

BUSINESS PLANNING

and

COMPANY LAW

(2006 Edition)

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I. INTRODUCTION

Today, having an understanding of business planning concepts, legal principles and accounting and tax methods is essential for the success of any business. Creating a profitable business enterprise and establishing a basis upon which you may plan for future income and retirement may no longer be assumed; it must be actively pursued. Finally, changes in laws, taxation rules and the economic climate require a vigilant effort on the part of business persons not merely to succeed, but to survive.

This booklet is intended to introduce the reader to a number of business law and planning concepts. Our goal in preparing this booklet is to assist your learning process in the areas described so as to better prepare you for working with your legal, accounting and financial advisors. Before commencing your review of this booklet, please read the "**Caveat**" at the end of this booklet.

II. INCORPORATION

a) Should we Incorporate?

Hopefully this question will be addressed early in the life of your business. Although incorporation may not be appropriate until the income level of your business is significant, understanding the considerations surrounding incorporation early on will allow you to plan more effectively.

Most business persons incorporate for either tax or personal liability reasons. The tax considerations usually relate to income splitting (sharing the profits of the company amongst family members with lower marginal tax rates) or retaining income within the company indefinitely without paying the taxes that would otherwise be payable if paid directly to the shareholders. The personal liability considerations centre

around businesses which are at risk of law suits or personal situations where significant personal assets need to be sheltered from the business operation.

b) What is a Company?

At law a company is a legal person. It is created by statute (in British Columbia - the *Business Corporations Act (the "BCA")*) and it has the powers of a natural person.

A company exists independently of its shareholders or its directors. However, to operate effectively a company relies upon its directors to protect its best interests and upon its officers to manage day-to-day functions and, together with the directors, make decisions on its behalf. A company has the power to enter into contracts and to carry on business without causing personal liability on the part of its shareholders or directors (with some exceptions, described below).

c) Special Considerations and Costs

Legal and accounting advice is recommended before a decision to incorporate is made. There are different styles of companies (for example, simple single share class companies or complex multi-share class companies). Appropriate persons to hold participating shares must be carefully considered. Voting control issues are also important. Other considerations include the level of income within the business that must be achieved before the cost of incorporation makes sense, as well as who will direct the operations of the company's business.

There are some costs to consider. First, incorporation costs will range from approximately \$1,200 to \$1,500 depending upon the level or amount of advice, planning and organization that is needed. Second, annual maintenance costs (keeping the company up to date with annual filings at the Corporate Registry in Victoria) and the necessity of preparing

annual financial statements and company tax returns will lead to some ongoing costs. Third, if the business is to acquire significant assets and equipment, it may be wise to incorporate early and allow the company to acquire the assets so as to avoid significant accounting and legal costs associated with transferring those assets to the company at a later date.

III. OTHER TYPES OF BUSINESSES

a) Proprietorships

If you carry on business as a sole proprietor, then you personally are the business. You may use a trade name, such as "ARC Welders". However, you are the actual business person, and you are the person liable for all of the activities and obligations of the business. The income of the business is yours personally as well.

b) Partnerships

The British Columbia *Partnership Act* defines a partnership as two or more persons carrying on business with a view to profit. All of the partners are capable of binding the partnership to contractual obligations. With some exceptions, the partners are also jointly and severally liable for the debts and obligations of the partnership. For these and other reasons, it is very important to choose your partners wisely. Partners may be individuals, companies or other partnerships.

c) Ventures

There is a common misconception that ventures, or joint ventures, are a distinct business entity. In fact, ventures are a form of partnership: they consist of two or more persons carrying a specific venture with a view to profit. Normally, certain of the costs associated with the partnership may be deducted from the income of the venturers (or partners). Income is, of

course, shared amongst the partners. Ventures normally come to an end on the completion of the specific project in question. Partnerships are ordinarily created for longer term relationships. There are situations in tax law where joint ventures are treated differently than partnerships or companies, thus seeking tax advice as well as legal advice when deciding on the type of business structure to use is essential.

IV. SHAREHOLDERS' AGREEMENTS

a) Why do we need one?

Earlier we pointed out that companies are legal persons capable of carrying on business activities. However, they require directors and officers to make decisions and to guide the business. The directors and officers are legally bound to represent the best interests of the company. They will also consider the interests of the shareholders. Without a shareholders' agreement, the shareholders may be leaving to chance the methods and aims of the company as well as the management and direction of the business affairs of the company. A shareholders' agreement helps add "personality" to the company's existence and gives the shareholders an opportunity to agree to some important business and governance terms.

b) Major Components

Modern shareholders' agreements go well beyond the old forms of "buy-sell" agreement. Certainly, a shareholders' agreement should describe how the shareholders wish their shareholdings to be dealt with given a number of circumstances (i.e. if one shareholder wishes to sell his shares; if a shareholder breaches the shareholders agreement; if one shareholder wishes to force another shareholder to either buy her shares or sell his; or if there is a death of a shareholder).

Other important components involve major decisions (what percentage of shareholders should be required to vote in favour of certain types of major business decisions?), confidentiality (certain trade secrets and business information of the company should be guaranteed secrecy), insurance (key persons within the company may require insurance coverage in favour of the company in case of a death or a disability), dispute resolution (do you wish company disputes amongst the shareholders to be handled in Court or possibly by way of arbitration?), and so on. Special business arrangements may also be described in the shareholders' agreement.

c) Innovations to Consider

A number of lawyers and accountants recommend to shareholders that they obtain a **security interest** (or charge) from their company over the personal property assets of the company securing shareholders' loans owed to the shareholders as well as other obligations owed to the shareholders, such as unpaid dividends, and so on. A certain degree of creditor-proofing is thereby established in the event of a business failure. Priority to the company's assets in favour of those shareholders may be created. Modern company and personal property security legislation enables shareholders to obtain this "secured" status by using the necessary language and following some relatively easy registration procedures.

In addition, mediation of disputes may be allowed. Failing this, **arbitration** of shareholder disputes before an expert in the field could be arranged so as to avoid lengthy and expensive Court actions.

Finally, describing banking arrangements as well as decision-making authority amongst the directors and officers can be tailored to the particular needs of the company. These

and other innovations are possible in a well-drafted shareholders' agreement.

d) Partnership Agreements

As an aside, similar components and innovations may be added to a partnership agreement. Some additional provisions to consider are termination provisions for when the partnership is deemed to have ended, division of assets of the partnership (remember there are no shares) and defining those partners who have authority to bind the partnership.

Back to companies:

e) Insuring Future Issues

We discussed above the possibility of placing **key person insurance** on shareholders whose loss to a company could affect the well-being of the company. Tax rules sometimes enable a company to pass life insurance proceeds on to the estate of the deceased shareholder tax free in return for the redemption of the shares of the deceased. These rules change from time to time and must be carefully considered when the company is organized. Some of the insurance proceeds may be provided to the company to provide for a transition to a new key employee or shareholder to replace the deceased. In addition, in some cases, a company may find it prudent to hold key person insurance on other persons of importance to the company, such as its head of technology or its lead manager.

Disability insurance (possibly with a capital balloon payment if the disability is deemed to be permanent) may greatly assist a company whose director or key shareholder becomes permanently disabled. Without this insurance, the company may find itself legally obligated to continue paying a

non-productive, disabled business associate for an indefinite period of time.

Insurance matters should be discussed with your financial advisor at the time you plan the organization of the company business. The same can be said for sole proprietorships with some adjustments.

V. SECURING YOUR SALES

- a) How may my business reduce or eliminate accounts receivable?

We may safely assume that a majority of the loan transactions between financial institutions and their customers are "secured". Most of us have experienced security agreements in the forms of chattel mortgages, debentures, and so on, granted to our bank or credit union when obtaining loans for our businesses. Yet most business transactions in a commercial setting are not secured. This is an anomaly, and an unnecessary risk for your business.

If you manufacture a product or if you distribute goods - or even if you simply provide a service to customers - why not secure your sales? Your legal advisor will be able to suggest methods for your company to obtain a security interest (or charge) under the *Personal Property Security Act* (the "PPSA"). The PPSA is fairly modern British Columbia legislation that carries on the legal innovation, commenced in the United States (under the *Uniform Commercial Code*) and brought into Canada in the 1970's, of allowing the creation of simple, straight forward and efficient security interests over the goods that you produce or over other personal property of your customers.

Businesses these days are learning that it is not commercially reasonable to spend time and effort

manufacturing a product or finding sales for its goods or services while at the same time risking non-payment. Why should your customer's success or failure and sense of business fairness determine whether or not you get paid? Consider securing your sales. Your lawyer will prepare relatively simple commercial documents that will grant your business security over your customer once signed and registered. If you obtain a security interest over the personal property of your customer and properly perfect it (usually by registering a simple financing statement at the Personal Property Registry in the province) then you will rank as a **secured creditor** in the event of an insolvency by your customer or if your customer simply does not pay you. As a secured creditor, your business stands a far greater chance of recovering its receivable. It is worth the effort. For an inexpensive and user-friendly "security" package for your business visit: www.guidetolegaladvice.com.

b) Other uses for the Security Interest

The PPSA security interest allows you to be a secured creditor. Generally secured creditors stand a greater chance of recovering debts owed to them than do unsecured creditors. Your business could, for example, grant a security interest to you and the other shareholders or partners of your business. This security interest would charge the personal property of your business. If you perfect the security interest through registration, then you would rank in priority to unsecured creditors who do not have a charge over your personal property.

Likely you, and your fellow shareholders or partners, and the bank will be the only secured creditors. In the event of, for example, an insolvency by your business, or a significant claim against your business, you would likely be secured and rank in priority over the unsecured claims of third parties. Consider adding security interest language in your security agreements or partnership agreements.

Although the rules relating to security interests and the PPSA are simple, they are designed to be used by business people in ordinary commercial settings. Consider creative uses for the PPSA in your business.

c) Consider Due Diligence

Before you lend money to another, grant a credit facility to a business or enter into a contract with a third party, consider conducting due diligence searches. This involves “checking the other guy out”. Due diligence is a process that is usually lead by your lawyer whereby searches are conducted at public registries and with the subject itself to see what claims or encumbrances currently affect that person. With this information in hand, your business will be better able to decide whether or not it wishes to enter into relations with that person. Wouldn't it be nice to prevent problems in the future by uncovering potential issues up front? Due diligence need not be expensive. Even basic searches that are readily available online can be very informative. Talk to your lawyer before you agree on arrangements or contracts with third parties.

VI. CORPORATE PLANNING

a) Transferring Assets To Your Company – The Rollover

Following incorporation of your company, your legal and accounting advisors will wish to ensure that the existing business assets, equipment and goodwill necessary to carry on your business are transferred to the company with as few tax consequences as possible. This may be accomplished using certain income tax rules found in Section 85 of the *Income Tax Act* (Canada). In many instances, through the use of proper agreements and elections, the business assets of your business may be transferred to your new company with little or no immediate tax consequences. Careful preparation of the

documents and the plan for the **rollover** is essential. By the way, it helps if your company has been incorporated with a diverse share capital so that some flexibility exists in the structuring of the plan. Begin planning for the future at the time you first create your company.

b) Income Splitting

Through the use of a company, and in some cases a partnership, it is possible to share income with family members who may benefit from a lower marginal tax rate.

For instance, if you are the sole shareholder in your company, then in order for you to benefit through the income earned by your company you must accept a mixture of salary and dividends. As your income rises so will your marginal tax rate. If, on the other hand, your spouse and an adult child are also shareholders of your company, it is possible to share dividend income with those in your family who may be at a lower marginal tax rate. In fact, if they are active in your business, they may also receive some employment income. In this manner, you may spread out the income normally received by yourself amongst three persons. This is a legitimate manner of reducing taxes payable to Canada Customs and Revenue Agency.

Don't be overly concerned about controlling the company. Properly mapped out in the first place, you may retain a majority of the voting shares while still sharing some of the participating shares with other family members, business associates or capital financiers.

c) Family Trusts

Canada Customs and Revenue Agency eliminated the "preferred beneficiary election" a number of years ago. With that change in the income tax rules, family trusts became less

enticing and the creation of family trusts for high income earners slowed down considerably. The “preferred beneficiary election” allowed the “trustee” of a family trust to elect that a certain amount of income would be attributed to some trust beneficiaries even though the actual funds may not at that time been paid to those beneficiaries. This election was changed to require actual payment to actual beneficiaries.

Over the past few years family trusts have nevertheless regained much of their lost popularity. After all, high income earners may pass a great deal of income through to lower income earning spouses, children and other family members and effect considerable income splitting benefits in the process. Yet, the family trust gives the trustee complete discretion as to how much income will be passed through to these beneficiaries as well as which beneficiaries will benefit from time to time. Family trusts may be designed so as to be discretionary in all of the important decision-making respects.

Although family trusts may be designed in varying ways, a classic format would involve the family trust subscribing for shares in your company (or a holding company created as part of the tax plan) and thereafter receiving dividends from the company. This income would be passed on to those beneficiaries determined to be appropriate by the trustee. Usually the family trust was used to buy special items for the beneficiaries such as presents, vacation travel, tuition, and so on. “Necessaries of life” were usually excluded. Recent views expressed by Canada Customs and Revenue Agency indicate that even necessaries of life may be paid from a family trust.

When you design your tax saving plan with your legal and accounting advisors, consider whether a family trust will enable you to save taxes while at the same time benefiting family members. There are costs associated with the creation of a family trust, including the annual preparation of a financial statement and a filing of a trust income tax return. However, for

higher income tax payers, family trusts may be a valuable tax saving vehicle.

d) Funding Your Retirement

One of the goals you should have for your business is to provide for a source of income or wealth when you decide to retire. A number of alternatives are available: build up retained earnings and invest them from time to time within the company; purchase assets in the name of the company and increase its value; or take income out and making personal investments. These are all viable alternatives, and there are many others.

Whichever methods you choose, it is important to both seek financial advice from a qualified financial planner and then implement the plan. These plans take time to evolve and must be tailor made to both your retirement funding goals as well as the ability of your business to help you achieve them. Otherwise, other priorities will surface (such as dealing with the day-to-day emergencies of any business) and your retirement funding plans will be put on hold. RRSP's, forced saving on a monthly basis and mutual fund (or other) investments are all valuable tools. Seek advice early.

On a related note, do not forget the value of insuring against long term disability or death. Think of the effects the death of a key person could have upon the future success of your business. Not only can the company or partnership offset some of the costs, inconvenience and loss through insurance coverage but the estate of the deceased may be able to receive insurance proceeds funded by the business without the obligation of paying taxes Canada Customs and Revenue Agency.

On the disability front, it may harm or destroy your business if it is forced to pay monthly income to a

director/shareholder who is permanently disabled. After all, a one time contributor becomes a long term liability. Long term disability insurance can offset these costs, and may also be available to fund a capital payout in the event that the disability is permanent. Take care to ensure that your corporate documents and agreements allow for the plans that you implement and that the proper person pays the premiums, otherwise the benefits may be taxable. Seek advice.

e) Intergenerational Transfers

Few types of business entities better accommodate the transfer of wealth to the next generation than the company. You may gift participating shares to family members while retaining control of the company by holding the voting shares. You may gift shares to beneficiaries in your Last Will and Testament. You may pass on corporate wealth to family members and dependents using a family trust that holds shares in the company. You may even pass on shares to family members who are active in the business through stock option plans. The choices are seemingly endless. Each method has the effect of moving assets from one generation to the next.

The sale of the business to children poses a series of issues, but also opens up possibilities. For example, a sale at less than fair market value or a sale where you take back some of the expense of the purchase by financing it holds promise. The reduced expense to your children helps ensure the success of the business and financial well being. In the process, you receive cash flow and may spread out the recovery of your capital. Remember, tax planning is an essential ingredient as most sales create a disposition on the closing date. Regardless, the possibility should be explored.

As a caution it is prudent to ensure that a modern shareholders' agreement (or partnership agreement) is in place or can be put into place to protect against harm to the

business which may arise due to unforeseen disputes, ill-considered share transfers by a child, matrimonial problems emerging involving a child, and so on.

f) Expanding Your Business Into the USA

Many businesses explore the possibility of expanding into the USA. This involves questions such as the costs of doing so, whether the Canadian business is mature enough to expand, availability of US-based suppliers, employees, visa and work permit requirements and many other issues. If it appears that the expansion makes sense, then careful tax and legal planning is necessary. To take advantage of the Canada-US Tax Treaty, it may be necessary to create a US company that is a wholly-owned subsidiary of your Canadian company, and to ensure that this company is a type of company that will allow you to avoid paying taxes in both the USA and Canada. Structural issues also exist.

Your expansion into the USA may be very exciting and enable you to achieve tremendous growth in sales and in profits, but do not jump into the business setup process. Take the time to plan, seek tax and legal advice and then set up the structure in the most advantageous manner possible. In addition, start the visa and work permit process as early as possible as delays exist in dealing with the various immigration officials.

VII. BUSINESS DISPUTES

a) Amongst Shareholders or Partners

It is almost impossible to list all of the potential areas for dispute amongst business associates. The range includes how major decisions are made, which person holds which office within the company or partnership, proportional sharing of income, whether or not to sell the business, the nature of the

business or market plan, the budget, personality disputes and financial woes.

Regardless of the nature of the dispute, each is serious and each requires a mechanism for a resolution. Often shareholders turn to the shareholders' agreement. If a method for dispute resolution is contained within the agreement, the business may still be able to carry on functioning while the dispute is being resolved. Failing a proper agreement, or if the dispute is so fundamental that the business comes to a standstill, Court action or arbitration may be required. In fact, in some serious situations a receiver for the company must be appointed while the dispute is being resolved.

Precautions include the creation of a balanced and thorough agreement amongst the shareholders before problems have surfaced. Consider a buyout clause (often referred to as a "**shotgun**" clause) in cases where there are two or more main shareholders. Consider a mediation clause or an arbitration clause that will enable a rapid resolution to even the most serious problems. Finally, seek counsel from an experienced business law lawyer or litigation barrister before precipitating Court action. Often such an advisor will have experienced a similar situation in the past and will have creative ideas or advice that may enable a resolution.

b) Shareholder Remedies

If a minority shareholder feels prejudiced as a result of business decisions made by the majority shareholders or directors, certain remedies may be found in the BCA. Provisions in the BCA, often referred to as the "oppression remedy", enable a minority shareholder to insist upon having the Court scrutinize the actions of the majority. If found to be oppressive, the company could be ordered to correct the wrongs or to purchase the shares of the minority shareholder at their fair market value.

Similarly, if decisions are made by the directors, or by the majority shareholders, that meet with the fundamental objection of one or more of the shareholders, dissent proceedings are available by virtue of the BCA. Often placing a dissent on the record will enable a shareholder to keep certain remedies available if Court proceedings ensue.

If a member of a company acts in conflict of interest, the BCA requires disclosure and a degree of accountability to the other shareholders and directors of the company. The BCA attempts to retain business ethics in the governance process involving companies. Failure to meet the test could result in liability on the defaulting business colleague.

In the unfortunate situation where a shareholder or director has acted unlawfully, case law has ruled that the “**corporate veil**” may be pierced and the appropriate shareholders or directors may be found to be personally liable for the damages which result.

Obtaining legal advice in a confidential setting will enable you to determine whether the conduct complained of is legitimate or warranting legal action. Normally it is in the best interest of the company to address these problems early. Ignoring the problem or allowing time to pass could compromise your legal remedies as well as the better interests of the company.

c) Employment/Wrongful Dismissal

Your employees, including shareholder or director employees, are protected by legislation as well as case law against wrongful dismissal. Sometimes the minimum notice periods described in the *Employment Standards Act* will apply. Where an employment contract describes the rights of an

employee on termination, those rights and remuneration may apply if not inconsistent with provincial legislation protecting employees. However, senior management or those employees who have spent many years in the service of your company may be entitled to greater remuneration on termination than you may think. Precautions are not easy. There are, however, some planning techniques that you should consider.

First, if you are purchasing a business, you may attempt to arrange for all employment contracts to be terminated and all employees terminated and fully remunerated before you purchase the business assets or the shares of the company. Remember, there are risks that key employees may not stay with the company if this process is used. However, if successfully implemented, you stand a much better chance of starting with a clean slate in terms of employee remuneration when you acquire the business.

Second, where possible you may wish to formalize employment by way of a written contract. Describe the termination benefits which meet with the best interests of your company. Provisions protecting the trade secrets and technology of the company should also be included. The best time to obtain an employment contract is at the beginning of the employment of the staff member. Failure to do so could result in a technical defense that any subsequently signed contract is unenforceable for lack of consideration. After all, if the employee is already working, why is the employment contract of any benefit to the employee?

Third, in some cases it may be possible to give an employee notice of termination while enabling the employee to continue working during the notice period. Obviously sometimes this will not work, especially where there is a risk of disgruntlement or harm to the business if an employee who receives notice is allowed to remain at the place of employment.

Nevertheless keep in mind that “**severance pay**” is sometimes paid in lieu of notice. If reasonable notice of termination is given it may be possible to avoid payment of severance pay.

If there is “**just cause**” for termination, this situation is different. Immediate termination is possible. Reasons for dismissal for cause vary and current case law must be studied carefully before a decision is made. In some instances, severe insubordination or unlawful activities directed at the employer will suffice. Clear incompetence also may be an acceptable justification. However, great care must be taken in considering dismissal for “**cause**”.

If dismissal is not for cause, reasonable notice must be provided. Years of employment, the age of the employee, the positions of responsibility held by the employee and many other factors must be considered in determining what reasonable notice is acceptable. Generally, advice in the area of employment and wrongful dismissal is difficult as it is an evolving area of law and it is determined on the facts of each case. Care, advice and prudent planning is important in order to avoid liability for the company and its directors in the event of a wrongful dismissal.

d) Lawsuits Against Your Company

Lawsuits may be a menacing agony to your company. Wasted administrative time, legal costs and the uncertainty of the result all have a negative effect upon the fortunes of a business. While it is not always possible to avoid a lawsuit, consider the following:

1. In your business dealings, try to ensure that the contractual arrangements between you and the contracting parties are clear and unequivocal;

2. Using alternate dispute resolution techniques in your contracts, such as mediation or arbitration clauses. Where appropriate, these forms of dispute resolution techniques may avoid Court time and expense;
3. Get to know your customers or contracting parties by performing due diligence searches in advance of making the contract. Look for the good as well as the bad news about potential contracting parties before problems emerge.

These are but a few suggestions. Your advisors can help you further when considering the nature of your business and the parties with whom you will be dealing. However, if a Court action appears imminent, seek legal advice immediately.

If you or your company are served with a Writ of Summons and Statement of Claim, then you have only seven days in which to enter and serve and Appearance. Thereafter, you have only fourteen days in which to file and serve a Statement of Defense. Ignoring the problem could result in important dates being missed, a Judgment being entered, and the severity of the problems worsened.

VIII. OTHER IMPORTANT AGREEMENTS

a) Employment Agreements

Earlier, we mentioned how important employment agreements are to the security of your business, trade secrets, technology and confidential business information. They are also important in defining the rights of the employee on termination of the employee's job.

Case law has determined that employees do not necessarily owe a duty of good faith to their employer when their job has been terminated or they choose to leave your employment. An employment agreement may create those duties contractually. At least the duties which exist during employment as well as post-employment may be defined. Protections that are important to the company may be preserved.

b) Your Lease

If you are a landlord of commercial premises, a state of the art lease containing modern lease language is essential. Protections of the landlord's property as well as unique enforcement rights given the nature of your particular building are now available if your lease is properly drafted.

In addition, the lease form may prevent legal liability for a landlord in the event of enforcement situations. For instance, the lease may separately define the right of distraint (seizing personal property assets of a tenant if rent falls into arrears) or terminating the lease and taking possession of the premises (commonly referred to as re-entry). The two remedies are incompatible and may not be exercised together. Ensure that your lease defines the remedies that are available in the event of a default.

If you are a tenant under a commercial lease, ensure that your solicitor carefully reviews the "offer to lease" and the lease agreement. Consistency between the two is essential. Also, beware of additional terms which sometimes find their way into the lease and impose unreasonable obligations upon the tenant. Sharing of income, extra management fees or incorrect calculations of pro rata leasehold expense charges sometimes exist. A balanced commercial lease is fair and reasonable. However, a lease is like all other contracts -

unless negotiated carefully, the terms may be one-sided and unfair to the tenant.

c) Director's Liability Indemnity Agreement

The law in respect of director's liability is evolving rapidly. At one time, companies enjoyed strict separate legal liability, separate from that of the company's directors or shareholders.

Over time, statute law and case law have adjusted this strict rule and have imposed liability on directors who have committed criminal offences or have undertaken fraudulent activities in the name of the company. Further developments in the law allowed the Court to determine that directors could also be liable for non-remitted employee deductions to Canada Customs and Revenue Agency, unpaid GST, environmental contamination caused by the company, and a limited amount of unpaid wages due to employees. Further, directors have been called upon to account for profits they have earned through contracts with their own company where the director had a direct interest in the contracting party and had acted in a conflict of interest.

Clearly, the potential for personal liability of directors and officers of companies is expanding. Great care is needed before you accept a director or officer position with a company or a society. An **indemnity** granted by the company is essential. Security for the indemnity by way of a charge over the company's assets or by way of thorough directors' liability insurance is highly recommended. Due diligence searches on the company and its current directors is also highly recommended as the more you know about the company, the better informed you are when making the decision as to whether or not to act as a director or officer. Legal advice and a strategy to enable you to make the proper decision is no longer a luxury. It is both reasonable and prudent.

d) With Your Bank

During the history of your business, you will have many different relationships with your bank. Obviously, the financial institution that finances your business is critically important. However, as essential as the funding is, a completely one-sided relationship is not in the best interest of your business. It is often said that your financial institution is not a business partner, it is a lender. Count on granting appropriate security in order to obtain the operating and capital loans that you require. Beware of providing unlimited personal guarantees. Obtain accounting and legal advice before your family home is put on the table to secure business loans.

Develop a strategy that allows you to objectively study the loan requirements of your business. First, carefully and critically design your business plan. Second, organize your business responsibly after seeking legal and accounting advice. Should you be a company, partnership or proprietorship? What types of business contracts are essential to secure the well being of your business and its sale? Is a shareholders' agreement appropriate? Have you conducted due diligence on your main customers? Third, ensure that your business plan and your procedures both involve more than one person having direct communications with and relationship building activities with the key bank representatives and with your key customers. This is important for emergency situations and for business succession.

Next, have your business projections reviewed by a professional, such as an accountant or a business consultant. Study the costs of providing key person insurance and disability insurance on the main actors of your business.

Then, present the entire plan to your financial institution showing your potential lender that you have an effective

business, a good business plan, a reasonable likelihood of success, good organization and an experienced professional team backing you up.

When the bank presents its list of requirements, sometimes referred to as a commitment letter or financing facility letter, have your accountant and lawyer review it carefully to ensure that the requests for security are reasonable and do not unduly restrict your business. The contracts you have with your financial institution are some of the most important contracts your business will enter into. Great care is recommended.

e) NDA's – Non-Disclosure and Confidentiality Agreements

Many business ideas require confidentiality protection at the outset at least. An NDA is a simple and convenient form of agreement that may offer a significant level of protection when you present ideas or inventions to third parties. More discussion on NDA's follows below in the section dealing with the question of patent protection. Consider who should be named as the "protected" party. Should it be you personally or should it be your company? It may be necessary to determine whether or not you wish to incorporate a company to hold your idea, invention or your business before the NDA is drafted.

IX. PATENTS, TRADE-MARKS AND YOUR BUSINESS NAME

a) Do we need patent protection?

Innovative devices or technology developed for your business or used in your business may be "**patent-able**". An inventor must act quickly to acquire maximum protection through the patent laws in Canada and the United States. Until these protections have been acquired, disclosure of the

invention may not take place as information in the hands of third parties may prejudice the legal effect of the patent. A patentability search is a logical first step if you or an employee working for your business has created a device or process that may deserve protection. NSA's, or **Non-disclosure agreements**, must be signed by persons who learn of the invention or are consulted regarding certain aspects of the device.

In addition, the procedure used to protect the patent could vary depending upon the nature of the patent and the jurisdictions where protection is required.

Remember that proper registration of a patent, together with other protections that are available in law, may help ensure that your business may use the patent without the risk of infringement by third persons and may license the patent to contracting parties who will help earn income using the invention. Proper assistance by a qualified patent lawyer is needed as early on in the process as possible.

b) Do we need trade-mark protection?

The same may be said regarding trade-marks. If your goods or wares are identified with a certain name or designation, it may be possible to register a trade-mark associated with those goods and wares. Well known trade-marks and trade names have added tremendous value to many products of which we are all familiar. The same may be said for your products or the name or designation associated with your products. Again, the advice of a trade-mark lawyer will help determine whether protection is available or advisable in each case.

There is a common misconception that the incorporation of your company offers complete protection of the company's name. This is not the case. Incorporation of a

company or the registration of a business name provincially does not offer thorough protection. It may prevent another company from incorporating using the same name within your province; however, other businesses may use portions, or all, of the same business name with little or no legal consequences. Only through the registration of a federal trade-mark will a business name receive thorough protection.

Consider the importance of your business name early on in the history of your business in order to determine whether trade-mark registrations are required. We have assisted many businesses in obtaining: (i) their trade-mark; (ii) their company's name; (iii) their web domain name; and (iv) all of their copyrighted or written material, all with the same wording. This clearly assists in building value for your branding and for the business itself.

c) Protecting Intellectual Property

Your business name or "Brand", your technology and the written or created works used in your business may have intrinsic value as intellectual property. The law enables you to protect these rights and thus to further protect your business. Seek advice. Your business procedures would be well-served if you obtain confidentiality covenants from employees and others who are to receive trade secrets or technical information from you and if you ensure that your contracts with employees and others clearly state that all intellectual property of your business is owned by your business and that any work that they do relating to the intellectual property is done on your business' behalf.

X. YOUR PROFESSIONAL TEAM

This booklet has highlighted a number of legal and business issues which may arise during the course of your business' history. Many of these issues may be avoided if they

are considered at an early point in time and dealt with by your professional team. We recommend that you give early consideration to hiring experienced legal accounting business or financial planning advice. There are costs; however, if serious problems can be avoided or the efficiencies of your company enhanced, the benefits should be well worth the costs incurred.

The lawyers at Cleveland Doan LLP welcome the opportunity to discuss your business planning and legal needs.

XI. ABOUT THE AUTHORS

The law firm of Cleveland Doan LLP (then known as “Cleveland & Doan”) was established in January of 1995, when Dale R. Doan left a large law firm in Vancouver to join Richard A. Cleveland in White Rock. Now comprising a number of lawyers and experienced legal assistants, the partners of Cleveland Doan LLP are proud that their law firm provides a wide range of legal services.

Business Planning

Dale R. Doan is a member of both the BC and Saskatchewan Bar. Dale became a member of the Law Society of Saskatchewan in 1980, and the Law Society of BC in 1991. Dale has written and lectured extensively on business law issues, and is an active practitioner in this area of law. Dale's particular areas of interest are secured transactions and strategic planning for business owners. Email: dale@cleveland-doan.com

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Richard A. Cleveland became a member of the Law Society of BC in 1984 after graduating from UBC. Richard has

appeared frequently and successfully before the BC Supreme Court and Court of Appeal on oppression remedy cases, PPSA, and other business law issues as well as many estates dispute cases. He has practiced in White Rock since 1985. Email: rick@cleveland-doan.com

Strata Property and Wills and Estates

Shawn M. Smith has established himself as one of the Fraser Valley's preeminent strata property lawyers representing strata councils as well as owners at various stages of the strata corporation's existence. Shawn also represents property developers. His practice also encompasses the areas of Wills preparation and the administration of estates. Email: shawn@cleveland-doan.com

Business Law and Conveyancing

Brent A. Ellwyn became a member of the Law Society of BC in 1998 and came to Cleveland Doan LLP in 2004 having previously practiced in Vancouver in the areas of corporate finance, business and securities law. He and Dale Doan work together in business law at our law firm. Brent also handles the bulk of our conveyance and mortgage law practice. Brent's background enables him to provide valuable business law and strategic advice to business clients of the law firm. Email: brent@cleveland-doan.com

CAVEAT

The information in this booklet must not be considered to be the provision of legal advice. Business and company law is too complex for a booklet of this nature to provide any specific advice. Rather, concepts are discussed in a general nature. Please consult with your legal, accounting and financial advisors for specific advice on any business problem that you encounter. Cleveland Doan LLP accepts no liability for actions you may take based on the information contained in this booklet unless we have been engaged to provide specific advice to you in relation to that matter.

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