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THE POWERS OF CSST INSPECTORS

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Various statutes impose obligations on employers to take the necessary measures to protect the health and safety of workers, including *An Act respecting Occupational health and safety* (R.S.Q., c. S-2.1) (hereinafter referred to as the "AROHS"). In the event of a breach of the AROHS, the offender is liable to significant fines, up to a several hundred thousand dollars in cases of subsequent offences.

For this purpose, the inspectors who work for the Commission de la santé et de la sécurité du travail (hereinafter referred to as the "CSST") are resource persons who have powers under the CSST enabling them to intervene to make sure of compliance with the AROHS and its regulations.

For example, they are called upon to determine the causes of an accident and check whether the working conditions include hazards that endanger the safety of the workers and, in such a case, to make sure that they are eliminated at the source.

In this context, an inspector may, at any reasonable hour of the day or night, enter a place of business of an enterprise to which the AROHS applies. At his discretion, he may be accompanied by one or more persons of his choice when carrying out his duties (for example, an engineer, an architect, etc.) (sec. 180 AROHS). The inspector can request access to all the books, registers and records of the employer (sec. 179 AROHS). He may also take samples for analysis, conduct tests and take photographs or make recordings.

The employer should keep a copy or duplicate of everything gathered by the inspector and make sure that the inspector is accompanied by someone acting for the employer throughout his inspection of the enterprise.

It should also be noted that an inspector has no obligation to make an appointment with the representatives of the employer prior to making an inspection. Indeed, an employer subject to the AROHS is required to receive him at any reasonable time, failing which the employer and its representatives are liable to fines. However, the AROHS provides that, upon arriving at a workplace, an inspector must take reasonable steps to advise the employer (sec. 181 AROHS). The representatives of the employer can request that the CSST inspector present a certificate of his office.

A CSST inspector can issue various orders. They could be inconvenient for the employer and have significant financial consequences. The CSST inspector can:

- Issue a remedial order requiring a person to comply with the AROHS or the regulations, and fix the time within which he must comply (sec. 182 AROHS).
- Order the suspension of work or the complete or partial shut-down of a workplace and affix seals (sec. 186 AROHS).

Although it is possible to contest an order or decision of an inspector within ten (10) days, such order or decision is effective immediately. An employer who fails to comply with it could be the subject of a penal complaint (sec. 191 AROHS).

Also, an order suspending work, which is made where a serious hazard exists, must be substantiated in writing.

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It should be noted that an inspector's reports might be used to issue an offence report.

The AROHS provides for two kinds of offences in sections 236 and 237. Section 236 provides for a generic offence that applies in any case of a breach of the AROHS or its regulations. Section 237 provides that anyone who, by an act or omission, does anything that directly and seriously compromises the health, safety or physical well being of a worker is guilty of an offence.

Generally, a penal complaint will be filed if that proves to be necessary to achieve the objectives of the AROHS. Several factors will be taken into account when considering whether it is appropriate to commence a penal prosecution against the employer. More particularly, these factors are as follows:

- the seriousness of the offence;
- the specific circumstances of the offence;
- the employer's history with respect to accidents and previous interventions;
- the record with respect to previous offences by the employer in matters of occupational health and safety;
- the cooperation by the employer and its representatives;

- the quality of the employer's management with respect to occupational health and safety considering among other things:
  - the degree to which measures to prevent offences were put in place prior to the offence;
  - the degree to which the objectives of the AROHS relating to prevention were achieved prior to the offence;
- the implementation, since the offence, of additional measures that achieve the objectives of the AROHS and make a penal prosecution no longer necessary;
- the frequency of the commission of the offence;
- the need for deterrence;
- the technical nature of the offence.[1]

These factors as well as the weight given to them will vary according to the circumstances of each matter.[2]

In short, it should be remembered that a CSST inspector has broad powers and that his intervention could lead to penal complaints being filed. Therefore, we encourage you to be well-informed of the powers of the inspectors and the potential consequences of their visits to employers' premises.

As you can see, compliance with a remedial order is not a factor considered by the CSST when considering whether it is appropriate to commence a penal prosecution. Therefore, it turns out that even if an employer complies with such an order, a penal complaint may still be filed. We therefore suggest that you make a rigorous analysis of any remedial order and make sure that it is contested within the time period stated above. If your contestation of the remedial order proves to be well-founded, that fact may be used in your favor in the event that a penal complaint is filed concerning the same situation.

[1] See: CSST, *Soyez plus sécuritaires soyez productif*, Cadre d'émission des constats d'infraction, 31 août 2010, p. 2-3, accessible online: http//www.csst.qc.ca. /publications/.

[2] Ibid.

CONFIDENTIALITY AGREEMENTS: THE IMPORTANCE OF PROTECTING YOUR SECRETS

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Are you an inventor or developer who wishes to approach businesses in order to sell, distribute or manufacture your discoveries? Have you met a potential partner? Are you getting ready to negotiate the purchase or sale of a business or enter into any other significant transaction? Does this potentially involve the disclosure of strategic information or other confidential information about your business?

The conclusion of a confidentiality agreement should be the starting point of the business relationship. This agreement should be signed even before you engage in preliminary discussions and negotiations concerning the terms of the deal. Although a confidentiality agreement is not foolproof, the fact remains that using one can help you protect your business secrets and avoid worry and expense.

Confidentiality agreements provide that the party to whom confidential information is disclosed, the recipient, will keep it confidential. It is all the more crucial to have such an agreement in place when the party you want to negotiate with is a direct competitor or someone who might appropriate your technologies, ideas or confidential information for its own purposes.

NEGOTIATING THE CONFIDENTIALITY AGREEMENT

The negotiation of the confidentiality agreement is often part of the initial contact with the other party and presents an opportunity to assess how the other party approaches contractual arrangements. Difficult negotiations at this stage of the relationship should trigger an alarm. Such difficulties do not necessarily mean that you should end the relationship, but they may nevertheless prove to be indicative of the complexity of the coming contractual negotiations and business relationship.

After reflection, you may conclude that the other party is not the right partner for you and that its vision is incompatible with your own.

THE CONTENT OF A CONFIDENTIALITY AGREEMENT

When negotiating and drafting a confidentiality agreement, the parties should draw up a list of the information that will be disclosed and its nature, for example, technical information, financial data and customer lists, and accurately describe both the information they wish to include in the confidentiality agreement and the information that it will not cover. Be aware, however, that only information which is truly confidential can be protected and that information already in the public domain is generally excluded from the agreement.

The remedies in the event of misuse or improper disclosure of confidential information, particularly the injunction and right to compensation, should also be set out in the agreement.

The term of the agreement should also be specified. Your confidential information should not cease being confidential as soon as the negotiations break down. Ideally, the confidentiality obligation should never expire. The term of the agreement can vary depending on the information disclosed, the nature of the business and the parties involved, and will generally be between two and five years.

MANAGING THE CONFIDENTIALITY AGREEMENT

Signing a confidentiality agreement does not mean that you are, from then on, giving the other party unlimited access to your confidential information. The party that wants to protect its information should manage the provisions of the agreement carefully.

In this regard, to avoid confidential information from being disclosed or improperly used, it is wise and strategic to limit access to the people who truly "need to know" and to use phased disclosure according to what is needed for the purposes of the transaction, or the progress of negotiations. It is also useful to write down a list of the information that is disclosed. If a problem arises, this will make it easier to prove that specific information was disclosed at a particular time. You should also ensure that all confidential information and copies thereof that your partner has made is returned to you or destroyed. It would be troubling to discover that your confidential trade secrets have been disclosed by your partner through inadvertence.

A well-kept secret can make the difference between success and misadventure... Confidentiality agreements are often overlooked and left out or, copied from the Internet to reduce the costs of legal services. It is very important to read the provisions of any pre-written or standardized agreement carefully prior to signing it and have it drafted or reviewed by a lawyer who is well aware of the specific context in which it is entered into. Doing so ensures that you start your business venture on the right foot and cover all the contingencies.

A confidentiality agreement protects your ideas and your business. Take the step to make sure your business partners stay silent!

YOUR FIRST FINANCING WITH A FINANCIAL INSTITUTION

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For a start-up enterprise or an enterprise planning for a growth phase, timely access to funds can prove to be one of the main vehicles for success. It is also in the best interest of an enterprise wishing to finance its operating activities or acquisitions to find financing that meets its needs at an acceptable cost. To do so, an entrepreneur can call upon a multitude of potential sources of financing available, including, in particular, personal investments, investments by family or friends, venture capital, grants or loans from financial institutions.

Among these sources, financing from financial institutions is the preferred method for most SMEs. In this respect, according to the Canadian Bankers Association, banks alone provide approximately 58 % of small business financing in Canada[1].

REQUEST FOR FINANCING

An enterprise that desires a loan from a financial institution must be in a position to reassure of the associated financial risks. Thus, at the first meeting stage, the representative of the financial institution should be presented with a detailed business plan that describes the enterprise's activities as well as the realistic financial projections. Furthermore, financial statements for the previous financial years may also allow the investors to evaluate certain key ratios, including, in particular, profitability ratios, cash ratios and capital structure ratios.

Situations may arise in which a young enterprise certainly exhibits excellent prospects of profitability, however, it is doing business in an industry that presents a high risk of losses or it does not have sufficient security to offer[2]. Given that one of the main decision-making criteria of traditional financial institutions is whether the borrower will remain a viable enterprise, in such situations, it may be that certain specialized financial institutions, such as asset based lenders, subordinated lenders or certain governmental institutions, will better meet the borrower's particular needs.

OFFER LETTER

The next step consists in negotiating and entering into a letter of offer. This document sets out the type of loan and the applicable terms as well as all of the conditions that must be satisfied before the financial institution will disburse the funds.

Within these conditions, the financial institution usually wants to ensure that it will be able to perform a due diligence review of the borrower so as to subsequently put into place sufficient security on the borrower's assets, obtain guarantees from the appropriate persons, obtain the necessary consents from persons having an interest and, ultimately, put in place all legal agreements or documents useful in protecting its interests.

DUE DILIGENCE

Due diligence is the process whereby a lender undertakes to validate certain declarations made by the borrower as well as certain facts in order to be in a position to better assess the risks related to its loan. Obviously, various factual and commercial elements may cause the scope of the verifications to vary.

Among the various potential verifications, particular attention is given to the collecting of information regarding the financial strength of the borrower and other relevant persons related to the borrower. In this context, many verifications will be made at a multitude of data banks including, in particular, those maintained by rating agencies, the Office of the Superintendent of Bankruptcy, the clerks of various courts, judicial and administrative tribunals, and even tax authorities.

[1] See: http://www.cba.ca/en/media-room/50-backgrounders-on-banking-issues/122-contributing-to-the-economy.

[2] The nature or particularities of certain assets provided to a financial institution as security can in some instances negatively affect their potential value. For example, although intellectual property, such as trademark, copyrights or patents, certainly have a value when they are used in carrying on an enterprise's business, they generally do not have the same value from the point of view of a financial institution in the event that it must realize on its security by liquidating these types of assets.

The lender will also want to ensure the legal capacity of the borrower to enter into the loan transaction as well as the validity of the borrower's consent to its obligations. For example, in the case of a corporation, various verifications of a corporate nature will be required to ensure that the corporation is validly existing and is in conformity with its corporate organization. In particular, the lender will review the corporation's articles, by-laws, corporate records, any shareholder agreements that may exist, and the resolutions authorizing the planned financing. Therefore, it is important that your corporation's minute books are up-to-date and all annual filings under corporate laws must have been made in order to avoid delays and additional costs.

The nature of the borrower's activities could, at times, also require that certain permits or authorizations be obtained from third parties. In such circumstances, certain verifications must be made to ensure that the borrower's commercial activities are not being carried out in breach of its industry's applicable regulations or in breach of certain agreements made with its main partners.

Furthermore, the borrower's assets that are offered as security will also be the subject of certain verifications, including, in particular, as regards to ownership as well as to any security already charged against such assets. In this regard, verifications must be made in the various relevant registers. For example, in Quebec, such verifications will be made at the Register of Personal and Movable Real Rights, the land register, the register of security created under section 427 of the *Bank Act* and the various databases maintained by the Canadian Intellectual Property Office.

In addition, depending on the nature of the given assets, additional verifications may also be required; in particular, where immovable property is involved.

NEGOTIATION OF THE FINAL AGREEMENTS AND DISBURSEMENT

According to the terms set forth in the letter of offer and in light of the results of the due diligence, the lender and its legal counsel will draft the legal documents, including the key document, the loan agreement, which sets out all the financial and legal terms and conditions. In certain cases, if the letter of offer is sufficiently detailed, it may itself serve as the loan agreement, thereby avoiding the expense of drafting a separate loan agreement.

The next step will be to put in place the security agreements that will serve to guarantee the repayment of the loan if the borrower defaults. These agreements may take many different forms; they could include an undertaking by a person, such as a personal guarantee, or the charging of an asset, for example by means of a hypothec or a pledge, to guarantee fulfilment of the borrower's obligations. The form of each security will also vary depending on the nature of the asset being charged as well as the geographical location of the asset or person concerned.

The accessibility and accuracy of the information required by the financial institution's legal counsel to prepare this legal documentation will significantly affect the efficiency and cost of this process. In practice, many circumstances may complicate, or even jeopardize, a financing, including, in particular, the existence of undisclosed potential liabilities, the absence of cooperation on the part of an existing lender, questionable title to property or rights to assets, or any other situation that may alter the financial institution's perception regarding its risk.

CONCLUSION

An enterprise that has its legal affairs in good order has all the more chance to see its financing put in place within the estimated schedule and budget. In addition, financial institutions are interested in doing business with enterprises that are in a position to demonstrate that the necessary financial and legal measures have been taken to minimize the risks associated with the desired loan. Experience shows that an entrepreneur has every interest in being proactive and engaging the services of advisors in this regard well before undertaking the process of obtaining funds, as this will avoid delays and extra costs when the time comes.

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