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LET'S MAKE A (GOOD) DEAL

WANT TO BUY OR SELL A BUSINESS? REMEMBER THIS.

Congratulations! You've decided to acquire a brand new business or pass on the one you've built over the years. That's great news but be prepared. You're getting down to some serious brass tacks. Here are some pointers to help ensure the deal works out for everyone.

BUYING OR SELLING A BUSINESS is exciting for anyone. From a legal perspective, you need to make sure that your rights, as either the seller or the buyer, are protected and that the risk of the transaction is shared between the parties in accordance with the terms of the deal negotiated and agreed to by the parties. Here are some key points you should know about buying or selling a business:

What is a LOI ? A term sheet, often referred to as a letter of intent or LOI, is generally the first document signed by the buyer and the seller. It sets out the key terms of the deal, such as the purchase price, what is being bought or sold, the deposit, and key terms of the purchase and sale agreement to be negotiated between the parties following the signing of the LOI. More often than not, LOIs are not binding between the parties and are legally not enforceable (often except for the confidentiality provisions). However, the non-binding nature of the LOI does not mean it's unimportant. It anchors the negotiations and drives the production of the purchase and sale agreement for the transaction. For this reason, care and consideration should be put into

WHAT ARE YOU BUYING?
That's one of the important considerations in buying or selling a business. The deal could be for the shares in the company. Or it could be for the company's assets. Be sure you understand the difference when negotiations start.

the LOI to ensure that all of the "must have" terms of the deal are set out prior to signing.

Share Purchase vs. Asset Purchase You will likely buy or sell your business by signing either a "share purchase" or "asset purchase" agreement. Both will allow you to either buy or sell the business, but there are significant legal, accounting, and tax differences between them.

Under a share purchase agreement, the seller sells the shares in the corporation that owns the business to the buyer. After the deal closes, the buyer owns all of the shares. Along with the shares, the seller also sells all of the liabilities and assets of the business. Additionally, all contracts of the target business, including employment contracts, will be the responsibility of the buyer after the deal closes. In the employment context, this typically means the buyer assumes all employment related liabilities, including, for example, accrued vacation and notice provisions.

With an asset purchase agreement, the seller sells all of the assets of the business, often including equipment, accounts receivable, and contracts to the buyer. After the deal closes, the buyer owns all of the assets of the business and assumes operations with those assets. Unless a certain liability (such as a contract or a lease) is specifically assumed by the buyer as part of the transaction, that liability continues to be the responsibility of the seller. Typically, only employees that agree to enter into a new relationship with the buyer will continue employment at the business.

What about the bank? Bank accounts, lines of credits, mortgages, and credit cards of a business that is sold will be treated differently depending on whether the transaction is handled through a share purchase or an asset purchase agreement.

Under a share purchase agreement, the liabilities of the business will remain with the business after the deal closes. For example, if a buyer buys a business with $100,000 of bank debt, that debt will become the responsibility of the buyer. If a seller gave a personal guarantee to the bank guaranteeing the debt, that seller must ensure that he or she is released from that personal guarantee before the closing of the transaction as that guarantee most likely remains in place after the sale of the business.

Under an asset purchase agreement, all liabilities of the business remain with the seller unless the buyer specifically assumes them. So, any debt existing before the sale of the business assets will remain with the seller. In this situation, the bank has likely registered a security interest in the assets of the business. The buyer will want to ensure that such registration is discharged by the personal property registry prior to closing the sale. Otherwise, if the seller defaults on debt obligations, the bank will have a claim against the assets purchased by the buyer.

Taxes Tax advice is a must when buying or selling a business. It could have significant impacts on an individual's retirement or succession planning. Sellers must consider the possible capital gain taxes on the sale of the shares or assets of their business. In Canada, business owners selling shares can utilize the lifetime capital gains exemption in certain circumstances to shelter their capital gain from taxes. If certain pre-conditions are met, it may even be possible to sell your business tax free. UHB