

9. PRACTICAL CONSIDERATIONS

9.1 Preliminary Preparation by the Investor

A general knowledge of Canadian geography, politics, economics and law is fundamental to a sound investment decision. Such knowledge can best be obtained from government information services abroad, attending investment seminars, viewing the websites of various government and other agencies engaged in encouraging foreign investment, reviewing the general information available in reference libraries, reading this manual, and regularly updating internet searches and viewing publications which are available on the internet (such as *Canadian Business*, *The Globe & Mail Report on Business* and *Maclean's* magazine). A personal orientation tour by the principal or a very senior member of the enterprise of at least 10 days duration with a well planned itinerary is then advisable. Maintenance of a daily journal throughout the entire assessment and review process recording the investor's impressions, assessments, queries, comments and criticisms is an invaluable tool in making the investment decision and developing an effective business plan.

9.2 Establishing Contacts in Canada

Through Canadian embassies, consulates and trade offices abroad, representatives of the Province of Ontario, Canadian and domestic banks abroad and private contacts, the investor can locate well-informed individuals in the appropriate areas of commercial activity who may be of assistance. The embassies and consulates established by the government of the investor's home country in Canada are also invaluable sources of introductions to such people. The investor's professional advisers and bankers also often have international affiliations which may be of assistance in selecting suitable Canadian accountants, architects, engineers, investment counsel, lawyers and other professional advisers.

Since the quality of the people involved is the essence of success in business, there is no substitute for referrals from business associates or friends and direct, personal, face-to-face contact with prospective Canadian associates, suppliers and advisers. This direct personal contact should occur during the preparation phase of the investment project. Although proficiency in the investor's mother tongue may be convenient for communicating with associates and advisers, the selection should be made on the basis of ability, honesty, integrity, knowledge and experience rather than linguistic proficiency. French is the language of business in Quebec, English is the language of business everywhere else in Canada and, for that reason, it is advisable for the investor or business immigrant to use the English language wherever possible.

9.3 Preparation of a Comprehensive Business Plan

With the assistance of government representatives and professional advisers, a detailed business plan establishing objectives and setting out all aspects of the investment activity should be prepared, preliminary contacts with sources of funds should be made and market studies, income and expense budgets, capital cost projections and start-up cost estimates should be prepared. Special attention should be given to customs and excise, income, sales, goods and services and other tax implications of the proposed investment as well as any governmental or contractual constraints in connection with the labour, production, marketing or distribution requirements affecting the investor's products, services or industry. The availability of Canadian personnel and the immigration issues arising from the transfer of personnel from abroad should be canvassed and alternatives considered at an early date. To the extent possible, a strategic future plan for three to five years should also be formulated at the outset.

Although the preparation of a comprehensive business plan is an extremely difficult and time consuming exercise, such a business plan is an essential tool in dealing with government agencies, immigration applications and the financing of the proposed investment, as well as providing a basis for obtaining sound financial and professional advice and requesting government assistance. Such evidence of a carefully considered commercial decision is extremely persuasive and demonstrates the investor's

knowledge and sincerity.

9.4 Necessity for Professional Assistance

The tax and legal systems of Canada and the Province of Ontario are extremely complex and the advice of knowledgeable, experienced and innovative professional advisers is essential to success. Early consultation by the investor with advisers will expedite the research and review process, facilitate the preparation of the business plan and accelerate applications for immigration, funding, investment review (if applicable) and other approvals. Good professional advice is often expensive but should ultimately save the investor a great deal of time, difficulty and money. In our legal system no significant commitment should be made without first obtaining professional advice.

9.5 Preparation of the Required Documentation

It is advisable for the choice of business organization to be made as early as possible so that all documents can be prepared in the name of the entity which will ultimately carry on business in Canada. Since the various forms require details of the investor's past, present and future business activities, the advance preparation of the business plan makes it possible to complete and file the required applications and notices quite quickly. Immigration applications are customarily completed abroad by the individual applicant but prior review of the application form with government officials and professional advisers may enhance the success potential for the application and minimize the delays which often occur. Accuracy, completeness and precision in the preparation of documents is an invaluable aid and consistency of information is necessary as there may be an exchange of information between agencies. Complications can occur if plans or objectives are changed while a matter is being processed by the bureaucrats and for that reason every reasonable effort should be made to develop final plans before such documents are filed.

9.6 Establishing the Canadian Business Organization

(1) Tax Planning

The prudent investor plans the investment in consultation with Canadian legal advisers who will point out the advantages and disadvantages of each type of business organization. If the investment is relatively small and capital gains are anticipated, an immigrant may wish to acquire the asset personally but he or she then becomes personally responsible for all liabilities arising from the investment. Under Canadian tax law, on death, an individual is deemed to have sold all of his or her Canadian capital property at fair market value and the estate is required to pay capital gains tax at progressive, personal rates on 50% of all accrued capital gains in excess of any capital losses (see Section 5.6 for details).

Each investor will require careful analysis of his or her situation, objectives and future prospects. In the event that the investment has potential for incurring liabilities the individual will be counselled to use a corporation in order to minimize such risks. If the investor plans the investment as part of a general estate plan, it may be held by his or her spouse and/or other family members from the outset. Although the investor or immigrant may be tempted to hold business assets in his or her own name in this country it is our view that the anonymity, flexibility, transferability, perpetuity and limited liability of a business corporation far outweigh other factors. Great care should be taken in structuring joint ventures in order to avoid the risk of joint and several partnership liability (see Section 4.4) and careful consideration needs to be given to placing adequate insurance coverage once the Canadian enterprise is established.

(2) Use of a Corporate Vehicle

Most investors find the use of a corporate vehicle, be it domestic or foreign, to be the most

satisfactory method of obtaining limited liability, separation of the Canadian activities from other aspects of the investor's business and maximum tax advantage. Usually the non-resident investor is advised by his or her tax and legal advisers to incorporate a Canadian company which directly engages in the commercial activities in Canada and which is controlled by a non-Canadian entity which has perpetual existence thereby avoiding the adverse income tax implications of the death of an individual.

Once an acceptable name (which does not conflict with existing business names, corporate names or trade-marks) is selected, incorporation is effected simply and quickly. Most law firms incorporate and organize the corporation using members of the firm as nominee shareholders, directors and officers who resign and transfer their shares as soon as the structure of shareholdings is settled and the permanent directors and officers are identified. Because there are residency requirements under federal laws as well as the Province of Ontario that 1/4 of the directors of a corporation incorporated are required to be resident Canadians, it is desirable to make advance arrangements with trusted Canadian colleagues or advisers so that delays are avoided. Once established, the corporation can commence business immediately subject only to compliance with the *Investment Canada Act* (if applicable), all laws of general application and the regulatory requirements applicable to the particular industry (if any).

(3) Canadian Business Practices

In our legal system the business person bestows a great deal of trust and confidence on his or her accountants and lawyers who often advise on the most suitable type of business organization, the structure of transactions, the methods of funding the enterprise available in the circumstances, the implications of relationships with co-venturers, distributors, agents and employees and the steps to be taken in establishing a new business in Canada or the acquisition of the assets or shares of an existing business.

Variety is the norm in Canadian commercial transactions which are frequently structured to achieve the particular objectives of the participants rather than being moulded by the strictures of a rigid legal system. Freedom of contract and freedom to plan one's affairs so as to attract the lowest levels of taxation consistent with a structure which has a legitimate commercial purpose are cornerstones of our legal system and the parties can sometimes achieve results not readily available under more formalistic systems. On the other hand, the emphasis of our system on the professional adviser results in the incurring of additional expenses which are sometimes not anticipated by the first-time investor.

(4) Protection of Corporate and Product Names

The selection of a corporate or business name which is acceptable to the investor and which does not conflict with existing names in use or recorded in this country often creates considerable difficulty and delay. If the investor wishes to use a corporate name, business style or trade-mark used elsewhere, it is advisable to conduct the appropriate searches and take the necessary steps to protect the name in this jurisdiction at a very early stage. This is especially important in connection with the registration and preservation of internet domain names and e-mail addresses. Complete protection of an investor's name is difficult but the registration of a trade-mark based either on the use of the name in Canada or on the existence of a previous registration in another jurisdiction is the best device which affords reasonably complete protection. The clearing and registration of internet domain names and e-mail addresses also affords additional protection. The registration of business names and/or the incorporation of companies only affords a limited degree of protection and is often inadequate if a dispute arises.

If a conflict exists between the investor's proposed business name, corporate name or trade-mark and an existing business name or trade-mark, further investigation must be undertaken to determine the validity of the existing name or trade-mark and, if validity is confirmed by such investigation, the investor must reconsider the choice of name, select another suitable name and repeat the same process for the

alternate name. It is, therefore, important to address this potential problem immediately once the investment decision is made.

In the Province of Quebec there are strict rules with respect to the use of the French language so it is important to decide whether or not business will be carried on in that jurisdiction. The use of a registered trade-mark is one exception which enables the enterprise to avoid the translation of its English business name into the French language but, in our experience, names which are the same in both languages, such as Heineken Canada Inc., etc., work best wherever possible.

(5) Compliance with Public Disclosure Requirements

Federally incorporated corporations are required to publicly disclose the names and residence address of directors, while Ontario corporations must publicly disclose the names and addresses for service of their directors and officers. In addition, Ontario legislation requires the members of an unincorporated business to file similar information as that required for corporations with respect to both active and passive participants. Any changes in officers or directors of a corporation or members of an unincorporated business firm must be recorded as they occur.

Various income tax, corporations tax and statistical returns must be filed each year by corporations, individuals and trusts but that information is usually treated as confidential by the agency receiving it and is not available for public scrutiny.

Although directors and officers of corporations and participants in unincorporated businesses cannot be anonymous under normal circumstances, the use of a nominee or a trustee (or a corporation in the case of a proprietorship or partnership) can minimize the extent of the public disclosure required because it is the nominee or trustee who appears on the public record rather than the investor. Some industries are also subject to additional disclosure requirements applicable to the particular industry as well as to the laws of general application. As a result, both the government agencies concerned and the investor's professional advisers should be consulted to ascertain the details of such additional requirements (if any).

Small and medium sized privately controlled corporations and businesses are subject to only limited public disclosure, but the non-resident investor should be aware of the circumstances where such disclosure is required and plan his or her affairs accordingly. Advisers should be cautioned where anonymity is essential to the investor because staff or junior professionals often prepare the various returns and they are prone to make too much disclosure rather than too little. Even if disclosure is not a matter of concern, everyone involved should be aware that tax treaties provide for the exchange of information between states.

It must be borne in mind that banks, financial institutions and others are required to report both financial transactions involving Cdn.\$10,000.00 or more as well "suspicious transactions" and that the agency which receives these reports may advise the appropriate police force or the Canadian Security Intelligence Service of any transaction which it considers to be inappropriate (see Section 6.5).

9.7 Arranging the Personal Affairs of the Investor

(1) Structuring the Investment

In view of the Canadian tax rule that all of the Canadian capital property of a deceased individual is deemed to have been sold at fair market value immediately prior to death, the individual investor should consider structuring the Canadian investment so that it is made by a foreign legal entity with perpetual existence. In that event, the payment of capital gains tax is deferred until the disposition of the Canadian asset occurs either by sale or by the dissolution of the corporation.

If an individual personally holds any property in Canada (shares, business assets, real estate or other forms of property), a Canadian last will and testament dealing with his or her Canadian estate and appointing executors and trustees of the Canadian estate is recommended in order to minimize administrative difficulties and delays subsequent to his or her death. Once again, careful planning can minimize the adverse consequences of the death of an individual and assist in the administration and disposition of the Canadian assets when that unhappy event occurs. To facilitate the administration of his or her Canadian affairs during his or her absence, illness or mental or legal incapacity, it is also suggested that the individual investor grant a power of attorney to a member of the family or a trusted friend or adviser.

(2) Income Splitting

Planning is equally important for the investor who immigrates to Canada since each resident of Canada is taxed on his or her worldwide income from all sources, unless he or she qualifies for special treatment under a tax treaty. The impact of this rule can be often modified by careful planning before admission to Canada by completing arrangements to transfer assets among various members of the family before being admitted to Canada for permanent residence and by involving spouses and adult children in the business as shareholders, officers, directors, employees or partners. The object of these measures is to reduce non-Canadian income and to distribute the total family income among the various members of the family to take advantage of the lower marginal tax rates and all of the personal exemptions available to each individual. The effective use of careful personal and corporate tax planning measures can have the desirable effect of maximizing the disposable family income and reducing the aggregate tax cost of earning that income. There must, of course, be a business purpose for whatever structure is adopted and there are usually many legitimate reasons for organizing one's affairs in a particular fashion when making a move to another country.

Gifts of money or income producing property between spouses or from parents to children under 18 years of age by Canadians should be minimized because the income therefrom is attributed to the donor for Canadian income tax purposes. On the other hand, if a spouse or infant child has money or property in his or her own right, when that person is admitted to Canada as a permanent resident, no attribution occurs. Once again, sound legal and tax advice based on full disclosure of all relevant facts is essential.

(3) Retention of Foreign Assets

Persons emigrating to Canada are well advised to carefully consider their non-Canadian assets, to review the impact of taxation in Canada and their country of origin, applicable tax treaty provisions and other laws applicable to those assets, and to plan their affairs in detail prior to being admitted to Canada for permanent residence. Individual situations vary widely as do the tax and legal regimes in the country of origin, but careful consideration of the entire situation and good professional advice often result in satisfactory arrangements being made. Once the investor is admitted to Canada for permanent residence, his or her flexibility in re-structuring his or her affairs is reduced and for that reason it is advisable to implement any necessary adjustments prior to taking up permanent residence in this country.

(4) Matrimonial Concerns

As in every jurisdiction, the legal implications of a marriage breakup are serious, not only for the parties involved but for the businesses in which they have interests. Under the *Family Law Act* (Ontario), the value of each of the two spouses' property acquired after the marriage is calculated and then an equalization payment is made to the spouse with the lower value. The matrimonial home (the home where the spouses resided on separation) is subject to special rules which override this scheme. To avoid unnecessary judicial proceedings and reduce the potential for conflicts, it is advisable for spouses to settle

a domestic contract between them when they immigrate to Canada which conforms with Canadian law (see Section 8.6).

9.8 Necessity for Careful Organization and Planning

The foregoing brief outline demonstrates that careful planning is imperative. The planning process itself often highlights potential problems or adverse implications and the intensive thought and analysis required usually enables the investor to take the precautions which effectively minimize the risks. Planning also has the effect of forcing the investor to clarify his or her thinking, determine the objectives, establish the priorities and consider all aspects of the investment decision.

9.9 Retaining a Lawyer in Canada

Lawyers and clients have a special relationship and one of the most important aspects of this relationship is that a lawyer has a duty of confidentiality to his client. A lawyer must hold all information concerning the business and affairs of the client in strict confidence and cannot divulge such information unless the consent of the client is obtained or required by law. As a corollary to this rule, the solicitor-client privilege protects all information concerning the business and affairs of a client, subject to the requirements of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act (Canada)*, acquired in the course of the professional relationship from being disclosed to third-parties unless authorized by the client or ordered by the Court.

Total candour with Canadian professional advisers is essential if sound, accurate and practical advice is to be obtained. A professional opinion is always based on a stated set of facts or assumptions and any change or variation thereof can significantly affect its efficacy. It is therefore absolutely essential that the prospective non-resident investor or prospective immigrant makes full disclosure of all relevant information to his or her counsel and for that counsel to discuss the implications of that information with the investor in detail.

The legal profession is regulated in Canada at both the national and provincial level. Each province has a law society whose main function is the regulation of lawyers and paralegals. In Ontario, the Law Society of Upper Canada (LSUC) regulates the legal profession and membership to the LSUC is mandatory in order to practice law in Ontario. Lawyers are guided by the Rules of Professional Conduct, the Rules of Practice and Procedure and the By-laws of the LSUC.

When retaining a lawyer, the LSUC guidelines require that lawyers identify the identity of their clients by obtaining their contact information and in some situations, to verify their identity. If the client is acting for or representing a third party beneficiary or a principal, the applicable information about the beneficiary or principal will need to be obtained. These stricter guidelines with respect to client identification and verification were recently introduced by the LSUC in order to enhance public protection and assist in preventing potential fraudulent or criminal activities.

The requirements for the verification of a client's identity are triggered where a lawyer receives, pays or transfers funds on behalf of a client, subject to some exceptions. To comply with verification requirements, the lawyer will need to examine a client's original, valid government issued identification such as a driver's license, birth certificate, passport and for organizations such as corporations this includes confirmation from a government registry as to its existence, name and address of the organization, including the names of its directors and officers. In a situation where the lawyer does not receive instructions from a client face-to-face, the lawyer must obtain an attestation from a suitable person

who has verified the appropriate independent source documents. Suitable persons include lawyers, dentists, judges, chiropractors, physicians, notaries, pharmacists and accountants. If the client is not in Canada, a person acting on behalf of the lawyer must verify the client's identity.

9.10 Timing

A careful analysis of the requirements to be satisfied should be made at an early stage so that timing problems can be minimized. It is risky, for instance, to acquire a business many months before the investor or his or her designated representative has been admitted to Canada as a corporate transferee or for permanent residence. Preparation of a detailed timetable and the co-ordination of the efforts of all persons involved are essentials for the implementation of a trouble-free investment and/or immigration decision.

Almost invariably, the investor or immigrant does not anticipate the delays which frequently occur at various stages of the process. In our view, a prospective non-resident investor should plan at least 6 to 10 months beforehand, while a prospective immigrant should begin preparations well in advance of the planned move as it generally takes 2 years or longer for a permanent residence application to be processed. The old adage "act in haste and repent at leisure!" applies rigorously to such decisions so we always recommend allowing ample time for the investment or immigration process to be completed in an orderly fashion.

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