



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

# Back to Basics: The Due Diligence Process

## CHAIR

**Sanjay Kutty**  
*Linmac LLP*

November 27, 2023



\* C L E 2 3 - 0 1 1 4 0 0 - D - W E B \*



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

### **CPD Materials Disclaimer & Copyright**

These materials are part of the Law Society of Ontario's initiatives in Continuing Professional Development. Their content, including information and opinions, provided by the authors, is that of the authors. The content does not represent or embody any official position of, or statement by, the Law Society of Ontario, except where specifically indicated, nor should any content be understood as providing definitive practice standards or legal advice. The Law Society of Ontario does not warrant the current or future accuracy of the content and expressly disclaims responsibility for any errors and omissions in the content, including inaccuracies that may result due to developments in law.

Copyright in the materials is owned by the Law Society of Ontario. The content of the materials, including any graphic images, is protected by copyright both as individual works and as a compilation. No user of the materials may sell, republish, copy, reproduce, modify or distribute the materials or any portion thereof without the prior written permission of the Law Society of Ontario and other applicable copyright holder(s).

© 2023 All Rights Reserved

#### **Law Society of Ontario**

130 Queen Street West, Toronto, ON M5H 2N6  
Phone: 416-947-3315 or 1-800-668-7380 Ext. 3315  
Fax: 416-947-3370  
E-mail: [cpd@lso.ca](mailto:cpd@lso.ca)  
[www.lso.ca](http://www.lso.ca)

Library and Archives Canada  
Cataloguing in Publication

#### **Back to Basics: The Due Diligence Process**

ISBN 978-1-77345-768-0 (PDF)  
ISBN 978-1-77345-769-7 (Hardcopy)



# Back to Basics: The Due Diligence Process



CHAIR: **Sanjay Kutty**, *Linmac LLP*

**November 27, 2023**  
**12:00 p.m. to 2:00 p.m.**  
**Total CPD Hours = 2 h Substantive**

**Law Society of Ontario**  
**Toronto, ON**

**SKU CLE23-01114**

## **Agenda**

**12:00 p.m. – 12:05 p.m.**      **Welcome and Opening Remarks**

*Sanjay Kutty, Linmac LLP*

**12:05 p.m. – 12:25 p.m.**      **Preparing for Due Diligence**

*Shawn English, WeirFoulds LLP*

*Julia Zanetti, Miller Thomson LLP*

- 12:25 p.m. – 12:40 p.m.**      **Conducting Real Estate Due Diligence**  
*Wesley Jackson, Wesley Jackson Professional Corporation*
- 12:40 p.m. – 12:55 p.m.**      **Conducting Mergers and Acquisitions Due Diligence**  
*John Sabetti, Fasken Martineau DuMoulin LLP*
- 12:55 p.m. – 1:10 p.m.**      **Conducting Environmental Due Diligence**  
*Joanna Vince, C.S., Willms & Shier Environmental Lawyers LLP*
- 1:10 p.m. – 1:25 p.m.**      **Conducting Financial Due Diligence**  
*Claudio Martellacci, CPA, CA, CBV, Grewal Guyatt LLP  
Chartered Professional Accountants*
- 1:25 p.m. – 1:45 p.m.**      **Reporting on Due Diligence**  
*Sanjay Kutty, Linmac LLP*  
*Cindy Cumming, Operations Director, Signal Lawyers*
- 1:45 p.m. – 2:00 p.m.**      **Question and Answer Session**
- 2:00 p.m.**      **Program Ends**



## This program qualifies for the 2025 LAWPRO Risk Management Credit

### What is the LAWPRO Risk Management credit program?

The LAWPRO Risk Management Credit program pays you to participate in certain CPD programs. For every LAWPRO-approved program you take between September 16, 2023 and September 15, 2024, you will be entitled to a \$50 premium reduction on your **2025 insurance premium** (to a maximum of \$100 per lawyer). Completing any Homewood Health Member Assistance Plan e-learning course available at [homeweb.ca/map](http://homeweb.ca/map) also qualifies you for a \$50 credit.

### Why has LAWPRO created the Risk Management Credit?

LAWPRO believes it is critical for lawyers to incorporate risk management strategies into their practices, and that the use of risk management tools and strategies will help reduce claims. Programs that include a risk management component and have been approved by LAWPRO are eligible for the credit.

### How do I qualify for the LAWPRO Risk Management Credit?

Attendance at a qualifying CPD program will NOT automatically generate the LAWPRO Risk Management Credit. To receive the credit on your 2025 invoice, you must log in to [My LAWPRO](#) and completing the online Declaration Form in the Risk Management Credit section.

STEP 1:	STEP 2:
<ul style="list-style-type: none"><li>Attend an approved program in person or online; and/or</li><li>View a past approved program</li><li>Completing a Homewood Health e-course*</li></ul>	Complete the online declaration form in the Risk Management Credit section of <a href="http://my.lawpro.ca">my.lawpro.ca</a> by September 15, 2024. The credit will automatically appear on your 2025 invoice.

You are eligible for the Risk Management Credit if you chair or speak at a qualifying program provided you attend the entire program.

### Where can I access a list of qualifying programs?

See a list of current approved programs at [lawpro.ca/RMcreditlist](http://lawpro.ca/RMcreditlist). Past approved programs are usually indicated as such in the program materials or download page. Free CPD programs offered by LAWPRO can be found at [www.practicepro.ca/cpd](http://www.practicepro.ca/cpd)

### Whom do I contact for more information?

Contact practicePRO by e-mail: [practicepro@lawpro.ca](mailto:practicepro@lawpro.ca) or call 416-598-5899 or 1-800-410-1013.

\*One Homewood Health e-learning course is eligible for the credit on a yearly basis.



# Back to Basics: The Due Diligence Process

November 27, 2023

SKU CLE23-01114

## Table of Contents

<b>TAB 1</b>	<b>Preparing for Due Diligence .....1 - 1 to 1 - 1</b>
	<i>Julia Zanetti, Miller Thomson LLP</i>
	<i>Shawn English, WeirFoulds LLP</i>
<b>TAB 2</b>	<b>Conducting Real Estate Due Diligence .....2 - 1 to 2 - 7</b>
	<i>Wesley Jackson, Wesley Jackson Professional Corporation</i>
<b>TAB 3</b>	<b>Legal Due Diligence in M&amp;A Transactions (PowerPoint) .....3 - 1 to 3 - 15</b>
	<b>Project Preliminary Legal Due Diligence Request List.....3 - 16 to 3 - 28</b>
	<i>John Sabetti, Fasken Martineau DuMoulin LLP</i>
<b>TAB 4</b>	<b>The Due Diligence Process (PowerPoint) .....4 - 1 to 4 - 9</b>
	<i>Joanna Vince, C.S., Willms &amp; Shier Environmental Lawyers LLP</i>

**TAB 5            Conducting Due Diligence (PowerPoint) .....5 - 1 to 5 - 13**

Claudio Martellacci, CPA, CA, CBV, *Grewal Guyatt LLP Chartered  
Professional Accountants*

**TAB 6            Due Diligence Reporting  
A Guideline For Your Transaction (PowerPoint).....6 - 1 to 6 - 11**

Sanjay Kutty, *Linmac LLP*

Cindy Cumming, Operations Director, *Signal Lawyers*



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

**TAB 1**

## **Back to Basics: The Due Diligence Process**

Preparing for Due Diligence

**Julia Zanetti**

*Miller Thomson LLP*

**Shawn English**

*WeirFoulds LLP*

November 27, 2023



# PREPARING FOR DUE DILIGENCE

## **1 – Legal Due Diligence – Brief Overview**

- *What* is legal due diligence?
- *Why* is legal due diligence performed?
  - Due diligence from the perspective of a buyer/investor
  - Due diligence from the perspective of a seller/target
- *When* is legal due diligence performed?
- *How* is legal due diligence performed?

## **2 – Legal Due Diligence – Scope, Reporting, Deliverables & Costs**

- Necessity of obtaining client instructions re:
  - Scope of due diligence mandate
  - Reporting expectations and frequency
  - Deliverable(s)
  - Cost constraints

## **3 – Due Diligence Team**

- Lawyers' role in due diligence – focuses on legal due diligence only
- Assembling a legal team dictated by the scope of your due diligence is important
- Consider any legal specialists required based on type of target business
- Local counsel in a foreign jurisdiction – when is this necessary?
- Importance of communicating with the legal team and with client to ensure client's expectations will be met (in terms of deliverables and costs)

## **4 – Due Diligence Request List**

- What is a Due Diligence Request List and what is its purpose?
- Responsibility for preparing and lawyer's role
- Due Diligence Request List is a "living document" and is supplemented over time
- Considerations for Legal Due Diligence Request Lists:
  - Materiality thresholds for contracts
  - Customizing based on the type of transaction (asset vs. share sale)
  - Industry-specific requests depending on the business of the target

## **5 – Virtual Data Room (VDR)**

- Purpose of a VDR and how it works in conjunction with Due Diligence Request List
- Importance of a well-organized VDR (numbered and segregated subject-matter folders)
- Best practices for sell-side:
  - NDA's in place with buyers; confirm with client who should have access and ensure ability to revoke access; responding to requests; organizing VDR
- Best practices for buy-side:
  - Reviewing materials relevant to legal due diligence; requesting missing or supplementary materials; downloading data room on closing

## **6 – Beginning to Conduct Due Diligence**

- Contract/Document Review can be done in early stages of a transaction
- Main purpose: to identify any third party consents/approvals required for the transaction
- Items to look for in Contract/Document Review:
  - Change of control/assignment; off-market termination clauses; exclusivity clauses; non-compete or non-solicit clauses
- Deliverables: Contract Summary or Contract "Red Flags" Summary



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

**TAB 2**

## **Back to Basics: The Due Diligence Process**

Conducting Real Estate Due Diligence

**Wesley Jackson**

*Wesley Jackson Professional Corporation*

November 27, 2023



## **PRELIMINARY MATTERS**

### **A) Identity of the Seller:**

- Seller Entity? (e.g., Individual? Trust? Partnership? Corporation? Limited Liability Company? Other legally existing entity?)
- Does the Seller validly exist and in good standing?
- Does the Seller have authority to convey?
  - Estate Trustee? Board of Director Approvals? Shareholder Approvals? Manager Approvals? Member Approvals? Partner Consents? Other Consents?
  - Who Has Authority to Bind Seller if not an individual?
    - Requisition an opinion letter from Seller's Lawyer
- Qualification to do business in jurisdiction of Property?
- Are sale proceeds sufficient to pay off all liens?

### **B) Identity of the Buyer:**

- Purchaser Entity? Has it been organized and in good standing?
- Articles of Incorporation/Organization and Certificate of Status on Closing
- Operating Agreement/Partnership Agreement/Joint Venture Agreement/Bylaws

- Authority to own and operate Property, and if applicable, finance acquisition:
  - Manager/Trustee/Board of Director Approvals?
  - Member/Beneficiary/Shareholder/Partner Approval?
- Resolutions to Purchase (and to borrower, if applicable)
- Incumbency Certificate
- Qualification to do business in jurisdiction of the Property?
- Who is authorized to bind the Purchaser/Grantee?
- Lender Involvement? What are their requirements?

### **C) ISSUES CONCERNING THE PROPERTY:**

- Intended use of property
- Intended use of the property
- What is the Intended use of the property
- I cannot stress this enough: Ask your client about their intended use of the property
  - Owner-Occupier?
  - Investment - Acquiring for ROI, cash flow?
  - Developer acquiring to change the character or use of the property to add value, usually short to mid-term exit strategy?
- What is being purchased? Land? Building? One Unit? Condo? Freehold?

- What is included? Fixtures? Other Improvements? Other Rights? (e.g., water rights, oil/mineral/natural/timber rights)? Development rights?
- Entire fee title interest including all air rights and subterranean rights?
- Zoning If No Development: Does current use conform or qualify as pre-existing?
- Licenses (e.g. liquor, entertainment, outdoor dining)? Who will transfer these?
- Property Physical Condition: structural systems; mechanical and electrical equipment; roof; curtain wall; fire and life safety systems; elevator maintenance; load limits; parking lot; drainage systems; soil erosion. *Any deferred maintenance? Code compliance? Remaining useful life?*
- Roof and mechanical warranties; copies of as-built plans; certificate of occupancy; occupancy placards
- Access: Roads; curb cuts; circulation/parking/loading; railroads; public transit
- Utility Service: Utilities to site? Adequate utilities for intended use? Separate metering?

## **FINANCIAL MATTERS**

***Not in the scope of my discuss topic, but it belongs here on the checklist.***

- **Real Estate Taxes and Assessments:**
  - Do taxes comport with value?
  - Has assessed value been increased or appealed?
  - Are there special assessments or special service areas?
  - Public user fees?
  - Water and/or sewer charges?
  
- Rent Roll
  
- Lease Review
  
- Security Deposits
  
- Options to Extend Term
  
- Options to Purchase?
  
- Rights of First Refusal or Offer?
  
- Expansion or Cancellation Clauses?
  
- Maintenance Obligations?
  
- Duty of Landlord to provide utilities?
  
- Real estate tax or CAM escrows?
  
- Delinquent rent?
  
- Pre-Paid rent?

- Tenant mix/use controls?
- Tenant exclusives?
- Tenant parking requirements?
- Automatic subordination of Lease to future mortgages?
- Signage requirements?
- Other material Lease terms?
- Fixtures?
- Subleases?
- Standard Form of Estoppel Certificate for Leases:
  - Does Purchaser and Lender Approve?
- Assumed Service Contracts (if assignable)?
- Schedule of incomplete tenant improvement work?
- Current on-going construction contracts
- Notices to Tenants of Lease violations
- Utility bills and service contracts – review two years of bills
- Insurance: Confirm Tenant's Certificates; Confirm Cost and Insurability of Property; Evaluate
- Deductibles and Self-Insurance

## **TITLE AND SURVEY MATTERS**

- Title Search
  
- Adjoining Lot Search
  
- Review Survey if you have one, Plan of Subdivision or other graphic representation of the property if you don't
  - Confirm size of parcel and building footprint;
  - Are any encroachments to or from the property;
  - Location and graphic depiction of all easements;
  - Setbacks and building lines;
  - Building height,
  - Number of parking spaces and other information necessary to confirm zoning and title zoning endorsements;
  - Utility locations;
  - Street access; etc.
  
- Confirm survey with parcel and subdivision maps
  
- Lender's survey requirements? Lender's Form of Surveyor's Certificate?
  
- Easements and or Reciprocal Easement Agreements (REAs)

- Covenants running with the land
- Liens and Charges
- Leases
- Development or subdivision agreements
- Condominium declarations
- Trust or land trust documents
- Title insurance riders to deal with existing but non-objectionable issues?
- Bankruptcy, Litigation, Judgment and Lien Searches
- Zoning and bylaw
- Landlord Tenant Board Inquiries for tenanted properties
- Requirements arising out of the Agreement of Purchase and Sale



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

**TAB 3**

## **Back to Basics: The Due Diligence Process**

Legal Due Diligence in M&A Transactions (PowerPoint)

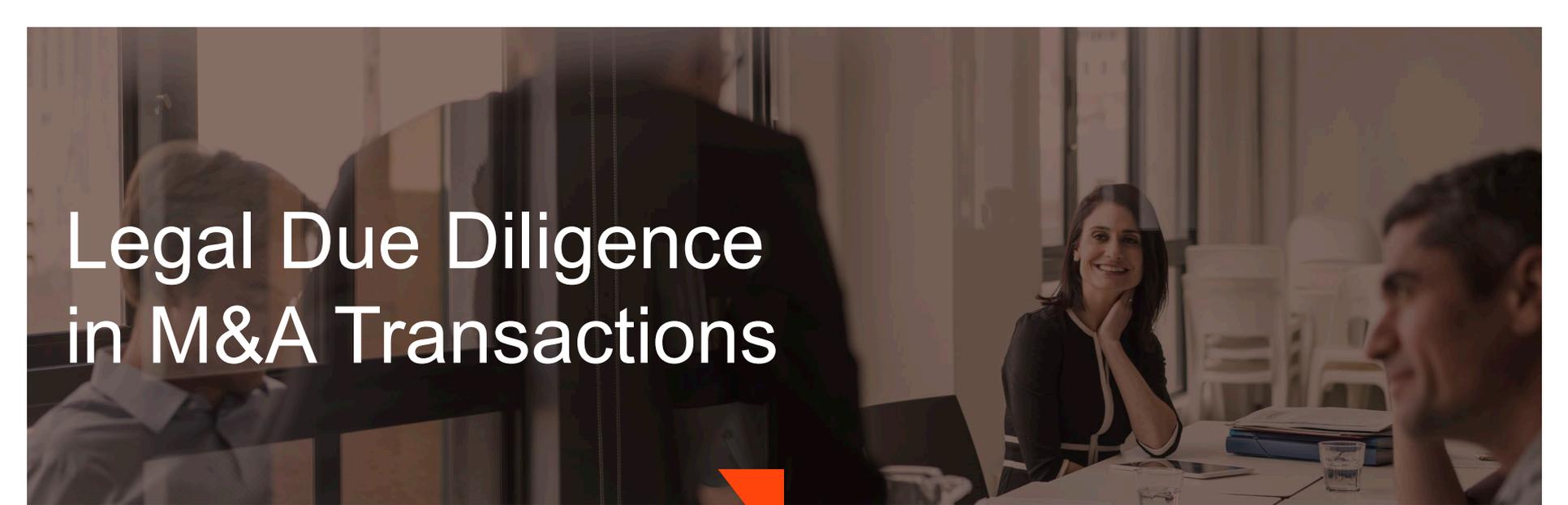
Project Preliminary Legal Due Diligence Request List

**John Sabetti**

*Fasken Martineau DuMoulin LLP*

November 27, 2023





# Legal Due Diligence in M&A Transactions

John M. Sabeti, Partner  
Fasken Martineau DuMoulin LLP  
November 27, 2023

# ▼ What is Due Diligence?

- Risk assessment exercise to inform decisions
- Mitigate risk and optimize outcomes
- Work product is client-driven and transaction specific
- Affects deal structure, price and deal timing

## ▼ What is it Not?

- Lawyers are legal advisors – engaged to conduct legal due diligence
- Business due diligence and advice regarding business, financial and accounting matters best left to someone else

# ▼ M&A Transactions

- Typically engaged to ensure the purchaser is getting the deal it expects by:
  - Helping the purchaser understand the business
  - Testing the accuracy and completeness of assumptions or disclosure about the business
    - Confirm what you know; become apprised of what is not yet known
  - Help determine whether to proceed any further with the transaction

## ▼ M&A Transactions

- Typically engaged to ensure the purchaser is getting the deal it expects by:
  - Identifying issues and liabilities that need to be dealt with before closing
  - Informing the structuring and drafting of transaction documentation (e.g., pricing, reps/warranties, covenants, conditions to closing, indemnities, consents and notices of assignment, opinions)

# ▼ M&A Transactions

- Typically conduct buyer-side due diligence
  - Due diligence sensitivities tend to depend on whether a share purchase or asset purchase
- Seller-side due diligence should not be overlooked, especially if shares of the buyer are being issued as consideration, or if management or some other relationship is continuing

# ▼ General Process

- Confirm client instructions and the scope of review
  - Type of transaction
  - Materiality threshold
  - Level of review – e.g., “leave no stone unturned”, “red flag”, etc.
  - Any specialized due diligence
  - Expected deliverables

# ▼ General Process

- Canvas available public information for preliminary background
  - Websites, recent news, SEDAR filings for public companies
- Prepare initial due diligence request list
  - Broad-based request for information from target and having regard to the nature of the business and background information

# ▼ General Process

- Order appropriate searches
  - Bank Act/PPSA, litigation, bankruptcy, IP (in some cases)
  - external background searches of directors and officers if desired
- Review and assess target responses to requests
  - Follow-up as needed with supplemental requests

# ▼ Personnel Searches

- Don't overlook personnel searches
- People are one of the critical factors for success of a business
- Public sources, prior Personal Information Forms (PIFs) submitted to stock exchange/securities commission
- Third party search firms
- “Bad” actors or actions can jeopardize the success of a transaction

# ▼ What are you Looking For? It Depends

- Generally, legal considerations that could affect the transaction outcome, including:
  - Indebtedness/liens
  - Liabilities (e.g., lawsuits, unreasonable indemnities, triggering events, trailing obligations, breaches)
  - Onerous contracts or clauses, contract deficiencies or breaches – e.g., term and termination rights, ongoing obligations
  - Restrictions on business activities (e.g., ROFR, exclusivity, restrictive covenants, etc.)

## ▼ What are you Looking For? It Depends

- Effects of the transaction (e.g., change of control clauses, ability to assign contracts, specific indemnities)
- Confirmation of ownership and rights and ability to operate business
- Verifying accuracy of any disclosure against representations and warranties
- Counterparty assessment; regulatory compliance assessment

# ▼ What are the Implications?

- Informs price and drafting of transaction agreements
  - Previously unknown liability – abatement of purchase price and/or specific indemnity
  - Ensure disclosure against representations is accurate
  - Interim covenants – e.g., discharge liens
  - Closing conditions – e.g., all indebtedness paid off

## ▼ Client Deliverable

- Synthesize the due diligence results into a report for the client
  - Client to determine scope of the report
  - Executive summary versus full report and detailed summaries
  - Use the results of due diligence in the definitive agreement



Partner, Fasken Martineau DuMoulin LLP

416-865-4455

[jsabetti@fasken.com](mailto:jsabetti@fasken.com)

**Project <\*>**  
**Preliminary Legal Due Diligence Request List**

<\*>, 2023

Set forth below is a preliminary list of documents and information with respect to <\*> Corp. (collectively, the “**Company**”) that we request to review in connection with the proposed transaction. Note that where a document is requested from the “Company”, the request is being made with respect to <\*> Corp., as well as its direct and indirect subsidiaries (if any). Note also that references to “material” refer to documents in connection with assets, operations or transactions with a value (individually or in the aggregate) in excess of \$<\*>.

Although we have attempted to tailor this list to the Company and its operations, we realize that some of the items may not be applicable and, in that event, please identify those items that are inapplicable. When providing materials to us in response to this request, please identify the item from the list below in respect of which such material is being supplied and return a copy of this checklist indicating the status of items requested. Please note that as our due diligence review progresses, we anticipate that we may need to request additional information. Thank you in advance for your assistance.

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
<b><u>A. GENERAL COMPANY DATA AND CAPITALIZATION</u></b>					
1.	Certificate of incorporation, articles of incorporation and by-laws (or comparable constating and governing documents of the Company).	[]	[]	[]	[]
2.	Minute books of the Company.	[]	[]	[]	[]
3.	Minutes (or written consents delivered in lieu) of all board of directors, committee and shareholders meetings.	[]	[]	[]	[]
4.	Complete organizational chart (with jurisdictions of organization).	[]	[]	[]	[]
5.	Capitalization tables of the Company.	[]	[]	[]	[]
6.	Copies of schedules/ledgers of issuances or grants of shares or options by the Company, including a list of the names of the issuees or grantees, the amounts issued or granted and the consideration received by the Company in each case.	[]	[]	[]	[]
7.	Documentation relating to restructurings (divestitures), mergers, acquisitions or financings made in the past [●] years.	[]	[]	[]	[]

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
8.	Material documentation (including letters of intent) from the past <input checked="" type="checkbox"/> years relating to any completed, pending or abandoned acquisition, disposition or business combination entered into.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9.	All agreements relating to the management, ownership or control of the Company, including any shareholders' agreements, voting agreements, voting trusts, rights of refusal, purchase plans, pledges, registration rights, etc. affecting any shares of the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10.	A list of the directors and officers of the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11.	Indemnification agreements for directors and officers of the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12.	Directors' and officers' liability insurance policies.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13.	A list of all options, warrants or other rights to acquire shares or other securities of the Company, together with copies of all documentation, understandings, commitments, agreements and plans relating thereto.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14.	All partnership, joint venture, agency and similar agreements involving the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15.	All other contracts not otherwise described above that are material to, or impose material obligations on, the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>B. CERTAIN FINANCIAL MATTERS</u></b>					
1.	Audited annual financial statements for the Company for the <input checked="" type="checkbox"/> most recently completed financial years, as well as any interim financial statements prepared since the completion of the most recently completed financial year.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
2.	Monthly/quarterly operational reports for [●] months, including: (a) sales statistics versus budget; (b) capital expenditures; (c) operating costs; and (d) working capital.	[ ]	[ ]	[ ]	[ ]
3.	List and details of all material off-balance sheet liabilities and contingent liabilities not appearing on the most recent financial statements (including indemnities, guarantees, loans (including to any officer or director of the Company), warrants, litigation, and other off-balance sheet items).	[ ]	[ ]	[ ]	[ ]
4.	Copies of budgets and business plans of the Company for the past [●] years and the current year, together with any forecasts or projections beyond the current year.	[ ]	[ ]	[ ]	[ ]
5.	Details of accounting systems and procedures of the Company, including: (a) list of service and maintenance personnel and third party providers; (b) any difficulties with any prior review or reports on the financial statements, including restrictions on external accountant's scope of review or access to information, for the past [●] years; (c) the substance and resolution of any significant accounting issues, including accounting and valuation practices and changes therein, for the past [●] years; (d) the adequacy of the Company's internal controls and accounting methods with respect to financial matters, including internal reporting systems, the recording of sales and expenses and other matters; (e) comments and opinions of the external accountants with respect to the general fairness of the accounting policies	[ ]	[ ]	[ ]	[ ]

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
	<p>and the presentation of the financial statements of the Company for the past [●] years;</p> <p>(f) copies or details of any oral or written supplementary financial or management reports or letters to management from the accountants or the Company's financial officers with respect to any aspect of the Company's accounting, financial reporting, record keeping or risk management systems for the past [●] years; and</p> <p>(g) details of transactions by the Company with affiliated companies and the method of reflecting these transactions in the Company's financial statements.</p>				
6.	Copies of any appraisals or valuations of the Company or any of its material assets prepared within the last [●] years.	[ ]	[ ]	[ ]	[ ]
7.	All agreements and other documents relating to the sale of securities of the Company, including correspondence with investors.	[ ]	[ ]	[ ]	[ ]
8.	All agreements related to indebtedness, including credit facilities, promissory notes, debentures, mortgages, lines of credit, agency or commission agreements and any correspondence related thereto regarding any waiver, consent, default, acceleration, termination or covenant compliance.	[ ]	[ ]	[ ]	[ ]
9.	Agreements governing accounts receivable and any other securitization transactions.	[ ]	[ ]	[ ]	[ ]
10.	All standard form small loan, closed-end credit/sales finance, commercial loan, installment sales contracts or other frequently used agreements related to any financing arrangements.	[ ]	[ ]	[ ]	[ ]
11.	Federal and provincial tax returns (including exhibits and schedules thereto) filed by the Company, and any determination letters or assessment notices, or the equivalent thereof, relating thereto for the last [●] years.	[ ]	[ ]	[ ]	[ ]

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
12.	A schedule describing any ongoing tax disputes, together with copies of revenue agents' reports and correspondence relating to pending tax proceedings.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13.	Description of significant tax liabilities relating to the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14.	Copies of any tax agreements relating to the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>C. PERSONAL PROPERTY AND ASSETS/LEASES</u></b>					
1.	List of all material personal property (including machinery, equipment, fixtures, vehicles, etc.) owned or leased by the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.	Copies of all documents relating to and evidencing title or rights to material personal property identified above.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.	Copies of all commitments to purchase, acquire or lease personal property.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.	Copies of all security interests, liens and encumbrances affecting the material personal property identified above.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>D. REAL PROPERTY</u></b>					
1.	All leases, deeds, other documents of title and other agreements relating to the use of leased or owned real property (as applicable), including offers to lease or purchase.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.	Evidence of registration of real property interests described above.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>E. MATERIAL CONTRACTS</u></b>					
1.	List of all customers, together with copies of all material agreements with such customers and credit and payment history for each such customer over the past <input type="checkbox"/> years.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.	List of all suppliers, together with copies of all material agreements with such suppliers.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
3.	Details/copies of any complaints from customers or suppliers over the past [●] years.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.	Copies of contracts providing for payments or benefits or termination upon consummation of the proposed transaction or otherwise upon a “change of control” of the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.	A list of all contracts requiring consent, notice or approval that may be required in connection with the proposed transaction or otherwise upon a “change of control” of the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.	Agreements pursuant to which the Company indemnifies third parties.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.	Standard forms for frequently consummated contracts.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.	Any brokers’ and finders’ agreements, including investment banker engagement letters.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9.	Material contracts providing for guarantees or price incentives offered by the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10.	Non-compete agreements with third parties or any agreements that would place business line or geographical restrictions on the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11.	Exclusivity agreements and material sales representative, distributorship or dealership agreements.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12.	Documentation regarding professional or industry accreditations.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13.	Insurance policies and [●] year claims history.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14.	To the extent not covered elsewhere, copies of all material agreements, including agreements with affiliates and agreements relating to inter-company transactions. If no written agreements have been entered into give particulars on the principles and terms of such transactions.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
<b><u>F. EMPLOYEE MATTERS</u></b>					
1.	Employment agreements, severance agreements, bonus agreements, bonus plans, change in control agreements, consulting agreements, confidentiality agreements, non-competition agreements and non-solicitation agreements, including independent contractor and consulting agreements.	[ ]	[ ]	[ ]	[ ]
2.	Schedule of employees of the Company, including: (a) date of hire; (b) the name, title, responsibilities and current annual salary (or rate of pay) and other compensation of such employees; (c) any increase in compensation of each employee since [●]; (d) all presently outstanding loans and advances (other than routine travel advances or vacation advances) made to any employee; (e) listing of employees on maternity, disability or other leave, including the reason therefor and anticipated return date; (f) identity of any employee on probation and the reason therefor if applicable; and (g) copy of the most recent performance appraisal for each employee.	[ ]	[ ]	[ ]	[ ]
3.	Copies or details of employee benefit plans or arrangements, (e.g., health care insurance, life insurance, short and long term disability, drug, eyeglass, health insurance and pension plans) of the Company and any announced or anticipated changes, together with: (a) any related plans and trusts; (b) any financial statements relating to such plans for the past [●] years; (c) any summary plan descriptions;	[ ]	[ ]	[ ]	[ ]

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
	<p>(d) a listing of any employees not eligible therefor, and the reasons; and</p> <p>(e) details of claims during the past <input checked="" type="checkbox"/> years and current year to date for which the Company was or is liable or which may result in increased premiums on renewal.</p>				
4.	List of any actions or claims, pending or threatened, with respect to wrongful dismissal, workers' compensation, employment standards, pay equity, labour relations or any other employment related issue.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.	<p>Identify risks of litigation in the following areas:</p> <p>(a) equal employment opportunity/pay equity claims;</p> <p>(b) occupational safety and health matters;</p> <p>(c) personal injury; and</p> <p>(d) environmental.</p>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.	All written statements of personnel policy, including manuals and employee handbooks.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.	Copies of all labour contracts, collective bargaining agreements or union agreements for the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.	CPP and EI contribution information.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9.	General details of compliance by the Company with applicable workplace safety, occupational health and hazardous materials legislation.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
<b><u>G. ENVIRONMENTAL MATTERS</u></b>					
1.	A schedule of any environmental licences, permits, authorisations and other rights required to own and operate the Company's business, including those needed but not obtained by the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.	Copies of any permits issued by governmental authorities in connection with environmental, health or safety matters of the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.	Copies of: (a) all environmental policies and guidelines adopted for the properties and real properties and the operations of the Company; (b) a summary of all internal and environmental due diligence systems and programmes; (c) all environmental audits, reviews or reports prepared by or for the Company or relating to the properties and real properties; and (d) all environmental due diligence investigations and reports conducted in relation to the acquisition of any interests in any of the properties and real properties.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.	Copies of all environmental studies, notifications, filings, inspections, investigations, assessments or reports, including any environmental audits of the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.	List of any above-ground storage tanks, and for each above-ground storage tank listed, its content, age, and, if applicable, whether it is secondarily contained.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
6.	List of all current and former underground storage tanks together with notifications to environmental agencies concerning underground storage tanks, contents of the tanks, any monitoring results, and, for former tanks, any closure reports.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.	Correspondence with environmental agencies concerning non-compliance or potential non-compliance by the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.	A schedule of any other costs, losses or expenses that the Company expects to incur in connection with compliance with environmental laws and regulations, including waste disposal costs, for the remainder of the current fiscal year and for the next succeeding fiscal year.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9.	Description of the following environmental and safety matters: (a) description of any waste materials, effluent or atmospheric or other discharge, whether or not regulated, which is or has been generated incident to the Company's business; (b) identification of any records relating to exposure by employees or others to any material, effluent or discharge; (c) description of past and present waste disposal practices of the Company and copies of all agreements relating to such practices; and (d) copies of any permits issued by governmental authorities in connection with environmental, health or safety matters of the Company.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10.	Provide copies of minutes of all health & safety committee (or any similar committee) meetings for the past <input type="checkbox"/> years, copies of all the Company's health and safety policies, and other evidence of due diligence (such as educational material distributed to employees) with respect to health and safety issues.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
<b><u>H. LITIGATION</u></b>					
1.	A list of all pending, threatened or resolved litigation or administrative proceedings, inquiries, or investigations, including copies of all material correspondence and petitions or complaints relating thereto.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.	Copies of all outstanding orders or decrees of any court or governmental or administrative agency affecting the Company and settlement agreements entered into by the Company within the last <input type="checkbox"/> years or at any time if the Company has any ongoing obligations thereunder.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.	A list of any actions or investigations instituted or threatened by any governmental or regulatory body, together with all documentation related thereto.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.	Correspondence or memoranda concerning any dispute with suppliers, distributors, competitors or customers.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.	Legal counsel audit response letters for three most recent audits.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.	Legal counsel opinions or advice letters or memoranda concerning the application of any law on the Company or expected outcomes of any litigation or other proceeding.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>I. INTELLECTUAL PROPERTY</u></b>					
1.	A schedule of all patents, trademarks, copyrights and other intellectual property owned or used by the Company. Please indicate whether such intellectual property is owned or, if not, what agreements are in place that permit the Company to use the intellectual property.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
2.	A list of all domain name registrations associated with the Company's web presence.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.	Policies regarding treatment or disclosure of proprietary materials.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.	All agreements concerning secrecy, confidentiality and nondisclosure with respect to intellectual property with employees, contractors or other parties.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.	Copies of intellectual property related purchase, licensing, assignment and royalty agreements to which the Company is a party.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>J. GOVERNMENTAL REGULATION</u></b>					
1.	List of all locations and jurisdictions where the Company carries on business, together with copies of all material governmental permits, licenses, exemptions, registrations, approvals or authorizations and any material correspondence related thereto. Please also provide a description of all regulatory schemes to which the Company or its business is subject.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.	List of any material contracts, licenses, permits, consents and regulatory approvals which the Company believes it may need but does not have.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.	All material applications, reports or compliance certificates filed with, reviews or examinations by, and transcripts of any proceedings before, any regulatory agency involving the Company or its operations, and any significant correspondence related thereto.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

		<u>Previously Provided</u>	<u>Provided Herewith</u>	<u>To Be Provided</u>	<u>Inapplicable</u>
4.	List of all consents, approvals, applications, orders, authorizations, notifications, registrations or filings that will be required to complete the proposed transaction.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.	Any agreements with regulatory authorities to which the Company is a party.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.	Details of government grants to the Company, if any.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.	Identify quality standards, if any, under which the Company is certified.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>K. OTHER MATTERS</u></b>					
1.	Copies of any documentation relating to, or information on, any other matter that may be relevant to the due diligence process.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**TAB 4**

## **Back to Basics: The Due Diligence Process**

The Due Diligence Process (PowerPoint)

**Joanna Vince, C.S.**

*Willms & Shier Environmental Lawyers LLP*

November 27, 2023



# The Due Diligence Process

## Joanna Vince

*Partner, Certified Specialist in Environmental Law by the Law Society of Ontario*

This presentation provides general information and is not intended to provide legal advice.  
Audience members should seek legal advice for specific situations.

**Law Society of Ontario: Back to Basics Program**  
Toronto, Ontario  
November 27, 2023



1

## Overview

---

- **Introduction**
- **Issues in Environmental Due Diligence**
- **Liabilities**
- **Conducting Environmental Due Diligence**
- **Conclusion**



2

## Why is Environmental Due Diligence Important?

---

- **Environmental due diligence can arise in transactions**
- **The *Environmental Protection Act, R.S.O. 1990, c. E. 19* is broad in application**
- **It is important to understand the environmental conditions or issues that can result in corporate and personal liability**

## Environmental Due Diligence Issues

---

- **Environmental contamination**
- **Operational compliance**
- **Approvals compliance**
- **Product and Materials compliance**
- **GHG Emissions and Carbon Costs**

# Environmental Liabilities

---

- **Civil liability**

- Lawsuits against company and future owners of company or company's assets
- lawsuits naming corporate directors' and officers' (D&Os) personally

- **Regulatory liability**

- statutory duties, orders, prosecutions
- Ministry can order and/or prosecute corporate directors and officers and those with management and control
  - Orders can require individuals to investigate and remediate contamination
  - Orders are no fault, no limitations period, and no limit on costs

## *Midwest Properties Ltd v Thordarson* (ONCA 2015)

---

- **Company stored liquid waste petroleum hydrocarbons (PHCs) at its property**
- **Neighbouring property owner discovered PHCs at its property and sued Company and Company's director**
- **Company and its director were liable in nuisance, negligence, and breach of the EPA, s. 99(2)**
- **Court held that the director was a person "in control" of the pollutant**
- **Court awarded full remediation costs (\$1,328,000) plus \$50,000 in punitive damages from each of the Company and Company's director**

## Damages in Environmental Civil Claims

Case	Relationship of Parties	Successful Causes of Action	Damages Quantum	Purpose of Damages Award
<i>Tridan Developments Ltd. v Shell Canada Products Ltd.</i> (2002 ONCA)	Neighbours	Nuisance	\$85,000	Cost of Barrier
<i>Canadian Tire v Huron Concrete</i> (2014 ONSC)	Neighbours	Strict liability ( <i>Rylands v Fletcher</i> ), nuisance, negligence and trespass	\$3.6 million \$1.1 million	Remediation Costs Costs
<i>Midwest Properties Ltd. v Thordarson</i> (2015 ONCA)	Neighbours	Negligence, nuisance and <i>EPA</i> , s. 99	\$1.3 million \$100,000	Remediation Costs Punitive Damages
<i>TMS Lighting Ltd. v KJS Transport Inc.</i> (2017 ONCA)	Neighbours	Nuisance and trespass	\$532,000	Diminished Productivity
<i>Huang v Fraser Hillary's Ltd.</i> (2018 ONCA)	Neighbours	Nuisance and <i>EPA</i> , s. 99	\$1.6 million + \$210,000 incurred	Remediation Costs
<i>Krierser v Garber</i> (2020 ONCA)	Neighbours	Nuisance	\$100,000	Punitive Damages
<i>Sorbam Investments Ltd. v Litwack</i> (2021 ONSC)	Neighbours	Negligence and nuisance	\$1.2 million \$90,000	Diminution in Value Cost for RA and RSC
<i>MTD v 1361821 &amp; Sandal</i> (2022 ONSC)	Neighbours	Negligence, nuisance and trespass	\$1.8 million \$2.8 million	Remediation Payment if defendants do not comply with Court-ordered schedule to remediate and file RSC

7

## ENVIRONMENTAL LEGAL DUE DILIGENCE REQUESTS

8

## Environmental Legal Due Diligence Request

---

- **Environmental counsel can begin a preliminary due diligence request**
- **Publicly available online sources can provide environmental counsel with an initial sense of the operations and to determine scope**
- **Follow-up requests to resolve ambiguities**

## Licenses, Permits, Authorizations, Registrations and Other Rights

---

- Copies of all environmental permits, authorizations, registrations**
  - Environmental Compliance Approvals
  - Environmental Activity Sector Registrations and other rights (including agreements with governmental authorities) required for lawful operation of the Company including those required or relating to these environmental issues
    - Air emissions
    - Water taking
    - Effluent management
    - Hazardous materials
    - Waste

## Other Information Relating to Environmental Issues

---

- Financial assurance requirements**
- Remediation and/or decommissioning obligations and liabilities**
- Agreements with governmental authorities**
- Applications and correspondence with governmental authorities, private parties and other stakeholders**

## Internal Documents Relating to the Company

---

- Contracts around waste disposal, chemical procurement, sale of items for recycling or reuse**
- Obligations under government GHG legislation**
- Environmental policies, procedures and guidelines (including drafts)**
- Environmental Management Systems**

## Audits, Assessments, Investigations and Reports

---

- Compliance audits, impact assessments, compliance reviews or reports
- Environmental site assessments, investigation reports, remediation reports, tank removal reports, sampling and monitoring results
- Environmental due diligence investigations and reports

## Records, Inventories, Agreements and Information Related to Remediation and Rehabilitation

---

- Details of any non-compliances (spills, discharges)
- Records of underground and aboveground storage tanks
- Remediation plans or treatment systems
- Agreements that allocate any environmental rights or obligations

## Complaints, Notices, Orders, Demands and Investigations

---

- Complaints, notices or orders by environmental authorities or third parties**
- Investigations against Company, their officers or directors**

## Willms & Shier Environmental Lawyers

---

- **Established nearly 50 years ago**
- **Environmental, Indigenous, and Energy law**
- **18 lawyers**
  - seven lawyers are certified by the Law Society of Ontario as Environmental Law Specialists and one in Indigenous Legal Issues
  - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and the Yukon
  - offices in Toronto, Ottawa, Calgary, and Yellowknife

## Contact Information

---



### **Joanna Vince**

(416) 862-4830

[jvince@willmsshier.com](mailto:jvince@willmsshier.com)

Environmental Law Specialist  
Certified by the Law Society of Ontario

Called to the Bars of Ontario, Nunavut,  
Northwest Territories, and the Yukon

**Willms & Shier Environmental Lawyers LLP**

[www.willmsshier.com](http://www.willmsshier.com)



**TAB 5**

## **Back to Basics: The Due Diligence Process**

Conducting Due Diligence (PowerPoint)

**Claudio Martellacci, CPA, CA, CBV**

*Grewal Guyatt LLP Chartered Professional Accountants*

November 27, 2023



# CONDUCTING DUE DILIGENCE

Buy-Side and Sell-Side Due Diligence  
Assessment of Financial and Business Risks  
in the Purchase or Sale of a Business Interest

# Agenda

<u>Overview of Grewal Guyatt LLP</u>	<b>3</b>
<u>Financial Due Diligence</u>	<b>4</b>
<u>Buy-Side “DD”</u>	<b>5</b>
<u>Sell-Side “DD”</u>	<b>6</b>
<u>Quality of Earnings and Due Diligence</u>	<b>7</b>
<u>Quality of Earnings Reports</u>	<b>8</b>
<u>Due Diligence Reports</u>	<b>9</b>
<u>Summary</u>	<b>10</b>
<u>Grewal Guyatt LLP Team</u>	<b>11</b>
<u>The Grewal Guyatt Difference</u>	<b>12</b>

# Overview of Grewal Guyatt LLP

*Entrepreneurs rely on us to bring a professional, practical and effective approach to meet their objectives and optimize value.*

## Who we are

Grewal Guyatt LLP is a full-service chartered professional accounting and advisory firm that also offers specialized services in high-net-worth tax planning, business valuations, litigation support, and transaction advisory for owner-operated businesses, with enterprise values ranging from \$1 million to \$200 million.

## Corporate Finance Services

With the experience and in-depth knowledge of our team of seasoned professionals, we have earned a reputation for achieving results by applying consistent efforts and innovative solutions to issues throughout the transaction process. Using our extensive network of contacts, we have successfully completed numerous complex transactions for our clients.

## Our Services

- Divestitures
- Mergers & Acquisitions
- Financing and Recapitalization
- Due Diligence
- Business Valuations
- Fairness Opinions

# Financial Due Diligence

- Alongside legal due diligence, financial due diligence is a critical step often taken by a prospective acquirer of a business.
- What is financial due diligence?
  - A detailed review and analysis of the financial records of a business, including financial statements, tax returns and other information, depending on the level and scope of review requested by the users.
- Why is financial due diligence so important in a business sale or acquisition?
  - It provides valuable information to support a fair purchase price and can identify potential issues that the purchaser or seller should address to complete a transaction successfully.
  - It can discover potential adjustments to earnings or asset values that may directly impact the ultimate purchase price and transaction structure.

# Buy-Side Due Diligence

- Acquiring a business?
  - Buy-side due diligence typically involves assessments of the sustainability of the revenues, earnings and cash flows of the target business, as well as the verification of key assets and liabilities that may impact the earnings and working capital requirements of the target.
  - A detailed due diligence report highlights potential issues and can be used by the acquirer to negotiate a better purchase price and terms to be paid for the target business.
  - Transaction multiples based on historical adjusted EBITDA figures are commonly used to calculate the price of a business.
  - Therefore, if a business is being acquired at 5x EBITDA, every dollar of inflated EBITDA could lead the acquirer to pay an extra five dollars

# Sell-Side Due Diligence

- Are you considering the sale of your business?
  - Owners preparing to list their business for sale can require a due diligence report to uncover potential issues and areas of concern, so that they can be addressed before they are discovered by a potential buyer.
  - Unaddressed issues on the sell-side have the potential to harm the negotiating position for the seller, reducing the ultimate sales price and in some instances, leading a qualified buyer to abandon the transaction altogether.

# Quality of Earnings and Due Diligence

- Is there a difference between QoE and DD?
  - While these terms are commonly used interchangeably, a Quality of Earnings Report typically refers to a review and analysis of the operations of a business, and in particular, its revenue and net earnings.
  - A Due Diligence Report is a more comprehensive analysis, which can include additional parameters, such as analysis of assets and liabilities, review of tax records to assess potential exposure or related risks, as well as regulatory and legal compliance reviews.

# Quality of Earnings Reports

An in-depth examination of a business' financial records, including the assessment of the following:

## EBITDA Adjustments

- Assessing seller's EBITDA and discretionary adjustments for reasonability and sustainability.

## Revenue and Margin Analysis

- Evaluating product/service revenue, gross margin, customer concentration risk, and seasonality factors.

## Income Statement Analysis

- Examining major items for potential trends and risk factors.

## Related Party Transactions

- Scrutinizing transactions involving affiliated parties.

## Operational Information

- Providing details on key operational aspects, including any unique accounting policies and processes.

# Due Diligence Reports

- Overview
  - Extension of Quality of Earnings Report.
  - Balance sheet analysis to assess trends and risk factors.
  - Working capital analysis to determine day-to-day cash flow requirements of the business.
  - Uncover potential tax-related exposure and risks.
  - Regulatory and legal compliance review.
  - Focuses on mitigating potential unknown liabilities and exposures.
- Tailored Due Diligence
  - Customized reports based on the size of the acquisition and potential risk factors.
  - Meant to align with the scale and potential impact of the transaction.
  - Designed to suit the unique characteristics of each transaction.



# Summary

- The level of due diligence is meant to be proportional to the size and potential risk of the transaction in consideration.
- Due Diligence procedures can provide vital information to assist with the completion of an M&A transaction.
- Due Diligence may avoid potential pitfalls that can be damaging to a transaction and for the parties involved.
- An experienced due diligence advisor can help you understand the underlying financial and operational risk factors, allowing you to make an informed decision.
- Our team of transaction advisors and tax professionals have the pedigree and experience to assist you throughout the due diligence process for a variety of industries and business sizes.

# Grewal Guyatt LLP Advisory Team



Adam Guyatt

Managing Partner

[adam@grewalguyatt.ca](mailto:adam@grewalguyatt.ca)



Tom Strezos

Senior Advisor

Valuations and Litigation Support

[tom@grewalguyatt.ca](mailto:tom@grewalguyatt.ca)



Claudio Martellacci

Partner

Valuations and Litigation Support

[claudio@grewalguyatt.ca](mailto:claudio@grewalguyatt.ca)

# The Grewal Guyatt Difference

Our complete range of complementary service offerings makes Grewal Guyatt LLP a “one-stop shop” for business owners looking for not just business valuation and transaction advisory services from accredited Chartered Business Valuators (CBV) and Chartered Professional Accountants (CPA). Our full range of service lines extend to the following:

Tax Consulting	Valuation & Litigation Support	Accounting & Assurance
<p><b>Estate &amp; Succession Planning</b> – Minimize taxes and probate fees on death while ensuring a smooth transition to next generation.</p>	<p><b>Business Valuation</b> – Valuation services for estate planning and corporate reorganizations, internal compensation plans and stewardship.</p>	<p><b>Audit &amp; Review</b> – Provide varying levels of assurance over the financial statements to meet stakeholder needs.</p>
<p><b>Corporate Reorganization</b> – Restructuring corporate groups through reorganizations including:</p> <ul style="list-style-type: none"> <li>• Implementation of trusts to multiply capital gains exemption and allow for income splitting</li> <li>• Introduction of holding companies to creditor proof assets</li> <li>• Strategies to extract corporate funds tax efficiently</li> <li>• Integrated plans to assist with cross-border expansion and minimize US estate taxes</li> </ul>	<p><b>Litigation Support</b> – Provide expert opinions, business valuations and other key calculations to assist legal counsel in resolving the following disputes, among others:</p> <ul style="list-style-type: none"> <li>• Matrimonial matters and divorce</li> <li>• Shareholder and partnership buy-outs</li> <li>• Estate conflicts between beneficiaries</li> <li>• Damage quantification (losses, injuries, etc.)</li> </ul>	<p><b>Tax Compliance</b> – Identify and file all necessary return to meet the annual requirements of the Canada Revenue Agency. Our compliance services include:</p> <ul style="list-style-type: none"> <li>• Personal tax returns (T1)</li> <li>• Corporate tax returns (T2)</li> <li>• Trust tax returns (T3)</li> <li>• Partnership returns (T5013)</li> <li>• Other information returns (T4, T5, NR4)</li> </ul>
<p><b>Post-Mortem Tax Planning</b> – Implementation of loss carry-back and “pipeline” strategies to avoid double taxation on death.</p>	<p><b>Forensics Support</b> – Detailed review and analysis of banking records, transactions and case facts to support damage quantification conclusions.</p>	<p><b>Foreign Reporting</b> – Comply with complex foreign reporting rules for Canadian residents by completing forms such as T106, T1134 and T1135 as applicable.</p>
<p><b>Divestiture Planning</b> – Maximize after-tax proceeds retained by shareholders on the sale of business by providing tailored planning. Assist with due diligence by identifying tax exposure through review of historical financial information.</p>	<p><b>Purchase Price Allocation</b> – Valuations of specific assets post-transaction for financial reporting purposes under ASPE and IFRS.</p>	<p><b>CRA Disputes</b> – Respond to CRA requests and formal audit enquiries with the goal of minimizing any reassessment(s) with minimal client involvement.</p>



**THANK YOU**

+1-905-479-1700 | [info@grewalguyatt.ca](mailto:info@grewalguyatt.ca)



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

**TAB 6**

## **Back to Basics: The Due Diligence Process**

Due Diligence Reporting  
A Guideline For Your Transaction (PowerPoint)

**Sanjay Kutty**  
*Linmac LLP*

**Cindy Cumming, Operations Director**  
*Signal Lawyers*

November 27, 2023





# DUE DILIGENCE REPORTING

A GUIDELINE FOR YOUR TRANSACTION

# THE PURPOSE

Your Due Diligence Report has a dual function of providing clarity on what legal services you did and did not provide. This is also an opportunity to market yourself and show the value provided for the fees billed.



# WHO IS THE REPORT FOR?

If it's internal (e.g. for a partner at your firm), then ensure the level of detail and analysis is sufficient to allow him/her to assess the risk and advise the client.

If it's external (e.g. for the client), ensure that the way the information is set out is tailored to the specific client.

In either scenario, the reports and your analysis should **always** be emailed. It is necessary to keep detailed notes as part of your file.



# CONTENTS OF YOUR REPORT

- Important to set out what documents you received/had access to review in order to clearly set out the scope of your review.
- Assumptions – listing any assumptions made in the scope of the review or specific instructions given by the client on the scope.
- Outline findings and highlight key issues/risks. Emphasize key dates and highlight areas that your client will need to follow up.
- Conclusion – depending on the subject matter of the review, you may need to definitively state if there is a “red flag” or not.

# REVIEW REPORT WITH YOUR CLIENT

- Given how technical findings can be, it's important to review them with the client to ensure he/she understands the findings.



# UPDATING YOUR CLIENT

Your Due Diligence Report will be a critical tool in the event that there is an issue on the transaction and the client expresses concern as to why he/she wasn't told about the issue in advance.

**This may be a telephone conversation. However, this should be followed up by email. Ensure you keep detailed notes as part of your file.**

To:	Client
From:	Lawyer
Date:	October XXX
File:	Purchase of ADDRESS (the "Property")
Re:	Due Diligence Review

#### **Expropriation Letter**

We were provided with a Local Working Group map from XXX indicating all potential locations for XXX.

As we had discussed before, it is possible that the heritage character of the building would prevent it from being chosen for demolition. However, the rear parking area could potentially be the subject of an expropriation order.

#### **ESA Report**

We reviewed the ESA Phase I report from XXXX.

Section XX indicates that no information had been received from the inquiries made to regulatory agencies e.g. for spills.

Conclusion #2 from Section XXX suggests that a Phase II ESA should be conducted

We assume that as no such report was provided, no such report was conducted

#### **Building Permit Notice**

This is a letter dated XXX that indicated zoning by-law infractions. Need clarity from Vendor on whether they were remedied?

#### **MPAC Assessment**

The MPAC Assessment provided was from 2016. Normally there would have been one done in 2020 (every 4 years) however, this was postponed due to COVID. As a result, the property tax is based on 2016 that will likely be increased when the next MPAC assessment is done.

#### **Commercial Parking Letter**

We were provided with a letter dated XXX from the City of Toronto indicating the requirements to maintain the Commercial Boulevard Parking permits for X spots. Need to know if the vendor complied with the requirements and the parking permits are in force.

#### **Lease Review**

- Lease is on standard Ontario Residential Tenancy Agreement form

# EXAMPLE: SEARCH LETTER CHECKLIST / DUE DILIGENCE LIST

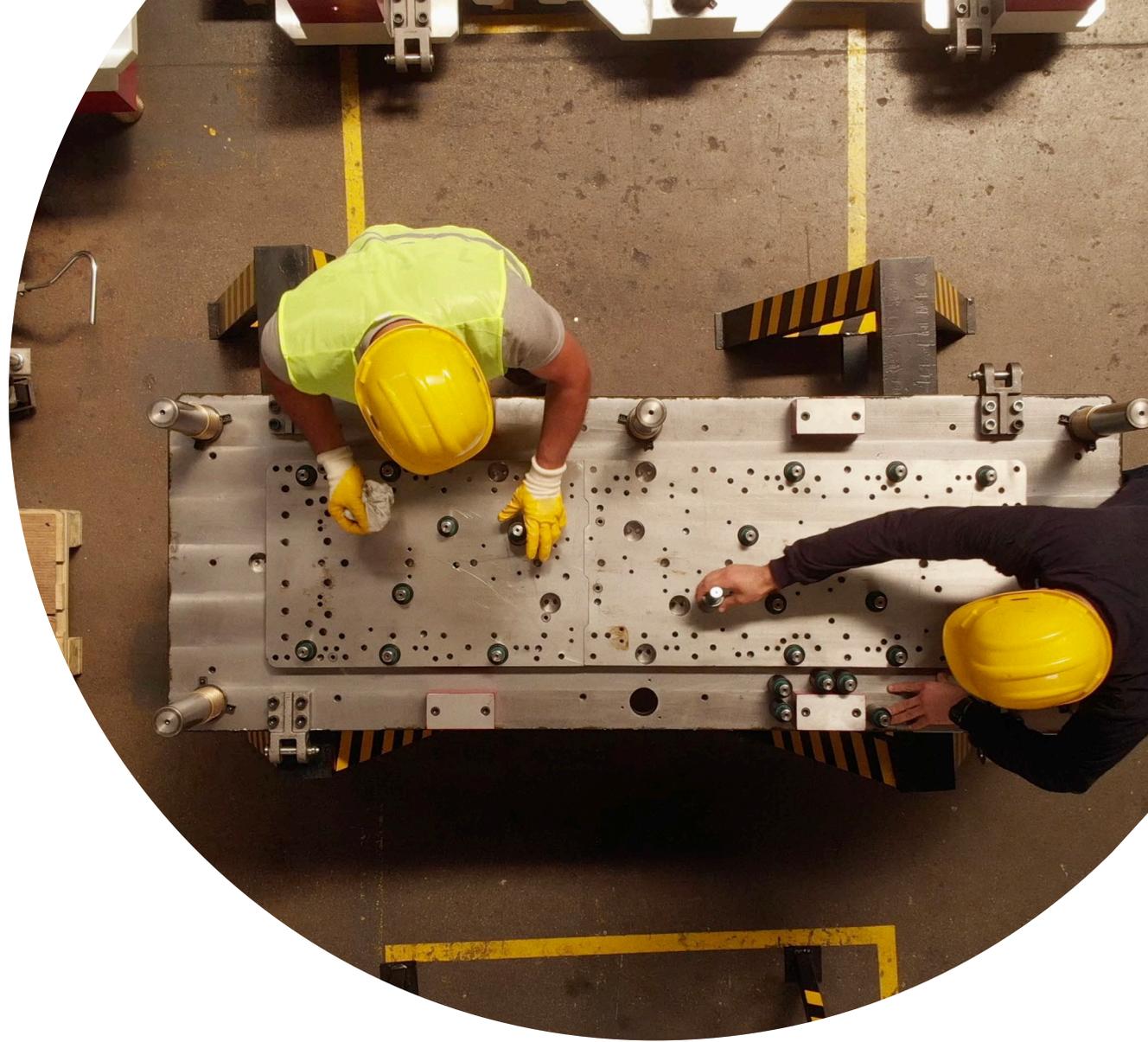
<b>ITEM</b>	<b>Who is Responsible</b>	<b>Date To Be Done</b>	<b>Date Received/ Completed</b>	<b>Date Reported to Client and Whom</b>
<b>Tax Certificate</b>				
<b>Local Improvements</b>				
<b>Water</b>				
<b>Hydro</b>				
<b>Local Hydro Easements</b>				
<b>Gas</b>				
<b>Ontario Hydro Easements</b>				

*\*\*\* for a more comprehensive list, please email [assist@lawtrepreneur.co](mailto:assist@lawtrepreneur.co)*

--	--	--	--	--

# REPORTING LETTER

- Include reference to Due Diligence Report and date thereof in your reporting letter or attach as an Appendix.



# THANK YOU

**Sanjay Kutty**

**Partner**

[skutty@linmac.com](mailto:skutty@linmac.com)

**Cindy Cumming**

**Law Clerk**

[cindy@signallawyers.ca](mailto:cindy@signallawyers.ca)





**Lawtrepneur helps solo and small firm lawyers deliver more value to clients, practice more efficiently and live more balanced lives.**

**[lawtrepneur.co](http://lawtrepneur.co)**