and waiver document on the instructions and for the benefit of XYZ. If W. Grant Buchan-Terrell has attended to my execution of the aforesaid documents, or any part thereof, or any other instrument relating to the matters herein, I expressly agree and acknowledge that he has done so solely as a witness and as legal counsel to XYZ, and not in any other capacity.

Dated this \_\_\_\_ day of May, 2024

WITNESS:

_____	)	
	)	
	)	_____
Name:	)	ABC