BUSINESS ACQUISITIONS: SHARE SALES, ASSET SALES AND AMALGAMATIONS

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Introduction

This paper will discuss important elements of share acquisitions, asset acquisitions and amalgamation transactions and some of the differences between each type of transaction. We discuss the differences between share and asset acquisitions and the advantages of each, as well as due diligence. After a discussion of signing prior to or on the closing date, a number of important terms of share and asset purchase agreements are reviewed. These include representations and warranties, adjustments, material adverse change conditions contract assignments, assumption of liabilities, and employees. Some mechanics of the process of recovering in case of breach of representation and warranty are discussed, including escrow or holdback and indemnification. Finally, considerations relating to amalgamations and certain public company issues are addressed. Attached to this paper are a model share purchase agreement, model asset purchase agreement and model amalgamation agreement. In addition, share and asset purchase agreement checklists have been provided to give a more comprehensive list of provisions that could be included in a share or asset purchase agreement, and a due diligence checklist has been provided to give an example of the materials that might be requested for due diligence review.

Fundamental differences between share and asset acquisition

Share acquisitions and asset acquisitions can both be used as methods of acquiring a business. In a share acquisition, the purchaser acquires the company that has been carrying on the business by acquiring the shares of the company from its shareholders. In an asset acquisition, the vendor is the company that has been carrying on the business, and the purchaser acquires all of the assets used by that vendor to carry on the business. Shareholders of a company carrying on a business consent directly to a share acquisition by becoming parties to a share acquisition agreement, but shareholder approval may be required for asset acquisitions as well. For example, pursuant to section 190 of the *Business Corporations Act* (Alberta) (the "**ABCA**"), shareholders must approve, by special resolution, a sale of all or substantially all of the property of a corporation. In a share acquisition, the contracts and liabilities of the business follow the company being sold and become the responsibility of the purchasers as new shareholders of the company. In an asset acquisition, the contracts and liabilities of the business remain with the vendor unless specifically assigned to and assumed by the purchaser.

Advantages of asset acquisition

By acquiring only the assets of a business, a purchaser can ensure that any unwanted liabilities are removed from the assets being purchased before the closing date, and can choose which assets, liabilities and contracts of a business it will buy. The purchaser also avoids liability for potential litigation relating to periods before it was the owner of the business, since this liability remains with the company that is the vendor. In addition to choosing amongst contracts and liabilities, parties to an asset purchase agreement can choose how the purchase price will be allocated among the purchased assets, and may be able to allocate the purchase price in a tax advantageous manner. Counsel for a purchaser may also find that the legal due diligence is less burdensome for an asset purchase than a share purchase, although each transaction varies.

Asset acquisitions can be preferable if the business that is being sold is a division of, or represents only one portion of the business carried on by the vendor. In this situation, the business being sold might not constitute "all or substantially all" of the property of the vendor, and shareholder approval of the transaction would not be required. Asset acquisitions can also be preferable if the company carrying on the business is widely held or publicly traded. A share acquisition requires the consent of all shareholders of the business, and may be subject to take-over bid rules in the absence of an exemption. In this case, seeking shareholder approval of a transaction which is entered into between a company, as vendor of assets, and a purchaser can be more efficient than a share acquisition for the same business.

Advantages of share acquisition

Share acquisitions can be simpler than asset acquisitions, since the company carrying on the business changes hands as a whole. For a business with many contracts, this is desirable since it reduces the need to seek approval for assignment of the contracts from third parties, although some contracts may require third party approval for a "change of control". In a share purchase employees of the business being purchased remain employees of the business without the need for the purchaser to re-offer or re-negotiate terms of employment. In general the transfer documentation needed to complete a share transfer is simpler since an asset acquisition can require asset conveyances and re-registration of various assets, whereas in a share transfer the only asset which physically changes hands is the share certificates.

Part 16 of the ABCA provides a procedure where holders of less than 10% of the shares of a class in respect of which a take-over bid has been made can be required to surrender their shares to the take-over bid if the bid is accepted by the holders of not less than 90% of the shares of that class. These compulsory acquisition provisions can be useful both in the case of acquisition of shares of a public company or in the case of a closely held company with uncooperative minority shareholders.

Depending on the circumstances, certain tax exemptions may also be available. Vendors who dispose of shares of qualifying private corporations will often be eligible to claim the lifetime capital gains exemption on proceeds from the sale. There are requirements imposed by the *Income Tax Act* that generally require that the corporation be a "small business corporation" as defined in the Act at the time of the sale of the shares, that through the 24 months preceding that time, the shares must not have been owned by anyone other than an individual or a person or partnership related to the individual, and through the 24 months preceding that time, the fair market value of the assets of the corporation must generally have been used principally in an active business carried on primarily in Canada by the corporation or a related corporation. The current available amount for a small business deduction is $750,000.00. Vendors should consult a tax advisor as to their eligibility to claim the lifetime capital gains deductions, in advance of the sale. Sometimes advance planning steps are required to ensure that shares qualify.

Due diligence

Regardless of the type of acquisition chosen, a purchaser needs to conduct careful due diligence prior to closing the transaction. Depending on the size of transaction and the size of the