

Professionals Involved in the Purchase and Sale of a Business

by Peter A. Cusimano, B.Sc., LL.B.

[Law Office of Peter Cusimano](#) • Toronto, Ontario, Canada

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To properly complete a purchase or sale of a business, you will need to obtain professional advice as early as possible from the following:

- 1) lawyer,
- 2) real estate agent,
- 3) accountant,
- 4) bank manager,
- 5) anyone else who has knowledge about the business such as a business evaluator, insurance agent, engineer, architect, or consultant.

Each professional can help you with their particular area of their expertise. We have found that those who fail to seek adequate professional advice early on in the process of buying or selling a business often spend more money in the long run, have difficulty resolving complicated issues on their own, and ultimately become frustrated and disappointed with the transaction. The roles of each of the above listed professionals as they relate to the purchase and sale of a business are briefly described below. You should consult directly with each professional to discuss: (i) what they can do for you in your particular transaction; (ii) their fees; and (iii) how to proceed.

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(1) Lawyer

I am experienced in both the purchase and sale of businesses. In general when you have decided to purchase or sell a business I will:

- a) meet with you for an initial consultation to learn more about your business;
- b) prepare a strategy specific to the legal requirements of your particular situation;
- c) prepare a Letter of Intent setting out the general terms of the purchase or sale;
- d) prepare an Agreement of Purchase and Sale;
- e) prepare the many legal documents and agreements required to complete the transaction;
- f) conduct and analyze extensive corporate and other searches from various government records against the purchaser or seller;
- g) advise you of potential problems and issues that you should consider;
- h) examine corporate records of the seller if required;
- i) negotiate with the landlord with respect to the lease and analyze the lease;
- j) address any issues relating to creditors, lien holders, taxes, customer lists, assignment of telephone;
- k) prepare employee contracts if required;

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- l) consult with your accountant with respect to purchase price, tax related issues including price allocation and estate planning;
- m) consult with other professionals as required;
- n) advise you how to arrange your affairs to protect your current assets;
- o) incorporate a new corporation for you if necessary;
- p) explain and advise with respect to banking documents;
- q) provide a written report to you and a reporting book after the transaction has been completed; and
- r) and provide any other legal advice necessary to complete the transaction.

It is important to contact me as soon as possible and preferably as soon as you are considering buying or selling. The sooner you contact me, the sooner I can help you, and the sooner you can be informed of the issues to be considered. It is not advisable for a purchaser or seller to act on their own and come to a preliminary understanding of the terms with the other party without consulting with a lawyer. The discussion and preparation by the parties of a written outline describing the basis of their transaction which may be as simple as notes on the back-of-a-napkin made during a lunch meeting may form the basis of a legal agreement even if the document is not signed. Typically during these negotiations the parties fail to consider significant legal and tax issues and implications. It is important and advisable that when considering the purchase or sale of a business that no formal discussions or documents are exchanged or signed without being first reviewed by a lawyer who is aware of the facts of your particular situation. Until you have spoken with me, during any discussions or exchange of any documents with the other side, you should make it clear to all parties that any

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discussions are preliminary and are not intended to create a binding obligation until a definitive agreement of purchase and sale has been prepared or reviewed by your lawyer.

Often purchasers or sellers obtain an agreement of purchase and sale from a real estate agent or from a local book store. These agreements are usually written to be as general as possible and almost always fail to adequately address the particular legal issues of your business. What may appear to a non-lawyer as standard legal text even if it is "explained" by the real estate agent or accountant will most likely be inadequate and written in such a way that it is one-sided. Using an Agreement that was not reviewed by a lawyer will lead to adverse legal consequences against you.

In providing legal assistance to you, I will examine the particular circumstances of the business being purchased or sold. Described below are a few issues that I consider in a purchase or sale of a business. In addition, there will be many other issues depending on the nature of the business. **(NOTE: this list is only a short list and it is not intended to be a detailed or exhaustive list)**

1. Are you going to buy/sell the shares of the business or are you going to start your own company and buy only the assets of the vendor's business.
2. Are there current employees? If so, what will happen with their contracts? Are any wages owing or unremitted source deductions to Revenue Canada? Are any of the current employees going to be continued? Is there a union?
3. Does the business owe any business or reality taxes? Has the business accurately prepared and filed its previous income tax returns and paid all of its corporate income taxes?

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4. Does the business own the assets that it is trying to sell or are they all owned by the bank and other parties? Is there any obligation relating to the borrowing of money or to a guarantee?
5. Are there any lawsuits or judgments against the business? Who are the creditors of the business and are they secured or unsecured?
6. Are there any special licences that are required to operate the business. For example, do you need to obtain a liquor licence? Or is the seller planning to transfer the liquor licence to the purchaser?
7. What is being sold? The equipment, land, inventory, assets, telephone number, name, accounts receivable, client list, patents, trademarks, copyrights, licences, goodwill? Who will honour existing purchase orders and warranties given to previous customers?
8. When is the deal going to be completed? Are there contracts in place which cannot be cancelled quickly without penalty or liability?
9. How is the deal going to be financed? Loan, cash, mortgage-back, lump-sum payment? Is the seller going to disclose financial statements of the business? Is the purchaser able to pay for the business?
10. What if the deal falls through or one party is unable to do something to which they agreed to do? Who pays? Do you waive the requirement and complete the transaction or do you terminate the agreement (if that is possible)?
11. Are there environmental problems associated with the business and are you adequately protected. If there is real estate, is the land "clean"?

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12. Is there a lease with the landlord? Is approval by the landlord required to assign the lease to the purchaser (most likely) ? Is there anything in the lease that will cause difficulty for the purchaser or the seller?
13. Is the equipment leased, owned, or is there a "chattel mortgage" registered against the equipment?
14. Is there going to be a non-competition clause preventing the seller from opening up a competing business in the vicinity after the sale?
15. Is there going to be a confidentiality clause preventing the seller from disclosing any of the business' confidential information?
16. Has there been any instances of non-compliance with the law that the purchaser or seller needs to examine? Are there any health, occupational health and safety, labour, or municipal by-law violations?
17. What representations, warranties, and conditions is each party going to make? Who is responsible for completing them and when?
18. Is the minute book of the corporation up-to-date? Is there a shareholders' agreement in place that requires the shareholders' approval?

For purchasers of a business, I will also be able to assist with:

- (i) incorporating a new corporation for the purchased assets if necessary, or registering a sole proprietorship or partnership;
- (ii) creating a shareholder or partnership agreement;

- (iii) assisting with registration for Goods and Services (now called Business Number), Retail Sales Tax, and other municipal business registrations that may be required.

(2) Real Estate Agent or Business Broker

Through the Multiple Listing Service (MLS™) a real estate agent can help locate businesses for you that are for sale or can list your business for sale and put you in touch with potential buyers. The purpose of the agent is to put you in touch with purchasers or sellers. Be sure to explain to the agent the nature of the business and any unique advantages of the business. The agent should not be relied upon for legal or accounting advice.

You should not have the real estate agent or business broker prepare a purchase and sale agreement for you. Although many agents have standard forms for the purchase and sale of a business, most likely the forms do not address the circumstances of the particular business you are buying or selling. The preparation of an agreement of purchase and sale should only be completed by a lawyer. In addition, you should not have the agent advise you on a purchase price. Although an agent can give you figures of what other businesses are selling for, each business is unique and requires careful analysis. For example, an agent is not typically qualified to advise you on the value of a customer list or telephone number. How much a business is worth is an accounting question which can only be properly determined by an accountant.

(3) Accountant

An accountant is a very important part of the team of professionals advising you when you purchase or sell a business. If you do not have an accountant then ask your lawyer to help you locate an accountant. Among other things the accountant

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will provide professional advice with respect to various accounting and tax related issues including:

1. The accountant will help you determine the value of the business. There are several ways of determining the value of a business. The business may be worth more or less than you initially think.
2. The accountant will provide advice with respect to the best way to complete the transaction so as to reduce your tax liability. It is no comfort to sell or purchase a business for a large sum of money only to find out that the transaction could have been structured differently to reduce your tax burden.
3. The accountant will also provide tax planning advice and will consider your current financial situation and how it fits into your business and life goals? The accountant will examine how much income tax you currently pay and how buying or selling this business is going to affect your tax planning.
4. The accountant will examine the financial profit and loss statements and income tax returns of the business you are buying for at least the previous three to five years.
5. The accountant will maintain the financial books for you so that you can concentrate on the business.
6. The accountant will prepare the financial statements and tax returns of the business.

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(4) Bank Manager

It is vital for a purchaser to know a bank manager. Whether or not you are planning to loan money from a bank, you must develop a professional business relationship with your bank manager.

The banking industry is very competitive and offer many services to the small & medium sized business. In addition, most major banks now have special programs catering to professionals such as doctors, dentists, and engineers. The bank manager will help you to obtain credit facilities such as operating lines of credit and capital loans. You may also qualify for various government sponsored loans such as a small business loan offering up to \$250,000 to qualified business owners. In addition some banks have identified certain sectors where they are willing to loan money such has as the high-technology industry.

If you are unable to finance the business using your own resources and will require financial assistance such as a capital loan to finance a purchase or a operating line of credit, here are a few tips to prepare you for your meeting with your bank manager:

1. Prepare a business plan. In preparing your business plan, remain conservative. You may think that you can dramatically improve the business once you are in charge but you still need a business plan. If you don't know what a business plan is or how to make one then ask your accountant to help you. We can refer to you an accountant or a financial consultant that is familiar with preparing business plans. In addition, every bookstore carries books in the business section on how to prepare a business plan;
2. Dress conservatively and professionally;
3. Be optimistic and concentrate on your skills and abilities.

4. Do not be disappointed if you are turned down many times. Simply ask the bank what else they need to satisfy them.
5. Shop around to many banks. You will be surprised that different banks have different attitudes and ways of doing business. Be sure to shop around to different branches of the same bank. Also, do not think that you have to go to the biggest bank in the city. The biggest bank branch in the city may be too busy to deal with you. Most banks have commercial banking centers which are worth approaching. If your financial requirements are small, you will have a greater chance of success if you go to a smaller local branch. Also, do not feel that you have to go to the bank across the street from your business. Most banks will let you do your banking at your local branch even though your accounts and credit facilities are located at another branch. Therefore, you should consider approaching a branch that is on the other side of your city.

(5) Other Professionals

There are many other professionals that you should consider contacting.

1. If you need financial planning advice, you should speak to a financial planner who can help you plan your business and organize your financial affairs. If you are a seller you must consider what you are going to do with the funds generated from the sale of the business or if you are buying you must consider how to properly invest any profits.
2. A business consultant can help in several ways including:
 - (i) prepare a business plan;
 - (ii) create a marketing plan;

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- (iii) put you in contact with others who can help you in the business;
 - (iv) examine the business operation, the products/services offered, the location, and available markets.
3. You may wish to consult with an engineer to examine equipment and an architect to examine a building.
 4. You should consult with your insurance agent to discuss the insurance requirements of your business and ensure that your business is adequately insured.
 5. Consult the business section of your local library and bookstore.

Conclusion

Whether you are a purchaser or a seller of a business, I am here to help you and act as your legal advisor. I have been involved in both purchases and sales of businesses and as such I have the professional expertise to ensure that your purchase or sale of a business will be successfully completed. Where required I can put you in touch with accountants, real estate agents, bankers, financial planners, architects, and other professionals to help you.

I am a business lawyer in Toronto, Ontario, Canada. If you are located in the Greater Toronto Area, I would be pleased to meet with you and represent you as your professional legal advisor.

Contact Peter Cusimano at:

Email: lawyer@cusimano.com
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