Law Society of Ontario | Barreau de l'Ontario

Business Law Refresher 2024

CO-CHAIRS

Abbasali (Ali) Kermalli
KPMG Law LLP

Heidi Reinhart, KC
Norton Rose Fulbright Canada LLP

May 15, 2024

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Law Society of Ontario | Barreau de l'Ontario

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Business Law Refresher 2024

CO-CHAIRS: **Abbasali (Ali) Kermalli,** *KPMG Law LLP*

Heidi Reinhart, KC, *Norton Rose Fulbright Canada LLP*

May 15, 2024
9:00 a.m. to 12:30 p.m.
Total CPD Hours = 2 h + 30 m Substantive + 45 m Professionalism
+ 15 m EDI Professionalism

Webcast only
Law Society of Ontario

SKU CLE24-00507

Agenda

9:00 a.m. – 9:05 a.m. **Welcome**

Abbasali (Ali) Kermalli, *KPMG Law LLP*

Heidi Reinhart, KC, *Norton Rose Fulbright Canada LLP*

9:05 a.m. – 9:35 a.m.	**Negotiating the Deal** (25 m P) Kevin Fernandes, *Keyser Mason Ball LLP*
9:35 a.m. – 10:05 a.m.	**Asset Purchase and Share Purchase Agreements: Distinctions and Key Considerations** Sara Josselyn, *Gowling WLG (Canada) LLP*
10:05 a.m. – 10:35 a.m.	**Determining Purchase Price Adjustments** (5 m P) Nicholas Gray*, Wildeboer Dellelce LLP* Adrian Myers, *Torkin Manes LLP*
10:35 a.m. – 10:45 a.m.	**Question and Answer Session**
10:45 a.m. – 11:05 a.m.	**Break**
11:05 a.m. – 11:35 a.m.	**Legislative Refresher and Update: *Competition Act* Wage-Fixing and No-Poaching Amendments** Jennifer Heath, *Piccolo Heath LLP* Rebecca Moskowitz Wagner, *Torys LLP*
11:35 a.m. – 11:55 a.m.	**Insolvency Considerations** (10 m P) Asim Iqbal, *Miller Thomson LLP*
11:55 a.m. – 12:20 p.m.	**Chairs' Panel: Implications and How to Harness Family Conflict in Mergers and Acquisitions** (5 m P + 15 m e) Abbasali (Ali) Kermalli, *KPMG Law LLP* Heidi Reinhart, KC, *Norton Rose Fulbright Canada LLP*

12:20 p.m. – 12:30 p.m. **Question and Answer Session**

12:30 p.m. **Program Ends**

This program qualifies for the 2025 LAWPRO Risk Management Credit

What is the LAWPRO Risk Management credit program?

The LAWPRO Risk Management Credit program pays you to participate in certain CPD programs. For every LAWPRO-approved program you take between September 16, 2023 and September 15, 2024, you will be entitled to a $50 premium reduction on your **2025 insurance premium** (to a maximum of $100 per lawyer). Completing any Homewood Health Member Assistance Plan e-learning course available at homeweb.ca/map also qualifies you for a $50 credit.

Why has LAWPRO created the Risk Management Credit?

LAWPRO believes it is critical for lawyers to incorporate risk management strategies into their practices, and that the use of risk management tools and strategies will help reduce claims. Programs that include a risk management component and have been approved by LAWPRO are eligible for the credit.

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STEP 1:	STEP 2:
• Attend an approved program in person or online; and/or • View a past approved program • Completing a Homewood Health e-course*	Complete the online declaration form in the Risk Management Credit section of my.lawpro.ca by September 15, 2024. The credit will automatically appear on your 2025 invoice.

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Where can I access a list of qualifying programs?

See a list of current approved programs at lawpro.ca/RMcreditlist. Past approved programs are usually indicated as such in the program materials or download page. Free CPD programs offered by LAWPRO can be found at www.practicepro.ca/cpd

Whom do I contact for more information?

Contact practicePRO by e-mail: practicepro@lawpro.ca or call 416-598-5899 or 1-800-410-1013.

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

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Business Law Refresher 2024

May 15, 2024

SKU CLE24-00507

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Business Law Refresher 2024

Negotiating the Deal (PowerPoint)

Kevin Fernandes
Keyser Mason Ball LLP

May 15, 2024

KMB LAW

KEYSER | MASON | BALL LLP

BUSINESS LAW REFRESHER 2024

NEGOTIATING THE DEAL

KEVIN R. FERNANDES

Partner, Corporate/Commercial | Mergers & Acquisitions

NEGOTIATING THE DEAL

Meeting your professional responsibility & obligations

1. Meeting with client & collecting information;
2. Managing client expectations;
3. The Deal Roadmap - Term Sheets / Letter of Intent; and
4. Courtesy & civility within the profession

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KEYSER | MASON | BALL LLP

Meeting with client & collecting information

- **Identification / Verification**. Obtaining basic identification information about the client and any third party that the client is acting for or representing. Verifying the identity of the client or third party where the licensee is engaged in or giving instructions in respect of the receipt, payment, or transfer of funds.

- **Monitoring**. Periodically monitoring the professional business relationship with the client when retained in respect of a financial transaction that is ongoing.

- **Source of Funds / Recordkeeping**. Obtaining source of funds information from the client or third party. Recording and retaining all information acquired during the identification and verification process.

- **Withdrawal**. If at any point while retained, including while obtaining identification and verification information, withdrawing from representation if: (i) the licensee knows or ought to know that they would be assisting in fraud or other illegal conduct or the client, or (ii) the client or third party refuses to provide the information required to comply with the identification, verification, or source of funds requirements.

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Meeting with client & collecting information

Transaction Structure

- Share transaction or asset transaction?
- One time transaction or a series of transactions?

Parties

- Family?
- Management?
- Industry Associates/Strategics?
- Brokered / Marketed Transaction?

Advisors

- Accountant?
- Valuator?
- Litigator?

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Managing client expectations

Client Experience

- Is this the client's first transaction?
- Is this your first interaction with this client?
- Who is the individual giving instructions? Are those instructions on behalf of someone else?

Client Team

- Internal team? M&A, financing, leasing, franchise, intellectual property, employment, litigation etc.?
- External team? Accountant, valuator, broker / corporate finance support?

The Other Team

- Is this your first experience working with opposing counsel?
- What it the timeline to close? Are there milestones/outstanding deliverables?

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Managing client expectations

Transaction Complexity

- Bank/lender financing requirements?
- Vendor financing arrangements?
- Retaining equity?
- Earn-Out?

Term Sheet / Letter of Intent

- Was a term sheet/letter of intent prepared by the parties?
- Was a confirmation of funding letter provided by the lender?
- Is there a deal ‘roadmap’?
- Are there major issues / sticking points to get in front of early?

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The Deal Roadmap - Term Sheet / Letter of Intent

- Complexity can lead to uncertainty/miscommunication
- The letter of intent/term sheet can ensure that all parties are aligned before going too far off track
- Typically non-binding, with the exception of certain circumstances (detrimental reliance or inducement)
- A roadmap can help provide for a smoother closing process with fewer last minute surprises

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Courtesy & civility within the profession

Learn from the litigator

- Tackle unfavourable issues head on
- Be reasonable with timeframes / deliverables

Context is Key

- Understand the overall role of the transaction
- Determine the overall timeline for the transaction

Closing Agenda

- Circulate early after the initial draft definitive agreement is prepared, to align all parties on deliverables
- Maintain ongoing ‘punchlists” of outstanding items

KMB LAW
KEYSER | MASON | BALL LLP

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TAB 2

Business Law Refresher 2024

Asset and Share Purchase Agreements: Distinctions and Key Considerations (PowerPoint)

Sara Josselyn
Gowling WLG (Canada) LLP

May 15, 2024

cpd

Asset and Share Purchase Agreements: Distinctions and Key Considerations

Presented by: Sara Josselyn

May 9, 2024

GOWLING WLG

Agenda

Topics
➢ Asset vs share acquisitions – distinctions
➢ Key considerations
○ Tax ○ Diligence ○ Corporate matters ○ Reps and warranties ○ Allocation of purchase price ○ Employment matters
➢ Concluding thoughts

GOWLING WLG

Asset vs share acquisition – distinctions

Asset acquisition

- Buyer acquires target's assets and assumes some or all of target's liabilities / obligations
- Target remains in existence (minus the assets and liabilities and obligations acquired by buyer)

Share acquisition

- Buyer acquires target's shares directly from target's shareholders, and buyer indirectly acquires assets and liabilities
- Target maintains its corporate existence, operating assets and liabilities, and continues to operate its business

GOWLING WLG

Asset vs share acquisition – distinctions

	Ownership	Assets & liabilities	Complexity	Contracts & licenses	Employees
Asset Sale	Buyer acquires desired assets; seller retains ownership of legal entity	Buyer can "cherry pick" desired assets and leave unwanted liabilities	A more cumbersome process; need to address each asset	May require renegotiation of third-party consents to assignment	Employee agreements cannot be assigned; must be renegotiated
Share Sale	Buyer acquires the legal entity; full transfer of ownership of the business	Buyer acquires entire business, including all assets and undisclosed liabilities	More straightforward; almost all assets transferred automatically	Are typically automatically assigned, absent change of control provisions	No changes in employment status

Key considerations

1. Tax
2. Tax
3. Tax… and
4. Tax

*** Tax issues tend to drive the deal***

Seek tax advice early!

GOWLING WLG

Key considerations : purchase price allocation

- There are mechanical differences depending on structure
- In an asset deal, keep in mind:
  - the purchase price must be allocated among the assets being purchased
  - certain types of assets might get special treatment
  - There may be tax concerns depending on how the consideration is structured

GOWLING WLG

Key considerations: diligence

- Due diligence in an asset deal is not altogether different from that in a share deal, except:
  - Corporate minute book reviews are generally not conducted
  - No need to confirm the accuracy of the capitalization table
  - Investigating potential undisclosed liabilities is unnecessary

GOWLING WLG

Key considerations: corporate matters

- Third party consents and approvals
  - Consents or notices – material contracts
  - Transferability of licenses or permits
  - Other approvals
- Security interests
  - Waivers and consents

GOWLING WLG

Key considerations: reps and warranties

- Asset deals
  - Generally provided by selling shareholders and the target corporation
  - Reps focus on the “business”
  - Purchaser would want joint & several liability (target and shareholders)

- Share deals
  - Generally provided by the selling shareholders
  - Reps focus on the target, its assets, liabilities and operations
  - Purchaser would want joint & several liability among shareholders

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Key considerations: employment matters

- More complicated in asset deals:
  - Employment agreements cannot be unilaterally assigned
  - The purchaser will normally make offers to transferred employees on substantially similar terms
  - Pensions and benefits add complications, as do unions and collective agreements

- In a share deal, there is no change in the employment status of the employees, but diligence is critical

Concluding thoughts

- Tension between buyers' and sellers' interests
- Buyers usually prefer asset deals
  - allows them to be selective and "cherry pick"
  - can avoid general assumption of liabilities (lower risk)
- Sellers usually prefer share deals
  - allows them to dispose of all assets and liabilities
  - results in taxation at capital gains rate, whereas sale of assets can result in ordinary income from recapture of CCA and profit on sale of inventory
- Tax is key

Thank you!

Sara Josselyn
Partner
Sara.Josselyn@gowlingwlg.com

GOWLING WLG

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TAB 3

Business Law Refresher 2024

Insights on Canada's New Wage-Fixing and No-Poaching Law (PowerPoint)

Jennifer Heath
Piccolo Heath LLP

Rebecca Wagner
Torys LLP

May 15, 2024

cpd

LSO Business Law Refresher 2024

Insights on Canada's New Wage-Fixing and No-Poaching Law

Jennifer Heath, *Piccolo Heath LLP*
Rebecca Wagner, *Torys LLP*

May 15, 2024

Background on the New Law

Introduction

- On **June 23, 2023**, a new Canadian *Competition Act* **criminal prohibition** against wage-fixing and no-poaching agreements took effect (**subsection 45(1.1)**)

Language

- The new law makes it a crime for any **employer** in Canada to enter into an agreement with **another unaffiliated employer, even informally**, to:
  - "fix, maintain, decrease or control salaries, wages or terms and conditions of employment" (i.e. **"wage-fixing agreements"**); or
  - agree to "not solicit or hire each other's employees" (i.e. **"no-poaching agreements"**)

Penalty

- Employers who violate the law could face **imprisonment** for up to 14 years or an uncapped fine in the discretion of the court, or both

Affiliates and Pre-Existing Agreements

What is an "Affiliate" under the *Competition Act?*

- The new law **does not apply** to agreements entered into only by **affiliated employers**
- Affiliates are defined as entities commonly controlled, with control defined a **50%+1 of director voting shares** in the case of corporations and **50%+1 of the equity** in all other cases
    - If two employers are controlled by the same parent company or individual, they are affiliated

Pre-existing agreements protection

- There is no retroactive liability or criminality for non-compliant agreements that are **terminated or expire** prior to June 23, 2023 or that are **not enforced or reaffirmed** after that date
- **At least two parties** must reaffirm or implement a pre-existing restraint to establish the requisite "meeting of the minds"

Who is an “Employer”?

Competition Bureau guidance interprets “employer” broadly

- The *Competition Act* **does not define “employer” or “employee”**
- An “employer” includes directors, officers, as well as agents of employers such as employees, including **HR professionals** and others who are usually only considered employees of an employer
  - **Employees** (including contractors, consultants, and other quasi-employees) who/which enter into illegal agreements may therefore be viewed as "employers" and be subject to prosecution
  - Third parties who/which are not employers, such as a **member of a trade association or a former employee**, are not insulated from being a party to an offence and may be prosecuted
  - Employer is **more broadly defined than in other contexts**, such as tax, employment standards, and health and safety legislation, and **will capture *external agents of* an employer**, such as a recruiter or staffing agency
  - Corporations may be subject to prosecution as a result of an agreement between their respective employees if those employees are acting as **“senior officers”**

Who is an “Employee”?

Much uncertainty remains

- While an **employment relationship is required**, it remains unclear who is an “employee” or when an "employer-employee" relationship exists
- Bureau guidance provides that this is a fact-driven analysis **dependent the nature of the interactions and applicable provincial and federal laws, which vary between jurisdictions and contexts** (e.g. CRA, employment standards, Service Canada/EI, health and safety)
- So-called **independent contractors** or those who are **self-employed** “employees” are likely caught in this category, especially given the common mis-categorization of such workers in other contexts and the employee-protection goals of this and other legislation
- **Former employees and indirect employees** (e.g. those hired through a staffing agency) may also be included
- Contractual relationships can **evolve** into an “employer-employee” relationship **over time**
- Overall, it is likely that a worker or service provider is covered by this legislation, **even if they are not treated as an employee**

Low Bar to Trigger

***Per se* offence**

- Wage-fixing and no-poaching agreements are ***per se* illegal**
  - Meaning that both the **intention and consequences of an act are irrelevant**; it matters only that the misconduct occurred
  - **Agreements that may benefit employees**, such as health and safety measures or work-from-home policies, are now likely illegal

"Agreement" has a very broad meaning and need not be in writing

- An agreement is a collaboration of any nature and can include **informal understandings**
- **Hard evidence** is not required to prove an "agreement" occurred
- Circumstantial evidence, including **parallel conduct** may be sufficient

Information Sharing

Approach information sharing with caution

- **Sharing employment information** may be "give rise to an inference" that an agreement exists
- Many employers regularly communicate with each other on matters of mutual interest, **such communications brings the risk of criminal sanction**
- **HR Information should be viewed as competitively sensitive and not shared directly** with other employers
- Participation in **anonymized surveys and other indirect resource-sharing should be reconsidered**

Information Sharing, Cont'd

Trade associations (formal and informal)

- Employers should **take care when sharing information** with each other in the course of collaborative activities, such as the benchmarking of employment terms and at trade associations
    - Informal settings such as **trade association social events and other HR/compliance support/mentorship groups** could lead to improper discussions and raise suspicion

Collective bargaining

- The new legislation presumptively covers wage information sharing in collective bargaining, but there is an existing exemption which the guidance supports applies (assuming good faith): any agreement between two or more employers in a trade, industry, or profession **engaged in collective bargaining with their unionized employees regarding salary, wages or terms or conditions of employment is exempt from scrutiny**

“Terms and Conditions” and No-Poaching Agreements

“Terms and conditions of employment” elaborated upon

- “Terms and conditions" covers the responsibilities, benefits, and policies associated with a job, as well as anything else **“that could affect a person's decision to enter into or remain in an employment contract”**
- Therefore, **“wage-fixing” goes way beyond wages** – e.g. job descriptions, allowances, non-monetary compensation, working hours, bonuses, vacation/personal time, employment/post-employment restrictions, perks, etc. as well as the absence of any such terms/conditions

No-poaching agreements must be mutual to be offside

- **Mutual non-solicitation agreements** between employers that limit opportunities for their employees to be solicited (e.g. restrictions on the communication of information related to job openings) or hired (e.g. with staffing agencies and third-party service providers) by each other will be caught
- **One-way no-poaching agreements** (e.g. a standard non-solicitation clause in an employment agreement) are not problematic unless there is more than one interconnected one-way agreement

Ancillary Restraints Defence ("ARD")

Defences

- **Limited defences** are available, the most important of which is the ARD
- Under the ARD, a restriction will be legal if it is a **component of an otherwise legal agreement** and "**directly related to, and reasonably necessary for giving effect to**", that agreement

"Safe" Agreements

- Bureau guidance affirms that the ARD will generally apply to employee-related restrictions in agreements supporting **mergers, joint ventures and strategic alliances**
- **Franchise agreements, staffing, IT services** and other common and pro-competitive business arrangements will also generally be protected

Problematic

- These agreements or arrangement may be investigated where clauses are **broader** than necessary or where the business agreement or arrangement is a **sham**

The ARD, Cont'd

How to interpret the ARD?

- Bureau guidance does not specify what is a **"reasonably necessary" restraint**. In practice, this will likely depend on:
    1. the **commercial reasons** behind the agreement;
    2. the **scope** of any restriction (e.g. employees covered, geographic territory, duration); and
    3. whether a court is likely to enforce the restraint as a matter of **employment law**
- The application of this test will **vary jurisdiction-by-jurisdiction and industry-by-industry**
- Similar to the courts' approach to assessing the enforceability of employer-to-employee restrictions, **it is safest to ask "what is the least restrictive restriction required to protect the business?"**
- Restrictions **not enforceable at law** likely not to pass the *Competition Act* smell test

What We Are Seeing

Since the law has come into effect:

- Companies are adjusting to **employment information being treated as "competitively sensitive information",** especially in the context of M&A transaction due diligence
    - This includes adopting best practices such as putting such information in a "clean room"
- **Newly-entered agreements** are being approached with more caution
- **Franchisees** are operating in a new landscape – Bureau guidance specifically highlights that steps taken by two or more franchisees to enforce a franchise agreement's no-poaching restraints could be problematic
- Employers and trade associations are still navigating best practices when it comes to **aggregating employment related data**:
    - This includes **benchmarking** and published reports on **employment information** in an industry (though "benchmarking" is no longer referenced explicitly in the guidance)

What We Are Seeing, Cont'd

- Reliance on presumed exceptions
  - Using **anonymized surveys and reports for purchase** to survey the market
  - **Seeking out information from presumed non-employers** – lawyers, accountants, HR consultants
- Concern about use of AI and other generative technology
  - **Using tools to generate policy recommendations opens up the possibility that the company's proprietary information could be shared (and adopted)** or that the company could implement another employer's policy/approach unknowingly
  - **Disclosure of AI use in hiring practices** now required in some job postings
- Still some naivete by some HR professionals and business owners
- Implicit conflict between new pay transparency legislation and these restrictions

Final Thoughts

What's next

- **Considerable uncertainty remains** given that the law is new and not yet tested
- The **Immunity and Leniency Programs** are being updated to reflect these (not so new) provisions

Review of business practices and agreements

- Employers should continue to **review** their business practices and active and template agreements
- Some practices may only need to be tweaked, but **some common practices may need to be eliminated/cancelled**

Identify key players

- As compared to other compliance initiatives, **a much broader group of employees and contributors are affected** – e.g. senior executives, HR/ER teams, third party providers (recruiters, staffing agencies)

Final Thoughts, Cont'd

Develop training and risk assessment

- Employers likely need to over-compensate for the dearth of guidance by taking an extremely **conservative approach** to policies, training, contracting practices and interactions with other employers to minimize contravention risk
- **Implement restrictions** on use of AI, sharing precedents, and public posting of policies

Establish appropriate compliance program

- Employers can mitigate risk by ensuring that they have a **credible and effective** compliance program in place and that includes training on the new prohibition

Update third party agreements

- Beyond internal compliance, **employers must re-think existing and future agreements with third party providers** to avoid breaches

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TAB 4

Business Law Refresher 2024

Distressed M&A: Overview & Ethical Considerations (PowerPoint)

Asim Iqbal
Miller Thomson LLP

May 15, 2024

DISTRESSED M&A:

Overview & Ethical Considerations

Business Law Refresher 2024

Asim Iqbal, Partner

WEDNESDAY, MAY 15TH, 2024

AGENDA

1. **Introduction**
    a) What is distressed M&A?
    b) What is insolvency?
2. **Legislative Landscape**
    a) Bankruptcy and Insolvency Act (Canada)
    b) Companies' Creditors Arrangement Act (Canada)
3. **Transaction Structures**
    a) Asset Sales
    b) Share Sales (RVOs)
4. **Typical Sale Process**
5. **Practice Management & Ethics: Cautions on Creditor-Proofing**

WHAT IS DISTRESSED M&A?

> Distressed M&A is the process of purchasing a company in financial distress out of a formal insolvency proceeding.

Out of court distressed M&A and conventional M&A are outside the scope of this presentation.

WHAT IS INSOLVENCY?

Tests for "insolvency" in Canadian statutes generally converge to a variation of one of two tests:

Cash-flow Test. The debtor is unable to pay its liabilities, or has ceased to pay its current liabilities in the ordinary course of business, as they generally become due.

Balance Sheet Test. The fair value of the debtor's assets, or the value of the debtor's assets if disposed of at a fairly conducted sale under a legal process, is less than its total liabilities.

See *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, s 2 ("insolvent person"); *Business Corporations Act*, RSO 1990, c B16, s 38(3); *Canada Business Corporations Act*, RSC, 1985, c C-44.

BANKRUPTCY AND INSOLVENCY ACT

RSC, 1985, c B-3.

Three (3) main types of insolvency proceedings under the *BIA*:

- Receivership (ss. 243-252)
- Proposal (ss. 50-65)
- Bankruptcy (ss. 42-45, 49)

COMPANIES' CREDITORS ARRANGEMENT ACT

RSC, 1985, c C-36

CCAA applies to:

- Insolvent companies and affiliates with assets, or doing business, in Canada
- Facing more than $5,000,000 worth of claims

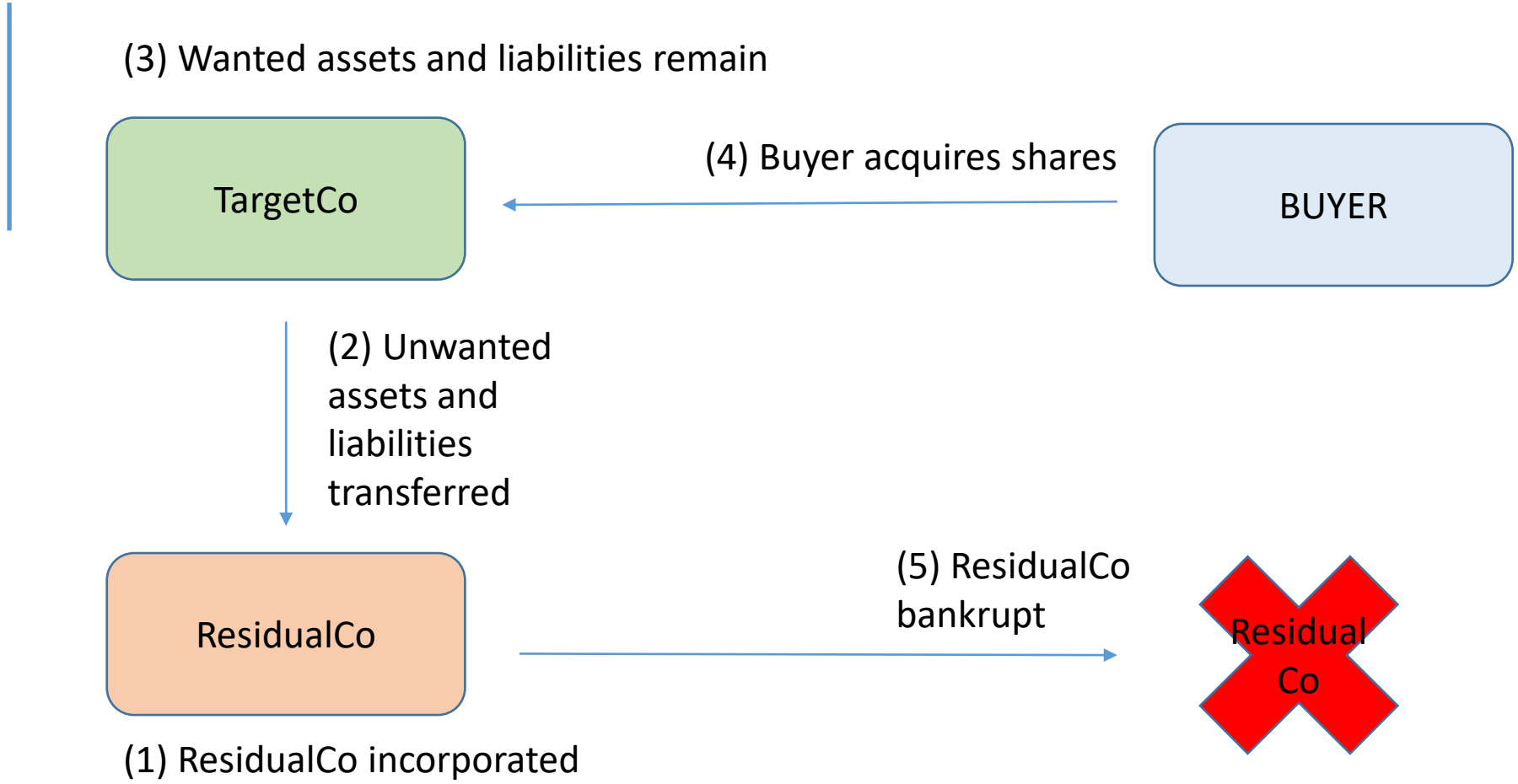
ASSET SALES

- Assets may be sold by way of a public sale process through a formal insolvency proceeding
- “As-is, where-is”
- **Approval and vesting orders**: powerful judicial tool that transfers assets “free and clear” of encumbrances

ASSET SALES

Common Law Test	Statutory Test (*CCAA*, s. 36(3))
Was there unfairness in the working out of the process?	Was the sale process reasonable?
Was there efficacy and integrity in the process by which offers were obtained?	Did the monitor approve the sale process?
Did the party consider the interests of all parties?	What effect would the proposed sale have on creditors and other interested parties?
Did the party make sufficient effort to get the best price and has not acted improvidently?	Is the consideration to be received for the assets reasonable and fair, accounting for their market value?
Royal Bank of Canada v Soundair Corporation et al, [1991] OJ No 1137 (ON CA)	Does the monitor report that the proposed sale would be more beneficial to the creditors than a sale under a bankruptcy?
	To what extent were creditors consulted?

SHARE SALES (RVOs)



TYPICAL SALE PROCESS

1. Develop target list of purchasers
2. Approval and Notice of Sale Process to potential purchasers
3. Initial due diligence phase
4. LOI submission deadline
5. Second diligence phase for qualified LOIs
6. Final bid deadline
7. Auction, if necessary
8. Seek court approval of successful bid

PRACTICE MANAGEMENT & ETHICS

- As legal counsel, you may be asked to advise a client on structuring their affairs to safeguard their enterprise
- **Client may be insolvent or nearing insolvency**
- Restructurings in these early stages may be impugned in formal insolvency proceedings and affect a potential sales process
- You must ensure that any advice provided is ethically sound, and in accordance with applicable *Rules of Professional Conduct*

PRACTICE MANAGEMENT & ETHICS

> **2.** Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

Fraudulent Conveyances Act, RSO 1990, c F29.

PRACTICE MANAGEMENT & ETHICS

Future creditors may impugn creditor-proofing strategies implemented prior to an "impending risky financial venture"

Ontario Securities Commission v Camerlengo Holdings Inc, 2023 ONCA 93

- ONCA allowed the appeal, holding that the OSC fell within the class of "creditors or others" at the time of the respondent transferring the family home to his wife, notwithstanding that respondent had no creditors at time of transfer

- *An intent to defraud creditors generally can be made manifest by taking steps to judgment proof oneself in anticipation of starting a new business venture. To plead a fraudulent conveyance on this basis, it is not necessary that a claimant be able to identify a particular, ascertainable creditor that the debtor sought to defeat at the time of the conveyance. It is enough* […] *that at the time of the conveyance the settlor perceived a risk of claims from a general class of future creditors and conveyed the property with the intention of defeating such creditors should they arise.* (para 11)

PRACTICE MANAGEMENT & ETHICS

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- Respondent's transfer was marked with "badges of fraud":
  - i) Respondent conveyed property to wife for no consideration;
  - ii) Transfer was made after 16 years of joint ownership;
  - iii) Transfer was made 4.5 months after respondent and his business partner incorporated a business;
  - iv) Transfer was made at the same time and using the same lawyer that respondent's business partner used to transfer his family home to his wife;
  - **v) Transfer was made at a time when respondent and his wife were concerned about exposure to personal liability from respondent's "rapidly expanding electrical contracting business that started bidding on, and working on, million dollar high-risk projects".**
  - vi) Respondent continued to treat the property as his own (continued to live there, caused his wife to mortgage the property for business purposes, paid all costs related to property, provided personal guarantees for mortgages)

PRACTICE MANAGEMENT & ETHICS

Rules of Professional Conduct prohibit facilitating improper restructuring efforts.

3.2-7 *A lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct or instruct a client or any other person on how to violate the law and avoid punishment.*

3.2-7.1 *A lawyer shall not act or do anything or omit to do anything in circumstances where he or she ought to know that, by acting, doing the thing or omitting to do the thing, he or she is being used by a client, by a person associated with a client or by any other person to facilitate dishonesty, fraud, crime or illegal conduct.*

3.2-7.2 *When retained by a client, a lawyer shall make reasonable efforts to ascertain the purpose and objectives of the retainer and to obtain information about the client necessary to fulfill this obligation.*

PRACTICE MANAGEMENT & ETHICS

- Lawyer cannot guarantee results (asset protection may lead to civil or even criminal fraud)
- Need accounting advice
- "Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if […] (b) the client's instructions require the lawyer to act contrary to [the *Rules of Professional Conduct*] or by-laws under the *Law Society Act"*

See Frank Bennett, "The Differences between Asset Protection, Civil Fraud and Criminal Fraud – A Practical Review List of Do's and Don'ts for Clients" (2013), Ontario Bar Association; *Rules of Professional Conduct,* Rule 3.2-2 ("When advising clients, a lawyer shall be honest and candid."); *Rules of Professional Conduct,* Rule 3.7-7 (Mandatory Withdrawal)

REFERENCES

Bankruptcy and Insolvency Act, RSC, 1985, c B-3, s 2.

Business Corporations Act, RSO 1990, c B16, s 38(3).

Canada Business Corporations Act, RSC, 1985, c C-44.

Fraudulent Conveyances Act, RSO 1990, c F29.

Ontario Securities Commission v Camerlengo Holdings Inc, 2023 ONCA 93.

Royal Bank of Canada v Soundair Corporation et al, [1991] OJ No 1137 (ON CA).

Frank Bennett, "The Differences between Asset Protection, Civil Fraud and Criminal Fraud – A Practical Review List of Do's and Don'ts for Clients" (2013), Ontario Bar Association.

MA Springman et al, *Frauds on Creditors: Fraudulent Conveyances and Preferences* (Toronto: Thomson Reuters Canada, 2024).

Luc Morin & Guillaume Michaud, "Guiding Principles for Distressed M&A Transactions: Choosing the Right Path and the Future of POAs and RVOs" 10:5 IIC-ART.