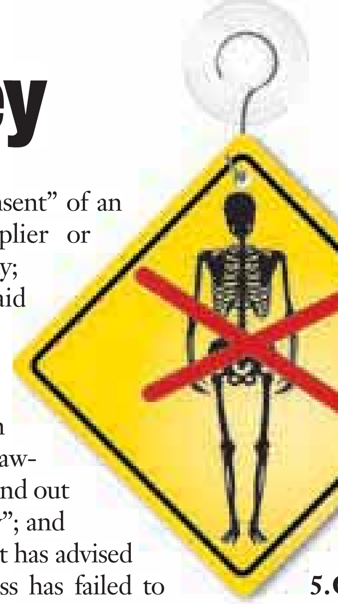
Sell smart: preparation is key

Many things must be considered before selling your business

By Jordan Dolgin



Every entrepreneur who has taken the risk of starting and building a business is ultimately curious about what his or her business is worth and what is involved in selling it. These days, few business founders plan on running their businesses until retirement. Naturally, when the time comes, they want to "sell smart" (i.e., maximize their after-tax sale proceeds), but they may not know what is involved in getting there.

Not surprisingly, preparation is essential and there are many things potential sellers can start doing today to:

- Take advantage of tax planning opportunities;
- Enhance business valuations (either by increasing earnings and/or multiples); and
- Minimize the legal "skeletons" which can erode your overall sale price and increase the cost and time to do your deal.

This article will focus on the legal aspects of business exit preparations.

Three-step process

Legal exit preparations involve a three-step process:

- First, you need to undertake various due diligence inquiries (i.e., public searches, review minute books, and key contracts);
- Next, you need to identify any "skeletons" and consider what options exist to remedy or neutralize them; and
- Last, you need to create and implement a plan to manage these skeletons. While you may be thinking "my business is squeaky clean", it is a rare business that does not have some "warts" which a buyer can and will exploit to your detriment.

The consequences of failing to consider legal issues in your exit preparations can involve significant delays in getting your deal done, higher than necessary legal and other costs and, in extreme cases, the death of the deal (or the inability to find a buyer at your target price).

Typical skeletons

While every company is different, some of the more typical skeletons I have encountered are as follows:

- Former employees and/or consultants were issued shares that have been forgotten about and they can't be located at closing so your buyer can't be sure of buying 100-percent of your business;
- There are no shareholder agreements with minority shareholders that permit the majority owner to "force" them to sell their shares;
- You don't want to sell your valuable real estate but the real estate is owned by the operating company, which your buyer wants to acquire;
- A key contract has a "change of control" restriction and you are not certain what it will take to obtain the "consent" of an important supplier or other third party;
- You are afraid that a few former employees might commence an opportunistic lawsuit once they find out you are "in play"; and
- Your accountant has advised that the business has failed to properly collect and remit PST and GST and a tax audit could result in very significant unpaid taxes plus interest and penalties.

For each of the above "skeletons" there are usually a number of options available to either neutralize or mitigate their impact on an actual sale event. The range of options is usually greatest if explored long before a buyer comes knocking on your door.

Best practices

In summary, I will leave you with my "Eight Best Practices" when it comes to legal exit preparations:

1. **Control share capital:** Be aware of both: (a) who owns your company's shares and, (b) whether you can force a sale by all shareholders at the time of exit.
2. **Control key contracts:** Identify which third parties have been given rights to consent to your exit transaction and try to either impose an "acting reasonably" requirement or try to negotiate the deletion of these restrictive terms during your next renewal discussions.
3. **Control assets:** Ensure all proprietary assets are, in fact, legally owned by your company and that any encumbrances or liens filed against such assets are maintained or discharged in the ordinary course. You should also be mindful of the quality of your assets (e.g. - are any environmental considerations in issue?).
4. **Control corporate structure:** Update and maintain corporate minute books on a regular basis to ensure they reflect all historical transactions. Consider isolating the ownership of passive vs. operating assets and distinct/multiple businesses in different corporations. Essentially, keep your overall corporate structure "buyer friendly."
5. **Control tax risk:** Solicit feedback from your accountants regarding areas of potential federal or provincial tax audit risk (i.e., income, GST, PST or payroll taxes) and areas where you may not conform to GAAP. Buyers may use areas of tax exposure and non-GAAP compliance to negotiate a lower purchase price.
6. **Control opportunistic litigation:** Identify disgruntled former employees, partners, customers or others who might commence a lawsuit once they learn of your exit plans in order to extract their "pound of flesh". Consider early settlements (and full releases) if possible or anticipate the issues and enhance your leverage before litigation is commenced.
7. **Control regulatory issues:** Identify all key industry/governmental license and permits (including any special conditions which might affect same) and determine if these are transferable to your buyer or if regulatory approvals are necessary.
8. **Control legal compliance risk:** Determine areas where your business may not be in full compliance with applicable domestic or foreign laws (e.g., privacy; consumer protection, industry specific rules, etc.) and assess the materiality of such non-compliance to your potential buyer.

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