



Navigating Lease Due Diligence: Key Considerations Upon Amalgamations

In the complex world of corporate mergers and acquisitions, the impact of improper and incomplete due diligence should not be underestimated. Amongst the various steps and legal issues companies should discuss with their counsel before the articles of amalgamation are filed is a careful review of all the relevant leases of the amalgamating entities.

It is important to be clear on the type and nature of the contemplated amalgamation before any lease is reviewed. Generally speaking, amalgamations are the merging of two or more corporations into one. In Canada, there are two forms of amalgamations: short-form and long-form. Short-form amalgamations can be “vertical”, where a corporation amalgamates with a wholly-owned parent, or “horizontal”, where at least two subsidiary companies, which are each wholly-owned by one parent company, amalgamate. A long form amalgamation is any amalgamation that is not a short-form amalgamation and requires the shareholders of each amalgamating corporation to approve the amalgamation.

The following are key considerations in the legal due diligence process of leases in the context of any contemplated amalgamation:

1. Names of the Parties: Validate the parties to the applicable lease to confirm which party is one of the amalgamating entities.
2. Terms and Renewal Conditions: Especially for brick-and-mortar businesses that are parties to leases, the length of the existing term, as well as the number, length and conditions of any renewal or extension terms is critical to the continuity of the amalgamated entity.

3. **Financial Obligations:** Take note of all the financial obligations in each applicable lease to determine rent, security deposits or pre-paid rent, and all other fees or expenses to analyze the financial impact of these obligations on the contemplated merger.
4. **Assignment Clauses:** As an amalgamation is not a “transfer” or “assignment” in the traditional sense but rather a continuation of two or more entities, Canadian courts have generally found that unless there is explicit language in the lease that requires a tenant to give notice of, or obtain consent from the landlord, a tenant will not be restricted from proceeding with the amalgamation.
5. **Change of Control Provisions:** Depending on the nature of the contemplated amalgamation, the transfer and assignment provisions of leases should be carefully reviewed to see whether there are any provisions restricting a change to the effective control, directly or indirectly, which may trigger a consent or notice requirement for the tenant.
6. **Special Provisions:** Often special provisions granted to the tenant are personal to the tenant, and the tenant may lose its entitlement to such special provision in the event of a “transfer”. While an amalgamation is not a transfer in the ordinary sense of the word, it is often included in the definition of “transfer” for the purposes of the lease. Prior to proceeding with an amalgamation, all “required conditions” and the terms of any special provisions, should be reviewed to confirm that the amalgamation does not void any special provisions, and if it does, the tenant should seek a lease amendment from the landlord.

These factors need to be assessed as early as possible in the due diligence process to address any restrictive provisions and negotiate any lease amendments that may be necessary. Being proactive will help mitigate stumbling blocks and facilitate a smooth merger.



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